OUTER HOUSE, COURT OF SESSION

[2025] CSOH 93

GP10/23

OPINION OF LORD SANDISON

In the cause

DAVID BRIAN BATCHELOR

Representative party

against

(FIRST) OPEL AUTOMOBILE GMBH; (SECOND) GM DEUTSCHLAND HOLDINGS GMBH; (THIRD) VAUXHALL MOTORS LIMITED; (FOURTH) IBC VEHICLES LIMITED; (FIFTH) STELLANTIS FINANCIAL SERVICES UK LIMITED; and (SIXTH) STELLANTIS &YOU UK LIMITED

Defenders

(Vauxhall & Opel NOx Emissions Group Proceedings)

Representative party: Smith KC, Middleton KC, Reid, Black; Pogust Goodhead
Defenders: Ellis KC, T Young, McAndrew; Morton Fraser MacRoberts LLP

10 October 2025

Introduction

[1] These are group proceedings in which payment and ancillary remedies are sought by the representative party on behalf of group members said to have suffered loss and damage in consequence of the claimed presence of prohibited "defeat devices" in terms of Articles 3.10 and 5.2 of EU Regulation 715/2007 ("the Emissions Regulations") in the diesel engines of vehicles which they bought or leased, or in which they otherwise acquired an interest. Some further background to the proceedings, together with a description of the

document recovery process which was ordered and is still underway, appears in my earlier opinion at [2025] CSOH 18. The debate proceeded in parallel with a debate in the similar group proceedings *William Mackie* v *Mercedes-Benz Group AG* (*Mercedes-Benz Group NOx Emissions Group Proceedings*) which dealt with many of the same issues, and an opinion in that case is issued simultaneously with this one.

[2] The summons in the proceedings principally seeks, firstly, decree of declarator that certain Vauxhall-branded vehicles with diesel engines purportedly manufactured to Euro 5 and Euro 6 emissions standards incorporated prohibited defeat devices, the purpose of which was unlawfully to control nitrogen oxide (NOx) emissions levels during regulatory engine testing, for the purposes of obtaining EC type-approval under EU Directive 2007/46/EC and, secondly, for payment by the defenders severally or jointly and severally to the representative party on behalf of the group members of such sums as represents a reasonable assessment of the losses suffered by each such member.

[3] The representative party, Mr Batchelor, is a retired deputy head teacher from St Andrews with a claim of his own in respect of a diesel Vauxhall Mokka X vehicle which he acquired by way of a conditional sale agreement regulated by the Consumer Credit Act 1974 with Vauxhall Finance plc through Arnold Clark Automobiles Limited in Glenrothes as credit intermediary. The other group members similarly claim to be or to have been purchasers, owners, registered keepers or lessees of affected vehicles.

[4] The first and second defenders are said to have designed and manufactured vehicles containing prohibited defeat devices which unlawfully reduced the effectiveness of the vehicles' NOx emissions control systems under conditions which might reasonably be expected to be encountered in normal vehicle operation and use, in terms of Article 3.10 of the Emissions Regulations, and to have issued Certificates of Conformity in respect of those

vehicles. The third defender is said to have manufactured and marketed Vauxhall-branded vehicles containing such defeat devices and to have supplied them to the UK market. The fourth defender is said to have manufactured and marketed affected certain Vauxhall "Vivaro" vehicles. The fifth defender is a finance company which is said to have supplied some group members with financing and leasing services in connection with their purchase or lease of affected vehicles. The assets and liabilities of Vauxhall Finance plc, which previously carried out such activities, are said to have been transferred to the fifth defender in April 2023. The sixth defender is a supplier of new and used affected Vauxhall vehicles in the United Kingdom. An account of the relatively complex corporate history of the defenders and the groups of companies to which they have from time belonged, together with a narrative of their shared directors and leadership personnel, is set out in the summons.

[5] Vehicle emissions standards and testing regimes have for some time existed in the UK and in the EU for the purpose of reducing the adverse effects of emissions including NOx. Relevant legislation is contained in EU Framework Directive 2007/46/EC; its successor EU Framework Regulation 2018/858; the Emissions Regulations themselves; EU Testing Regulation 692/2008; its successor EU Regulation 2017/1151; the UK Road Vehicles (Approval) Regulations 2009 and, thereafter, the Road Vehicles (Approval) Regulations 2020; the UK Road Vehicles (Construction and Use) Regulations 1986, and the Road Traffic Act 1988.

[6] The effect of the regulatory background, in broad outline, is that since the 1970s, any vehicle sold in the EU has to have obtained a relevant "type-approval" issued by a competent relevant authority in a Member State. The approval is in respect of a particular make and model of vehicle and is designed to permit pan-EU conformity and harmony in engine

performance and emissions. In 1976, there was introduced a single EC type-approval, which, once issued by a competent authority in a particular Member State, was valid for the whole of the EU and did not need to be validated separately in any individual Member State.

[7] Type-approval for a vehicle could only be granted if it complied with all of the regulatory acts set out in Annex IV of the Framework Directive. Article 4.3 of the Directive empowers Member States to register or permit the sale or entry into service of only those vehicles which satisfy the requirements of the Directive. Article 7.2 of the Directive obliges a manufacturer to provide the information listed in Annex III to the relevant authority when seeking type-approval. Since 1 September 2020, manufacturers have been obliged by Article 13 of the Framework Regulation to:

> "ensure that the vehicles, systems, components and separate technical units that they have manufactured and that are placed on the market have been manufactured and approved in accordance with the requirements laid down"

and to:

> "ensure that their vehicles, systems, components and separate technical units are not designed to incorporate strategies or other means that alter the performance exhibited during test procedures in such a way that they do not comply with this Regulation when operating under conditions that can reasonably be expected in normal operation".

Manufacturers are obliged, where a vehicle placed on the market was not in conformity with the Regulation, or where type-approval was granted on the basis of incorrect data, to take corrective measures immediately, and to inform the type-approval authority of any change in the particulars recorded in the information package which accompanied the application for type-approval.

[8] Article 18 of the Framework Directive requires a manufacturer to deliver a Certificate of Conformity with each vehicle. That certifies that the vehicle conforms in all respects to

the type-approval applicable to the vehicle and that it can be permanently registered in Member States. It sets out the applicable emissions standard and the levels of NOx emitted during regulatory testing procedures. Point 0 of Annex IX to the Framework Directive (as amended by the new Testing Regulations) provides that the Certificate of Conformity is

> "a statement delivered by the vehicle manufacturer to the buyer in order to assure him that the vehicle he has acquired complies with the legislation in force in the European Union at the time it was produced".

[9] Article 5.2 of the Emissions Regulations prohibits the use of defeat devices, defined by Article 3.10 as:

> “any element of design which senses temperature, vehicle speed, engine speed (RPM), transmission gear, manifold vacuum or any other parameter for the purpose of activating, modulating, delaying or deactivating the operation of any part of the emission control system, that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use”.

The representative party alleges that each of the engines within the affected vehicles contained an engine control system, which included computer hardware and software that optimised the engine's behaviour in response to real-time driving data. He claims that in all affected vehicles, the manufacturer defenders employed exhaust gas recirculation strategies which switched off or reduced the rate of exhaust gas recirculation (thus increasing NOx emissions) by reference to specific parameters in conditions which might reasonably be expected to be encountered in normal vehicle operation and use, and alleges that various other strategies, involving Lean NOx Traps and Selective Catalytic Reduction systems, were used, again with the effect of increasing NOx emissions, in some vehicles. It is claimed that these strategies represented prohibited defeat devices, the use of which enabled the diesel engines in the affected vehicles to comply with the regulatory standards as to NOx emissions during testing, but which allowed them to emit unlawfully excessive and harmful

levels of NOx, in breach of the applicable standards, during normal on-road driving conditions.

[10] The representative party alleges that, when applying for type-approval for their affected vehicles from the relevant authorities, the first, second, third and fourth defenders fraudulently misled the regulators by failing to disclose the use of prohibited defeat devices. A further claim is that they decided upon and published information as to the NOx emissions and performance of the affected vehicles, knowing them to be untrue and intending that customers would be influenced thereby into acquiring affected vehicles. Examples of supposedly false or misleading statements made by or on behalf of the defenders are given. The Certificates of Conformity issued with each affected vehicle are said to fall within that description. The fifth defender is alleged impliedly to have misrepresented to those group members to whom they supplied finance that the affected vehicles were emissions-compliant and could lawfully be used on the public roads, by agreeing to sell and finance those vehicles. The sixth defender is said to have made the same implied misrepresentations by supplying affected vehicles to the UK market. These misrepresentations are said to have been fraudulent or alternatively negligent.

[11] It is narrated that following the issue of recall notices by regulatory authorities, the first to fourth defenders installed software changes in the affected vehicles in Europe, which did not render the vehicles emissions-compliant and perpetuated the fraud.

[12] The grounds of action advanced comprise:

(a) Unlawful means conspiracy amongst all of the defenders. The first to fourth defenders are said unlawfully to have manufactured and installed prohibited defeat devices into the diesel engines of affected vehicles; the first and second defenders to have concealed the presence of such devices from the regulatory

authorities and, on obtaining type-approval on that basis, to have issued Certificates of Conformity which falsely certified to purchasers (and, by extension, lessees) that the affected vehicles complied in full with all regulatory and legislative emissions standards then in force; the fifth defender to have unlawfully sold and leased affected vehicles which were not compliant with emissions standards and which could not lawfully be driven on UK roads and to have unlawfully continued to take payments from the relevant group members; and the sixth defender to have supplied such vehicles to the UK market. It is alleged that all the defenders conspired together in a collective effort to sell and lease affected vehicles on the knowingly false pretence that they were emissions-compliant and fit lawfully to be registered, sold and put into service in the UK, and to that end made the representations described and marketed the affected vehicles. Further reference is made to the overlapping corporate ownership and leadership in the corporate group to which the defenders belong. It is further claimed that the defenders, without any just excuse, knowingly and intentionally conspired with each other to effect the sale and lease of affected vehicles to prospective customers, including the group members, at such customers' expense and in furtherance of the defenders' common economic interests in maximising profits. The group members' expense is said to have been the defenders' gain.

(b) Fraudulent misrepresentation on the part of the defenders, by knowingly dishonest statements to the group members, made with intent to deceive, that Vauxhall-branded vehicles had been tested and complied with UK and EU statutory requirements, including regulatory emissions levels; that they did

not incorporate prohibited defeat devices; that approval of their design had been properly and honestly obtained from the regulatory authorities; that the Certificates of Conformity issued in respect of the vehicles were accurate and valid; and that the vehicles were fit lawfully to be permanently registered, sold and put into service in the UK. Those misrepresentations are said to have been made with a view to obtaining type-approval and inducing group members to buy and lease affected vehicles. It is said that the misrepresentations were of a continuing nature and effect and that the defenders did not (as they were bound to do) seek to correct them. It is averred that the group members relied upon and were entitled to rely upon those representations when buying or leasing their vehicles and that had they not been made, the group members would not have entered into the transactions which they in fact entered into in relation to the vehicles. The signatories of the relevant Certificates of Conformity are identified.

(c) Alternatively to the case in fraudulent misrepresentation, it is alleged that the group members' claimed loss and damage was caused by the defenders' fault and negligence, and in particular that it was the first and second defenders' duty to take reasonable care to obtain type-approval and to issue accurate and valid Certificates of Conformity without negligently misrepresenting the true NOx emissions performance of the affected vehicles. It is said to have been the duty of all the defenders to take reasonable care not to represent to group members that the affected vehicles and their diesel engines had been tested and complied with UK and EU statutory requirements, including regulatory emissions levels; that they were fit lawfully to be permanently registered, sold

and put into service in the UK and EU; that the vehicles did not require modification in order to meet relevant emissions standards; and that they did not incorporate prohibited and unlawful defeat devices. The defenders, it is claimed, knew or ought to have known that such representations were false and were likely to induce group members to buy and lease affected vehicles. The group members maintain that they relied upon and were entitled to rely upon those representations when buying or leasing their vehicles. It is said to have been the sixth defender's duty only to supply, distribute, market and advertise vehicles to and within the UK which did not contain prohibited defeat devices, for which type-approval had been properly obtained and for which there were accurate and valid Certificates of Conformity and which could lawfully be registered, sold and driven on the public roads, and similarly to have been the duty of the fifth defender to provide financing and leasing services only for emissions-compliant vehicles. It is claimed that had the defenders fulfilled those various duties, the group members would not have purchased, owned or leased their respective vehicles. The issue of the Certificates of Conformity is said to have created a special relationship between the issuing defenders and the group members which amounted to an assumption of responsibility by those defenders to the purchasers and lessees of the vehicles.

(d) Breach of statutory duty on the part of the first to fourth defenders arising from the combined effect of Articles 4.1, 4.2, 5.1 and 5.2 of the Emissions Regulations, Articles 13, 14.1 and 33.1 of the Framework Regulation, and relevant provisions of domestic legislation as read with and giving effect to the Framework

Directive, namely Regulation 15 and 33A of the 2009 Regulations; Regulation 14 of the 2020 Regulations; and sections 42 and 75(1) of the Road Traffic Act 1988.

(e) Breach of contract on the part of the fifth defender in relation to financed vehicles. The incorporation of prohibited defeat devices and the supply of vehicles which had invalid or inaccurate Certificates of Conformity is said to have been in breach of implied contractual terms for those on the group register who purchased or leased the vehicles as to the description and satisfactory quality of the vehicles under sections 13(1) and 14(2) of the Sale of Goods Act 1979; as to the satisfactory quality of the vehicles under sections 11D(2) and 11(J)(2) of the Supply of Goods and Services Act 1982; and as to the satisfactory quality and fitness for purpose of the vehicles under sections 9(1) and 10(3) of the Consumer Rights Act 2015.

(f) Right of redress against the fifth defender in respect of financed vehicles under Regulation 27A of the Consumer Protection from Unfair Trading Regulations 2008. It is claimed that the first to fourth defenders engaged in misleading and unfair, and thus prohibited, commercial practices and omissions in relation to the affected vehicles, in terms of Regulations 3, 4, 5, 6, 27A and 27B of the 2008 Regulations. The fifth defender is said to have disseminated misleading marketing materials in the UK and, actually or constructively, to have been aware of the unfair commercial practices. Further, the fifth defender is said to have entered into consumer contracts for the sale or leasing of affected vehicles using false and misleading information, in breach of Regulations 5(3)(b), 5(4)(a), (b), (i) and (k) and 5(5)(b), (c), (e), (i), (1), (o) and (q)

of the 2008 Regulations, and it is claimed that its overall presentation deceived or was likely to deceive the relevant group members and caused or was likely to cause them to take the transactional decision to buy or lease their vehicles, which they would not otherwise have taken, in terms of Regulation 5(2).

(g) Remedies under section 140B of the Consumer Credit Act 1974 against the fifth defender for group members who financed their vehicles with credit agreements in terms of section 140C(l) of the Act. The other defenders are said to have been "associates" of the fifth defender in terms of section 184(3) of the Act, having been owned and controlled at all material times by the same parent company, to the effect that, by virtue of section 140A(3), anything done or not done by the other defenders fell to be treated as having been done by the fifth defender. That is said to have rendered the contractual relationships between the relevant group members and the fifth defender unfair under section 140A(l), in that those group members were misled by the misrepresentations already described and their vehicles were not of satisfactory quality, rendering the price and monthly repayment costs for the vehicles grossly overstated against the background of an unfair imbalance of information as between the group members and the defenders.

