OUTER HOUSE, COURT OF SESSION

[2025] CSOH 29

GP4/24

OPINION OF LORD SANDISON

In the cause

WILLIAM MACKIE

Representative Party for Pursuer

against

(FIRST) MERCEDES-BENZ GROUP AKTIENGESELLSCHAFT;
(SECOND) MERCEDES-BENZ AKTIENGESELLSCHAFT;
(THIRD) MERCEDES-BENZ CARS UK LIMITED;
(FOURTH) MERCEDES-BENZ RETAIL GROUP UK LIMITED;
(FIFTH) MERCEDES-BENZ VANS UK LIMITED; and
(SIXTH) MERCEDES-BENZ FINANCIAL SERVICES UK LIMITED

Defenders

Representative Party: Middleton KC; Slater and Gordon
Defenders: Duncan KC; Smart KC, Breen, Watt, Solicitor Advocate; Brodies LLP

14 March 2025

Introduction

[1] These are group proceedings arising out of claims that prohibited defeat devices within the meaning of Articles 3.10 and 5.2 of EU Regulation 715/2007 were present in the diesel engines of certain Mercedes-Benz vehicles which the group members bought or leased. It is said that those devices reduced the effectiveness of the vehicles' nitrogen oxide ("NOx") emissions control systems under driving conditions which might reasonably be

expected to be encountered in normal vehicle operation and use. The defenders variously designed, manufactured and installed the engines in question into vehicles, imported the relevant vehicles into the UK market and distributed them here, or else financed their purchase or lease by the group members.

[2] It is claimed that regulatory approval for the engines was obtained without disclosing the presence of the defeat devices to the relevant authorities, all with a view to cheating the emissions testing regime, to allowing the vehicles in which the devices were present to be put on the consumer market along with a Certificate of Conformity falsely certifying that the vehicle complied with the emissions legislation in force at the time it was produced, and to defraud purchasers and lessees of affected vehicles.

[3] The German automative standards regulator, the KBA, is said to have discovered the use of a defeat device in a Mercedes-Benz vehicle in 2018, in response to which, it is claimed, the first and second defenders made various software changes to the vehicles' engine control units, which nonetheless did not render the vehicles compliant with applicable emissions standards.

[4] The group members variously seek damages for losses said to have been sustained by them as a result of alleged fraudulent misrepresentation, fault and negligence, breach of statutory duty and breach of contract, and in satisfaction of several varieties of consumer right.

[5] The defenders deny that any of the relevant vehicles contained a prohibited defeat device, and explain at length the reasons which underlie that position.

[6] The representative party now seeks to recover documents and to obtain an order for the identification of witnesses so as to improve the statement of his case. The defenders

oppose in part the grant of the orders he seeks and at the preliminary hearing I directed that the matter be argued fully before the court so that the matter could be determined by it.

Relevant provisions

[7] Article 8 of the European Convention on Human Rights is in the following terms:

> "Right to respect for private and family life
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> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[8] Chapter 26A of the Rules of the Court of Session 1994 ("Group Procedure") contains *inter alia* the following provisions:

> "Procedure in group proceedings
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> 26A.3.—(1) Subject to the other provisions of this Chapter, the procedure in proceedings to which this Chapter applies is to be such as the Lord Ordinary is to order or direct.
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> …
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> Preliminary hearing
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> 26A.21.—(1) An action in proceedings to which this Chapter applies is to call for a preliminary hearing within 14 days after defences have been lodged.
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> (2) At the preliminary hearing, the Lord Ordinary …
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> (b) may make an order in respect of any of the following matters
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> …
>
> (iv) disclosure of the identity of witnesses and the existence and nature of documents relating to the proceedings or authority to recover documents either generally or specifically;

(v) documents constituting, evidencing or relating to the subject-matter of the proceedings or any correspondence or similar documents relating to the proceedings to be lodged in process within a specified period;

…

(e) may make such other order as the Lord Ordinary thinks fit for the efficient determination of the proceedings.

…

Power to make orders

26A.27. At any time before final judgment, the Lord Ordinary may, at the Lord Ordinary's own instance or on the motion of any party, make such order as the Lord Ordinary thinks necessary to secure the fair and efficient determination of the proceedings."

Documents in issue

[9] The representative party has lodged a list of documents in respect of which he asks the court to order production. He asks for that order to be made in terms of RCS 26A.21(2)(b)(iv) and (v), or alternatively by way of the grant of commission and diligence. The salient terms of that list are as follows:

"Certificates of Conformity

1. The COC delivered by the First and Second Defenders under Article 18.1 of Directive 2007/46/EC of the European Parliament and of the Council, to accompany a vehicle with one of each of the affected engine types.

Vehicle Emissions Control Systems and Devices and NOx Emissions Levels

2. All documents (including, but not limited to, NOx emissions levels testing results; software, hardware and firmware design and specification documents; engine failure modes, effects and analysis documents; and, written communications between the First and Second Defenders' engineers, between said engineers and said Defenders' management and between said engineers and said Defenders' internal regulatory compliance personnel) in the hands of the First and Second Defenders, relative to the design and manufacture of the emissions control systems ("ECS") (including, but not restricted to Exhaust Gas Recirculation, Selective Catalytic Reduction and NOx Storage Catalyst systems, referred to by the Representative Party in Conds 10 and 12 and by the Defenders in Answers 10, 10.2, 12 and 21.2) installed into (i) the Euro 5 A180 CDI BlueEfficiency SE vehicle model, with a 1,461cc OM607 engine manufactured in 2013 and (ii) the Euro 6 A180 D

vehicle model, with a 1,461cc OM607 engine manufactured in 2016 and showing or tending to show:

(a) the elements of design of the ECS in said models which sense temperature, vehicle speed, engine speed, transmission gear, manifold vacuum or any other parameter for the purpose of activating, modulating, delaying or deactivating the operation of any part of said models' ECS, so as to reduce the effectiveness of said ECS as regards NOx emissions (hereinafter referred to as a "device(s)");

(b) the function and calibration of each software, hardware and firmware component that is, or contains, such a device(s) in said models;

(c) the mode and parameters of the operation and effect of such a device(s) on said models' NOx emissions levels while driven under regulatory test conditions (Answer 10.4);

(d) the mode and parameters of the operation and effect of such a device(s) on said models' NOx emissions levels while driven outwith regulatory test conditions (Answer 10.4);

(e) the internal analysis conducted by or on behalf of the First and Second Defenders relating to and demonstrative of what they understood, at the time of manufacture, to constitute driving "conditions which may reasonably be expected to be encountered" by said models "in normal vehicle operation and use", in terms of Article 3.10 of the Emissions Regulations (Cond 15 and Answer 10.4);

(f) the nature, extent and consequences of the engine damage or accident (if any) which would be sustained without the use and operation of such a device(s) (Answer 10.7);

(g) in what way said affected vehicles could not be operated safely without the use and operation of such a device(s) (Answers 10.2 and 10.7); and

(h) the levels of NOx (measured in terms of milligrams per kilometre or otherwise) emitted by said models when driven both under and outwith regulatory test conditions (Cond 10 and Answer 10.3).

