OUTER HOUSE, COURT OF SESSION

[2025] CSOH 64

GP8/24
GP9/24

OPINION OF LORD SANDISON

In the applications to be a representative party in group proceedings and for permission to bring such proceedings

by

PAUL BELL

Applicant

against

(FIRST) VOLVO CAR CORPORATION; (SECOND) VOLVO CAR UK LIMITED; (THIRD) LEX AUTOLEASE LIMITED; and (FOURTH) SANTANDER CONSUMER (UK) PLC

Respondents

Applicant: Milligan KC, Black; Jones Whyte
First and Second Respondents: Dean of Faculty, R Anderson; DLA Piper Scotland LLP
Third Respondent (First Hearing): O'Brien KC; DWF LLP
Fourth Respondent (First Hearing): Tosh; Pinsent Masons LLP
Third and Fourth Respondents (Second Hearing): O'Brien KC; DLA Piper Scotland LLP

15 July 2025

Introduction

[1] Paul Bell has applied for permission to bring group proceedings in this court concerning the claimed design, manufacture, and installation of "prohibited defeat devices" into the diesel engines of certain Volvo branded vehicles purportedly manufactured to Euro 5 and Euro 6 emissions standards. Such devices are said unlawfully to reduce the

effectiveness of nitrogen oxide ("NOx") emissions control systems under conditions which might reasonably be expected to be encountered in normal vehicle operation and use.

[2] Mr Bell also applies to be authorised as the representative party in the proposed proceedings on behalf of many other persons claiming to have suffered loss in consequence of the presence of the alleged defeat devices. The first and second respondents to the applications are companies in the Volvo group. The first respondent is said to have designed, developed and manufactured affected vehicles and to have issued certificates that they complied with applicable regulations. The second respondent is said to have supplied new and used affected Volvo vehicles and in that connection to have advertised and distributed them in the UK market. It is claimed that those two respondents made fraudulent representations that the vehicles complied with UK and EU regulations, as well as being in breach of various statutory duties.

[3] The third respondent is a leasing services company which is said to have financed the lease of affected vehicles by some group members. The fourth respondent is a finance company which is said to have financed members' purchase or lease of such vehicles. These respondents are said to have been in breach of implied contractual terms as to the description and quality of the vehicles in respect of which they provided finance, and to have breached various consumer protection requirements.

[4] The Volvo companies and the fourth respondent oppose both applications. The third respondent was neutral on the application for Mr Bell to be authorised as the representative party but opposed the grant of permission to bring group proceedings. The applications initially came before me for a hearing on 6 March 2025. After some discussion I adjourned the hearing in order to give the representative party an opportunity to consider and, if seen fit, address certain criticisms that had been made of the content of his proposed summons.

During the adjournment, it became apparent that the opinions of the Inner House in *Mackay* v *Nissan Motor Co Ltd* [2025] CSIH 14, 2025 SLT 629 and *Milligan* v *Jaguar Land Rover Automotive Plc* [2025] CSIH 16, 2025 SLT 763, dealing with the grant of the same permissions in analogous proceedings, were likely to be issued in the near future and that it would be inexpedient to determine these applications before such guidance as might be contained in those opinions was available. The opinions in those cases were issued on 20 and 27 May 2025 respectively. Various other contested applications for authorisation as representative parties and for permission to bring group proceedings in relation to similar issues involving other motor manufacturers were then before the court, but the respondents in each of those other applications withdrew opposition to their grant in light of the content of those opinions. The present respondents, however, maintained their opposition and a further hearing to determine the matter was held on 24 June 2025.

First hearing

Submissions for the applicant

[5] On behalf of the applicant, senior counsel submitted at the first hearing that he was in no different a position than applicants who had been approved as representative parties in other similar group proceedings before the court. There were no factors which would suggest that he was unsuitable as compared with those other applicants. The court required to consider the matters set out in RCS 26A.7(2)(a) - (f) when determining whether or not the applicant was a suitable person, but those did not represent standards which he was required to meet, merely matters to which, taken together, the court should have regard in the exercise of its discretion to determine whether or not the applicant was a suitable person to be appointed. In the present context, suitability required little more than that the

representative party would prosecute the action efficiently and effectively in the interests of the group.

[6] The opposition to the applicant's authorisation as a representative party appeared to proceed on the basis of a lack of any special abilities or relevant expertise on his part, and on claims that he had not demonstrated that he would act fairly and adequately in the interests of the group members as a whole, and had sufficient competence, including financial resources, to litigate. However, the bar to appointment of a representative party in an opt-in group proceeding both was and should be low, as an onerous barrier to entry would act as an impediment to access to justice. Observations in the Outer House in *Mackay* [2024] CSOH 68, 2024 SLT 827 at [50] and in *Bridgehouse* v *Bayerische Motoren Werke AG* [2024] CSOH 2, 2024 SC 270 to the effect that a relatively benign view fell to be taken to the question of suitability if the group proceedings facility was to work as designed in the improvement of access to justice, were correct.

[7] It was accepted that the applicant had no special abilities or relevant expertise, but in that respect he was in the same position as the applicants who had been authorised in the other group actions related to diesel engine emissions. He was an ordinary member of the group. He was a firefighter by profession. His experience of litigation related to the pursuing of a personal injury action arising from a road traffic collision. He was therefore someone who was employed in a position of responsibility and who had some, fairly limited, litigation experience. Any concern that he might not act fairly and adequately in the interests of the group members as a whole was more theoretical than real. Mechanisms were in place to deal with issues which might arise if group members become dissatisfied about a representative party's discharge of his duties: RCS 26A.8. There was no identifiable conflict of interest at this stage and thus no basis upon which to consider that the applicant was

unsuitable. That was how the question had been dealt with in *Bridgehouse* at [45] and *Mackay* [2024] CSOH 68 at [48(e)].