The heads of loss in respect of which the group members variously claim redress are uncertainty as to the effect of software updates and their alleged effect on engine torque, engine performance, acceleration, driveability and enjoyment of driving, fuel efficiency, fuel consumption, durability of engine components and running and maintenance costs; and diminution in value of their vehicles in the used car market due to the negative perception of diesel vehicles. They further advance claims for repayment of the full purchase price or cost

of leasing or financing their respective vehicles, which failing, payment of the difference between the prices they paid and the actual value of the vehicles at the time of purchase. They seek damages under section 15B of the Sale of Goods Act 1979 or section 11F of the Supply of Goods and Services Act 1982, orders for repetition of finance payments made under section 140B(l) of the Consumer Credit Act 1974 and for the reduction or cancellation of such payments as still fall to be made, or a discount under Regulations 27A and 27I of the 2008 Regulations. They seek damages for financial loss, distress and inconvenience under Regulations 27A and 27J of those Regulations, or price reduction under section 19 of the Consumer Rights Act 2015; and a sum of general damages for distress, inconvenience and loss of enjoyment of the vehicles.

[13] The representative party also makes averments in response to the defenders' claims that some of the group members' claims have prescribed. In particular, it is maintained that the misrepresentations relied upon are all continuing acts and that the first and second defenders are under a continuing duty to apply and implement the requirements of the relevant regulations and to disclose the presence of prohibited defeat devices, and to remedy their presence and effect. It is claimed that section 6(4) of the 1973 Act immediately suspended any prescriptive period which did start to run against group members and that the group members only became aware of the defenders' actions in 2021, when advertisements proposing these proceedings were placed by solicitors, and that an objectively and ordinarily prudent and diligent purchaser or lessee of the vehicles in question had no reason to be aware of or to investigate the true state of affairs before then.

[14] Although effectively all material averments made by the representative party are disputed by the defenders, it is necessary only for present purposes to note specifically that they maintain that they installed no defeat devices and, in any event, no prohibited defeat

devices in any of the affected vehicles. They maintain that there was no defeat device because no installed device detected and reacted differently in a regulatory test cycle, that the reference in Article 3(10) of the Emissions Regulations to conditions reasonably be expected to be encountered in normal vehicle operation and use is a reference to conditions within such test cycles, and that in any event the effectiveness of the emissions control systems is not reduced in driving conditions normally to be found in the UK or the EU.

[15] They further maintain that, in the event that there were defeat devices in the vehicles, they were not prohibited defeat devices because of the effect of exemption provisions in Article 5 of the Regulations which result in devices which reduce the effectiveness of emission control systems not being prohibited *inter alia* 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, or conditions are substantially included in the test procedures for verifying evaporative emissions and average tailpipe emissions. Extensive explanations for each of these positions are provided. Finally, the defenders maintain that, if the operation of any of the technologies in the emissions control systems does amount to a prohibited defeat device, that was inadvertent. They maintain that they have never knowingly designed, manufactured, or installed a prohibited defeat device.

[16] The matter came before the court for a discussion of the preliminary pleas of the defenders and the representative party.

Relevant statutory provisions

[17] The Prescription and Limitation (Scotland) Act 1973 contained the following provisions in effect from 25 July 1976 until 27 February 2025:

"**6.— Extinction of obligations by prescriptive periods of five years.**

(1) If, after the appropriate date, an obligation to which this section applies has subsisted for a continuous period of five years—
   (a) without any relevant claim having been made in relation to the obligation, and
   (b) without the subsistence of the obligation having been relevantly acknowledged,

   then as from the expiration of that period the obligation shall be extinguished:

…

(4) In the computation of a prescriptive period in relation to any obligation for the purposes of this section—
   (a) any period during which by reason of—
      (i) fraud on the part of the debtor or any person acting on his behalf, or
      (ii) error induced by words or conduct of the debtor or any person acting on his behalf,

      the creditor was induced to refrain from making a relevant claim in relation to the obligation, and
   (b) any period during which the original creditor (while he is the creditor) was under legal disability,

   shall not be reckoned as, or as part of, the prescriptive period:
   Provided that any period such as is mentioned in paragraph (a) of this subsection shall not include any time occurring after the creditor could with reasonable diligence have discovered the fraud or error, as the case may be, referred to in that paragraph.

(5) Any period such as is mentioned in paragraph (a) or (b) of subsection (4) of this section shall not be regarded as separating the time immediately before it from the time immediately after it."

Section 11 of the 1973 Act was in the following terms at all material times for the present proceedings until 31 May 2022:

"**11.— Obligations to make reparation.**

(1) Subject to subsections (2) and (3) below; any obligation (whether arising from any enactment, or from any rule of law or from, or by reason of any breach of, a contract or promise) to make reparation for loss, injury or damage caused by an act, neglect or default shall be regarded for the purposes of section 6 of this Act as having become enforceable on the date when the loss, injury or damage occurred.

(2) Where as a result of a continuing act, neglect or default loss, injury or damage has occurred before the cessation of the act, neglect or default the loss, injury or damage shall be deemed for the purposes of subsection (1) above to have occurred on the date when the act, neglect or default ceased.

(3) In relation to a case where on the date referred to in subsection (1) above (or, as the case may be, that subsection as modified by subsection (2) above) the creditor was not aware, and could not with reasonable diligence have been aware, that loss, injury or damage caused as aforesaid had occurred, the said subsection (1) shall have effect as if for the reference therein to that date there were substituted a reference to the date when the creditor first became, or could with reasonable diligence have become, so aware.

(4) Subsections (1) and (2) above (with the omission of any reference therein to subsection (3) above) shall have effect for the purposes of section 7 of this Act as they have effect for the purposes of section 6 of this Act;"

From 1 June 2022 until 27 February 2025, section 11 of the 1973 Act was in the following terms:

"**11.— Obligations to make reparation.**

(1) Subject to subsections (2) and (3) below; any obligation (whether arising from any enactment, or from any rule of law or from, or by reason of any breach of, a contract or promise) to make reparation for loss, injury or damage caused by an [act or omission][1] shall be regarded for the purposes of section 6 of this Act as having become enforceable on the date when the loss, injury or damage occurred.

(2) Where as a result of a continuing act or omission loss, injury or damage has occurred before the cessation of the act or omission the loss, injury or damage shall be deemed for the purposes of subsection (1) above to have occurred on the date when the act or omission ceased.

(3) In relation to a case where on the date referred to in subsection (1) above (or, as the case may be, that subsection as modified by subsection (2) above) the creditor was not aware, and could not with reasonable diligence have been aware, of each of the facts mentioned in subsection (3A), the said subsection (1) shall have effect as if for the reference therein to that date there were substituted a reference to the date when the creditor first became, or could with reasonable diligence have become, so aware.

(3A) The facts referred to in subsection (3) are—

(a) that loss, injury or damage has occurred,

(b) that the loss, injury or damage was caused by a person's act or omission, and

(c) the identity of that person.

(3B) It does not matter for the purposes of subsections (3) and (3A) whether the creditor is aware that the act or omission that caused the loss, injury or damage is actionable in law.

(4) Subsections (1) and (2) above (with the omission of any reference therein to subsection (3) above) shall have effect for the purposes of section 7 of this Act as they have effect for the purposes of section 6 of this Act;"

The Consumer Credit Act 1974 contains the following provisions:

"**140A Unfair relationships between creditors and debtors**

(1) The court may make an order under section 140B in connection with a credit agreement if it determines that the relationship between the creditor and the debtor arising out of the agreement (or the agreement taken with any related agreement) is unfair to the debtor because of one or more of the following–
   (a) any of the terms of the agreement or of any related agreement;
   (b) the way in which the creditor has exercised or enforced any of his rights under the agreement or any related agreement;
   (c) any other thing done (or not done) by, or on behalf of, the creditor (either before or after the making of the agreement or any related agreement).

(2) In deciding whether to make a determination under this section the court shall have regard to all matters it thinks relevant (including matters relating to the creditor and matters relating to the debtor).

(3) For the purposes of this section the court shall (except to the extent that it is not appropriate to do so) treat anything done (or not done) by, or on behalf of, or in relation to, an associate or a former associate of the creditor as if done (or not done) by, or on behalf of, or in relation to, the creditor.

(4) A determination may be made under this section in relation to a relationship notwithstanding that the relationship may have ended.

…

140B Powers of court in relation to unfair relationships

(1) An order under this section in connection with a credit agreement may do one or more of the following–
   (a) require the creditor, or any associate or former associate of his, to repay (in whole or in part) any sum paid by the debtor or by a surety by virtue of the agreement or any related agreement (whether paid to the creditor, the associate or the former associate or to any other person);
   (b) require the creditor, or any associate or former associate of his, to do or not to do (or to cease doing) anything specified in the order in connection with the agreement or any related agreement;
   (c) reduce or discharge any sum payable by the debtor or by a surety by virtue of the agreement or any related agreement;
   (d) direct the return to a surety of any property provided by him for the purposes of a security;
   (e) otherwise set aside (in whole or in part) any duty imposed on the debtor or on a surety by virtue of the agreement or any related agreement;
   (f) alter the terms of the agreement or of any related agreement;
   (g) direct accounts to be taken, or (in Scotland) an accounting to be made, between any persons.

(2) An order under this section may be made in connection with a credit agreement only–
   (a) on an application made by the debtor or by a surety;

(b) at the instance of the debtor or a surety in any proceedings in any court to which the debtor and the creditor are parties, being proceedings to enforce the agreement or any related agreement; or

(c) at the instance of the debtor or a surety in any other proceedings in any court where the amount paid or payable under the agreement or any related agreement is relevant.

(3) An order under this section may be made notwithstanding that its effect is to place on the creditor, or any associate or former associate of his, a burden in respect of an advantage enjoyed by another person.

(4) An application under subsection (2)(a) may only be made–

…

(b) in Scotland, to the sheriff court;

…

(5) In Scotland such an application may be made in the sheriff court for the district in which the debtor or surety resides or carries on business …"

The Civil Jurisdiction and Judgments Act 1982 contains the following provision:

"**22.— Supplementary provisions.**

…

(4) Where a court has jurisdiction in any proceedings by virtue of Schedule 8, that court shall also have jurisdiction to determine any matter which—

(a) is ancillary or incidental to the proceedings; or

(b) requires to be determined for the purposes of a decision in the proceedings."

Submissions for the defenders

[18] On behalf of the defenders, senior counsel made the following submissions:

Consumer Credit Act 1974

[19] The summons contained two substantive conclusions. The first was for declarator of the existence of prohibited defeat devices, and the second for payment. The representative party *inter alia* averred that the contractual relationships entered into by group members who had made finance agreements were unfair because the first to fourth defenders had deliberately entered into those agreements without regard to the way in which the vehicles had been constructed. He sought orders for repayment of all payments already made under

the agreements to the fifth defender and reduction of any future payments due, and had a corresponding plea-in-law. That amounted to the assertion of an entitlement by debtors in the agreements.

[20] Section 140B(2) of the Act provided that an application for an order under the section might be made only in three types of cases. The claim being made in the present case had to be regarded as an application by the debtor in terms of section 140B(2)(a). Section 140B(2)(b) had no application as it dealt only with situations where there was an attempt to enforce the agreement. Section 140B(2)(c) was a fallback provision which allowed an order to be made in any other proceedings where the amounts paid or payable under the agreement were relevant. That had no application in the present case either, as the reference to "other" proceedings had to mean proceedings not covered by the terms of either section 140B(2)(a) or (b). Section 140B(4) restricted an application for an order on the part of the debtor to the sheriff court. That statutory prorogation would be of diminished effect if the debtor could avoid it simply by combining an application under section 140B with an application for another order to which the sums paid or payable had some connection.

[21] Further, section 140B(2)(c) only applied where in the other proceedings the amounts paid or payable under the agreement were relevant, not where they merely might be relevant. Relevance in this context was properly to be understood as meaning material to the determination of the other case. Any entitlement to the statutory remedies sought in the present case were not relevant to any general claim for payment. They did not provide a basis for, support or assist in the assessment of such a claim. The obvious measures of loss in respect of which payment might be claimed were extra running costs or diminution in value of the vehicle. The amounts of payments made under the financing agreements were not relevant to any such assessment. Payments already made (but not those still due) could

be relevant to assessing a claim to *restitutio in integrum*, but that was not what was sought. That was not surprising, as all group members appeared to have retained rather than rejected their vehicles and there were no averments that indicated that *restitutio* was possible.

[22] Further, the representative party relied on section 22(4)(a) and (b) of the Civil Jurisdiction and Judgments Act 1982, claiming that the entitlement to a remedy under section 140B of the 1974 Act was a matter ancillary or incidental to the current proceedings, or one which required to be determined for a purpose of a decision in them. However, it was clear that the availability of a remedy under section 140B did not require to be determined for the purpose of a decision on the conclusions in these proceedings, nor could its grant be regarded as ancillary to the proceedings. A re-writing of the terms of any individual finance agreement was a particular statutory remedy and was not incidental to the claim for payment. It followed that the court had no jurisdiction to entertain the claimed entitlement to remedies under section 140B.

[23] There was nothing untoward about such a result. The group proceedings were essentially a claim for payment on behalf of group members. Rewriting the individual relationships of any group member who had taken out a finance agreement was not a relevant matter in such proceedings. Any assessment of the question of unfairness in the relevant agreements, and of the appropriate remedies, would be an inherently fact-sensitive exercise, dependent on the circumstances affecting each group member: *Smith* v *Royal Bank of Scotland* [2023] UKSC 34, [2024] AC 955, [2023] 3 WLR 551 at [22] – [25]. The specific conduct of each group member would be relevant to the court's exercise of its discretion, as would any delay in making the claim: *Smith* at [57] – [59], [89]. If any rewriting of the basis of relationships was appropriate, the individual group member was free to apply to the

relevant sheriff court, which was the proper forum to conduct the individual assessment exercise required by each case. The group proceedings ought not to be diverted into consideration of the individual circumstances of all relevant group members in relation to the finance arrangements they had entered into.

Prescription

[24] The claims pursued by the representative party were for payment based on various grounds, both in fault of one kind or another and in breach of contract, and were all subject to the short negative prescription in terms of sections 6 and 11 of and Schedule 1, paragraphs 1(af), (b), (d) and (g) to the Prescription and Limitation (Scotland) Act 1973. Where prescription was raised as an issue in a case, the onus was on the claimant relevantly and specifically to aver the basis on which the claims had not prescribed. In relation to group members who had purchased their vehicle, signature of the contract to purchase or, at the very latest, the date of acquisition of the vehicle was the latest date for loss to have been suffered if that had occurred prior to 1 June 2017 (ie 5 years before the amendments made by section 5 of the Prescription (Scotland) Act 2018 came into force). The representative party had no relevant or specific averments that would extend the prescriptive period.

[25] Dealing firstly with those group members whose claims were subject to the prescription regime as it stood before the amendments to the 1973 Act came into effect, on the hypothesis upon which the litigation proceeded, every group member suffered loss as soon as he or she bought or leased an affected vehicle. That was the relevant date for the concurrence of *injuria* and *damnum* for the purposes of sections 6(1) and 11(1) of the 1973 Act. As each group member would also have been aware of buying or leasing the vehicle, there was no scope for postponing prescription under section 11(3) of the 1973 Act:

Gordon's Trs v *Campbell Riddell Breeze Paterson* [2017] UKSC 75, 2017 SLT 1287 at [19] – [21]. These proceedings had only commenced against each defender with service of the relevant applications in terms of RCS 26A.18(1), the earliest date of which was on 18 July 2023, the latest on 25 September 2023. Group members who joined the register later had a later commencement date. No claim in this class had therefore been made within 5 years of the date on which the relevant group members alleged they had suffered loss, injury and damage.