Type-Approval Authorities

3. All documents (insofar as not already called for) submitted by the First, and Second Defenders to and their correspondence with the German *Kraftfahrt-Bundesamt* ("KBA") Type-Approval Authority, in the hands of said Defenders, relevant to the applications for and granting of Type-Approval for (i) the Euro 5 A180 CDI BlueEfficiency SE vehicle model, with a 1,461cc OM607 engine manufactured in 2013

and (ii) the Euro 6 A180 D vehicle model, with a 1,461cc OM607 engine manufactured in 2016 and showing or tending to show (Cond 9 and 14):

(a) the date, nature and content of the application package (including the "information folder" and "information package", as defined in Articles 3.38 and 3.39 respectively of said Directive 2007/46/EC) for EU Whole Vehicle Type Approval submitted to the KBA, insofar as relevant to the NOx emissions of said models;

(b) the date, nature and content of the application package (as defined in Para 3(a) hereof) for Emissions Type-Approval of the ECS submitted to the KBA, insofar as relevant to the NOx emissions of said models;

(c) the information provided to the KBA by the First and Second Defenders for the purpose of satisfying the KBA that said models conformed to the relevant type approval as regards NOx emissions levels, in accordance with Regulations 4 and 5 of the Emissions Regulations, and that they met the NOx emissions limits set out in Annex I thereof (Cond 11); and

(d) the date and content of the Type-Approval Decision issued by the KBA in respect of said models (Answer 11.1).

Regulatory Investigations, Recalls and Software Updates

4. All documents (insofar as not already called for), (including, but not restricted to, administrative recall decisions), in the hands of the First and Second Defenders, relating to the recall notices issued by (i) the KBA (ii) the Netherlands *Divisie Voertuig Regelgeving & Toelating* ("RDW") and (iii) the UK Driver & Vehicle Standards Agency ("DVSA") detailed in Condescendence 14 and showing or tending to show (Cond 14 and Answers 10.8 and 11):

(a) the nature of said recall notices issued by the KBA, RDW and DVSA in relation to the NOx emissions levels of the affected engine types; and

(b) for each affected engine type, where software updates have been carried out relative to the recall notices detailed in Condescendence 14:

(i) the brand and model (including the engine model, engine code, engine capacity and production period) relevant thereto;

(ii) the dates when the First and Second Defenders were first advised that such recalls and software update programmes were required and how and by whom they were so advised;

(iii) the date, nature and content of all software update programmes implemented by or on behalf of the First and Second

Defenders from 1st September 2009 to date in relation to the NOx emissions of affected engine types (Cond 11 and Answer 10.8);

(iv) the nature of all faults, issues and emissions strategies that such recalls and update programmes were intended to rectify in relation to the NOx emissions of affected engine types; and

(v) the nature and effect of said recalls and software update programmes on the NOx emissions levels of the affected engine types, including details of (a) what vehicle ECS parameters were updated (b) the effect that said recalls and update programmes had on the ECS with regards to the level of NOx emitted outwith regulatory testing conditions, and (c) the effects of said recalls and updates in relation to fuel economy, engine damage and accident, component service life, diesel exhaust fluid refill interval, driveability and driver safety.

Software Updates and Communications with Customers

5. All documents in the hands of the First, Second, Third, Fourth and Fifth Defenders relating to the software updates referred to in Para 4 hereof, carried out on the affected engine types and showing or tending to show the reasons given to the group member owners, registered keepers and lessees of vehicles with affected engine types as to why said software updates were required (Conds 11 and 14 and Answer 10.8).

Technology Suppression Cartel Decisions

6. European Commission

(a) The full and unredacted decision of the European Commission, dated 8th July 2021, in relation to Daimler AG's breach of anti-trust competition rules.

(b) All documents referred to in said European Commission decision of 8th July 2021.

(c) All documents which are part of the administrative files relating to the investigations leading to the European Commission decision dated 8th July 2021.

(d) All documented requests for information made by the European Commission to the Defenders in relation to said breach of anti-trust competition rules and their responses thereto.

7. Korea Fair Trade Commission (KFTC)

(a) The full and unredacted decision the Korea Fair Trade Commission (KFTC), dated 9th February 2023, in relation to the first defenders' collusion with BMW AG, Volkswagen AG and Audi AG in curbing emissions-cleaning technology in diesel vehicles.

(b) All documents referred to in said KFTC decision dated 9th February 2023.

(c) Alldocuments which are part of the administrative files relating to the investigations leading to the KFTC decision dated 9th February 2023.

(d) All documented requests for information made by the KFTC to the Defenders in relation to said curbing emissions-cleaning technology in diesel vehicles and their responses thereto.

8. The First Defenders' written response to the order of the Amsterdam District Court of 13th November 2024 (C/13/686493/HA ZA 20-697), referred to in Condescendence 14.

9. Failing principals, drafts, copies or duplicates of the above or any of them."

[10] It is expressly accepted by the representative party that no documents prepared in contemplation of litigation should be recovered by either of the mechanisms invoked.

[11] The representative party also asks for an order to be made in terms of RCS 26A.21(2)(b)(iv) for the disclosure of the identity of witnesses, in the following respects:

"1. The identity of the person or persons employed or engaged by the First and Second Defenders who was or were ultimately responsible for the design and internal approval (within said Defenders' organisations) of those parts of the emissions control systems ("ECS") relevant to the control of NOx emissions (including the Exhaust Gas Recirculation, Selective Catalytic Reduction and NOx Storage Catalyst systems, referred to by the Representative Party in Conds 10 and 12 and by the Defenders in Answers 10, 10.2, 12 and 21.2) of the Mercedes-Benz branded motor vehicles which contain an OM607, OM622, OM626, OM640, OM642 or OM651 diesel engine to which the Euro 5 or Euro 6 standards apply (under exception of such vehicles manufactured to Euro 6d and Euro 6d Temp standards), hereinafter referred to as "affected engine types".

2. If different from the person or persons referred to in Paragraph 1 hereof, the identity of the person or persons employed or engaged by the First and Second Defenders upon whose "interpretation" (as referred to in Answer 10.4) of the meaning of the terms of Articles 3.10 and 5.2 of the Emissions Regulations the design of those parts of the affected engine types' ECS relevant to the control of NOx emissions was or were based.

3. The identity of the person or persons employed or engaged by the First and Second Defenders (be that the identity of the "manufacturer" or the "manufacturer's representative", as defined in Articles 3.27 and 3.28 of the Framework Directive, or any other person or persons) who was or were ultimately responsible (within said Defenders' organisations) for the carrying out of NOx emissions levels testing on the affected engine types and the certification thereof for the purpose of demonstrating to the German Kraftfahrt-Bundesamt ("KBA") type-approval authority that the emissions limits set out in Annex I of the Emissions Regulations were met, in terms of Article 4.1 of said Regulations.

4. The identity of the person or persons employed or engaged by the First and Second Defenders (be that the identity of the "manufacturer" or the "manufacturer's representative", so defined, or any other person or persons) who was ultimately responsible (within said Defenders' organisations) for the contents of or who was the signatory to the submission of the application package (including the "information folder" and "information package" as defined in Articles 3.38 and 3.39 of the Framework Directive) to the KBA, for the purpose of obtaining type-approval for the affected engine types.