[8] As to financial resources, this was a recurring submission in applications for diesel emissions group proceedings. It had been dealt with in *Bridgehouse* at [47], *Mackay* [2024] CSOH 68 at [48] - [49], and *Milligan* [2024] CSOH 96, 2025 SC 115, 2024 SLT 1275 at [26]. The position was the same in this case. The applicant's own financial resources were not being offered as a demonstration of his competence to litigate. He had lodged an undertaking from Quantum Claims Compensation Specialists Limited to meet adverse awards of expenses, together with a copy of that company's most recent financial statements to 30 April 2024. Quantum Claims was a litigation funder which had been operating in Scotland for around 35 years and had been responsible for funding many individual and multi-party litigations. It had never failed to meet any award of expenses in its history. Its latest statutory accounts showed assets of over £9 million. It was therefore submitted that the provision of funding by Quantum Claims was apt to demonstrate that the applicant had sufficient financial resources to meet any adverse expenses awards. Should the financial position change, or a proper basis for concern about the ability to meet adverse awards of expenses arise, it would be open to the respondents in the course of the group proceedings to enrol a motion for an appropriate remedy in that situation. In any event, the availability of financial resources was simply one consideration to be taken into account in the exercise of the court's discretion. The applicant could still be authorised as a representative party even if there were doubts about the finance issue. The fact that he had access to at least some finance should be seen as a positive factor. The primary issue was his competence; finances were secondary in a context where access to justice was the principal policy aim.

The court should approve the applicant's appointment as representative party in the proposed group proceedings.

[9] Turning to the application for permission to bring group proceedings in terms of section 20(5) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018, it was submitted that the terms of RCS 26A.11 had been satisfied and an order in terms of RCS 26A.12(1) was therefore sought.

[10] At this stage, the court was not adjudicating on the issues in dispute. All it was doing was considering whether the representative party had satisfied it that there were 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. The Rules of Court envisaged that the court might refuse permission in four situations: RCS 26.A11(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.

[11] The first situation in which the court might refuse to permit group proceedings to be brought was when either of the two key 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". As regards commonality, 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 Volvo vehicles containing Euro 5 or Euro 6 diesel engines, which they alleged contained unlawful defeat devices and had caused them to sustain loss and damage. In relation to the making of reasonable efforts to identify and notify all

potential members of the group about the proceedings, the group members were represented by a steering group of agents who had each carried out significant amounts of advertising *inter alia* on television and online. The requirements of section 20(6)(a) and (b) were satisfied.

[12] As to the merits of the proposed proceedings, the Rules of Court stated that the court might refuse permission where either it had not been demonstrated by the applicant that there was a *prima facie* case, or that the proposed proceedings had any real prospects of success: RCS 26A.11(5)(b) and (d). However, the court should resist any temptation to delve into the substantive merits of the proceedings at this stage. *Mackay* [2024] CSOH 68, 2024 SLT 827 at [46] set out the correct approach. All that was required to satisfy the requirement of a *prima facie* case was that the representative party had demonstrated that there was a case to state and a case to answer. Reference was made to questionnaire responses supplied by the first respondent dated 26 August 2016 to the European Parliament Committee of Inquiry into Emission Measurements in the Automotive Sector. Those responses showed that there was indeed a case to state and a case to answer.

[13] As regards "real prospects of success", that had broadly the same meaning as in the context of the test for permission to bring a judicial review, namely that the prospects were real ie, genuine rather than fanciful or speculative. The test was not one of *probabilis causa*: *Wightman* v *Advocate General for Scotland* [2018] CSIH 18, 2018 SC 388, 2018 SLT 356 at [9]. The purpose of this provision was to filter out obviously unmeritorious claims. Having regard to the details provided in the application, the draft summons, and the material lodged in support thereof, the applicant had demonstrated a *prima facie* case and real prospects of success. Questions as to the substantive merits or otherwise of the representative party's averments were for a later date, at debate or proof.

[14] Finally, the court might refuse permission 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 than by separate individual proceedings, in terms of RCS 26A.11(5)(c). This was essentially a superiority test as to whether group procedure was most suitable for the proposed claims. That was self-evident given the number of prospective group members.

[15] Whilst various issues had been raised regarding the present state of the Group Register, such matters were more properly for case management once the proceedings were up and running. Any deficiencies in the information contained on the Register would be reviewed and addressed.

Submissions for the first and second respondents

[16] At the first hearing, senior counsel for the first and second respondents submitted that the applicant should not be authorised to act as a representative party. He had not demonstrated sufficient competence to litigate the claims properly, by reference to his own position. Further, he had not demonstrated that there were sufficient financial resources in place to meet any adverse awards of expenses.

[17] A vehicle with the same VIN number as the applicant's was included in group proceedings in England and Wales at the instance of a different claimant. How that had happened was unclear. It might be because the vehicle was a second hand one which had been resold. That the basics of an apparent overlap between the Scottish and English proceedings had not been pled out did not instil confidence in the ability of the applicant to assume a representative role.