[26] The only possible exception to that analysis would concern any separate non-damages claim for remedies pursuant to section 140B of the Consumer Credit Act 1974. In England, for limitation purposes, such a cause of action was not regarded as arising until the court made a determination on the matter or until the agreement ended: *Smith* at [2], [19], [42] and [47]. It was not easy to understand how, if at all, that decision affected the Scots law of prescription. Notwithstanding that the court's discretion to make an order only arose when it seemed to the court at the time of the decision that the contract was unfair, the obligation being considered arose from contract in terms of Schedule 1, paragraph 1(g). It became enforceable when the thing which caused the perceived unfairness occurred. A debtor had the right to seek the discretionary remedy at that point. In this case, the claimed unfairness was either the presence of the alleged defeat device or the alleged misrepresentations leading to the contract. Either way, the relevant event had occurred by or at the date of purchase or lease. Time started to run at that point. However, even if the earliest point at which time started to run was indeed the end of the contract, it was essential for the representative party – who bore the onus of demonstrating an extant right – to aver whether or not the agreements were continuing within 5 years of commencing proceedings: *Smith* at [45]. No such averment had been made.

[27] The representative party's primary argument on prescription was that the prescriptive period has not yet commenced by virtue of section 11(2) of the 1973 Act. Given that the parties had decided not to debate whether the Emissions Regulations furnished a cause of action in breach of statutory duty, it could not be said at this stage that any such breach which did exist was not a continuing one for the purposes of section 11(2), and thus the representative party's appeal to that subsection in that context could not be said to be irrelevant. However, that did not apply to any of the other bases of claim which were advanced. In all such cases, the representative party alleged that group members suffered loss when they bought, leased or financed their vehicle in reliance on prior wrongful acts completed by the defenders.

[28] The proper approach was to identify the act or omission from which the loss was said to flow and to determine whether that act or omission was a continuing one or, conversely, whether it was completed at a particular point in time: *Johnston* v *Scottish Ministers* 2006 SCLR 5 at [9] and [17]; *John G Sibbald & Son* v *Johnston* [2014] CSOH 94 at [8]; *Huntaven Properties Ltd* v *Hunter Construction (Aberdeen) Ltd* [2017] CSOH 57 at [65] – [66]. The proper scope of application of the subsection had been identified in *David T Morrison & Co Ltd (t/a Gael Home Interiors)* v *ICL Plastics Ltd* [2014] UKSC 48, 2014 SC(UKSC) 222, 2014 SLT 791 at [12], even if the rationale for its existence was perhaps less than clear: Johnston, *Prescription and Limitation of Actions* (2nd edition) at 4.72. It did appear from *David T Morrison* at [14], where Lord Reed had suggested that:

> "sec 11(2) reflects the view that continuing damage requires some adaptation of the general approach laid down in sec 11(1), on the basis that the date when a right of action arises is not in that situation the appropriate date for the commencement of the prescriptive period",

that the subsection applied only where loss and damage was continuing to accrue. That would not be the case for every group member, but it would be for some. If an act or omission was truly a continuing one for the purposes of section 11(2), then even the long negative prescription would not begin to run until it ceased: section 11(4). That underscored the need for caution in determining what did and did not actually amount to a continuing act or omission for these purposes.

[29] The acts and omissions averred by the representative party were clearly not continuing ones to which section 11(2) of the 1973 Act applied. The cases on which he relied were not of assistance to him. *McGowan* v *Springfield Properties Plc* [2024] CSIH 31, 2025 SC 10, 2024 SLT 1161 dealt with the very particular question of whether the obtaining of an interim interdict was a continuing act and found no parallel in the current litigation. *Cramaso LLP* v *Viscount Reidhaven's Trustees* [2014] UKSC 9, 2014 SC (UKSC) 121, 2014 SLT 521 illustrated that the consequences of an act or default might be regarded as continuing, particularly in the context of an intended contract, but that did not necessarily mean that the act or default itself had that character in law. The alleged misrepresentations in the present case were acts that were complete as soon as they were respectively made, although it was accepted in principle that the continuing nature of a duty for the purposes of the subsection might depend on a close consideration of the facts from which the duty emerged. *GI Globinvestment Ltd* v *Faleschini* [2024] EWHC 481 (Comm) vouched only the proposition that certain misrepresentations might remain operative until "fully acted on" ([143]), which had happened in the present case when each group member purchased, leased or financed a relevant vehicle, and so that proposition did not assist the representative party. The averments which the representative party had made about a supposedly ongoing "duty to correct" were limited in scope to representations which were

said to be fraudulent in nature, and there were in any event no averments that any group member had relied on any such putative duty.

[30] The representative party's averments in support of its case under section 11(2) were in any event so lacking in specification as to be irrelevant. There were no adequate averments of misrepresentation, for reasons to be later explained.

[31] The only other averments from the representative party in relation to prescription sought to engage section 6(4) of the 1973 Act, by reference to an alleged fraud or error induced by the words or conduct of the defenders. As to the claimed case in fraud, the representative party's averments fell to be excluded from probation for reasons afterwards to be explained, and so he could not relevantly found upon section 6(4)(a)(i). Even if the relative averments were suitable for probation, "fraud" had a particular meaning in this context: *Dryburgh* v *Scotts Media Tax Ltd* [2014] CSIH 45, 2014 SC 651 at [30], namely a deliberate acting on the part of the debtor that was intended to induce and did induce the creditor to refrain from asserting its rights. There had been no attempt on the part of the representative party to make averments from which such a conclusion could be drawn, nor to provide any basis for the ascription of the necessary state of mind to the defenders as corporate entities, for example along the lines mentioned in *Dryburgh* at [21] and [22] and *Coulter* v *Anderson Anderson & Brown LLP* [2025] CSOH 32, 2025 BCC 717 at [49].

[32] Turning to the question of induced error, as a matter of statutory interpretation, the scope of section 6(4) was informed by the general purpose of the 1973 Act to prevent the bringing of stale claims, and the more specific purpose of section 6(4)(a)(ii) to relieve a creditor from the effect of delay in the pursuit of a claim, so long as that delay did not arise from the creditor's own negligence: *Tilbury Douglas Construction Ltd* v *Ove Arup & Partners Scotland Ltd* [2024] CSIH 15, 2024 SC 383, 2024 SLT 811 at [66]; *Dryburgh* at [18] – [20]. It was

not, therefore, relevant to plead "everyday" activity by the debtor (such as performance of the contract in question) or the mere expression of confidence in one's product, absent any relevant averment of bad faith or misrepresentation: *Tilbury Douglas* at [61] – [62] and the court's subsequent Statement of Reasons for refusal of permission to appeal to the United Kingdom Supreme Court given on 20 September 2024 at [5], where it had been observed that it could not have been Parliament's intention that section 6(4) would operate in circumstances where a defender had merely made an assertion to the effect that he had performed his obligations or has not been negligent, because that would run contrary to the entire purpose of the statute, which was, as a matter of generality, to prevent the bringing of stale claims. It was accepted, however, that the Supreme Court itself had subsequently granted permission to appeal, although the case had settled before it had made any substantive ruling.

[33] Separately, the test under section 6(4) was not purely subjective; rather, the court required to consider the words or conduct founded upon objectively and determine whether they were sufficient to induce an objective reasonable person into error: *Heather Capital Ltd* v *Levy & McRae* [2017] CSIH 19, 2017 SLT 376 at [63]. It followed that a party's averments based upon section 6(4) would not automatically merit probation if, viewed objectively, the words or conduct relied on would be insufficient to meet the statutory test. In the present case, the representative party in effect claimed that the defenders, by continuing to deny liability and continuing to advertise vehicles for sale, had induced the group members to refrain from making claims. That was irrelevant. Firstly, the positive conduct averred was the "everyday" sort of activity that fell outwith the scope of section 6(4), or which, in any event, would not induce an objectively reasonable person into error. Secondly, the reliance on an alleged failure to disclose the presence and effect of defeat devices, and public denials,

would suggest that prescription did not operate whenever a defender disputed liability. Moreover, the averments were misconceived on the basis that they were wholly lacking in specification of the actual statements and advertising material relied upon by identified group members and, instead, seemed to present an entirely hypothetical case. There was no meaningful attempt to discern amongst the acts of the separate defenders. There was no specification of the error said to have been caused in the minds of the group members by the defenders, how that caused them to refrain from bringing proceedings, or when and how that error had finished.

[34] Although the onus was initially on the defenders to aver circumstances bringing the case within the reasonable diligence proviso to section 6(4) – *Highland and Islands Enterprise* v *Galliford Try Infrastructure Ltd* [2023] CSOH 21, 2023 SLT 1077 at [17] – that onus had been discharged in this case. The defenders averred that there was widespread media coverage of "Dieselgate" allegations from 2015. That gave rise to an inference that, exercising reasonable diligence, an investigation by the group members ought to have taken place at that point in time. In such circumstances, the burden of proof was on the representative party to aver how – exercising ordinary diligence – any fraud or error could not have been discovered during 2015, or indeed at any later time prior to 5 years before commencement of the action. It was sufficient that group members became aware even of the possibility of making a claim: *Tilbury Douglas* at [53] and [59]. The representative party was bound to fail on this issue.

[35] The only relative averment seemed to be that it was the advertisements for the group proceedings (in April 2021) that caused the group members to be disabused of their error. However, the reasonable diligence test was an objective one. The mere fact that advertisements were being run for the group litigation showed that the representative

party's case under section 6(4) must fail. The fact that there was such an advertisement promoting group litigation claims demonstrated the existence of a set of facts that ought to have prompted investigations so that the clock started running: *Glasgow City Council* v *VFS Financial Services Limited* [2022] CSIH 1, 2022 SC 133, 2022 SLT 181 at [52] and [55]. Once it was established that an investigation ought to have commenced, it was not necessary to go further and seek to establish what would have been discovered and when.

[36] In summary, it was uncontroversial that there was mainstream press reporting of the "Dieselgate" scandal during 2015. This ought to have prompted the very investigation on the part of group members that must have occurred at some point prior to the April 2021 advertisements. The representative party's averments about what had been revealed by certain press reports and whether those articles had been accessed by group members were irrelevant. The point was that there was enough to prompt the investigation by 2015. The group members thereafter had the quinquennial prescriptive period to complete investigations and commence proceedings: *VFS* at [52]. At best, the representative party's averments were saying no more than that the group members were unaware of their claims until someone happened to suggest they had a claim through the April 2021 advertisements. That was insufficient for the purposes of section 6(4), but was also self-defeating, in that it amounted to an implicit acceptance that there was sufficient earlier basis for an investigation to take place. The defenders had consistently denied the existence of any defeat devices. Their actions could not justify the group members' inaction where information imparting knowledge of the alleged problem was available. In those circumstances, the representative party had not made averments capable of proving that, using reasonable diligence, the group members could not have discovered any fraud or error more than 5 years before commencement of the present action. Accordingly, even if there was a relevant averment of

fraud or error, that would present a further basis on which to absolve the defenders of the claims.

[37] Turning to those group members whose claims were subject to the prescription regime introduced by the 2018 Act, the same results as already discussed applied to all claims relating to purchases or leasing of vehicles made between 1 June 2017 and the date 5 years before proceedings were commenced respectively for the individual group members, including group members who were added to the group register after the date of commencement of proceedings. In particular, the averments of the representative party designed to support an assertion that the group members were not aware and could not with reasonable diligence have been aware of the three matters contained in the amended section 11(3A) of the 1973 Act were irrelevant and lacking in specification. In respect of the reasonable diligence proviso, the onus was on the representative party to make relevant averments to delay the start of the running of the prescriptive period. The averments made in support of the claim to relief under section 6(4) were also irrelevant and lacking in specification. As the case stated by the representative party based on unlawful means conspiracy had only been introduced to the pleadings on 29 September 2024, it would have prescribed had the quinquennium run from 27 September 2019 at the latest. Many of the group members had acquired their vehicles before that date. All of the difficulties which attended the representative party's general case equally applied to the case based on unlawful means conspiracy. The representative party's argument that that case was simply a development of what had already been pleaded was not well-founded. It was necessary to identify particular obligations which were founded upon: Johnston at 2.17. In *JG Martin Plant Hire Ltd* v *MacDonald* 1996 SC 105 at 111A – C, 1996 SLT 1192 at 1196 B - D, it had been observed, albeit in the context of refusing to permit amendment, that the advancement of a

different ground of fault or different reason for a claimed liability to make reparation would amount to a change in the basis of a pursuer's action, which could not be permitted if out of time. In *Assuranceforeningen Skuld* v *International Oil Pollution Compensation Fund (No. 2)* 2000 SLT 1348 at 1352A it had been posited that the appropriate test for time bar purposes was whether a claim freshly advanced had been so altered in character as to be presented on a fundamentally different legal basis. Either of those expressions of the relevant principle was apt to cover the introduction of a case based on unlawful means conspiracy which had not previously been stated.

[38] The court should hold that the relevant claims relating to purchases or leasing of affected vehicles made before the date 5 years before commencement of proceedings for the relevant group member had been extinguished by prescription and assoilzie the defenders from all claims by any affected group member; which failing allow a preliminary proof on such part of the representative party's averments concerning prescription as survived debate.

Averments of fraud

[39] The representative party advanced a case of fraudulent misrepresentation which was irrelevant and lacking in specification and ought to be excluded from probation. A claimant alleging fraud had to make very clear and specific averments, given the seriousness of the allegation. That requirement would apply regardless of the type of action concerned. What represented appropriate notice would, however, vary depending on the particular circumstances of the case. Nonetheless, the authorities were very clear about the requirements for a case based on fraud. The principle and the policy reasons behind it would apply whatever the particular chapter of the Rules of Court governing the action. For

example, the same requirements applied to actions on the Commercial Roll: *Marine and Offshore (Scotland) Ltd* v *Hill* [2018] CSIH 9, 2018 SLT 239 at [16]. Further, the test of relevance was the same for all actions: *Jamieson* v *Jamieson* 1952 SC (HL) 44 at 50, 1952 SLT 257 at 257.

[40] The matters which required to be averred included that the alleged false statement was relied on in entering into the transaction in question and that the representation was made knowing that it was false (or that its maker was reckless as to the truth of it). Details of the acts or representations complained of and how they caused the claimants to enter into the transactions were also required: *Leander CB Consultants Ltd* v *Bogside Investments Ltd* [2023] CSOH 26 at [26]; *McLellan* v *Gibson* (1843) 5 D 1032 at 1034; *AW Gamage Ltd* v *Charlesworth* 1910 SC 257 at 264, 1910 1 SLT 11 at 14; *Royal Bank of Scotland* v *Holmes* 1999 SLT 563 at 569 to 570. In the case of alleged fraud by corporate entities, that should include specification of the specific natural person or persons within the entity said to have committed fraud or made fraudulent misrepresentations, and explicit averments as to the nature of that person's fraud: *RBS* v *Holmes* at 569K – 570D; *Marine and Offshore* at [16]. It had been observed in *RH Thomson & Co* v *Swann* (1895) 22 R 432 at 436 – 437, (1895) 2 SLT 546 at 546 that fraud was a personal matter which could only be committed by an individual, and that it was incompetent to charge a firm generally with fraud.

[41] *Richards* v *Pharmacia Ltd, c/o Pfizer Ltd* [2018] CSIH 31, 2018 SLT 492 did not assist the representative party. That was not a case on which the pursuers' case depended upon the making out of a fraud ([64]). Although it had been made clear that what was required by way of adequate specification would depend on the nature of the case, the identity of the other party and what he was already aware of or might be taken readily to understand, none

of that assisted the representative party with the fundamental difficulties which attended the statement of his case in fraud.