5. If different from the person or persons referred to in Paragraphs 3 and 4 hereof, the identity of the person or persons employed by the First and Second Defenders (be that the identity of the "manufacturer" or the "manufacturer's representative", so defined, or any other person or persons) who was ultimately responsible (within said Defenders' organisations) for corresponding and liaising with the KBA, the Netherlands RDW *Divisie Voertuig Regelgeving & Toelating* and the UK Driving and Vehicle Standards Agency regulatory authorities in relation to the recall notices detailed in Condescendence 14 and said Defenders' responses to said notices.

6. The identity of the person or persons employed or engaged by the First and Second Defenders upon who was ultimately responsible (within said Defenders' organisations) for the design of the software changes to the affected engine types' ECS, insofar as relevant to the control of NOx emissions, as referred to in Condescendence 11 and Answer 10.8.

7. The identities and job titles of the three Mercedes-Benz employees who were issued with penal orders by the local court (*Amtsgericht*) of Böblingen in Germany in or around July 2021, in relation to the fraudulent manipulation of the exhaust emissions in Euro 6 engines, referred to in Condescendence 14."

[12] Reference to the Emissions Regulations in the list is to EU Regulation 715/2007 and the Framework Directive referred to is EU Directive 2007/46/EC.

[13] Shortly before the hearing of the representative party's motion, my opinion in relation to a document recovery exercise in analogous litigation against Vauxhall/Opel was issued: *Batchelor* v *Opel Automobile GmbH* [2025] CSOH 18. In *Batchelor*, I held that the powers given to the court relating to the provision of documentary material in group proceedings were very wide indeed, and did not fall to be exercised in strict conformity with the principles developed by the court in the exercise of its common law powers to grant commission and diligence, but rather that the proper exercise of those powers would turn on (a) consideration of how directly or otherwise the material sought to be recovered appeared to bear upon matters properly in (or likely properly to be in) dispute, (b) the respective positions of the parties in relation to access to potentially significant information (including their ability or inability to access it without the assistance of the court) and (c) the respective legitimate benefits and burdens (the latter in terms of time, trouble and expense) of the making of the order sought or something approximating to it. The question of witness identification was not directly addressed in *Batchelor*.

[14] In light of the content of my opinion in *Batchelor*, the representative party modified somewhat the list of documents which it had previously sought to recover into the version already set out.

Submissions for the representative party

[15] On behalf of the representative party, senior counsel submitted that the onus would be on him to prove that defeat devices had been deployed in the vehicles in question, and – if he did so – the onus would then be on the defenders prove that any such devices were not prohibited or that their effect had been removed by the software update. In order to assist him in his task, the representative party sought orders under RCS26A.21(2)(b)(iv) for

information as to the identity of various relevant witnesses connected to the defenders who were responsible for the design of the emissions control systems of specified affected engine types and for the obtaining of Type-Approval therefor from the regulatory authorities; and, under Rule 26A.21(2)(b)(iv) and (v), for the production of documents or specified kinds of document relating to the proceedings. In relation to document recovery, paragraphs 1 to 5 of the list of documents sought in the present case approximated as closely as circumstances allowed to the recovery orders granted in *Batchelor*. To address the defenders' concerns that emissions levels testing was usually conducted in respect of one representative vehicle from a given line, and that each of the two vehicle models specified in paragraphs 2 and 3 of the documents list might have had more than one emissions Type-Approval, the representative party was content that the words "one vehicle falling within each of the following categories" might be added after "installed into" in the preamble to paragraph 2 and after "granting of Type-Approval for" in the preamble to paragraph 3 of the list.

[16] In relation to the documents sought by paragraph 6, averments had lately been added into the representative party's pleadings setting out a claim that Daimler AG (as the first defender was then known), Volkswagen, Audi and BMW had collectively engaged in anti-competitive conduct by suppressing the roll-out of NOx-reducing technology in relation to the use of exhaust fluid or "AdBlue" in the selective catalytic reduction systems of vehicles sold in the EU and the EEA. The European Commission had issued a decision in that regard on 8 July 2021, *inter alia* commenting on the use of small AdBlue tanks, which had advantages in terms of vehicle weight (and, therefore, fuel consumption and CO2 emissions - but at the expense of higher NOx emissions) and available construction space and stating that such usage had taken place between 25 June 2009 and 1 October 2014. The first defender was named as a "direct participant". While the representative party did not have a

claim based on a breach of competition law, he did have a case based on the use of prohibited exhaust fluid or AdBlue conservation strategies. These averments were highly suggestive of fraudulent conduct in the face of existing, but suppressed, NOx reducing technology. The representative party only had a copy of the Summary of Commission Decision (Case AT.40178 Car Emissions) and sought access to the full decision and the documents which underlay it. The first defender had agreed to produce the full decision and certain other documents from the Commission file in corresponding litigation in England: *Cavallari* v *Mercedes-Benz AG* [2023] EWHC 1888 (KB), [2024] RTR 1 at [18].

[17] Turning to paragraph 7 of the document list, averments had also been added recently to the representative party's case concerning similar anti-trust proceedings and findings in South Korea, in respect of which the first defenders had been fined $14.5 million. The same considerations applied in this connection as to the European Commission Decision and its related documents. In *Cavallari*, early disclosure of the Korean Decision and all documents referred to in it had been ordered – [2023] EWHC 1888 (KB) at [36] and [37].

[18] Paragraph 8 of the document list dealt with proceedings in the Amsterdam District Court described in averments also latterly made by the representative party, to the effect that, by order of that court dated 13 November 2024 in similar NOx emissions "mass tort" litigation, the first defender was ordained to answer a number of specific questions as to the existence and function of defeat devices, any claimed exceptions thereto under Article 5.2 of the Emissions Regulation, and the effect thereon of any software updates. The court's order required a response by 5 February 2025. If, as the defenders suggested, no response had actually been lodged in Amsterdam, this court's order should require it to be produced in these proceedings as soon as it was lodged there.

[19] Insofar as witness identification was concerned, the court's power to order any person to disclose information as to the identity of potential witnesses in existing or likely proceedings was not new – see Section 1(1A) of the Administration of Justice (Scotland) Act 1972. The relative paucity of prior authority on the point was probably due to the fact that (i) in non-group proceedings cases, the identity of relevant witnesses was normally relatively self-evident, and (ii) in group proceedings, insofar as the representative party was aware, the court had not yet been asked to invoke the RCS26A.21(2)(b)(iv) power.

[20] It was accepted that any order made had to be relevant, necessary and proportionate. The evidence of the witnesses whose identification was sought was likely to be relevant to (i) existence and purpose of defeat devices; (ii) any defence of technical justification under Article 5.2 of the Emissions Regulation – for example, engine protection and safe vehicle operation; (iii) the levels of NOx emitted from the affected engine types under and outwith regulatory test conditions; (iv) how and on the basis of what documentation and information Type-Approval was obtained from the regulatory authorities; (v) the nature and purpose of post-manufacture changes to the emissions control system software; (vi) misrepresentation to the regulatory authorities and, by extension, to the group members; and (vii) in the context of prescription, fraud and error in terms of section 6(4) of the Prescription and Limitation (Scotland) Act 1973.