[18] The averments in the application about the funding arrangements were limited. Quantum Claims had been identified as the funder. A letter from it dated 19 February 2025 had been addressed to the court, undertaking to indemnify the applicant and each group member in respect of any award of expenses made against them in the course of the group proceedings. Quantum Claims was a well-known litigation funder in Scotland and was funding a considerable number of group proceedings currently proceeding before the court, involving many thousands of individual group members. In the absence of further disclosure of information from Quantum Claims as to its financial standing, the court could not be satisfied from the most recent publicly available information, viz, the statutory accounts for the year ending April 2024 (and signed on 21 January 2025) that it would be able to satisfy contra awards of expenses in all the group proceedings in the event that the claims were unsuccessful. Failure and liability in expenses in even one claim might imperil its solvency. The accounts had been prepared in accordance with the small companies regime set out in section 444 of the Companies Act 2006. They contained no provision for contingent liabilities. While there might be room for reasonable differences of opinion as to the appropriate measure of the contingent liabilities which the company had undertaken, it was difficult to see how no such provision could properly be made for a litigation funder involved in multiple complex group proceedings and other litigations, at least without some explanation. On the limited information available from the statutory accounts, it was not possible for the court to be satisfied that the representative party had the financial resources to meet any expenses awards. While Quantum Claims had cash at hand of £1.8m, and further net current assets of £5.5m, that had to be seen in the context of the expense likely to be incurred in the litigations. If it subsequently became apparent that the state of the company's finances had deteriorated, it would then be too late to do anything meaningful

about it; the respondents would already have incurred expense and might have to seek to enforce substantial expenses awards against thousands of consumers. That would be a highly undesirable outcome from the perspective of the proper administration of justice in Scotland. The court could not be satisfied that the applicant had the financial resources required in terms of RCS 26A.7(2)(f), and should not authorise him to be the representative party.

[19] Turning to the grant of permission to bring group proceedings, the draft summons was entirely confused and confusing on the matter of jurisdiction. There was no possibility of a finding that all of the respondents were jointly and severally liable for each group member's claim. They should not be forced to be involved in an action in which some material part of the subject matter was unconnected with each of them. The averments of loss were entirely inadequate. For each of these reasons, the draft summons did not demonstrate a *prima facie* case in terms of RCS 26A.11(5)(b) and it had not been demonstrated that the proposed proceedings had any real prospects of success in terms of RCS 26A.11(5)(d) within the meaning of *Wightman* at [9] and *Mackay* [2024] CSOH 68, 2024 SLT 827 at [46].

[20] Dealing with those matters in more detail, the draft summons did not set out a coherent basis for jurisdiction. No respondent was said to be based in Scotland, to exercise its central management or control here, or to have a specified place of business here. Merely carrying on business activities in Scotland was not a proper basis upon which to allege domicile here. As to the suggestion that the harmful events founded upon occurred in Scotland, the averments in support of that ground were paper-thin, and it was impossible to imagine that all of the claims, which were manufactured and artificial, would succeed against all of the respondents. Accordingly, for some – probably many – of the claims, all of

the respondents would be forced to litigate the claims in Scotland despite the fact that they might ultimately be found not to be subject to the court's jurisdiction. It was averred that the second to fourth respondents were domiciled in Scotland, or had branches, agencies, authorised dealerships or related establishments here, but without relevant specification of that claim. Jurisdiction based on alleged breach of contract applied only to the third and fourth respondents. That could not involve the first and second respondents in relation to all of the claims.

[21] As to the merits of the proposed proceedings, there was no *prima facie* case against either of the first or second respondent. An affidavit had been provided stating that the first respondent had never entered into sales transactions in the UK and that the second respondent was not a party to direct sales transactions with consumers in the UK prior to 1 September 2020, by which time the engines which were the subject of the claims no longer formed part of vehicles being sold. Permission should therefore be refused in relation to any contractual claims against the first or second respondents.

[22] Insofar as the claims in the summons were based in delict, the extent of the fraudulent concealment case against the second, third and fourth respondents in the draft summons was that they "knew or ought to have known that … the vehicles were not emissions compliant". That was not sufficient for a case based on fraud, which was an intentional delict. There were no averments about any representations made by the second, third and fourth respondents which were said to have been relied upon. There was thus no *prima facie* case against those respondents.

[23] Even on the applicant's own draft case, not all of the respondents could be jointly and severally liable. It was incompetent to call different defenders and conclude against them on separate grounds which were alleged to infer a separate and several liability:

Liquidators of the Western Bank v *Douglas* (1860) 22 D 447 at 497 per LJC Inglis. Defenders should not be forced to be involved in an action in which some material part of the subject matter was unconnected with them or their actions: *Treadwell's Drifters Inc* v *RCL Ltd* 1996 SLT 1048 at 1059H per Lord Osborne (cited with approval in *Ruddy* v *Chief Constable of Strathclyde* [2012] UKSC 57, 2013 SC (UKSC) 126, 2013 SLT 119 at [28] per Lord Hope of Craighead) and *SDG Tulloch Homes Ltd* v *European Development Co (Homes) Ltd* [2016] CSOH 36 at [7] – [14]. Any liability incumbent on the first and second respondents could only be joint and several with one or other of the third and fourth respondents, not both. In the case of outright sales, it was difficult to see how any of the respondents could have any liability: the first and second respondents did not make relevant direct sales and it was understood that the third and fourth respondents were involved only in hire purchase or lease transactions. Still less could each of the respondents be jointly and severally liable for direct sales.

[24] Further, the averments of loss were difficult to understand. In relation any group member who had purchased a relevant vehicle and sold it prior to any determination by a court that there had been defeat devices in Volvo vehicles, it was difficult to see how the market for the vehicle had in any way been affected. It was difficult to see how there could be more than one claim in respect of a single vehicle; if the hypothesis was that the market for the vehicles was affected by the time that vehicle was sold, that information should have been factored into the sale price. If the suggestion was that the market had been affected by the existence of the various NOx group litigations here and elsewhere, it was difficult to understand how anyone who had purchased a second-hand vehicle with that knowledge had incurred any loss.

[25] Parts of the proposed case were based upon a false premise that Volvo vehicles had been subject to post-manufacture software updates. That was not the case. Losses based on alleged breach of contract could not apply to either the first or the second respondents. Permission to bring the proposed group proceedings should in all the circumstances be refused.