[42] The representative party had made averments about four named individuals who signed Certificates of Conformity confirming that the relative vehicle had been manufactured to the standards required for type-approval, and also setting out the relevant emissions standard and the amount of NOx emitted during testing. Those who signed the Certificates of Conformity were accused of fraudulent misrepresentation. However, it was not averred that the information in the Certificates was false or that the signatories knew that they were false, or were reckless as to the truth of the information set out in them.

[43] Beyond the individuals who had signed the Certificates the representative party also accused board members and officers of the defenders from time to time of fraud. The need for specification was even clearer in a case where one was dealing with an alleged contravention of a complex legislative system designed to regulate emissions standards that was applied in multiple jurisdictions. The terms of that legislation were, at the very least, open to interpretations on which reasonable persons might disagree.

[44] The allegations also related to technical issues about performance of the engines on the open road as opposed to during test cycles, and knowledge of such matters on any relevant person's part could not simply be assumed. Despite that, the representative party did not even attempt to specify his allegations of fraud or fraudulent misrepresentation. For example, he did not specify how or in what manner any individual knew that any alleged modulation of parts of the vehicles' emissions control systems constituted a prohibited defeat device. He did not specify how the defenders were said to have concealed the presence of defeat devices in the affected vehicles or misled regulators about them. It was not said in what manner regulators were misled. The representative party relied on

unparticularised allegations of fraud against every director and board member of every defender for the entire period of the manufacture of Euro 5 and Euro 6 engines from 1 September 2009 onwards. During that period, the corporate entities in the litigation had been owned by different parent companies and formed part of different corporate groups at different times. The dispute concerned a complex and technical area of engine design which might reasonably be assumed to have involved many different people both within the defenders and also within their contractors and agents. It was essential for the representative party to explain in at least some detail how there could have been such a widespread and persistent fraud and who was said to be behind it. Not every statement relied upon could be attributed to every defender. Not every group member could have relied on every statement said to be a misrepresentation.

[45] If the material available to the representative party was so scant as to not allow him to plead (even inferentially) the basic nature of the fraud or the persons concerned in it, then his case was plainly insufficient to establish fraud and should not be remitted to probation.

Unlawful means conspiracy

[46] The representative party further claimed that all the defenders were party to an unlawful means conspiracy, but his averments were irrelevant and lacking in specification and ought to be excluded from probation. There were four fundamental difficulties. Firstly, the representative party did not relevantly and specifically aver intention by each of the defenders to harm each of the group members. It was a core ingredient of the delict that the conspirators must intend to harm the claimant. That intention did not need to be an end in itself; the end might simply be a promotion of the conspirators' economic interests, but the conduct still had to be deliberate in the sense of intending harm to the claimant as the way to

pursue those economic interests. It was not sufficient that harm to a person or class of unknown persons was merely foreseeable from any unlawful action. The issue was always whether a purpose of the conspiracy or agreement was to injure the pursuer: eg *Crofter Hand Woven Harris Tweed Co* v *Veitch* 1942 SC (HL) 1 at 9 – 10, 1943 SLT 2 at 5.

[47] Those requirements would be particularly difficult to satisfy where one was dealing with large classes of unknown and unknowable potential claimants such as end consumers because it would often be impossible for there to be any conscious knowledge of whether any of them would actually suffer any harm: *WH Newson Holdings Ltd* v *IMI plc* [2013] EWCA Civ 1377, [2014] Bus LR 156 at [32], [37] – [42]; *Emerald Supplies Ltd* v *British Airways Plc* [2015] EWCA Civ 1024, [2016] Bus LR 145 at [159] – [170]. *4VVV Ltd* v *Spence* [2024] EWHC 2434 (Comm) at [628] did not cast doubt on that proposition. It simply repeated the standard formulations used to describe the delict and did not consider the specific question now at hand, but instead dealt with the very different context of a relatively limited class of prospective investors as potential victims. *ED & F Man Capital Markets Limited* v *Come Harvest Holdings Limited* [2022] EWHC 229 (Comm) negatived the proposition that an actionable conspiracy had to have a specific victim in contemplation, but did not deal with how defined a class of potential victims had to be in order for the "intention" element of the tort to be present.

[48] The representative party merely averred that the defenders' intention was to effect the sale and lease of affected vehicles to prospective customers at such customers' own expense and in furtherance of their common economic interests. Any purchase or lease of a vehicle by a customer would involve expense and an intention to sell and lease vehicles at a customer's expense could not sensibly be interpreted as an intention to harm that customer. It appeared that the representative party was seeking to rely on the principle outlined by

Lord Hoffmann in *OBG Ltd* v *Allan* [2007] UKHL 21, [2008] 1 AC 1, [2007] 2 WLR 920 at [167] whereby the requisite intent might be inferred from a situation where a defender knew that conduct advancing his own business interests would necessarily be injurious to the claimant because the two were inseparably linked. However, that argument was bound to fail where one was dealing with complex supply chains and the class of persons was drawn as widely as any end consumer anywhere in the world. In such circumstances any benefit gained by the defenders would not necessarily be at the expense of such consumers. The present case was *a fortiori* of cases such as *WH Newson* and *Emerald Supplies*. Nowhere in the summons were there any averments of direct dealings between the first to fourth defenders and group members. The absence of such positive averments reflected the reality that none of those defenders entered into contracts of sale or other forms of contract with end consumers. It was wholly unclear how the defenders' gains were said to be inseparably linked to the group members' alleged losses.

[49] Secondly, a conspiracy required an actual agreement amongst all the defenders, whether formed expressly or tacitly. This required all of the defenders to have a sufficient degree of knowledge about the actions constituting the unlawful means and the surrounding circumstances, and also actually to share the same object of intentional harm: *Kuwait Oil Tanker Co SAK* v *Al Bader (No 3)* [2000] 2 All ER (Comm) 271 at [106] – [111]. The degree of knowledge required was knowledge of all the facts which made the means unlawful: *Racing Partnership Ltd* v *Sports Information Services Ltd* [2020] EWCA Civ 1300, [2021] Ch 233, [2021] 2 WLR 469; *4VVV Ltd* at [625] – [631]. The support of the court in *Kidd* v *Lime Rock Management LLP* [2025] CSIH 11, 2025 SLT 651 for the dissenting view in *Racing Partnership*, that in at least some cases knowledge of the unlawfulness of the means deployed in order to give effect to the conspiracy was necessary in order to create potential

liability, further bolstered the suggestion that the representative party's case in unlawful means conspiracy was bound to fail.

[50] Here, the defenders would have needed to know that the vehicles' emissions control systems enabled emissions which were not in compliance with the applicable regulations. There was no averment to that effect in the summons. The representative party's averments offered nothing to address the required knowledge on the part of each of the defenders. The representative party averred that the first and second defenders manufactured the vehicles with prohibited defeat devices and that the fifth defender sold the vehicles and took payments. However, there was no averment from which it could be inferred that all the defenders had the necessary knowledge other than the simple basis that they were all part of a group of companies, which was insufficient.

[51] It was the fact of an agreement or combination that was the essence or gist of the delict and imposed primary liability on all of the participants: *Crofter Hand Woven Harris Tweed Co* 1942 SC (HL) 1 at 5, 1943 SLT 2 at 3; *JSC BTA Bank* v *Khrapunov* [2018] UKSC 19, [2020] AC 727, [2018] 2 WLR 1125 at [9] – [11]. It was important to emphasise that the delict of conspiracy was not to be seen as simply some form of joint and several or accessory liability amongst joint wrongdoers: *JSC BTA Bank*. The representative party had no averments of any such agreement or conspiracy. Whilst it was true that the defenders formed part of groups of companies from time to time (albeit with different parent companies over time), that was insufficient as an averment of conspiracy between separate legal persons based in several different jurisdictions. There had been a significant change in ownership of many of the shareholdings in the defenders in 2017. The period of time over which the alleged conspiracy must have extended was at least the period 2009 to 2019, being the period covered by Euro 5 and Euro 6 engines. Nonetheless, there was no differentiation

in the sparse averments of alleged conspiracy which appeared to be made equally to all defenders over the entire period.

[52] The averment that all of the defenders undertook roles for themselves for and on behalf of each other was meaningless. It lacked any specification of the necessary agreement amongst all of the defenders intentionally to harm consumers such as the group members. It was unclear what roles were being referred to or how they were connected to the issue of alleged prohibited defeat devices. As with the averments of fraud, there was no attempt to specify natural persons who were said to have formed part of the conspiracy. The averments displayed a distinct blurring of the lines between conspiracy and accessory liability. The averments that the defenders all jointly acted as a single corporate group was more redolent of joint liability. The representative party had averred in detail how various individuals had from time to time held leadership roles in common across the third to sixth defenders. However, that raised more questions than answers. No director had been identified as common to all of the defenders. No individuals appeared to have been directors over the whole of the relevant period of time with which the proceedings are concerned. Indeed, many of the periods in office were very short and large periods of time were missing. No details at all were given for the first and second defenders. In any event, it was unclear whether it was being suggested that all of these individuals were the people said to be part of the unlawful means conspiracy.

[53] Thirdly, the unlawful means alleged were not clearly specified and did not have a sufficient relationship to the losses claimed. Whilst the unlawful means employed by the conspirators did not require to have been independently actionable by group members, it had been repeatedly emphasised that there remained a need to keep the delict within reasonable bounds lest it distort both commerce and various other areas of law such as

accessory liability. That required close attention to the nature of the unlawfulness and the relationship with any resultant damage to a claimant: *JSC BTA Bank* at [11]. There might be complex, and unresolved, issues involved where the unlawful means constituted breaches of civil statutory duties or private law duties owed to third parties: *JSC BTA Bank* at [15]. At the very least, the unlawful means founded on could not simply be incidental to the means by which the defenders intended to harm the claimant, or merely provide the occasion for that loss. The classic example of an insufficient relationship was where a courier company instructed its couriers to break the speed limit in order to beat a rival courier: eg *OBG* at [159] – [160]; *Revenue and Customs Commissioners* v *Total Network SL* [2008] UKHL 19, [2008] 1 AC 1174, [2008] 2 WLR 711 at [119]; *JSC BTA Bank* at [14]; *Racing Partnership* at [151] - [154]. In this case, if the representative party's case was that the relevant unlawful means was the incorporation of prohibited defeat devices into vehicle engines contrary to the Emissions Regulations in order to obtain type approval from regulatory authorities within the EU, then even if that were established, it would be no more than incidental to the losses claimed. The Emissions Regulations were part of a regulatory system primarily governed by the regulatory authorities. There was an insufficiently direct relationship between that alleged unlawfulness and any alleged harm sustained by the group members. The case would not be materially different to the speeding courier example.

[54] Fourthly, it appeared to be suggested that at least in some cases the alleged unlawful acts came before the alleged combination. It was of the essence of an unlawful means conspiracy that the combination had to come before the unlawful act relied on: *4VVV* at [625]; *JSC BTA Bank* at [9]. The representative party failed to identify the combination and its date or dates, or to identify whether the alleged combination came before or after the unlawful means. It appeared that there might be two aspects to the claimed unlawful

means; firstly, the manufacture of vehicles with a prohibited defeat device; and secondly, the publication of representations that the vehicles were emissions compliant. There was no indication that the manufacture of the vehicles was said to arise following the alleged combination. As to representations, there was no averment that the defenders knew that any information they published was untrue. All of the defenders were alleged to be part of the conspiracy for the whole period. No liability could be imposed on a defender for acts of a conspiracy before it became part of the combination. Becoming part of the combination would not incur liability for any earlier acts by others.

Irrelevant and inspecific averments of misrepresentation

[55] The representative party's other delictual claim was premised on alleged misrepresentations by the first to fourth defenders. Other than in relation to the averments concerning the Certificates of Conformity, the effect of which the defenders accepted would be for later determination after evidence, the averments about misrepresentation were irrelevant for lack of specification and ought to be excluded from probation. They were so confused as to make it difficult to isolate what representations were being founded on and by whom they had been made. An omnibus approach to pleading had been adopted. It was claimed that representations had been made directly to group members through advertising and marketing, and indirectly through the regulatory authorities. However, many of the statements relied upon were newspaper articles. The notion that statements reported in a newspaper (some in German language publications) could be construed as actionable representations to the whole world was startling. The representative party did not specify who made any of the statements or which defenders they were said to relate to. It was difficult to reconcile the actual content of the statements relied upon with the

characterisations put on them by the representative party, or how their content could be referable to each of the defenders. The overall impression given was that the pleader had thrown in any statement made in any context at any time by anyone remotely connected with the Vauxhall brand in relation to anything that vaguely had to do with emissions, and then claimed they all amounted to actionable misrepresentations, even on occasion without claiming that the statement was actually false.

[56] The effect was to make it very difficult rationally to analyse the representative party's case and conduct an appropriately focused debate on its relevancy of that case. The courts had been very careful to set out limits on the duties of care in the context of widely disseminated statements. A duty of care was generally recognised only where there was a close or special relationship, often quasi-contractual in nature, between the maker of the statement and the recipient. The analysis required a careful consideration of the circumstances in which a statement was made, to whom it was addressed, the extent to which it was relied on by the recipient, and whether any such reliance was reasonable in all the circumstances: eg *Steel* v *NRAM Ltd* [2018] UKSC 13, 2018 SC(UKSC) 141, 2018 SLT 835 at [18]; *Playboy Club London Ltd* v *Banca Nazionale del Lavoro SpA* [2018] UKSC 43, [2018] 1 WLR 4041 at [7]. In short, the averments failed to provide fair notice. There was, further, no averment of any relevant reliance on any of the alleged representations by any group member at any relevant time.

[57] In any event, none of the supposed misrepresentations (with the exception of the Certificates of Conformity) were statements of fact. They were all statements of opinion, including those expressing a view as to whether a vehicle complied with the law: *Royal Bank of Scotland Plc* v *O'Donnell* [2014] CSIH 84, 2015 SC 258 at [26]; *Rashdall* v *Ford* (1866) LR 2 Eq 750 at 754 –755. In order for such statements to constitute operative misrepresentations,

there had to be clear allegations that the defenders did not hold or believe any of these expressions of opinion at the time. There were none. Either the case based on misrepresentation should be refused probation, or further specification of the matters complained of should be ordered before any probation was allowed.

Submissions for the representative party

[58] On behalf of the representative party, senior counsel submitted that his pleadings, taken *pro veritate*, were sufficient for enquiry. The adoption of a traditional approach to pleading in group proceedings would be inappropriate, as requiring too high a standard and imposing too heavy a burden on the representative party. Any deficiency in the pleadings was referable to the fact that documentation which the defenders had been ordered to produce had not yet been provided. The essential basis of the representative party's case was clear; the deliberate use of defeat devices had been concealed from the outside world from behind the defenders' corporate veil. In such circumstances, the court ought to draw all possible inferences adverse to the defenders' debate submissions; resist a trial by pleading (*Heather Capital* at [100]); take a benevolent view of the representative party's pleadings in these group proceedings: *Leonardo Hotel Management (UK) Ltd* v *Galliford Try Building 2014 Ltd* [2024] CSOH 43 at [98] and [105] – [113]; and refuse any motion for dismissal of the proceedings or the deletion of averments. It could not be said that the representative party was bound to fail – *Jamieson* at pp 49 to 50; *Heather Capital* at [70].

Consumer Credit Act 1974

[59] Some group members advanced claims against the fifth defender under section 140B(1) of the 1974 Act, on the basis that the contractual relationship between the relevant parties was unfair in terms of section 140A(1). Those claims were advanced under subsection 140B(2)(c), and could be pursued in this court. Proceedings of the kind described in subsection 140B(2)(a) could be pursued in the sheriff court local to the debtor in the agreement, for his convenience. Proceedings in terms of subsection 140B(2)(b) or (c) could be brought in any court. Subsection 140B(2)(c) required only that the amount payable under the credit agreement had to be relevant to the anchor proceedings, to which a claim under the subsection could then attach itself, without providing for any particular degree of materiality.