[21] The court would have to ask itself why the identification of particular witnesses was being sought and what each would be asked to speak to. In relation to the first of those questions, it was acknowledged that the description of the witnesses whose identities were sought might be thought to be wide. That was necessary due to the complex nature of the litigation, the wide ranging (but relevant) facts to which the potential witnesses would be asked to speak and because, thus far – despite previous requests for the production of

documents which might have assisted in further refining the request – the defenders had refused to produce any documentation or even offered to look into the identity of the witnesses who would speak to matters raised in the current proceedings. They should not be permitted to delay matters further by demanding that the representative party should seek to extract witness identities from any documents recovered. The early identification and precognition of relevant witnesses was essential in proceedings of this nature. It ought to be obvious that the information sought related to the identification of those people who were ultimately responsible for the design, testing and approval of the emissions control systems of affected engine types, for the applications for Type-Approval to the regulatory authorities, and for liaising with those authorities as regards vehicle recalls and for the software changes. The representative party did not want to be inundated with the names of hundreds or thousands of people, but simply the identities – and, by extension, for obvious practical purposes, the contact addresses – of those people who, on the instruction and with the authority of the corporate defenders, oversaw, approved and formally signed off the relevant designs and interactions with the regulatory authorities. In the first instance, the defenders could be ordained to provide the names of a restricted number of relevant people for each paragraph of the relevant list. Paragraph 7 of that list contained a specific request for the identities of three employees who were the subject of penal orders imposed by the local court (*Amtsgericht*) of Böblingen in Germany in July 2021, in relation to the fraudulent manipulation of exhaust emissions.

[22] The GDPR concerns raised by the defenders had no merit. By virtue of Paras 5(2) and 5(3) of Part 1 of Schedule 2 to the Data Protection Act 2018, the provisions of the GDPR did not apply to the disclosure of personal data where that disclosure was required

by an order of a court or was necessary for the purpose of, or in connection with, legal proceedings.

[23] It was accepted that Scots law did not recognise a system of binding pre-proof deposition and that any person identified under any Chapter 26A.21 order could not be compelled to answer any question posed by the representative party's agents. That, however, was not a reason to refuse the making of such an order.

[24] In relation to Article 8 of the European Convention on Human Rights, an individual's right under that Article to respect for his private and family life, his home and his correspondence potentially applied to any witness who was precognosced or who gave evidence in any litigation in Scotland. If it presented a bar to witness identity disclosure, Rule 26A.21(2)(B)(iv) would be unenforceable and redundant. Any person whose identity had to be disclosed could take their own legal advice in relation to the provision of a precognition or what questions to answer. Individuals would simply be asked about matters of fact, and no allegations of the commission of fraud or other legal constructs would be put to them. If the defenders' position that defeat devices were not deployed was correct, that exercise would provide a convenient and useful occasion for them to demonstrate that position.

[25] I was dissatisfied with what was initially said on behalf of both the representative party and the defenders in relation to the potential impact of Article 8 on the witness identity request and invited further submissions on the matter. At that point, counsel for the representative party vacillated somewhat on whether the proposed witness identity disclosure order fell within the scope of Article 8(1) at all, and referred to *Tickle* v *BBC* [2025] EWCA Civ 42 at [56] and [57] for the proposition that the Article was engaged only if the "high threshold" was reached that proposed publication of a person's identity would

present a real risk of constituting such a serious interference with his private life as to undermine his physical or psychological integrity. That proposition was derived from *Abbasi* v *Newcastle upon Tyne Hospitals NHS Foundation Trust* [2023] EWCA Civ 331, [2023] Fam 287, [2023] 3 WLR 575 per Lord Burnett CJ at [60], from *Re Guardian News and Media Ltd* [2010] UKSC 1, [2010] 2 AC 697, [2010] 2 WLR 325, per Lord Rodger of Earlsferry at [37] – [42], and in turn from the decisions of the ECtHR in *Kaboğlu and Oran* v *Turkey* (Applications no. 1759/08, 50766/10 and 50782/10), 30 October 2018 at [50] – [51] and in *Von Hannover* v *Germany* 2004 EMLR 21, (2005) 40 EHRR 1 at [50]. On that basis, counsel ultimately maintained that the threshold would not be met by disclosure of the names of the witnesses sought by the representative party's application, and so the Article was not engaged. If it was, then – at least on the application of the relatively unstructured proportionality test espoused by counsel – any interference with the witnesses' private life would in the present circumstances be justified in terms of Article 8(2).

Submissions for the Defenders

[26] On behalf of the defenders, it was submitted in writing that the motion seeking an order for the disclosure of witnesses should not be entertained, having been intimated with little notice. Responding to it in the time available had proved extremely difficult.

[27] Dealing first with the application for the disclosure of documents, the defenders submitted that this matter should be dealt with as if it were an application for the grant of commission and diligence (as the representative party sought in the alternative to his primary motion under RCS26A). The representative party's application was not a targeted request for identified documents. If granted in its current form, the defenders reasonably and conservatively estimated that hundreds of thousands of documents would be caught.

Rules 26A.21(2)(b)(iv) and (v) were not intended to be used for, and were not apt to cover, requests of that nature. They made no provision for an excerpting process. As a matter of generality, it was not uncommon for only part of a document to be responsive to a call with the remainder of the document being irrelevant. In the commission and diligence procedure, that was dealt with by the appointment of a commissioner to excerpt only the relevant material. Under Chapter 26A, absent the appointment of a commissioner, it was unclear whether the task of removing or redacting irrelevant material would be performed by the party disclosing the document, by the court, or otherwise. The mirroring provisions in commercial procedure in the court had not diminished the use of commission and diligence in commercial actions. That was supportive of the contention that RCS26A.21(b)(iv) and (v) were intended to serve a different, narrower purpose than the commission and diligence procedure. Rule 26A.2 disapplied certain rules to group proceedings, but not Chapter 35 of the RCS, which concerned the recovery of evidence by way of commission and diligence (including the confidential envelope procedure). If Rules 26A.21(b)(iv) and (v) were intended to introduce a new document recovery procedure for group proceedings, then one might expect use of commission and diligence in such proceedings to be precluded. That was not the case. The scope of the court's power to make orders in terms of Rules 26A.21(b)(iv) and (v) could further be discerned by the restriction of the exercise of those powers to the preliminary hearing. A key purpose of that hearing was to assess what further specification required to be made to parties' cases, which should be well-defined prior to the action calling for a case management hearing. Chapter 26A did not import a period of disclosure or discovery into Scottish procedure.

[28] The nature of the documents sought by the representative party was, in general terms, highly commercially and competitively sensitive to the defenders. While use of the

confidential envelope procedure was not excluded by Chapter 26A, it was open to the Court under the commission and diligence process to appoint a commissioner to consider questions of confidentiality in the first instance. That might be particularly appropriate in circumstances where, as here, there was the real possibility that the approval of some or all of the calls sought by the representative party would result in the production of a high volume of confidential material. In such circumstances, the court should consider the representative party's request for documents by reference to his secondary motion for commission and diligence. Even if the court was minded to consider the application for documents in terms of Chapter 26A, it nonetheless ought to be determined by reference to the general principles of document recovery which had been well-established in relation to commission and diligence.