Submissions for the third respondent

[26] On behalf of the third respondent, senior counsel confirmed its neutrality on the question of the authorisation of the applicant to act as a representative party.

[27] In relation to the grant of permission, the third respondent adopted the submissions to be made on behalf of the fourth respondent so far as relevant to it. The third respondent could not be liable to those group members with whom it had had no dealings. It had no knowledge of any defeat devices.

Submissions for the fourth respondent

[28] On behalf of the fourth respondent, counsel submitted that the onus rested on the applicant to satisfy the court that he was a suitable person to act as a representative party in group proceedings following consideration of the matters specified in RCS 26A.7(1)-(3). Four particular matters required to be demonstrated rather than merely asserted: RCS 26A.7(2)(e)-(f). Those matters were that: (i) the applicant would act fairly and adequately in the interests of the group members as a whole; (ii) the applicant's interests did not conflict with the interests of the group; (iii) the applicant had sufficient competence to litigate the claims properly; and (iv) the applicant had the financial resources to meet any

expenses awards. There was some overlap amongst the first three of these matters. Their content might be informed by experience in other jurisdictions.

[29] A representative party was to be "neither a passive figurehead, nor a follow puppet operated by a lawyer." He did not require to be an ideal and sophisticated representative with relevant skills, training or experience, but he should have and be able to demonstrate at least a basic knowledge of the nature and form of group proceedings and his role in them: *Sullivan* v *Golden Intercapital (GIC) Investments Corp* 2014 ABQB 212 at [54] - [58] (Alberta). A representative party should also be able to demonstrate an ability to exercise independent judgment and loyalty to the group as a whole in order that he might fulfil the important functions of properly representing the interests of that group and providing an independent check on the approach taken by the solicitors and counsel conducting the proceedings: *Azar* v *Strada Crush Ltd* 2020 ONSC 549 at [22] - [23] (Ontario).

[30] Being a representative party involved significant and serious obligations. It was not a responsibility to be taken on lightly. In order for a representative party fairly and adequately to represent the interests of the group, he had to be able to manage the proceedings and instruct its lawyers. It was important that a representative party was able to demonstrate that he had a clear view of the interests of the group and that he could engage robustly and independently with advice received from legal advisers. That required a representative party to have a good understanding of the terms on which the litigation was funded and on which legal advisers had been engaged in order that he might understand the context in which any advice was given and, in particular, the risks of any conflicts of interest arising from the position of those legal advisers or from any other competing interests, particularly within the group itself: *Christine Riefa Class Representative Ltd* v *Apple Inc* [2025] CAT 5, [2025] Bus LR 417 at [23] - [31] and [88] - [106].

[31] Against that background, the court was entitled to expect the applicant to be able to demonstrate, rather than merely assert, that he possessed the skills, qualities and experience that would enable him properly to discharge the significant and serious functions and responsibilities of a representative party in group proceedings. That might, but would not necessarily, involve a demonstration of experience of receiving, testing and acting upon legal advice. Absent that, there was a real risk that the applicant would simply accept advice given to him uncritically and might become a mere cipher for the solicitors that he bore to instruct. That would be tantamount to allowing the solicitors conducting the group proceedings to be the representative party, which was inappropriate: *Mackay* [2024] CSOH 68, 2024 SLT 827, at [48(f)]. The applicant had been called upon to demonstrate (rather than merely assert) that he would act fairly and adequately in the interests of group members and that he had sufficient finances to litigate the proposed claims properly, but had failed to answer those calls. He had produced no affidavit or other evidence in support of the assertions made in his application. In any event, the assertions which were made in the application favoured the conclusion that the applicant was not a suitable person to be a representative party. They demonstrated that he considered himself a mere figurehead for the group and a cipher for its solicitors and counsel or, as the applicant put it, he would be the group's "nominal representative" and "the day-to-day running [i.e. control] of the Group Proceedings will be the responsibility of the Agents comprising the steering group and of independent Counsel instructed." The applicant's position had been described by his own counsel as involving "fairly limited" litigation experience. Neither the application nor the submissions made in support of it addressed adequately the potential for conflicts of interests to arise amongst constituent parts of the group. They did not demonstrate that the applicant was alive to them. They also failed to demonstrate how such conflicts might be

identified and addressed and the interests of each of the constituent parts of the group fairly and adequately represented in such an event.

[32] Turning to the question of whether the applicant had the financial resources to meet any expenses awards, he accepted that he did not. Instead, he had produced an undertaking by Quantum Claims to indemnify him and any group member represented by certain firms of solicitors in respect of any expenses awards made against them in the course of the proposed group proceedings. That undertaking was inadequate. It failed to identify clearly to whom it was given: to the applicant and group members, to the court, or to the defenders. It also failed to identify whether it was revocable or not. If it was intended to be revocable, it made no provision for the respondents to be notified in the event that it was revoked. Such notice would be essential if the respondents were to be able to take steps properly and timeously to protect their position. In any event, the adequacy of the undertaking depended upon the financial position of Quantum Claims. Whilst the Rules of Court did not insist on details of funding arrangements being disclosed, in practical terms that might be necessary to enable an applicant to demonstrate that he had, or had access to, sufficient financial resources to meet any expenses awards. This was such a case. Quantum Claims was a well-known litigation funder which was understood also to have undertaken to indemnify representative parties and group members in other similar group proceedings. The first, second and fourth respondents had each called upon the applicant to disclose the company's wider exposure to adverse expenses in such group proceedings and whether any insurance or reinsurance arrangements were in place. He had failed to answer those calls.

[33] In relation to the application for permission to bring group proceedings, the onus rested on the applicant to demonstrate (among other things) that there was a *prima facie* case and that the proposed proceedings had a real prospect of success: RCS 26A.11(5)(b) and (d).