[60] Failing jurisdiction on that ground, the court had jurisdiction by virtue of Schedule 8 to and sections 22(4)(a) and (b) of the Civil Jurisdiction and Judgments Act 1982. It was not disputed by the defenders that this court had jurisdiction to hear all of the claims made against the first and second defenders in terms of section 20(1) of and rule 2(c) of Schedule 8 to the 1982 Act. The conduct of those defenders was founded upon as forming the basis of the unfair contractual relationship with the fifth defender. That conduct was imputed by virtue of sections 140A(3) and 184(3) of the 1974 Act to the fifth defender as an associate of the first and second defenders. The applications under the 1974 Act were matters which were ancillary or incidental to the proceedings against the first and second defenders or which required to be determined for the purposes of a decision therein.

[61] In any event, and with reference to RCS26A.27, it was clearly necessary to secure the fair and efficient determination of the proceedings that this court determine the 1974 Act applications. The court was seized of all of the other claims – including the other contractual

claims – and there was no group proceedings procedure in the sheriff court, which would necessitate the raising of over 20,000 individual actions in such courts all over Scotland, giving rise to enormous pointless expense and use of court time.

Prescription

[62] In terms of RCS 26A.18(1), these proceedings had commenced when the group register was originally served. In terms of RCS 26A.18(2), the claims of group members not then on the register commenced when the version of the register containing their details was lodged with the court. The defenders' argument was that many of the group members' claims had prescribed, as any obligation to make reparation arose and became enforceable when a group member purchased or acquired his or her vehicle, and certain members had purchased or acquired their vehicles more than 5 years prior to the commencement date of the proceedings as concerning them. Section 11 of the 1973 Act had been amended with effect from 1 June 2022 by the Prescription (Scotland) Act 2018. An amendment to section 6 came into force on 28 February 2025 but the changes were immaterial for this case.

[63] The defenders argued that many of the group members' claims had prescribed, either because they purchased or acquired a vehicle prior to 1 June 2017 (ie more than 5 years prior to the coming into force of the 2018 Act) and those claims were not preserved by either section 11(2) or section 6(4) of the unamended 1973 Act, or else they had purchased or acquired their vehicle on or after 1 June 2017 (ie less than 5 years prior to the coming into force of the 2018 Act) but more than 5 years prior to the commencement of these proceedings so far as they were concerned and those claims were not saved by either sections 11(2), 11(3), 11(3A) or 6(4) of the amended 1973 Act. The defenders further claimed that all of the group members' claims based on unlawful means conspiracy had prescribed,

on the basis that the relative adjustments to the summons specifically addressing that formulation of the claim had first been intimated on 27 September 2024. The representative party's position was that it was premature to take a finalised view of his prescription averments until the document recovery process has been concluded, and that a determination of the arguments could not in any event be made without the hearing of evidence.

[64] The group members fell into five parts for prescription purposes. As of 30 April 2025, the group as a whole was comprised of 20,600 members. Of those, information about date of acquisition was missing for about 1,000. The remaining parts of the greater group comprised (i) those seeking to enforce obligations which (on the face of it) had subsisted for more than 5 years prior to 1 June 2022 and which were subject to the unamended 1973 Act (11,061 claims or 56.43% of the whole); (ii) those seeking to enforce obligations which had subsisted for less than 5 years prior to 1 June 2022, but for more than 5 years prior to the relevant commencement of these proceedings and which were subject to the amended 1973 Act (2,964 claims or 15.12% of the whole); (iii) those seeking to enforce obligations which had subsisted for less than 5 years prior to the commencement of these proceedings on 18 July 2023 and whose names appeared on the original group register as it then stood, and whose claims could not have prescribed (3,580 claims or 18.27% of the whole); (iv) those seeking to enforce obligations which had subsisted for less than 5 years prior to the appearance of their names on a revised group register, and whose claims could not have prescribed (1,439 claims or 7.34% of the whole); and (v) those seeking to enforce obligations which had subsisted for more than 5 years prior to the appearance of their names on a revised group register and were subject to the provisions of the amended 1973 Act (556 claims or 2.84% of the whole).

[65] One group member was acting under a Power of Attorney and might place reliance on the legal disability provisions of section 6(4)(b) to suspend the running of the quinquennium.

Members who purchased vehicles before 1 June 2022

[66] The unamended 1973 Act applied to this part of the group. *Prima facie*, the members in this part would have suffered loss, and the obligation to make reparation therefor would have become enforceable, on the date that each purchased or started leasing his or her vehicle. Further, in line with *Gordon's Trustees*, it was also accepted that they would have been aware that they had incurred expenditure in that regard and that (under the law as it then stood) the start of the prescriptive period would not have been postponed to a later date under section 11(3). They, therefore, relied on sections 11(2) and 6(4)(a).

[67] Section 11(1) was subject to the effect of section 11(2), which provided that:

> "Where as a result of a continuing act, neglect or default loss, injury or damage has occurred before the cessation of the act, neglect or default the loss, injury or damage shall be deemed for the purposes of subsection (1) above to have occurred on the date when the act, neglect or default ceased."

As was noted in *Johnston* v *Scottish Ministers* at [17], the first task in considering the possible impact of the subsection was to identify the act or neglect founded upon and to consider whether it was continuing. The fact that the acts or neglect founded upon were of the same "character" would be of assistance to a pursuer who founded upon the subsection – *Johnston* at [11] and [20]. A failure to implement a piece of legislation (eg a European Directive or Regulation) was a "continuing neglect" – [19].

[68] While it was accepted that it had to be the breach of duty (ie the act or neglect) rather than the duty itself that continued for section 11(2) to apply, it had been observed in *John G*

Sibbald at [8] that so long as a continuing duty subsisted and remained unfulfilled, there might be a continuing neglect or default capable of falling within section 11(2). That subsection could cover the situation where a duty to do or not do something existed and had been breached, that duty was continuing, and it remained unfulfilled, ie breach of the duty was ongoing.

[69] Further, it was clear that a misrepresentation could be an "act, neglect or default" and it could be seen from *Cramaso* and *McGowan* that a misrepresentation did not cease when it was once made and was treated as continuing to have effect until it was withdrawn or lapsed, or until the other party discovered the true state of affairs; the legal consequences of a misrepresentation were not fixed at the time it was made; the representor assumed and had a continuing responsibility for its accuracy; a failure to withdraw the misrepresentation continued impliedly to assert its accuracy (all propositions in *Cramaso* at [16] – [23] and [31]); and where there was a continuing responsibility for a representation's accuracy, the representor could not wash his hands of responsibility for its continuing consequences; accordingly, a failure to withdraw was an ongoing breach of the duty as to its accuracy – *McGowan* at [7]. *GI Globinvestment Ltd* at [145] supported the suggestion that a misrepresentation which formed the "core premise" of an ongoing relationship might well be regarded as continuing during the currency of that relationship. That could be applied to the situation of group members being induced to purchase, lease or finance relevant vehicles by a misrepresentation about their compliance with applicable regulations.

[70] The representative party's position was that, for the purposes of section 11(2), the defenders' neglect, or their ongoing failure to fulfil their continuing duties of care, was continuing and that, as a result, the prescriptive period had not yet even commenced; which failing, at the very earliest, the effect of the defenders' misrepresentations continued at least

until the group members discovered that they were false, when they saw the advertisements inviting interest in these proceedings when they were proposed.

[71] In greater detail, the relevant "neglect" in these proceedings was:

(i) the first, second, third and fourth defenders' ongoing breach of their subsisting duties to implement and apply the terms of the various European Directives and Regulations in respect of the NOx emissions of affected vehicles, both as regards their original design and manufacture and the ongoing failure to remedy those breaches, eg by effective software update, including:

(a) Article 4.1 of the Emissions Regulations - obligation to meet emissions limits;

(b) Article 4.2 of the Emissions Regulations - obligation to take technical measures to ensure the effective limitation of tailpipe and evaporative emissions throughout the normal life of a vehicle;

(c) Article 5.1 of the Emissions Regulations – duty to ensure conformity of production, whether or not the relevant manufacturer was directly involved in all stages of the construction of a vehicle, system, component or separate technical unit;

(d) Article 5.2 of the Emissions Regulations – the prohibition against defeat devices. As was stated by the Grand Chamber of the ECJ in *QB* v *Mercedes-Benz Group AG* (Case C100/21) at [80]:

> "that certificate [a Certificate of Conformity] allows that purchaser to be protected against that manufacturer's failure to fulfil its obligation to place on the market vehicles which comply with that provision";

(e) Articles 13.1 of the Framework Regulations (with reference to Article 5 and Annex II) – duty to ensure manufacture in accordance *inter alia* with the Emissions Regulations;

(f) Article 13.5 of the Framework Regulations - duty to ensure that vehicles were not designed to incorporate performance altering strategies during test procedures;

(g) Article 13.6 of the Framework Regulations - duty to establish procedures to ensure that series production conformed to the approved type;

(h) Article 14.1 of the Framework Regulations – the ongoing obligation to take immediate corrective measures to withdraw from the market or recall vehicles disconform to the Regulations; and,

(i) Article 33.1 of the Framework Regulations – the ongoing obligation on the manufacturer to inform the approval authority that granted the EU type-approval without delay of any change in the particulars recorded in the information package.

(ii) the fifth defender's breach of its contractual obligation to sell or lease a vehicle that:

> "is in good order and condition, and of satisfactory quality, is durable and fit for its purpose and complies in all respects with any representations made by [the fifth defender] or any employee or agent of [the fifth defender] and with any conditions or warranties whether express or implied" – see the Opinion of Advocate General Rantos in Cases C-128/20 *GSMB Invest GmbH & Co KG*, C-134/20 *Volkswagen* and C-145/20 *Porsche Inter Auto and Volkswagen* at [146] to [151];

(iii) the first to fourth and sixth defenders' duty under Article 16.1 of the Framework Regulations only to place on the market vehicles in compliance with those Regulations;

(iv) the first to fourth and sixth defenders' duty under Article 17.1 of the Framework Regulations to take immediate corrective measures to bring non-conforming vehicles into conformity with those Regulations;

(v) the sixth defender's duty under Article 19.1 of the Framework Regulations not to make non-conforming vehicles available on the market until brought into conformity with those Regulations;

(vi) all of the defenders' respective ongoing failures (whether as a matter of delict or breach of contract) to disclose the presence of prohibited defeat devices in and the registrability and lawfulness of use of the affected vehicles which were designed and manufactured (first, second, third and fourth), marketed and advertised (first to sixth), supplied and distributed (sixth) and sold or leased (fifth) by them; and

(vii) all of the defenders' respective ongoing failures (whether as a matter of delict or breach of contract) to fulfil their subsisting duties not to misrepresent the emissions-compliant state of affected vehicles and to correct what had been said in that regard.

Those aspects of neglect were all of the same character and were all continuing and, unlike the position of a positive act of misrepresentation, were unaffected by the group members discovering the true state of affairs. On that basis, the prescriptive period had not yet commenced.

[72] The relevant "acts" in these proceedings were:

(i) the first and second defenders' ongoing misrepresentations (without withdrawal or correction) in their Certificates of Conformity (in terms of Article 3.36 and Point 0 of Annex IX of the Framework Directive and Article 3.5

of the Framework Regulations) that their vehicles complied with all regulatory acts that were in force at the time of their production and upon which the group members were entitled to rely – see *QB* at [81] and [82]:

> "81. When acquiring a vehicle model of a type that has been approved and is, therefore, accompanied by a certificate of conformity, an individual purchaser can reasonably expect that Regulation No 715/2007, and, *inter alia*, Article 5 thereof, has been complied with in respect of that vehicle (see, to that effect, judgment of 14 July 12 2022, *Porsche Inter Auto and Volkswagen*, C-145/20, EU:C:2022:572, Paragraphs 54).
>
> 82. Consequently, it follows from the provisions of the Framework Directive referred to in Paragraphs 78 to 80 above that it establishes a direct link between the car manufacturer and the individual purchaser of a motor vehicle intended to guarantee to the latter that that vehicle complies with the relevant EU legislation. In particular, since the manufacturer of a vehicle must comply with the requirements arising from Article 5 of Regulation No 715/2007 when issuing the certificate of conformity to the individual purchaser of that vehicle with a view to the registration and sale or entry into service of that vehicle, that certificate allows that purchaser to be protected against that manufacturer's failure to fulfil its obligation to place on the market vehicles which comply with that provision."

(ii) by extension, all of the defenders' ongoing misrepresentations (without withdrawal or correction) that the affected vehicles designed and manufactured (first, second, third and fourth), marketed and advertised (first to sixth), supplied and distributed (sixth) and sold or leased (fifth) by them were regulatory and emissions-compliant:

(iii) all of the defenders' ongoing misrepresentations (without withdrawal or correction) that the affected vehicles did not contain any prohibited defeat devices;

(iv) all of the defenders' ongoing misrepresentations (without withdrawal or correction) that those vehicles could lawfully be registered for use on the road; and

(v) for those group members with a contractual claim, the fifth defender's continued taking of financing or leasing payments.

Those acts were all breaches of duty of a similar character, were all continuing and were acts in respect of which the first and second defenders had an ongoing responsibility in respect of the accuracy of the Certificates of Conformity and all of the defenders had an ongoing responsibility for the production and subsequent use of marketing materials and other activities which followed thereon. The prescriptive period would only have commenced when the group members discovered the true state of affairs. They claimed that that had occurred less than 5 years before proceedings were raised, but evidence would be required about that.

[73] Further, the relevant misrepresentations were made to the original and successive purchasers and lessees of a vehicle – *Cramaso* at [25] to [31]. A distinction existed between the date of existence of a right of action and the date of the start of the prescriptive period. They were not one and the same thing. In *David T Morrison* at [12] it was observed that:

> "…the right of action arises [under section 11(1)] as soon as any material loss is suffered as a result of the default. The prescriptive period does not however begin to run on that date: the loss, injury or damage is deemed, for the purposes of sec 11(1), to have occurred on the date when the default ceased. For the purposes of prescription, therefore, the loss is deemed to have occurred on a later date than (some of) it actually did."

Accordingly, while the group members had the right to sue on the day they paid to purchase or lease their vehicles, they did not have to do so for the purposes of prescription.

[74] While section 11(2) postponed the start of the prescriptive period, a claimant could also rely on section 6(4) to interrupt or suspend the running of that period for as long as he had been induced to refrain from making a relevant claim by reason of fraud by the defender, or by an error induced by the defender's words or conduct, and he had been

reasonably diligent in taking any necessary steps that might have discovered the fraud or error.

[75] As a matter of policy and, importantly, in the context of the unamended section 6(4)(a)(i), the word "fraud" had to be broadly construed and meant "any form of concealment by the debtor" – see *VFS* at [21]. In *Dryburgh* at [30] it had been noted that:

> "We should emphasise that the word 'fraud' in sec 6(4) does not appear to us to have the same meaning as in criminal law, where it means a false statement, made in the knowledge that it is false, which produces a practical result. The word rather denotes a significantly wider concept, akin to the meaning of 'fraud' in the common law of bankruptcy, namely any device or other acting designed to disappoint the legal rights of creditors (see Erskine, Inst III, i, 16; *McCowan v Wright* [(1852) 15 D 229]). We reach that view in the light of the statutory context, namely the interruption of the period of prescription and the fundamental policy underlying sec 6(4) as described in *BP Exploration Operating Co Ltd v Chevron Transport (Scotland)* [[2001] UKHL 50, 2002 SC(HL) 19, 2001 SLT 1394], discussed above .... That policy appears to us to demand that, in any case where a creditor is induced to refrain from taking steps to enforce a debt because of some deliberate action on the part of the debtor, the prescriptive period should not run. For this purpose it is immaterial whether the debtor's actings are dishonest in the strict sense of that word; what is required is a deliberate acting on the part of the debtor that is intended to induce and does induce the creditor to refrain from asserting its rights. In such a case the creditor's failure to act is not his fault, but rather the fault of the debtor, and basic fairness demands that where an intentional act of the debtor is the reason for the delay the creditor should not be prejudiced."