[29] In that context, it was generally accepted that commission and diligence was appropriate only where there was a basis to believe that the documents sought existed, were in the hands of the haver, and could be produced: *National Exchange Co* v *Drew* (1858) 20 D 837, affd. (1860) 22 D (HL) 9. Furthermore, each call in a specification of documents required to have a basis in the pleadings. Document recovery was permitted to facilitate further specification of a party's pleaded case: *Civil Service Building Society* v *MacDougall* 1988 SC 58 at 61 and 62, 1988 SLT 687 at 689. Calls which were unsupported by averments on record, or which were supported only by vague averments, ought to be refused on the basis that they amounted to a fishing diligence. The court should closely scrutinise any suggestion by the representative party that the purpose of a given call was to make more specific his existing averments, as often "such an excuse is… used as merely a cloak for a fishing diligence": *Macrae* v *British Transport Commission* 1957 SC 195, per Lord President Clyde at 200, 1957 SLT (Notes) 30. In considering whether to grant a specification of

documents in whole or in part, the expense to the havers of complying with the court's interlocutor was a relevant consideration: *Somervell v. Somervell* (1900) 8 SLT 112, per Lord Stormonth Darling at 113 – 114.

[30] All of that having been advanced by way of written submission, when it came to the oral hearing the defenders nonetheless recognised the need for progress and that against the background of the approach taken in *Batchelor*, an order for recovery was to some extent inevitable. They accordingly offered no oral argument against an order being pronounced in terms of paragraphs 1 to 5 of the revised list, subject to the minor and uncontroversial revisals already noted. They did not, however, formally abandon any of the general or particular objections which they had previously made in writing.

[31] The first paragraph of the representative party's list of documents (relating to Certificates of Conformity) was and remained unopposed.

[32] The lengthy position taken in writing in relation to the second paragraph, concerning vehicle emissions control systems and devices and NOx emissions levels, was that the representative party's framing of the paragraph was not properly based in his existing pleadings and was, in various ways, so imprecise that it would in practical terms be impossible for the defenders to comply with an order in terms thereof. Many documents falling within the paragraph would be confidential. None of these points was ultimately pressed at the oral hearing as continuing to represent a bar to the grant of an order in terms of the paragraph. The defenders' expressed concern that emissions testing was usually conducted in respect of only one representative vehicle from a given line was dealt with by the concession from the representative party already noted, which the defenders were content to accept.

[33] In relation to the third paragraph of the representative party's list of documents, relating to Type-Approval authorities, the defenders had submitted in writing that much of the paragraph had no basis in his pleadings, which were – especially as they related to allegations of fraud – inspecific to the point of irrelevance. Some of the documents sought were confidential. Again, none of these objections was ultimately pressed at the oral hearing as representing a bar to the grant of an order in terms of the paragraph.

[34] Turning to the fourth paragraph of the list of documents, concerning regulatory investigations, recalls and software updates, it had again been submitted in writing that much of the paragraph was not supported by the existing state of the representative party's pleadings, which in relevant regards were vague and self-contradictory. However, no oral argument against the grant of an order in terms of this paragraph was offered at the hearing.

[35] In relation to the fifth paragraph of the list of documents sought, dealing with software updates and communications with customers, the defenders had submitted in writing that the information sought ought already to be in the hands of group members and it was disproportionate for the defenders to have to produce it again. They did not insist on this argument at the oral hearing.

[36] Opposition was maintained at the hearing to the grant of orders in terms of paragraphs 6 and 7 of the document list, dealing with technology suppression cartel decisions by the European Commission and the Korea Fair Trade Commission respectively. Those calls sought an exceedingly high volume of highly commercially sensitive information and had no basis in the pleadings. No claim was made by the representative party that any relative breach of competition law would sound in damages for the group members. The European Commission's press release in relation to its decision, dated 8 July 2021, was clear that its findings related to an arrangement not to maximise emissions suppression to the

greatest possible extent, rather than to fail to meet applicable legal standards, and stated in terms that

> "[t]his cartel investigation is separate and distinct from other investigations, including those by public prosecutors and other authorities into car manufacturers and the use of illegal defeat devices to cheat regulatory testing. There are no indications that the parties coordinated the use of illegal defeat devices to cheat regulatory testing".

The defenders agreed with that statement. The Korean Commission's decision appeared to relate to the same subject-matter as that of the European Commission. Any relevance which the documents described in these paragraphs had to the representative party's pleaded case was at best collateral. He had already had access to the lengthy and detailed publicly available versions of the decisions in question. Much of the material which would be caught by the paragraphs was highly commercially confidential, as witnessed by the fact that both the European and Korean commissions had only made available redacted versions of their respective decisions to the general public. Reference was also made in this connection to the supportive terms of a letter from the European Commission to the claimants' solicitors in *Cavallari* dated 22 June 2023.

[37] Some oral argument was also offered against the grant of an order in terms of paragraph 8 of the list of documents, seeking the first defender's written response to the order of the Amsterdam District Court of 13 November 2024. That matter was not linked to the representative party's case as stated, and in any event, in accordance with how proceedings before the Amsterdam court had developed, those defenders had not in fact lodged any written response pursuant to the court's order and it would accordingly be impossible for them to comply with this order now sought.

[38] Turning to the question of the application for disclosure of the identity of witnesses, the paragraphs of the relative list were notably wide-ranging and unfocused. They had the

potential to cover a large number of areas within the first and second defenders' businesses and an exceptionally large number of people. What the defenders had or had not done was a matter of objective technical fact capable of being determined by an analysis of the documents to which the representative party sought access.

[39] RCS26A.21(b)(iv) allowed the court to order disclosure of the identity of witnesses, but questions arose about the intended and appropriate scope of the provision. The scheme of Rule 26A.21 indicated that the various orders in its subparagraph (b) were intended to serve the purpose referred to in subparagraph (a), namely the further specification of the summons or of the defences. That reflected the scheme of Rule 47.11 for commercial actions. On the question of what was truly required to provide further specification, pleadings in Chapter 26A cases were intended to be abbreviated. The focus of the preliminary hearing ought to be on litigating the cause in the most efficient way possible. Further, the Rule was concerned with something much more focused than what was proposed here. That was implicit in the wording of RCS26.21(b)(iv). In particular, the use of the word "witnesses" was suggestive of a focused approach, with the focus in question being upon those individuals thought necessary for the articulation and proof of the parties' cases rather than something that was significantly broader and was not meaningfully defined.

[40] A number of fundamental principles supported the defenders' suggested approach to Rule 26.21(b)(iv). The function of adversarial litigation was not the conducting of a general investigation into the whole circumstances underlying a case. Consequent on that, parties were required to conduct litigation with due economy. There was no system of pre-proof deposition in Scottish procedure. Rule 26.21(b)(iv) should be construed consistently with the principles applicable to commission and diligence. Therefore, there ought to be a basis in the pleadings for each call, and the court ought not to permit what was in effect a

fishing exercise. Serious allegations, including fraud, were made against corporate bodies. It was proposed to obtain the names of natural persons who were in some unexplained way part of the processes said to be tainted by fraud. The court should be astute to ensure that this was not simply an attempt to gain support for a speculative case made by the representative party.