A *prima facie* case was one which was sufficiently well founded in law and asserted fact that it might succeed, subject to any future comprehensive examination of its relevancy, the exigencies of proof and the strength or otherwise of any defence. In order to demonstrate that there was a *prima facie* case, the applicant required to make averments which were sufficiently specific and weighty: *Bilfinger Construction UK Ltd* v *The Edinburgh Tram Inquiry* [2018] CSIH 48, 2018 SLT 925 at [36]. Such averments were the bare minimum that was required. The court was entitled to expect more. For example, it might reasonably expect to see expert reports or affidavits which bore to support the key factual elements of the proposed claims.

[34] Similarly, in order to demonstrate that the proposed proceedings had a real prospect of success, the applicant had to demonstrate that they had a real rather than fanciful such prospect, which had substance. Arguability or statability was not enough: *Wightman* at [9] (see *Mackay* [2024] CSOH 68, 2024 SLT 827 at [33]). Any arguments or statements had to have "sufficient substance": *Brown* v *Parole Board for Scotland* [2021] CSIH 20, 2021 SLT 687 at [39].

[35] Against that background, it was clear that there was no *prima facie* case, nor one with any real prospect of success, directed against the fourth respondent. The case against that respondent was set out only very briefly, and advanced three separate cases. First, it was said that it knew or ought to have known that vehicles financed by it were not emissions-compliant, or that it ought to have taken reasonable care to satisfy itself that such vehicles were emissions-compliant, that any type-approval had been obtained on the basis of full disclosure of defeat devices to regulatory bodies, and that any relevant certificates of compliance were valid. Those allegations were unsupported by any averments or vouching which laid a basis for proof of any relevant knowledge or duty on the part of that

respondent. In any event, no authority was identified in the application or in submissions which supported the existence of any relevant duty of care upon that respondent. Secondly, it was said that the incorporation of defeat devices and the supply of vehicles with invalid certificates of conformity amounted to a breach of statutorily implied contractual terms as to description, satisfactory quality and fitness for purpose. There were no averments in the application or supporting submissions which explained why there was said to have been any breach of any such statutorily implied terms. For example, there were no averments that explained how anything to do with defeat devices formed part of the description of any of the vehicles, why a reasonable person would not consider any such vehicles to be of satisfactory quality, or for what specific purpose the vehicles were said not to have been fit. Thirdly, it was said (i) that the fourth respondent disseminated the first respondent's misleading marketing materials and either was or ought reasonably to have been aware of its unfair commercial practices, and (ii) that the fourth respondent entered into consumer contracts for the sale or lease of affected vehicles using false and misleading information, such that a right to redress arose under the Consumer Protection from Unfair Trading Regulations 2008. Those allegations were unsupported by any averments which laid a basis for proof of any relevant knowledge on the part of the fourth respondent, any dissemination of marketing materials by it, or any use or deployment of false and misleading information by it. Those were not mere pleading points or complaints about relevancy and specification. They were fundamental deficiencies in the application and draft summons. They did not disclose a *prima facie* case against the fourth respondent or one which enjoyed any real prospect of success. The applicant was wrong to suggest that the court should not delve into the substantive merits of the proceedings. It was compelled to do so in order to reach an informed view about the strengths and weaknesses of the proposed proceedings in order to determine whether there was a *prima facie* case and one with a real prospect of success.

[36] In summary, the applicant had failed to demonstrate that he was a suitable person to act as a representative party in group proceedings or that the criteria for permission to bring group proceedings were met, at least insofar as those proceedings were directed against the fourth respondent. The applications should be refused. Alternatively, if permission to bring group proceedings was to be granted, it should be granted only on limited grounds, and not on those directed against the fourth respondent: RCS 26A.11(4)(a).

Second hearing

[37] By the time of the second hearing, the third and fourth respondents had consolidated their representation by counsel, and all respondents had engaged a single set of agents.

Submissions for the first and second respondents

[38] For the first and second respondents, senior counsel did not formally resile from the submissions made at the first hearing, but at least tacitly recognised that the opinions of the Inner House in *Mackay* and *Milligan* had effectively broken most of the bats with which he had proposed to belabour the applicant.

[39] In relation to the authorisation of the applicant to act as a representative party, counsel submitted that it remained entirely unclear, despite enquiry having been made, how far Quantum Claims could direct the proposed litigation and any proposed settlement. It seemed likely that its involvement would be on a speculative basis, with a contingent return. If such matters were under its control, the requirement in the Rules of Court that the applicant be a suitable person to be a representative party would be stultified and he would

not have the requisite independence. Reference was made to *Milligan* [2025] CSIH 16, 2025 SLT 763 at [54], and to *Thompsons Solicitors Scotland* v *James Finlay (Kenya) Limited* [2022] CSOH 12, 2022 SLT 731 at [25] - [27].

[40] On the question of permission to bring group proceedings, it was accepted that the recent Inner House decisions had recognised that the bar which an applicant had to surmount was low in this regard. However, fundamental problems remained clear from the draft summons, especially in relation to the heads of damages claimed jointly and severally against all the defenders. Of the ten heads claimed, at least five could only flow from breaches of contract, and the first and second respondents had never contracted with any of the group members. One head appeared to relate to vehicle performance issues arising out of software updates, and it remained those respondents' position that there had been no such updates.

Submissions for the third respondent

[41] Senior counsel for the third respondent confirmed that it maintained a position of neutrality on the authorisation of the applicant as a representative party. On the question of permission to bring group proceedings, it aligned itself with the position of the first and second respondents.