Further, it was not necessary in order to invoke section 6(4)(a)(i) that there be averments about the specific identity of an individual fraudster. The prescriptive period commenced when a loss was incurred – in line with sections 6(1) and 11(3) – but was immediately suspended due to the existence of a fraud or error which induced a claimant not to sue and only started to run again when the fraud itself was (or ought with reasonable diligence to have been) discovered. For the purposes of prescription, while discovery of the fraud operated to end the period of suspension of the quinquennium, the absence of averments about the specific identities of fraudsters did not operate to prevent its suspension in the first place. That was the effect of the observations in *VFS* at [53]. To require such specification

would run counter to the clear authority that fraud had a different contextual meaning under section 6(4); the wider concept of "any form of concealment", "device" or "other acting" could not carry with it the stricter pleading requirement normally associated with those of actual criminal or civil fraud. To impose such a requirement would run counter to basic fairness – by its very nature, a fraud or concealment was an intentional act which was designed to shield from sight not only the act, but also the actors, particularly in a situation where, as here, there remained a substantial information asymmetry between the representative party and the defenders. Section 6(4)(a)(i) itself referred to "fraud on the part of the debtor or any person acting on his behalf", encompassing fraud by the corporate defenders or by any individual person on their behalf.

[76] Turning to error induced by the defenders' words or conduct, in *Adams* v *Thorntons WS* 2005 1 SC 30, 2005 SLT 594 at [68] it was held that a claimant had to establish that he was in error as to the scope of his remedies and because of that error he refrained from pursuing a claim against particular defenders; that the error was induced by those particular defenders; and that the error could not have been discovered with reasonable diligence until a point in time after which the discovery was irrelevant to the running of prescription against him. In other words, the error had to be on the part of the claimant as to his position and to have been induced by the conduct of the defender. In *Heather Capital* at [62], it had been noted that the claimant's error might have arisen in a number of ways, one of which was an erroneous assumption that solicitors would act in accordance with their normal professional standards and practices. No "sinister overtone" on the part of the debtor was required - *Adams* at [38]. As had been said in *Heather Capital*:

> "[63]…[conduct] should not be construed in a narrow or restrictive way… [it] may be active or passive. It may involve positive action, but equally, in certain circumstances, it may involve a silence or a lack of action. The conduct need not be

> deliberate, or blameworthy or careless or be carried out with any particular motive such as deception or concealment…The conduct does not have to constitute a crime or a breach of duty…The conduct does not require to be the sole cause of the error…
>
> [64] … the relevant question, in my opinion, is simply whether any conduct on the part of the solicitors concerned, viewed objectively, induced or contributed to inducing some or all of the error as defined above, with the result that HC refrained (in the broad sense explained in *BP Exploration*) from making any claim against the solicitors."

Further, the relevant conduct did not need to post-date the coming into existence of the obligation – *Rowan Timber Supplies (Scotland) Ltd* v *Scottish Water Business Stream Ltd* [2011] CSIH 26 at [17] and [18].

[77] If the claimant relied on fraud or error, he also had to prove that he was induced to refrain from raising his claim for as long as he was affected by it. There was no need to say anything about a claimant's intention to sue had he not been the victim of the fraud or error: *Heather Capital* at [79]; Johnston at 6.108. "Refrain" had to be given a broad meaning and covered the period of time:

> "when the creditor does nothing to enforce the obligation, whether or not that is due to a conscious decision on his part. It is not necessary for the creditor to identify the date when he would have made the claim but for the error" - *Adams* at [38].

[78] The saving provision in section 6(4) was subject to its own proviso – namely, that:

> "…it is for the pursuer, as the putative creditor in the obligation in question, relevantly and specifically to aver circumstances capable of bringing the case within the ambit of the primary provisions of either or both of sections 6(4) or 11(3) of the 1973 Act. If it does so, it will be for the putative debtor in the obligation in question relevantly and specifically to aver circumstances capable of bringing the case within the ambit of the 'reasonable diligence' proviso to either or both subsections." – *Highlands and Islands Enterprise* at [17].

[79] The preliminary question, however, was whether the group members had had any reason to exercise such diligence in the first place – see (in the analogous context of reasonable diligence in section 11(3)) *Adams* at [22] – [24] and [30]. "Reasonable diligence" did not mean the doing of everything possible, nor necessarily the using of any means at the

plaintiff's disposal, nor even necessarily the doing of anything at all. What it meant was the doing of that which an ordinarily prudent creditor would do having regard to all the circumstances.

[80] Further, in *VFS* the court had observed that:

> "[46] …The fact that some piece of news has made its way into the media, or has been the subject of a report somewhere on the BBC's website, does not necessarily make that news something which is known to the public generally, or even to those who might have an interest in the subject-matter.
>
> [47] The existence of information in 'the public domain' does not carry with it an implication that it is public knowledge. The pursuers did not trade in trucks. They purchased trucks for their own use. There was no obvious reason for them to be alert to the financial or business pages of the news media to see what was happening in that sector of the market."

In summary, insofar as fraud within the meaning of section 6(4)(a)(i) was concerned, the defenders had deliberately concealed the presence of prohibited defeat devices from the group members, the effect of those devices on their vehicles' NOx emissions and that their vehicles were not emissions-compliant or registrable for use. That had disappointed the group members' legal rights and, as a result, they were induced to refrain from raising proceedings. That concealment was achieved by way of sales, advertising and marketing materials and brochures; by the issuing of Certificates of Conformity; and by public denials of wrong-doing and statements that all vehicles were Euro 5 and 6 compliant and environmentally friendly. Such statements had continued until September 2024. Further, while the defenders had been carrying out software updates since the summer of 2016, their correspondence with group members still did not disclose the presence of prohibited defeat devices, their consequences, and the fact that that was the reason for the software updates. Rather, the third defender had presented what was happening as a customer satisfaction

programme. The defenders had not produced any documents showing any other reason why such updates were required.

[81] So far as error within the meaning of section 6(4)(a)(ii) was concerned, the group members were induced not to claim earlier than they did because they were in error as to their rights and remedies by reason of the defenders' active and passive words and conduct as regards sales, advertising and marketing materials and brochures, the effect of the Certificates of Conformity and the ongoing public statements and denials. The group members had made erroneous assumptions that the defenders, as global and reputable vehicle manufacturers, would act in accordance with prevailing law and regulations. The fifth defender continued to take finance payments from relevant group members.

[82] The defenders claimed that allegations that every vehicle designer and manufacturer had used defeat devices were reported in the media following upon the 2015 "Dieselgate" scandal in the US involving Volkswagen, and that claims were brought in England and in the EU very soon afterwards. The representative party was not aware of any litigations having been mooted before April 2021. The defenders' contention involved the propositions that an ordinarily prudent or diligent purchaser or lessee of a Vauxhall diesel vehicle ought reasonably to have known about the Volkswagen scandal in the US, to have read any of the particular ensuing publications selected by the defenders (either in paper or online) on the particular days that they were published or thereafter; and, either with or without such knowledge, to have researched the position either before acquiring a vehicle (in the face of advertising and marketing maintaining that vehicles were compliant and environmentally friendly) or after acquisition (in the face of such marketing and the existence of an *ex facie* valid Certificate of Conformity); or to have known about any claims in England and the EU, to have realised from such media reporting that their vehicles emitted excessive levels of

NOx; and to have realised that such emissions gave rise to a right of action for a recoverable loss.

[83] Such a purchaser or lessee might, by chance, have come across such media reporting, but it could not be suggested that failure to do so was eloquent of a lack of reasonable diligence. Further, even if such a person ought to have looked into the matter further, he would have been met with misrepresenting denials by the defenders. The representative party maintained that group members were not aware of the fraud or error and had no objective reason to investigate whether such fraud or error existed until they saw advertising for these proceedings in or after April 2021 and, even if – at a time earlier than that date – they had a reason to investigate, they could not with reasonable diligence have discovered the defenders' fraud or realised that they were in error as to their rights in making a claim less than 5 years prior to the commencement of proceedings in 2023. At worst for the group members, the court would require to hear evidence as to what they were actually aware of and when; what objective reasonable diligence required; and what that would (or would not) have revealed in these circumstances: *Leonardo Hotel* at [61].

Members who purchased vehicles less than 5 years before 1 June 2022 but more than 5 years before commencement of proceedings

[84] The amended 1973 Act applied to these members. By virtue of section 11(2), the prescriptive period had not yet started to run against them, on the basis that the defenders' acts and omissions were continuing as already set out; which failing, by virtue of section 11(3), the prescriptive period did not start to run against them under sections 6(1) and 11(1) until they became aware of each of the section 11(3A) facts, which was only when they saw the advertisements for the current proceedings in and after 2021, and because they

could not with reasonable diligence have become so aware on any other date within the period of 5 years prior to the commencement of these proceedings in July 2023; and, in any event, the running of time was immediately suspended, from the date of vehicle acquisition until the date when they saw the advertisements for the current proceedings in and after 2021, by virtue of the defenders' fraud and the members' error induced by the defenders under section 6(4)(a)(i) and (ii). The representative party's averments were sufficient to engage sections 11(2), 11(3) and 11(3A) – as the latter two subsections affected section 11(1) – and section 6(4)(a)(i) or (ii), but would require the hearing of evidence before a final determination could be made.

Members who commenced proceedings on or after 18 July 2023 but who acquired their vehicle more than 5 years before the relevant date of commencement

[85] For these members, if the date of acquisition was prior to 1 June 2017 the unamended 1973 Act would apply. If the acquisition was between 1 June 2017 and 17 July 2018 the amended Act would apply. In either event, the principles already respectively described would apply.

Members with claims under the Consumer Credit Act 1974

[86] The prescriptive period for such claims only started to run when the unfair relationship was at an end: *Patel* v *Patel* [2009] EWHC 3264 (QB), [2009] CTLC 249, [2010] Bus LR D73 at [65] and [66], and *Smith* v *RBS*.

Prescription of the unlawful means conspiracy claim

[87] Adjustments pleading the case based on unlawful means conspiracy were introduced on 27 September 2024. The unlawful acts founded upon were the defenders' fraud in the form of deceitful concealment from the regulatory authorities and from the group members of the presence of prohibited defeat devices, and the fraudulent misrepresentations to the group members (via the Certificates of Conformity and other published materials) that their vehicles were emissions-compliant and could be registered for use on the roads. The allegation was that this was a conspiracy or combination amongst the defenders to commit fraud. The representative party had specified the role of each of the defenders in that conspiracy. The first to fourth defenders had failed fully to disclose and knowingly concealed from the type-approval authorities the use of prohibited defeat devices to meet emissions test standards. The fifth and sixth defenders knew that the vehicles which they imported, marketed, advertised, supplied, sold, distributed for sale and lease in the UK and for which they provided the finance were not emissions-compliant. Allegations of fraud and of unlawful means conspiracy (which was, in this case at least, a combination to commit fraud) were both, essentially, allegations of delicts of bad faith: *Coulter* at [49] to [51]. They were part of the same family of delicts. Accordingly, the averments of unlawful means conspiracy were simply a development of the pre-existing averments of fraud; the application of a new label to essentially the same complaint. They did not seek "to cure a radical incompetence…or change the basis" of the representative party's case or "involve a radical or fundamental incompetence": *Pompa's Trustees* v *Magistrates of Edinburgh* 1942 SC 119 at 125, 1942 SLT 118 at 122. It was permissible to adjust or amend a claim which was subject to the section 6(1) short negative prescription after the expiry of the quinquennium.

As long as the relevant obligation remained the same, its expression or the grounds for it might be altered. It had been observed in *MacLeod* v *Sinclair* 1981 SLT (Notes) 38 at 39 that:

> "It is clear from [*British Railways Board v Strathclyde Regional Council* 1980 SLT 63] that if as a result of a certain set of circumstances there arises an obligation to make reparation on the ground of negligence, an action raised within five years which relies on one ground of negligence will prevent the extinction of the obligation albeit different grounds of negligence are added to or substituted for the original grounds after the expiry of the five-year period. There is, for the purposes of s. 6, one obligation to make reparation on the ground of negligence and not a number of different obligations based on different grounds of negligence."

A practical approach required to be taken to the issue: Johnston at 2.16. In these proceedings, the underlying obligation remained the same (ie to make reparation) and the addition of an unlawful means conspiracy case was simply an elaboration of its underlying grounds. Even if, however, section 6(1) was engaged, the court would still require to determine (for each set of group members already identified) whether an operative prescriptive period had subsisted since before 27 September 2019 – including whether such a period had commenced at all, and if so whether it had been suspended and for how long, under the provisions of the 1973 Act in its unamended and amended forms. The representative party's position, for the reasons already stated, was that the relevant obligation had not prescribed by 27 September 2024, or at least that the court could only determine the issue after proof.

Relevance of the averments of fraud

[88] It was accepted that a high degree of specification was usually required where an allegation of fraud was made. *RBS* v *Holmes* at 569K to 570D had stated that the party alleging fraud should identify the act or representation founded upon; the occasion on which the act was committed or the representation made; the circumstances relied on as

yielding the inference that that act or representation was fraudulent; and the person who committed the fraudulent act or made the fraudulent misrepresentation. However, the questions for the court at this stage were simply whether fair notice of the representative party's case had been given and, if so, whether that case could be said to be bound to fail.

[89] It was alleged that there had been an underlying and enabling fraud perpetrated by the first to fourth defenders upon the UK, Dutch and German type-approval regulatory authorities as regards the use of prohibited defeat devices, without which the sixth defender could not have supplied the affected vehicles to the UK market, the fifth defender would not have able to offer financing or leasing facilities and the group members would never have been able to buy or lease their affected vehicles in the first place; and the ensuing and operative fraud by all of the defenders on the group members regarding regulatory emissions compliance and registrability for use.

[90] The fraud in respect of which the representative party sought reparation was the second fraud. He did not suggest that the underlying fraud on the regulatory authorities directly sounded in damages for the group members. Criticisms of a lack of specification should be proportionate, depending upon the nature of the case and what a defender himself knew. The degree of strictness with which the rules of pleading fraud were applied was not universal and would depend upon whether, ultimately, a defender had fair notice of the case brought against him. There might be circumstances in which identification of the specific act founded on operated as sufficient identification of the perpetrator, for example, where a fraudulent statement was said to have been made in a specified letter: *RBS* v *Holmes* at 570A – B.

[91] In *Richards* v *Pharmacia* it had been observed that:

> "[47] … When what is in issue is specification, as is self-evident, what is required will depend on the nature of the case but regard must also be had to the identity of whom [sic] the pleadings are primarily addressed: the other party; and what the other party is already aware of and what the other party may be taken readily to understand.
>
> [48] … in considering counsel for the defenders' submissions that the defenders have not been given fair notice of the case against them, the identity of the defenders and the nature of the activity with which the actions are concerned, provides the context in which her submissions have to be considered.
> …
> [64] The party against whom any allegation is made is entitled to have fair notice in the other party's pleadings of the substance of the allegation. Where the allegation is of fraud, the courts have applied that rule of fairness particularly strictly. But, in my view, even in a case of fraud, a defender is not entitled to complain of lack of specification if the pursuer's pleadings give him what in the circumstances amounts to fair notice of the allegation. He cannot, through reliance on the authorities about the high standard of specification required in cases of fraud, demand that the pursuer's averments go into more detail than is necessary to give fair notice of the case."