[41] The defenders were not aware of an order of the magnitude sought ever having been pronounced (either under the Rule under consideration or the commercial court equivalent) or of any authority addressing such an application. Authorities involving recourse to section 1(1A) of the Administration of Justice (Scotland) Act 1972 for the purpose of identifying witnesses were few in number. It was for the party seeking a section 1(1A) order to show why it was in the interests of justice that it should be granted. Thus, it was necessary for the applicant to set out the purpose of the information sought; why it was required now; and what attempts had been made to obtain it without recourse to the court. If the applicant did not do these things, that ought to be an end of the matter. If a basis for the order was set out, that had to be weighed against any countervailing circumstances. The impact on the defenders and on the witnesses themselves would be one obvious consideration. Overall, the court's decision should be taken in light of the policy within the scheme of the Rules of Court for disclosure of witnesses. Reference was made to *Mooney* v *City of Glasgow District Council* 1989 SLT 863 at 865L-866B; *Boyce* v *Cape Contracts Ltd* 1998 SLT 889 at 891L; and to *Moffat* v *News Group Newspapers Ltd* 1999 SC 664 at 668I to 669A, 2000 SCLR 346 at 350A - B.

[42] The court should further have regard to the GDPR and to Article 8 of the European Convention on Human Rights. In terms of the GDPR and the obligations owed by them as employers, the defenders did not have the consent of their employees or any third party to

provide details of their names. As to Article 8, there could be no doubt that it was engaged in the situation of an application for an order requiring an employer to disclose the identities of its employees: *F* v *Scottish Ministers* 2016 SLT 359, 2016 SCLR 694 at [29] – [31]. There might be a question as to whether the defenders could properly assert the Article 8 rights of their employees or any affected third party, but in any event the court would nevertheless have a duty to consider the point, and in the particular context of a case in which serious allegations including fraud were made, the engagement of Article 8 rights was self-evident. It was for the representative party to demonstrate in relation to each individual that disclosure of their name was necessary and proportionate.

[43] In their supplementary oral submissions on Article 8, the defenders accepted that *F* v *Scottish Ministers*, concerning as it did confidential and sensitive medical information, was not particularly helpful in relation to the issue which arose in the present case. Rather, they drew attention to *Axel Springer AG* v *Germany* [2012] EMLR 15, (2012) 55 EHRR 6 at [83],where the ECtHR noted that the right to protection of reputation was a right protected by Article 8 as part of the right to respect for private life, that the concept of "private life" was a broad term not susceptible to exhaustive definition, which covered the physical and psychological integrity of a person and could therefore embrace multiple aspects of a person's identity, such as gender identification and sexual orientation, a name or elements relating to a person's right to their image, and personal information which individuals could legitimately expect should not be published without their consent. The Court further observed, however, that in order for Article 8 to come into play an attack on a person's reputation had to attain a certain level of seriousness in a manner causing prejudice to personal enjoyment of the right to respect for private life, and that Article 8 could not be relied on in order to complain of a loss of reputation which was the foreseeable consequence

of one's own actions such as, for example, the commission of a criminal offence. In *LB* v *Hungary* (2023) 77 EHRR 1, the Court had reiterated those observations, adding at [104] that data such as an applicant's name and home address, processed and published by a tax authority in connection with the fact that he had failed to fulfil his tax payment obligations, clearly concerned information about his private life, and that the public character of the data processed did not exclude it from the guarantees for the protection of the right to private life under Article 8. Reference was also made to *Sõro* v *Estonia* (App. 22588/08), 3 September 2015 at [56], and (in further written submissions provided after the oral hearing) to *Sidabras* v *Lithuania* (2006) 42 EHRR 6 at [49] and to *Gillberg* v *Sweden* 34 BHRC 247 at [67]. Interference with the prospective witnesses' Article 8 rights in the present case would not be "in accordance with the law" given the novelty of the RCS26A provisions concerning witness identity disclosure and was not necessary for the service of any legitimate aim recognised by Article 8(2).

[44] As to practicalities, the defenders operated in around 40 countries, with around 166,000 employees, selling around 2.5 million cars per year. The Board of Management comprised a number of separate divisions. The research and development division was responsible for development of passenger cars and was split into a number of different directorates, including the Powertrain directorate, which was responsible for diesel engine development. Hierarchically beneath the directorates, there were work centres, departments, teams and, finally, specialists who were involved with actual functionality. The time period in relation to which disclosure was sought ran approximately from 1 September 2009 to September 2019. Any order to identify the individuals involved in the various processes would require to look at a large number of sections of the defenders' businesses over a considerable number of years. A very large number of employees and

third-party suppliers would have been responsible for the various steps. Many of these individuals would no longer be employed by the defenders, and no archive of who had worked on which projects had been kept. The scale of responding to the order sought could not be overstated. The wording used by the representative party was ambiguous at best, for example the request for the identities of those "ultimately responsible" for various matters, which might refer to a number of distinct functions carried out by employees or third-party contractors.

[45] The first and third paragraphs of the list of persons whose identities were looked for covered a very large number of people spanning a number of departments and external organisations over a significant period of time. The representative party was plainly seeking to marry up individuals to the averments of fraud he had made. That was a profoundly serious step from the perspective of those individuals, and to proceed in such an unfocused way came nowhere near meeting the requirement to demonstrate necessity and proportionality in relation to the order sought.

[46] Paragraph 2 of the relative list was concerned with employees or third parties upon whose interpretation of certain parts of the Emissions Regulations the design of "the affected engine types' ECS relevant to the control of NOx emissions was based." That was an overly broad call, with nothing in the pleadings that would cover it. The defenders were not aware of anyone who would fall within the description set out.

[47] Paragraph 4 of the list was concerned with the "application package" including the "information folder" and "information package". Only the last of those terms appeared in the representative party's pleadings. The paragraph appeared to seek the identities of the signatories and also those who contributed to those items. That could be an exceptionally large number of people.

[48] Paragraph 5 was a variation on the previous two paragraphs and was subject to the same criticisms. The drafting was notably vague and broad. Paragraph 6 sought the identity of those who were involved in the design of software changes. It was hopelessly wide and inspecific, and was likely to involve very many people.

[49] Paragraph 7 sought the disclosure of the identities of persons subject to criminal proceedings in Germany. It raised a most serious matter from the perspective of the individuals concerned, and their rights required to be considered. The relevant names had not been disclosed in any civil proceedings or elsewhere. The decision itself was not issued in a public hearing. German constitutional and labour law and the duty of care owed to employees would preclude disclosure by the defenders of their names.

Decision

Documents

[50] The powers of the court under RCS26A.21(2)(b)(iv) are expressly capable of being exercised in respect of requests for documents described generally by reference to their nature or contents. No more specific identification of the documents requested is required. If any documents produced in obedience to an order made in terms of RCS26.21 are produced subject to a claim of confidentiality, an examination of such documents, whether by the court or a commissioner appointed by it (but not by the producing party), may take place and any appropriate excerpting exercise can be carried out. The fact that the powers in question are conferred on the court at the preliminary hearing indicates the desirability of early appropriate disclosure and does not imply that similar powers cannot be exercised at a later stage; RCS26A.27 makes that tolerably clear.