Submissions for the fourth respondent

[42] Senior counsel for the fourth respondent confirmed its continuing opposition to both applications on the grounds previously stated, in particular in relation to the apparent merits of the case against that respondent set out in the draft summons.

Reply for representative party

[43] In a brief reply for the representative party, senior counsel clarified that Quantum Claims could choose to withdraw its funding from the proposed proceedings, and would be entitled to consider its position afresh should fundamental changes to the proposed action be mooted, such as the addition or substitution of defenders. Beyond that, however, all routine matters concerning the conduct of the litigation were in the hands of the representative party and the appointed legal advisers. That satisfied the criterion for control set out by the Inner House in *Milligan* at [52].

Decision

[44] It is appropriate to begin by considering the legal background against which the discretionary decisions now before the court require to be taken. Those appear in *Mackay* and were applied in *Milligan*.

[45] *Mackay* fully canvassed the policy background to the provisions of primary and subordinate legislation which govern the authorisation of a representative party in group proceedings and the grant of permission for such proceedings to be brought. It was observed that Scottish group procedure was not a system for managing numerous actions brought by different pursuers, each of whom had an individual claim, but proceeded on the basis of a single action brought by a representative party on behalf of persons who each had a separate claim, and which would result, if successful, in the grant of a decree in respect of that action as a whole rather than separate decrees in respect of each such person. Decisions to grant authorisation to a representative party and to give permission for proposed group proceedings were identified, under reference to section 20(6) of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 and RCS 26A.7(1), as discretionary in

nature and as not involving hard-edged questions of legal principle. They were to be made on a pragmatic and realistic basis with a particular emphasis being given to ensuring that the underlying policy, aim and purpose of the 2018 Act (ie 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) were given proper effect. The procedure was intended to be streamlined and efficient, and technical points should not be allowed to get in the way, particularly at the outset of proceedings. Applications of the kind in question here should be dealt with expeditiously and flexibly and should not be allowed to become unduly drawn out by protracted procedure, technicalities or the exploration of detailed questions of fact or law.

[46] Specifically in relation to authorisation to act as a representative party, the observations in *Mackay* and *Milligan* were, strictly speaking, *obiter*, since no valid reclaiming motions against the grant of such authorisation were before the Inner House. Nonetheless, it was made clear in *Mackay* that what was said there was to form guidance for the future. It could be seen from RCS 26A.7(1) and (3) that the sole and overriding criterion for authorisation was suitability, which was to be assessed holistically, and that while all the matters specified in RCS 26A.7(2) had to be considered (along with all the relevant features of the particular case), they did not all have to be satisfied before authorisation could be granted. That included consideration of the financial resources available to the applicant, deficiencies in which went only to weight and were not in themselves bars to the grant of authorisation.

[47] *Milligan* added that an applicant was not required to lodge supporting evidence and vouching to demonstrate his suitability, and the fact that the allegations made against proposed defenders were complex and serious placed no greater burden upon him.

Although RCS 26A.7(2)(e) and (f) used the word "demonstration", that could be done by way of inference from the information made available. The test posed only a low bar. The involvement of Quantum Claims in the funding of a number of diesel emissions cases did not cause the applicant's financial resources to be insufficient. Caution could later be sought if circumstances justifying that approach arose. Authorities from other jurisdictions concerning the operation of their equivalents of group proceedings were likely to be of limited value; the question for a Scottish court was how the policy considerations reflected in the 2018 Act and the statutory provisions and rules of court applicable to group litigation in Scotland fell properly to be applied.

[48] Turning to the grant of permission to bring the proposed group proceedings, it was noted in *Mackay* that it was important to remember that the statutory test did not require the issues for resolution in group proceedings to be identical in the case of every group member; they merely had to be similar or related to each other. Where the group members all wished to pursue claims for loss and damage arising from the claimed issue of excessive NOx emissions from vehicles in which they individually held financial interests and which contained Euro 5 or Euro 6 diesel engines which were said to have been fitted with illegal defeat devices, the court would be entitled to hold the requisite communality as present. The requirement of demonstration of a *prima facie* case required no more than the appearance of a serious question to be tried or, as it had also been put, that there was a case to argue and a case to answer. That was a low test which did not involve detailed examination of questions of relevancy and specification of averments; such questions should be dealt with after the pleadings had been finalised, not at the stage of a preliminary application. As to the test of there being real prospects of success, it too was not an exacting one. The prospects had to be genuine as opposed to being speculative or fanciful and the

test 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 developed. All substantive issues which might arise should be left for determination later; they were not suitable for resolution at the outset of the proposed proceedings.

[49] *Milligan* added that the truth or otherwise of the factual basis of the proposed proceedings was a matter to be dealt with as the case proceeded, if necessary by deployment of the extensive case management powers available.

[50] The climate for those seeking to have an applicant refused authorisation to act as a representative party, or to have permission to bring group proceedings refused, might now fairly be described as a somewhat bracing one, as most of those who were maintaining such positions pre-*Mackay* and *Milligan* appear to have recognised.

[51] Dealing firstly with authorisation to act as representative party, the specific matters to be taken into account in terms of RCS 26.7(2), all with a view to determining whether the overarching criterion of suitability of the applicant to act as such, together with the features of the application pertinent to each are:

(a) The special abilities and relevant expertise of the applicant. In this case, it was accepted that the applicant had no such abilities and only limited litigation expertise in a rather different context. While little or nothing positive is, accordingly, contributed to the overall decision-making process under this head, equally no consideration which would count against the applicant's suitability was advanced.

(b) The applicant's own interest in the proceedings. The applicant claims to have suffered loss in consequence of the matters complained of. Although it was suggested that there might be some issue arising out of the listing of the vehicle in which he claims to have been interested in the corresponding English litigation also, it is for present purposes appropriate to proceed on the basis that he has the interest he claims, unless and until the contrary is demonstrated. This factor adds moderately to a conclusion that the applicant is a suitable person for authorisation.