The nature of the underlying fraud which had set in motion the chain of events which enabled the ensuing operative fraud on the group members was adequately specified. The act or representation founded upon was the concealment (by way of failure to disclose) the presence of prohibited defeat devices, which were used to meet emissions testing; the occasion on which the act was committed or the representation was made was when type-approval was applied for, and the circumstances relied on as yielding the inference that that act or representation was fraudulent were that the manufacturer defenders knew that type-approval would not be granted if they disclosed the use of prohibited defeat devices. In any event, this fraud was part of the factual background and the pleading requirements did not apply there with such rigour. The identity of the fraudsters did not require to be specified; the defenders were familiar with the regulatory process and the way that type-approval was sought; subject to the control of the regulatory authorities, they were

responsible for framing the terms of the type-approval documents, including the information package that had to be supplied, and might be taken to know all that there was to know about their vehicles. If individuals did require to be named, it could reasonably be inferred that those were the signatories to the applications for type-approval from time to time, whom failing, by inference, the members of the board of directors or other company officers. At the very least, it might be said that the signatories to the Certificates of Conformity were implicated. Their certification that the vehicles complied with the type-approval must have meant that they were aware of the requirements for such approval, but the vehicles did not so comply without the use of prohibited defeat devices.

[92] Turning to the fraud on the group members, again the overriding requirements of fair notice were met in the circumstances. The fraud had been perpetrated upon many thousands of group members over many years and the need to specify the precise circumstances of each fraud would be impracticable and impose too high a pleading burden on the representative party. To delete the fraud averments would be "entirely disproportionate and not in the interests of justice": *Leonardo Hotel* at [105]. The defenders knew far more about the circumstances of the events complained of, and about the identities of the natural persons behind them, than the representative party could. The representative party averred the acts or representations founded upon – namely, the false pretence about, concealment of and failure to disclose the presence of prohibited defeat devices used to meet emissions standards, and the misrepresentations of regulatory emissions compliance and registrability for use contained in the Certificates of Conformity and in the sales and advertising materials and offers of finance. He specified the occasions on which the acts were committed or the representations were made – namely, when the Certificates of Conformity were supplied to each group member at the time of each individual purchase or

lease, when the sales and advertising materials were published and when finance and leasing facilities were offered. The circumstances relied on as yielding the inference that those acts or representations were fraudulent were that the affected vehicles were not regulatory emissions compliant, that the manufacturer defenders knew that they were not so compliant and that the fifth and sixth defenders knew that the vehicles that they financed, leased or supplied were not so compliant. The persons who made the fraudulent misrepresentations were identified – namely, the Certificates of Conformity signatories and the members of the board of directors and company officers of the defenders from time to time. They were to be taken to know what there was to know about how their vehicles functioned and what they were representing to actual and prospective customers.

Relevancy of the averments concerning unlawful means conspiracy

Intention to harm

[93] The representative party's case on intention to harm was straightforward. The vehicles manufactured, sold and financed by the defenders were presented to customers as vehicles which complied with all applicable regulations, including emissions standards. That presentation was untruthful and fraudulent since the vehicles did not, in fact, meet the required standards. Harm was caused to group members by means of the purchase of a vehicle on a basis which was untruthful.

[94] The defenders claimed that the representative party had failed to aver that the purpose of the conspiracy was injury to the group members, in circumstances in which the misrepresentations affected a large class of potential purchasers. Knowledge of the identity of the victim of the conspiracy was not an essential element in establishing an unlawful means conspiracy. It was sufficient that it was known that there would be a victim: *CMOC*

Sales & Marketing Ltd v *Persons Unknown* [2018] EWHC 2230 (Comm) per HHJ Waksman at [126]. Neither of the authorities relied upon by the defenders, namely *WH Newson* and *Emerald Supplies*, established the contrary proposition, both being concerned with circumstances in which it was not possible to establish that the conspiracy would, in fact, cause a loss to any victims (whether of known or unknown identity): *ED & F Man* at [502] - [516]; *4VVV Ltd*.

[95] This was not a case where there was an extended supply chain between the alleged conspirators and the ultimate victims of the conspiracy. It was in that sort of situation that intention to harm someone, whoever that might be, could most readily be regarded as fading into mere foreseeability that someone, somewhere, might or might not one day be harmed. The representative party offered to prove that the defenders conspired to manufacture, distribute, supply, market, advertise, sell and finance defective vehicles to group member consumers. Injury was, in those circumstances, inevitable. That this consequence was directed at all purchasers of the affected vehicles rather than a single purchaser was of no moment.

[96] The representative party's averments were sufficient to entitle him to a proof on intention. The manufacture, distribution, supply, marketing, advertising, sale and financing of a vehicle which was falsely represented as meeting a particular standard was something which would, by its nature, necessarily be injurious to the group members. The intention to injure might, in such circumstances, be inferred from the act giving rise to liability: *Kuwait Oil Tanker* at [120]. Tested against the broader standard of blameworthiness which underlay the requirement for intention, such conduct was clearly sufficient to justify the imposition of liability.

Combination

[97] Agreement might found a claim for unlawful means conspiracy, but it was sufficient that there was evidence of "combination". In *Kuwait Oil Tanker* it had been stated at [111] that:

> "A further feature of the tort of conspiracy, which is also found in criminal conspiracies, is that, as the judge pointed out (at p.124), it is not necessary to show that there is anything in the nature of an express agreement, whether formal or informal. It is sufficient if two or more persons combine with a common intention, or, in other words, that they deliberately combine, albeit tacitly, to achieve a common end. Although civil and criminal conspiracies have important differences, we agree with the judge that the following passage from the judgment of the Court of Appeal Criminal Division delivered by O'Connor LJ in *R v Siracusa* (1990) 90 Cr App R 340 at 349 is of assistance in this context: 'Secondly, the origins of all conspiracies are concealed and it is usually quite impossible to establish when or where the initial agreement was made, or when or where other conspirators were recruited. The very existence of the agreement can only be inferred from overt acts. Participation in a conspiracy is infinitely variable: it can be active or passive. If the majority shareholder and director of a company consents to the company being used for drug smuggling carried out in the company's name by a fellow director and minority shareholder, he is guilty of conspiracy. Consent, that is agreement or adherence to the agreement, can be inferred if it is proved that he knew what was going on and the intention to participate in the furtherance of the criminal purpose is also established by his failure to stop the unlawful activity.' Thus it is not necessary for the conspirators all to join the conspiracy at the same time, but we agree with the judge that the parties to it must be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they were acting in concert at the time of the acts complained of. In a criminal case juries are often asked to decide whether the alleged conspirators were 'in it together'. That may be a helpful question to ask, but we agree with [counsel] that it should not be used as a method of avoiding detailed consideration of the acts which are said to have been done in pursuance of the conspiracy."

The existence of a combination was something which might be (and might require to be) established by inference from primary facts: *Moray Offshore Renewable Power Ltd* v *Bluefloat Energy UK Holdings Ltd* [2023] CSOH 29, 2023 SLT 623 at [71] and *Kuwait Oil Tanker* at [112]. Given those authorities, it was not possible to dispose of the representative party's averments at debate. He offered to prove that the defenders, as a group of entities, sought to manufacture, distribute, supply, market, advertise, sell and finance the affected vehicles,

with each playing a role. The defenders had a common ownership structure and there were significant overlaps in their corporate leadership. Should these averments be proved, there would be sufficient material for the court to infer a conspiracy in respect of the affected vehicles.

Timing of the combination

[98] The defenders' submission that the representative party's averments suggested that the unlawful acts complained of occurred prior to the combination, and that that made them irrelevant, was advanced under reference to *4VVV Ltd* at [625]. However, that decision was not authority for that proposition. The correct test was that set out by the Court of Appeal in *Kuwait Oil Tanker* at [111], namely that:

> "it is not necessary for the conspirators all to join the conspiracy at the same time, but … the parties to it must be sufficiently aware of the surrounding circumstances and share the same object for it properly to be said that they were acting in concert at the time of the acts complained of."

The representative party offered to prove that each of the defenders played a role on the basis of a knowingly false pretence as to the emissions status of the affected vehicles. That met the applicable legal test.

Knowledge of unlawfulness

[99] The majority of the Court of Appeal in *Racing Partnership* held that a claimant must prove that the defendants knew the facts which rendered the means unlawful but did not need to show that the defendants knew that the means were unlawful as a matter of law. That was so even if the unlawful means consisted of an infringement of private law rights (per Arnold LJ at [143] under reference to *JSC BTA Bank* at [15] and per Phillips LJ at

para [171]). Arnold LJ had rejected the possibility of a distinction being drawn between a situation where the unlawful means consisted of an infringement of private law rights and where they consisted of a crime or contravention of a regulatory provision imposed for public benefit. That was the view followed in *Roche Diagnostics Ltd* v *Greater Glasgow Health Board* [2024] CSOH 55, 2024 SLT 880 at [103]. Lewison LJ dissented on this point, but only where the unlawful means consisted of a violation of some private right (at [265]). Whether, by expressing support for the dissenting view of Lewison LJ, the Inner House in *Kidd* was to be taken as setting Scots law on a different path to English law as regards knowledge of unlawfulness for the purposes of unlawful means conspiracy in private right cases was of no moment in the present case. The genesis of the delicts which the representative party sought to prove were perpetrated against the group members was the unlawful conduct directed at the relevant type-approval regulatory authority as regards the use of prohibited defeat devices, without which the affected vehicles could not have been supplied to the UK market and the group members would never have been able to buy, lease or finance their affected vehicles in the first place. The regulatory framework was concerned with public benefit, namely the protection of the public from harmful NOx emissions. As had been observed in *Roche Diagnostics* at [104], that was sufficient to take the present case out of the category of private right cases in relation to which Lewison LJ dissented in *Racing Partnership*. The representative party had averred primary facts which might, if established, enable the conclusion to be drawn that there was a combination between the defenders and that what were known to all defenders to be unlawful acts were carried out pursuant to that combination as a means of injuring the group members: *Moray Offshore* at [72].

Relevance of the misrepresentation averments

[100] The representative party's position was straightforward: the defenders' misrepresentations came by way of the Certificates of Conformity issued in respect of each affected vehicle and the advertising, marketing and sales materials. The Certificates of Conformity certified that a vehicle conformed in all respects to the type-approval applicable to that vehicle; that the vehicle could be permanently registered and used in Member States; that it complied with all regulatory acts at the time of its production, and were generally a statement delivered by the vehicle manufacturer to the buyer in order to assure him that the vehicle he had acquired complied with the legislation in force in the European Union at the time it was produced. They were direct statements to the purchaser or lessee which were "intended to guarantee … that that vehicle complies with the relevant EU legislation": *QB* v *Mercedes-Benz* at [81] and [82]. The Certificates of Conformity were issued by the first and second defender manufacturers, but their issue was enabled by concealment of the prohibited defeat devices from the regulators. The direct statements as to regulatory emissions compliance made by those defenders to the group members were false. They were factual misrepresentations made by the signatories to the Certificates of Conformity, the defenders' board members and by company officers directly to the consumer group members, as consumers to whom such statements foreseeably would be made.

[101] In relation to advertising, marketing and sales materials, the affected vehicles were all supplied to the UK market on the misleading basis that they complied with the relevant regulatory requirements, did not contain prohibited defeat devices, were emissions standard-compliant and were designed in such a way as to reduce environmental impact and increase efficiency. Those were misrepresentations made by the third to sixth defenders, who were all party to the Vauxhall group-wide common strategies and who

knew or ought reasonably to have known about the existence of defeat devices and the nature and effect of Certificates of Conformity.

[102] The third defender produced sales and marketing brochures and price and specification guides which contained such misrepresentations, alongside offers of finance from the fifth defender. Further, the first to fourth defenders falsely portrayed themselves as consumer-friendly and falsely reassured the group members as to their obligations as manufacturers. Those misrepresentations were made to all prospective consumer customers and, in particular, by the fifth defender to individual group members at the time they entered into finance agreements. They were made by the defenders' board members and company officers. A list of misrepresentations relied upon had been lodged. They could not sensibly be regarded as mere expressions of opinion. It was averred that group members had reasonably relied on them when contemplating entering into contracts for the acquisition of affected vehicles. It was averred that they were false. The averments were sufficiently specific for enquiry and it could not be said at this stage that the representative party was bound to fail.

Alternative and inconsistent averments of fact

[103] The representative party maintained that the defenders had made alternative and inconsistent averments of fact about the use of defeat devices. Although there was no absolute rule of law dealing with that situation, as a matter of generality where a party's position was based on two or more alternative and inconsistent averments of fact which were both or all within his own knowledge, the relevancy of his position as a whole had to be tested by reference to the strength or relevancy in law of the "weaker alternative", that being the only one which such a party absolutely offered to prove: *Hope* v *Hope's*

Trustees (1898) 1 F (HL) 1 at 3; *Finnie* v *Logie* (1859) 21 D 825 at 829. Absent some reason demonstrating excusable ignorance of the precise facts in question, a party to litigation was expected to choose which version of events he wished to rely upon and it was "incompatible with substantial justice" to allow such a party to advance alternate grounds: *Smart* v *Bargh* 1949 SC 57 at 60 to 61, 1949 SLT 91 at 93. In *Greig* v *Davidson* [2015] CSOH 44, 2015 SCLR 722 at [20] it had been observed that:

> "The logic of the rule is this: someone who will not commit to proving the truth of a relevant factual basis for his or her claim cannot insist on what might turn out to be a pointless fact-finding inquiry. The deficiency struck at by the weaker alternative rule lies in the refusal to choose between a relevant and irrelevant bases of claim; and it is this that sabotages the claim as a whole."

While such an argument was more commonly seen in the context of a defender attacking a pursuer's pleadings, a pursuer could also take the point, albeit that a defender who pleaded alternate grounds of defence was usually afforded more latitude: *MacPhail, "Sheriff Court Practice"* (4th edition) at 9.37; *Smart* at 61 to 62.

[104] The defenders sought to rely on three alternative and inconsistent lines of defence regarding the use of defeat devices: firstly, that they had never designed or manufactured any vehicles with a defeat device within the meaning of the Emissions Regulations; secondly. if they did use defeat devices, they were not prohibited such devices because their use was justified by reference to the exceptions to prohibition contained in Articles 5.2(a) and (c) of the Emissions Regulations; and thirdly, that if they did use prohibited defeat devices, that was as a result of some form of inadvertence or was an unintentional act (albeit that they now conceded that subjective mistake or inadvertence was not a defence to any claim competently arising from the first to fourth defenders' failure to comply with the Emissions Regulations).

[105] There was an obvious and irreconcilable tension between those different, alternative and inconsistent lines of defence. How the engine mechanics and software operated must have been a matter within the defenders' own knowledge. They could not justifiably assert that they were excusably ignorant of the precise facts about their own engines and it would be incompatible with substantial justice to allow them to proceed to proof on those alternate bases. The strength of the defences had to be tested by reference to the weakest of the three alternatives – namely, that the use of prohibited defeat devices was inadvertent or unintentional. To permit the defenders to run their alternative cases would give rise to a pointless fact-finding enquiry. Decree of declarator that prohibited defeat devices were present in the vehicles in question should be granted.