[51] The powers in RCS26A.21 which are mirrored in chapters 47 and 55 of the Rules of the Court of Session ought to have diminished the use of specifications for commission and diligence in the forms of procedure governed by those chapters, where the powers in question are grossly underused, and it is to be hoped that in future greater resort will be had to them than has heretofore been the case. Their previous underuse in those contexts in no way implies that commission and diligence ought to be the default mode of recovering documents, either in those forms of procedure or in group proceedings such as are presently in issue. Commission and diligence remains available as an alternative means of document recovery in all circumstances, and may be preferable in certain instances, for example where the documents sought to be recovered are not parties to the cause in question.

[52] Beyond those additional matters, the defenders' submissions may be dealt with by reference to my remarks in *Batchelor*.

[53] No active opposition was ultimately maintained to the grant of an order under RCS26A.21(2)(b)(iv) or (v) in terms of paragraphs 1 to 5 of the representative party's list of documents, subject to the minor adjustments to paragraphs 2 and 3 already described, and such an order will be made. As was done in *Batchelor*, the defenders will be ordained to lodge a brief note setting out the progress made by them in searching for and producing the relevant documents on a rolling 28-day cycle thereafter. Either the court or the representative party may, at any time during the process, and even though there remain repositories still to be searched by the defenders for responsive documents, pronounce themselves satisfied with what has been produced to that point, in which case the obligations incumbent on the defenders in terms of the interlocutor to be pronounced will cease.

[54] The remaining orders for document recovery sought by the representative party will be refused. It is clear from the material presented to me that the enquiries and decisions made by the European Commission and the Korea Fair Trade Commission and referred to in paragraphs 6 and 7 of the list of desired documents respectively concerned a collusive arrangement, contrary to applicable competition law, to fail to maximise the potential reduction of diesel engine emissions, rather than to use defeat devices to give the false impression of compliance with existing legal requirements. Since the former matter forms no element of the representative party's case, and is not a natural development of that case as it currently exists, the recovery of the material sought by those paragraphs could not materially assist in the statement or refinement of any issue properly falling within the scope of the current proceedings, and no order for such recovery will, accordingly, be made.

[55] Dealing with the material sought by paragraph 8 of the list of desired documents, what the Amsterdam District Court requires the defenders to produce to it is clearly a matter for that court to decide according to its own rules and principles governing document production and recovery. The same can be said for relative orders of this court. The notion that one court can or should simply ride on the coattails of the other in this context, without reference to its own applicable rules and principles, is difficult to reconcile with the principle that questions of the grant or refusal of orders concerning document recovery are exclusively for the *lex fori* to determine. When one adds to that consideration the fact that this court regards documents produced in consequence of its own orders as under its control and subject to its directions – *Iomega Corp* v *Myrica (UK) Ltd (No. 2)* 1998 SC 636, 1999 SLT 796 – the idea that it should seek to gather the fruits of the foreign order without any reference to the will of that court on the matter can be seen to be inconsistent with any

coherent conception of international judicial comity. The use of any material recovered by order of the Amsterdam court in other *fora* is a matter for that court to determine.

Witness identity disclosure

[56] I consider that the defenders have had sufficient notice of the content of this element of the representative party's motion to enable it to be fairly dealt with at this point.

[57] The court's power to compel the identification of witnesses, like the other powers conferred by RCS26A.21, falls to be exercised with a view to securing the efficient and expeditious processing and disposal of the group proceedings. The considerations already set out in relation to orders for document recovery (in short, the directness or otherwise of the bearing of the possible fruits of the order on the matters properly in dispute, the availability by other means of the essence of the information sought, and the proportionality of the order desired) will equally inform the exercise of the court's powers in this respect. It ought to be borne in mind that in the context of group proceedings involving the alleged commission of mass delicts, where the actions complained of literally and metaphorically occurred at some distance in time and place from the loss said to have been suffered by the group members, early disclosure of the identity of witnesses may (at least in many cases) provide the key to efficient progress.

[58] I reject any contention that the reference to witnesses in RCS26A.21(2)(b)(iv) is to persons actually likely to be called to give evidence at proof, as opposed to persons who may potentially be a source of material reasonably necessary for the development and establishment of the representative party's case. The former construction would in effect deprive the facility of witness identification orders of much of its plainly intended force.

[59] Although group proceedings remain adversarial in nature, the defenders' submissions based on that consideration fail to recognise how the concept has evolved in modern litigation so as to entail and require a degree of cooperation between parties, and amongst parties and the court, so as to enable each party adversarial to present its case for adjudication to best advantage. The court's ability to compel such cooperation if it is not willingly to be given in no respect transforms its role into an inquisitorial one.

[60] It is difficult to draw much useful guidance from the caselaw concerning the exercise of the court's general power to order witness identification under section 1(1A) of the Administration of Justice (Scotland) Act 1972. Those decisions merely establish the entirely unstartling and somewhat uninformative propositions that it is for the party seeking such an order to justify it (as in any case where the court is being asked to exercise a discretionary power), that the court's discretion falls to be deployed in light of the circumstances of the particular case (again, how could it be otherwise?), and that the governing principle is what the interests of justice require in those circumstances (a proposition expressed at a higher and thus less practically useful level than the principles identified in *Batchelor* and already noted). The requirements of Practice Note 8/1994 (as now amended by Practice Note 1/21), requiring a party to disclose the identity of its own witnesses at least 28 days prior to a proof diet in forms of procedure which do not require earlier disclosure have no bearing on the situation where (as here, but unlike in *Moffat* v *News Group*) a party is seeking witness identity disclosure in order to develop and present its own case rather than to discover how its opponent intends to prove its case.

[61] It is necessary to consider whether the exercise of the court's discretion in this context is constrained by Article 8 of the European Convention on Human Rights. Although Article 8 does not contain any explicit provisions concerning names, the concept of private

life is at least capable of extending to aspects relating to personal identity, such as a person's name (e.g. *Burghartz* v *Switzerland* [1994] 2 FCR 235, (1994) 18 EHRR 101). However, all that is being sought by way of the witness identity orders in issue in the present case is disclosure to the representative party of the names and contact details of persons who may have relevant evidence to provide to him. That is a situation far removed from the typical one dealt with in the cases cited to me, in which a person's name was (or was to be) published to the world at large accompanied by a direct (and usually incontrovertible) allegation of serious wrongdoing against that person. While the latter situation may present a real risk of constituting such a serious interference with the private life of the person in question as to undermine his physical or psychological integrity, and thus to engage Article 8, it is not seriously arguable that the mere communication of a name between parties to a litigation as being that of someone who may or may not have something to contribute to the resolution of the dispute risks such an effect, even though that dispute involves allegations of fraud against corporate parties. I therefore do not consider that the circumstances of the present application engage Article 8.

[62] Had Article 8 been engaged, I would in any event have held that any order which the court might actually make, and the resulting interference with the right conferred by the Article, was capable of being regarded as being in accordance with the law (given the existence of RCS26A.21(2)(b)(iv) and the guidance as to its likely operation provided in *Batchelor*) and was necessary in a democratic society for the protection of the rights and freedoms of the group members in this litigation, all in accordance with Article 8(2). That would involve the conclusions against the background of the stated circumstances that the objective of the effective litigation of the group members' claims was one sufficiently important to justify the limitation of the potential witnesses' Article 8 right to the extent

inherent in the order; that the measure employed was rationally connected to the relevant objective; that a less intrusive measure could not have been used without unacceptably compromising the achievement of the objective; and, balancing the severity of the measure's effects on the protected right against the importance of the objective and the extent that the measure would contribute to its achievement, that the impact of the rights infringement would not be disproportionate to the likely benefit of the measure.