(c) Whether there would be any potential benefit to the applicant, financial or otherwise, should the application be authorised. This is effectively the same point as just considered, with the same result.

(d) Confirmation that the applicant is independent from the defenders. No suggestion of any relevant connection between the applicant and any of the defenders was made by any party. This factor accordingly also contributes positively but moderately to a determination of suitability.

(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. It has already been noted that the required demonstration may be inferential rather than direct. The question of conflict with the interests of other group members is relatively easy to address; on the facts as they are claimed to be, the applicant's interests align with the other group members. It cannot be said that that situation will necessarily pertain to the end of the proposed proceedings, but there is no present reason to suppose, either, that it will not, and the question of the applicant's suitability falls to be determined as matters stand now. In relation to demonstration that he would act fairly and adequately in the interests of the group members as a whole, there is little to consider either way. In essence, it is maintained on behalf of the applicant that he would, in conjunction with agents and counsel, so act. There is no material forming a proper basis for a contrary view to be taken. In summary in relation to these factors, the lack of current conflict provides moderate support for authorisation; nothing can be said in contradiction of the applicant's professed intention to act fairly and adequately in the interests of the group members as a whole.

(f) The demonstration of sufficient competence by the applicant to litigate the claims properly, including financial resources to meet any expenses awards. As already noted, the applicant claims no special competence. Leaving aside financial resources for a moment, his relevant competence flows from the knowledge and experience of the legal advisors to the group. On finance, the most hotly disputed issue in relation to suitability in this case, *Mackay* and *Milligan* have made it clear that an undertaking by Quantum Claims of the kind given in those cases as in this (and others) is capable of being regarded as enough to satisfy the financial element of this factor. The additional concern expressed by the first and second defenders, that it was unknown how much control and influence Quantum Claims could exercise over the conduct of the proposed litigation, was factually answered by the information teased out of the applicant's representatives in the course of the second hearing, and counsel for the first and second defenders conceded, in the light of that information, that that particular point could not properly be pressed further. I agree.

[52] Other innominate circumstances may be taken into consideration if pertinent to the question of suitability, but none was urged on me in this case.

[53] In summary, then, there are some moderately positive matters, as identified above, going to support the suggestion that the applicant is a suitable person to be authorised as a representative party. There are no countervailing considerations. In these circumstances, bearing in mind that the bar to being deemed suitable is a low one and that the policy underlying the provision of the facility of group proceedings in Scots law is best served by adopting a benign approach to authorisation as a representative party, it is open to me in the exercise of my discretion in this matter to grant such authorisation. I am satisfied of the applicant's suitability in all the circumstances, and exercise that discretion in favour of granting such authorisation.

[54] Turning to the question of the grant of permission for the proposed group proceedings to be brought, section 20(6) of the 2018 Act provides that the court may grant such 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)."

RCS 26A.11 provides that:

> "(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."

Dealing with these matters in turn:

Do 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?

[55] It is undoubtedly the case that not every prospective group member has a case which raises issues identical to those raised by the cases of every other member. That, however, is not the test to which the statute directs attention. Sufficient similarity or a sufficient relationship amongst the claims is all that the statutory test requires. Identification of the criteria to be applied to determine the requisite similarity is something left open by the statute and the Rules of Court. It would appear from *Mackay* that recognition of the requisite similarity or relationship is another matter for the exercise of the court's discretion, to be exercised by reference to all relevant circumstances and with a view to preserving, if not indeed promoting, the policy objectives of the 2018 Act. *Mackay* also held that where the group members all wished to pursue claims for loss and damage arising from the claimed issue of excessive NOx emissions from vehicles in which they individually held financial interests and which contained Euro 5 or Euro 6 diesel engines which were said to have been fitted with illegal defeat devices, the court would be entitled (but not bound) to hold the requisite communality as present.

[56] In the present case, there exist relatively clear lines by which the totality of the claims might be divided into smaller groups. An obvious example arises out of the quite distinct roles played in the whole affair by vehicle manufacturers and distributors on the one hand and the mere providers of finance for acquisition of the supposedly affected vehicles on the other. At some point, possibly sooner than later, establishment of the grounds of any liability incumbent on those different sets of defenders seems likely to take divergent routes, and that divergence is in turn likely to feed into any evaluation of such losses as may

properly be claimed by group members and, indeed, into the extent (if any) to which the various defenders may be found jointly and severally liable with each other.

[57] All that taken into account, however, it still does appear that the cases advanced by the group members have more in common than they have to distinguish themselves from each other. For example, a basic issue across all of the claims is whether or not prohibited defeat devices were indeed fitted to vehicles in which group members had an interest. That is a matter that is very much in dispute and which will - if experience in other diesel emissions group proceedings already at a more advanced stage is anything to go by - require an involved document discovery process followed by delicate and complex decisions on both fact and law having to be made. If one were to separate out, on a necessarily fairly crude basis at present, groups of cases on the basis indicated, or any other, and require each group to litigate by way of its own separate proceedings, then there would be a risk of unnecessary duplication in the expense of the exercise of getting to a decision on that issue common to them all, and indeed a decision on the issue made in one set of proceedings would not technically bind the outcome in relation to the same issue in another set. Further, the risk that any separation of groups at this stage would turn out not to have been made along the lines which actually made a difference once the issues in the litigation were more developed is considerable. All in all, the advantages (if any) of requiring any disaggregation of claims at this point seem more illusory than real. Bearing all of that in mind, and having regard to the consideration that group procedure is intended to provide greater access to justice in a streamlined and efficient way, with little regard being paid to technicalities at this early stage, I am entirely persuaded that the requisite degree of similarity amongst all the claims advanced by the group members has been established and that the requirement of section 20(6)(a) of the 2018 Act has been met.

Has the representative party made all reasonable efforts to identify and notify all potential members of the group about the proceedings?

[58] It is claimed on behalf of the applicant that the agents involved in the steering group supporting the proposed litigation have undertaken extensive advertising on mainstream and social media platforms, and that that amounted to the making of all reasonable efforts to identify and notify all potential members of the group about the proceedings. No suggestion to the contrary was made by the respondents, and I am satisfied that the requirement of section 20(6)(b) of the 2018 Act has also been met.

Has it been demonstrated that there is a prima facie *case?*

[59] It should be borne in mind that, in this context at least, the demonstration of a *prima facie* case is a low test which requires no more than the appearance of a serious question to be tried; a case to argue and a case to answer. It does not involve the detailed examination of questions of relevancy and specification of averments at this stage. As to the criticisms made of the averments concerning jurisdiction in the draft summons, it appears to me that, as an irreducible minimum, the cases that jurisdiction may be founded (a) in relation to claims in delict, on the basis that the harmful events complained of occurred in Scotland (as that concept is well-understood in the relevant jurisprudence) and (b) in relation to claims in breach of contract, on the basis that the contracts in question were entered into and performed in Scotland, or were consumer contracts with consumers domiciled in Scotland, pass the *prima facie* case test. It cannot be said that the jurisdictional claims based in one way or another on the domicile of the respondents are necessarily either good or bad without going into the facts in way which *Mackay* suggests is impermissible at this stage of proceedings.

[60] The first and second respondents criticised the structure of the draft summons as disclosing a situation in which a single conclusion inviting a finding of joint and several liability was stated against several defenders on separate and unconnected grounds. There can be no doubt that, at common law, severe legal difficulties would attend such a conclusion. However, these proceedings are not governed by the common law. Section 20 of the 2018 Act provides:

> "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.
> …
> (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 …"

Those provisions render it competent to bring a single action on behalf of a plurality of persons, each of whom has a separate civil claim, so long as the court considers that the issues of fact or law raised by all of the claims are the same as, or similar or related to, each other. In the context of group proceedings, that innovates upon and supersedes the common law approach exemplified in cases such as *Liquidators of the Western Bank* and *Treadwell's Drifters*. I have addressed the statutory test above in some detail, in accordance with the guidance given in *Mackay*. No separate consideration of the matters advanced by the first and second respondents in this regard is either necessary or competent.

[61] The other matters raised by the respondents in connection with the existence or otherwise of a *prima facie* case cannot succeed given the observations in *Mackay* on the nature of such a case in this context. In essence, they involve either an examination of questions of relevancy and specification of averments in a degree of detail inappropriate for this stage of

proceedings, or else an assessment of the likelihood or otherwise of the factual basis of the proposed case being established in a way deprecated in *Milligan*. The requirement for a *prima facie* case to be demonstrated is satisfied.

Has it 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?

[62] There are many thousands of group members wishing to participate in the proposed group proceedings. As in *Mackay*, the prospect of separate individual proceedings is unthinkable. None of the respondents contended otherwise.

Has it been demonstrated that the proposed proceedings have any real prospects of success?

[63] The existence of this consideration as a separate criterion feeding in to the decision as to whether or not permission to bring group proceedings should be granted, in addition to demonstration of the existence of a *prima facie* case, requires that at least some assessment of the prospects of success requires to be undertaken, although *Mackay* makes it clear that the focus in this context is the exclusion of speculative or fanciful cases and not a requirement of probable success or anything like it. In these proposed group proceedings, as in other diesel emissions group proceedings already under way, many and diverse questions of fact and law arise, and it presently remains quite unclear how those questions will ultimately be answered. In other group proceedings concerning alleged prohibited defeat devices, representative parties have been able to point to relevant regulatory authorities having issued pertinent recall notices for the vehicles there in issue, and to consequent alterations made to the operation of the emissions control systems of such vehicles. No such recall and rectification processes are alleged to have occurred in relation to Volvo vehicles, and this

case may therefore be seen as proceeding on a basis which appears less immediately objectively justifiable than others. Nonetheless, it is clear that serious questions arose as to the installation of what might or might not have been devices designed to interact improperly with the emissions control systems of diesel vehicles manufactured at the relevant time on what was effectively an industry-wide basis. In its evidence to the European Parliament Committee of Inquiry into Emission Measurements in the Automotive Sector on 26 August 2016, the first respondent accepted that it was relying on the derogation to the prohibition of defeat devices that reduced the effectiveness of emissions control systems contained in Article 5(2) of Regulation 715/2007/EC (which exempts such devices from the general prohibition where the need for the device is justified in terms of protecting the engine against damage or accident and for safe operation of the vehicle, where the device does not function beyond the requirements of engine starting, or the conditions are substantially included in the test procedures for verifying evaporative emissions and average tailpipe emissions) and it further at least appeared to accept that it had utilised so-called "thermo windows" which some maintain (and some deny) typify certain defeat devices. Bearing in mind that the real prospects of success criterion is (per *Mackay*) 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 proceedings develop, it appears to me in these circumstances that the proposed litigation cannot be said *in limine* to be entirely speculative or fanciful, and that the considerations gathered under this head ought not to be regarded as presenting a bar to the grant of the permission sought.Having considered these various matters, I conclude in the round that it would be appropriate to exercise my discretion to grant permission for the proposed group proceedings to be brought.

Disposal

[65] Orders authorising Mr Bell to act as a representative party and granting permission for the proposed group proceedings to be brought, dealing also with the matters ancillary to such grant, will be pronounced.