[63] It is also necessary to consider the impact of the GDPR. Article 23 of Regulation (EU) 2016/679 permitted member states to whose law a data controller was subject to restrict by way of legislative measure the scope of their relevant data protection rights so long as that restriction respected essential and fundamental rights and freedoms and was a necessary and proportionate measure in a democratic society to safeguard, *inter alia*, the enforcement of civil law claims. In the UK, that facility was implemented, so far as relevant for present purposes, by paragraph 5 of Schedule 2 to the Data Protection Act 2018, which disapplies the applicable UK GPDR provisions from the disclosure of personal data where such is required by an order of a court, as well as from disclosure necessary for the purposes of, or in connection with, legal proceedings. It was not submitted to me that any foreign law to which the first and second defenders may be subject, presumably the law of the Federal Republic of Germany, was at odds with the UK domestic provisions or would criminalise any person acting in conformity with any witness identity order which this court might pronounce in terms of RCS26A.21(2)(b)(iv), other than (faintly and inspecifically) in connection with the issue of the disclosure of the names of the Mercedes-Benz employees issued with penal orders by the *Amtsgericht* at Böblingen, an issue which in my view falls for reasons yet to be set out to be determined irrespective of the impact of GDPR or similar rights. My overall conclusion on the impact of the GDPR is therefore that, while any

reasonable expectation of data privacy on the part of the persons whose identity is sought to be disclosed is certainly a matter falling to be weighed in the balancing exercise to be carried out in terms of RCS26A.21(2)(b)(iv), it cannot not in itself be determinative or even strongly instructive of the outcome of that exercise.

[64] The stage thus set, it is now appropriate to turn to the application of the identified principles to the nature and terms of the request which has been made of the court. It seems clear that the identities of the persons sought by the representative party in this regard are not otherwise reasonably available to him, at least on the basis of the material currently in his possession. That said, it is entirely possible, to put it no higher, that the documentation which this court is ordering the defenders to produce may well contain clear indications of the identities of those persons most closely involved in the events with which he is concerned. It follows that this case may not be a typical one in which early witness identity disclosure is reasonably necessary for effective progress, because the events in dispute appear to have been very closely and extensively documented. By the same token, the disclosure of witness identities may well not advance the representative party's case much, if at all. It is acknowledged that any person whose identity is disclosed would be under no obligation to say anything at all to the representative party's agents, and insofar as such persons are still in the sphere of influence of the defenders, it would appear likely that they would be advised (perfectly properly) of that fact.

[65] It is, however, in the context of consideration of the practical feasibility of an order in terms of the representative party's motion that the application encounters its greatest difficulties. The persons whose identities are sought are, by and large, described by reference to a function or functions performed by them: those "ultimately responsible" for the design and internal approval of those parts of the emissions control systems relevant to

the control of NOx emissions in the affected engine types; those whose interpretation of the meaning of the Emissions Regulations formed the basis for the design of those parts of those systems; those "ultimately responsible" for the carrying out of NOx emissions levels testing on the affected engine types and the certification thereof; those "ultimately responsible" for the contents of, or who signed, the application package to the KBA for the purpose of obtaining type-approval for the affected engine types; those who were "ultimately responsible" for corresponding and liaising with the KBA, the RDW and the DVSA in relation to specified recall notices; and those "ultimately responsible" for the design of the software changes to the control systems of the affected engine types insofar as relevant to the control of NOx emissions. Although one can entirely understand that these are precisely the sorts of person in whose potential evidence the representative party is legitimately interested, and I appreciate that in many ways his attempts to describe those whose identities he wishes to know are as matters stand necessarily no more than a slightly more sophisticated version of the party game of pinning the tail on the donkey, the fact remains that any order pronounced by the court must be capable of practical implementation on a reasonably certain basis, in the interests of all parties to the litigation and indeed in the public interest in the proper administration of justice.

[66] I do not consider that the phrase "ultimately responsible" in the various ways it is deployed in the list to describe those in respect of whom disclosure is sought conveys with any adequate degree of specification the category of those who would fall within the terms of any order that might be pronounced in such terms. Design and design approval, together with testing and certification and the composition of delicate and involved regulatory correspondence, or liaison with regulatory authorities, are potentially complex processes in which many people might be involved, each with a degree of responsibility which might

fairly be described as ultimate in respect of at least part of the process. I can see much force in the defenders' submission that they would reasonably be greatly perplexed if required to comply with an order in such terms. If "ultimate" is to be taken as meaning something further up the chain of command, then it is difficult to see what the proper resting points would be on the way up to the respective chief executive officers of each of the first and second defenders. The severe practical difficulties which would attend the working out of any order involving the concept of "ultimate responsibility" means that those elements of the representative party's request which deploy that concept cannot properly be the subject of a witness identification order, without the need for any very nuanced consideration of where the balance for or against any such order would be struck should those difficulties be overcome by way of some more focused expression.

[67] In relation to the request for disclosure of the identities of those whose interpretation of the Emissions Regulations was relied upon in the relevant ECS design, it is not clear to me from the pleadings as they stand what interpretation is being referred to in the request. The defences advance a view as to the proper interpretation of the relevant Regulations, but do not suggest that that interpretation was actually in anyone's mind at the time of the events in question as opposed to representing the view taken now on legal advice as to the true meaning of the Regulations. Again, an order in the terms sought in such circumstances would in practical terms be unworkable and for that reason alone cannot be granted.

[68] A straightforward motion for the identity of the signatories of specified correspondence would be likely to be acceptable, but it would appear that, to the extent that such information is sought by the witness identity disclosure list, it will in any event emerge from the production of the documents to be covered by the court's order in that regard, and

that a separate witness identification order would in such circumstances be quite superfluous.

[69] There remains the distinct request for disclosure of the identities of the Mercedes-Benz employees who were in 2021 issued with penal orders by the *Amtsgericht* at Böblingen. It appears to be clear that that court (indeed perhaps German law more generally) has prevented the public identification of those individuals. That is the prerogative of the foreign jurisdiction in relation to proceedings before it. Although this court always retains the jurisdiction to make orders under RCS 26A.21(2), it would, just as in the case of the request for the recovery of documents ordered by the Amsterdam court, be contrary to the requirements of judicial comity for it to order the disclosure of that which the German court or law has determined should not be disclosed. Given the uncertainty surrounding exactly what the allegations in the German court were and what was established, and that the degree to which the employees in question would, if identified, cooperate with enquiries made of them by the representative party's agents is unknown, it further cannot be said that the balance in favour of an identity disclosure order is so obvious that the making of such an order ought to be prioritised over the demands of comity.

Conclusion

[70] Orders for the production of the documents referred to in paragraphs 1 to 5 inclusive of the representative party's relative list, subject to the minor adjustments already canvassed, will be granted in terms of RCS 26A.21(2)(b)(v). *Quoad ultra* the representative party's application will be refused.