Defenders' reply

[106] In response to the representative party's argument on alternative and inconsistent averments, senior counsel for the defenders submitted that their position could not properly be described as such. It was that there were no defeat devices in terms of Article 3(10) of the Emissions Regulations for a number of reasons, but if there were, they were not prohibited defeat devices because of the exceptions in Article 5(2)(a) and (c). There was no factual inconsistency between the two positions. The difference related to the correct legal analysis of the factual position. In any event, there was no absolute rule against a party adopting alternative and inconsistent averments. On the contrary, the rule was that a party was free to do so, subject to that being consistent with substantial justice: *Smart* at 61. Alternative and inconsistent averments were, further, easier to justify in the case of a defender because any attempt to limit the scope of defences could create problems in the application of the common law principle of "competent and omitted": *Smart* at 61 – 62. Moreover, and in any

event, the weaker alternative rule was aimed at truly alternative averments of fact, not of analysis: *Hope* at 3; *Haigh & Ringrose Ltd* v *Barrhead Builders Ltd (No 2)* 1981 SLT 157.

[107] The design and operation of the emissions control system in any given vehicle model was a technically complex issue and the categorisation of any particular part of it as amounting to a defeat device or a prohibited defeat device within the meaning of the Emissions Regulations was a matter of legal analysis. There was nothing incompatible with substantial justice in the defenders arguing that any particular operation was not a defeat device but, if it was, it was not a prohibited defeat device within the meaning of the Emissions Regulations. Those were not inconsistent averments of fact. They were alternative legal conclusions on the underlying facts. In addition, even if the court were to conclude as a matter of law that any particular operation of the emissions control system amounted to a prohibited defeat device, that would not be inconsistent with the defenders not having intended that outcome. The question of intention was clearly relevant in response to assertions such as that of fraud made by the representative party and might have relevance to other issues. The argument that the defenders were relying on alternative and inconsistent averments should be rejected. In any event, the declarator sought by the representative party, effectively by default through the application of the weaker alternative principle, was too widely drafted and inconsistent with his case as it had developed.

Decision

[108] Before addressing the specific issues raised by the debate, it is appropriate to note that group proceedings in our law take the form of a single action brought by the representative party on behalf of group members as a whole, with a view to obtaining a single decree in satisfaction of all their claims. Although the issues in the proceedings,

whether of fact or law, must at least be similar or related to each other, there is no requirement that they be identical in the case of every member of the group. The facility of group proceedings was made available so as to increase access to justice and the relative case management powers afforded to the court must be used in a pragmatic and realistic way designed, so far as possible, to give proper effect to that policy: *Mackay* v *Nissan Motor Co Ltd* [2025] CSIH 14, 2025 SLT 629 at [73].

[109] Those considerations inevitably affect the way in which the court must evaluate claims of lack of fair notice or irrelevancy such as were advanced by the parties in the debate. There are over 20,000 members of the group. RCS 26A.19(2)(d) requires the summons only to "summarise the circumstances out of which the proceedings arise" and the procedure as a whole is intended to be "streamlined and efficient" and to promote social responsibility on the part of businesses: *Mackay*, loc.cit. and [74]. The purpose of requiring fair notice to be given in a summons is to enable a defender properly to understand the case against it and to make the appropriate preparations to meet that case at proof. In cases raised by a single pursuer or a small group of pursuers, which usually proceed upon and narrate a limited set of circumstances, there will often be no material considerations militating against requiring the defender's interests in those regards to be amply met. In the case of group proceedings, however, much more by way of a balancing exercise between the legitimate interests of the defender and those of the group members is called for. In many cases it may be impossible or at the very least highly impracticable, due to the number of members of the group and the slightly differing circumstances attending the case of each, for a representative party to give the degree of detail which would be expected outwith the context of group proceedings, and fair notice may be achieved by the statement of a summary or outline of the general circumstances said to pertain to the group as a whole,

even if that results in the defender not having quite all of the material for proof preparation which in other proceedings it would be entitled to expect.

[110] That is not to say that a defender's interests should be regarded as subordinate to those of the group members, but rather merely to observe that the balance between the conflicting interests which are engaged in the specification of a summons in group proceedings may necessarily and properly have to be struck at a different place than it would be in other kinds of proceedings, with the powers of the court to regulate the preparation for and the conduct and mode of resolution of the ultimate proof being deployed as necessary to mitigate as well as may be any resultant adverse consequences for the defender. The fact that in group proceedings concerning alleged mass delicts, as here, the information available to the group members as to exactly how and by whom the various elements of the delict were done may by force of circumstance necessarily be very limited indeed is a further factor pointing in the same direction.

[111] Nor do the particular features of group proceedings resonate only in the context of fair notice. The ordinary practice of the court is to refuse probation to some or all of a pursuer's pleadings as irrelevant only if the case as a whole or some elements of it set out in those pleadings is "bound to fail": *Jamieson*. In group proceedings, where the position of individual group members may differ to a greater or lesser extent from that of other members, it is appropriate to refuse probation to averments only where the case they disclose in bound in the instance of every group member to fail, which may be difficult for a defender to demonstrate to the court at the stage of debate.

Relevance and specification of fraud allegations

[112] At the heart of the representative party's case is the allegation that the group members were defrauded by the deliberate making of statements about the affected vehicles which were known to be false and for which the defenders are said to be responsible, against the background of a separate but related fraud against the regulators which is not in itself relied upon by the group members but explains why what was said to the members is said to have been false and to have been known to be false to the defenders. Parties were agreed that the normal pleading requirements for a case in fraud were described in *RBS* v *Holmes*; in essence, what statements were relied upon, when and by whom they were made, and the circumstances from which any inference that they were fraudulent in nature might be drawn.

[113] It is, however, also necessary to observe that the degree of notice required of these matters is simply that which is fair in context: *Richards* at [47] and [64]. That was not itself a fraud case, but the observations there made about the nature of fair notice are of general application. I have already drawn attention to the practical difficulties presented to the pleading of a case involving mass delict where the consequences of what appears to have been done are clear, but exactly what was done and by whom to achieve those consequences does not immediately appear out of the information asymmetry which is typically inherent in such cases, and how that must influence the decision as to how much a defender is entitled to demand by way of pleading from a representative party.

[114] Turning from the abstract to the particular, the representative party has made it clear exactly what statements are relied upon as having been false and to have induced the group members to enter into the transactions in the affected vehicles which are said to have caused them loss. The mode by which the statements in question were made, and when they were

made, is also made clear. It is true that some members will no doubt have relied on some of the criticised statements and others on different statements, but it would be impossible within the reasonable bounds of pleading to require the representative party to specify exactly what happened in that regard. No more could reasonably be expected of him in this aspect of the matter, and the defenders are left in no doubt what case they have to meet in relation the statements said to be false.

[115] Equally, the circumstances which are said to render the statements false is very clear; they all directly or indirectly concerned the attributes of the affected vehicles concerning NOx emissions in one way or another and are said to have been false because of the underlying fraud which is said to have been perpetrated on the regulators. Adequate specification of this aspect of matters has been given. In something of a recurring theme in the debate, whether the representative party will be able to make out his claims that all of the defenders knew of the claimed falsity of the statements remains to be seen. The question at this stage is not whether he is bound to succeed in doing so, but whether he can be said at this stage to be bound to fail.

[116] As to who made the criticised statements, the representative party has named the signatories to the relevant Certificates of Conformity and beyond that maintains that the officers and boards of directors of the defenders from time to time must be responsible for the criticised statements. Two points fall to be made about this approach; firstly, in relation to specification, as a matter of fact the defenders (but not the representative party) either know or have the means to know exactly who was behind the making of the various clearly-identified statements and thus can scarcely complain that the pleadings do not disclose in more detail that which the representative party cannot know but which the defenders do, or at least could find out if they chose.

[117] Secondly, it is by no means clear as a matter of law, and thus as a matter of the relevancy of the representative party's pleadings, that it is necessary to fix the directors of a defender or any particular officer with knowledge of and responsibility for the criticised statements in order to render the relevant company liable for them. As noted in *Dryburgh* at [22], in *Meridien Global Funds Management Asia Ltd* v *Securities Commission* [1995] 2 AC 500, [1995] 3 WLR 413, the Privy Council made it clear that the rule of attribution in *Lennard's Carrying Co Ltd* v *Asiatic Petroleum Co Ltd* [1915] AC 705, that corporate responsibility derived from the relevant involvement of the "directing mind and will" of the company, was not one of universal application, and that it was necessary to consider contextually the content of and policy underlying the substantive rule of law in issue in order to determine how that rule ought properly to be served by a particular form of corporate attribution. Given that the substantive rule of law in issue here is that no-one should be deceived to their detriment, against a background of what seem at least largely to have been consumer transactions, it may be that a wider form of attribution than that at which the representative party currently directs his pleadings will ultimately transpire to be appropriate. In any event, if the truly applicable rule of attribution is not for the moment clear, it becomes effectively impossible for the defenders to demonstrate as matters stand that the representative party is bound to fail on this point as a matter of law.

[118] I conclude that the representative party's averments about the fraud allegedly perpetrated on the group members are suitable for enquiry.

Duty of care in negligence for misrepresentations?

[119] It is accepted that the representative party's case of negligent misrepresentation which has been stated on the basis of the content of the Certificates of Conformity is

sufficiently specific and relevant for enquiry. I do not consider that the defenders' complaint of lack of adequate specification in relation to the other misrepresentations founded upon in this regard can be sustained. The representative party has produced a list of allegedly negligent misrepresentations made by or on behalf of the defenders, which is a distillation of the relative content of the summons. In essence, it is suggested that the first and second defenders, in marketing, advertising and sales materials, misrepresented that the vehicles in question complied with all applicable regulations, that the relevant authorities had been satisfied of such compliance, that emissions would be controlled when the vehicle was in use, that they did not include prohibited defeat devices, that they could lawfully be driven on the roads, that they were environmentally friendly, and that they ran with increased efficiency. The third and fourth defenders are said to have made the same misrepresentations by the same means, and to have corresponded with group members, concealing the true reasons for software updates.

[120] The fifth defender is said, by its advertisement of the availability of finance in the third defender's brochures, and by the provision of finance for the acquisition of affected vehicles, to have impliedly represented that those vehicles were compliant with regulatory and emissions standards and could lawfully be used on public roads. The sixth defender, by its supply of the affected vehicles to the UK market, is said to have made the same implied representations. Appropriate vouching of the various modes of explicit communication said to have taken place have been provided. I regard it as clearly implicit in the representative party's case that it is claimed that each of the representations in question was untrue and made without the use of reasonable care, and that each group member relied on at least some element of the misrepresentations as a whole in acquiring whatever interest he or she had in an affected vehicle (the alleged misrepresentations about the real reason for software

updates having conceivably been relied upon by acquirers of second-hand vehicles, even though those particular representations probably have more resonance in the context of the representative party's case under section 6(4) of the 1973 Act). Whether those propositions will actually be made out at proof is not a matter for speculation at this stage. These averments provide sufficient notice of what it is that the representative party maintains was said, by whom or with what link to the defenders, and to what effect.

[121] The real difficulty with the representative party's case in negligent misrepresentation beyond the content of the Certificates of Conformity lies not in its specification but its relevancy, seeking as it does reparation in respect of pure economic loss caused by allegedly negligently-made statements. It is perhaps not immediately apparent that there was any particularly "special relationship" between the defenders on the one hand and the claiming group members on the other, that having been suggested as the touchstone for liability in this sphere in the foundational case of *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd* [1964] AC 465, [1963] 3 WLR 101, although when one appreciates that (per Lord Reid at [1964] AC 486, [1963] 3 WLR 109) such a relationship may exist:

> "where it is plain that the party seeking information or advice was trusting the other to exercise such a degree of care as the circumstances required, where it was reasonable for him to do that, and where the other gave the information or advice when he knew or ought to have known that the inquirer was relying on him"

the matter becomes markedly less clear.

[122] After a period of uncertainty as to the proper legal basis or bases for the recognition or imposition of a duty of care in negligence for misrepresentation causing economic loss, narrated in *NRAM* v *Steel* at [18] to [24], the concept of assumption of responsibility has emerged as the single most compelling foundation for the existence of such a duty (*Smith* v *Eric S Bush* [1990] 1 AC 831, [1989] 2 WLR 790; *Henderson* v *Merrett Syndicates Ltd*

(No 1) [1995] 2 AC 145, [1994] 3 WLR 761; *Williams* v *Natural Life Health Foods Ltd* [1998] 1 WLR 830), it being understood that the focus is on deemed assumption of responsibility for the task in question, rather than an assumption of responsibility for the consequences of its negligent performance (*White* v *Jones* [1995] 2 AC 207, [1995] 2 WLR 187), and with the underlying possibility of cautious incremental development in order to fit cases to which it does not readily apply (*NRAM*; *JP SPC 4* v *Royal Bank of Scotland International Ltd* [2022] UKPC 18, [2023] AC 461, [2022] 3 WLR 261; *HXA* v *Surrey County Council* [2023] UKSC 52, [2024] 1 WLR 335).

[123] In the *Playboy Club* case, the majority in the Supreme Court observed at [7] that it was fundamental to this way of analysing the duty that the defender was assuming a responsibility to an identifiable (although not necessarily identified) person or group of persons, and not to the world at large or to a wholly indeterminate group. Under reference to *Caparo Industries plc* v *Dickman* [1990] 2 AC 605, [1990] 2 WLR 358, it was noted that factors pointing towards a possible conclusion that responsibility was assumed might lie in the defender's knowledge (i) that his statement would be communicated to the claimant, either individually or as a member of an identified class; (ii) especially in connection with a particular transaction or a transaction of a particular class; and (iii) that the claimant would be very likely to rely on it for the purpose of deciding whether to enter into such a transaction. However, in a situation where a statement was put into more or less general circulation and might foreseeably be relied on by strangers to the maker of the statement for any one of a variety of different purposes which its maker had no specific reason to anticipate, a duty of care would not exist. The court added at [10] that the defender's knowledge of the transaction in respect of which the statement was made (being the salient issue in that case) was potentially relevant for the purposes of identifying some specific

person or group of persons to whom he could be said to assume responsibility; of demonstrating that the pursuer's reliance on the statement would be financially significant; and of limiting the degree of responsibility which the defender would be taken to assume if no financial limit was expressly mentioned. Lord Mance's separate but concurring judgment was less clear that a duty of care should not arise in relation to an inspecific purpose, provided that the representation was requested and given in terms showing that it was intended to be and would be relied on.

[124] Applying these principles to the averred facts of the present case is, the principal difficulty for the representative party is that the statements complained of were made to effectively whoever chose, or even happened, to read or otherwise receive them. The defenders cannot, without some further factor, be taken to have been assuming responsibility in general to such a wide group. On the other hand, if statements of fact were made by one or other of the defenders for the very purpose of encouraging persons to buy or otherwise acquire an interest in vehicles being sold as part of the defenders' overall enterprise, and achieved that purpose because of reliance which those persons reasonably placed on their content, it would seem unrealistic to hold that no objective assumption of responsibility, and thus no duty of care, existed in relation to negligently untrue material contained in such statements.

[125] I consider, then, that an appropriate balance can be struck, in accordance with the principles set out in the authorities, by recognising a relevant assumption of responsibility only where a statement meets two conditions. Firstly, it should contain some factual material (now claimed to be negligently untrue) pertaining directly to the issue of the affected vehicles' emissions compliance. Such a circumstance enhances the degree of foresight that the defender who made the statement ought to have had that it would be

relied upon in that specific regard. Although it is possible that merely offering affected vehicles for sale, or offering to finance them, etc., could be regarded as implicitly making a claim that those vehicles were emissions-compliant, it is in my view not sufficiently clear in that situation that such a generalised sort of claim would be likely to be relied upon as to justify the conclusion that an assumption of responsibility in that respect should be recognised to exist.

[126] Secondly, the statement should have been made in the context of a situation which may reasonably be regarded as one in which it was hoped on the part of the defender making it that a transaction for the acquisition of some relevant interest in an affected vehicle would transpire, as for example in sales and marketing brochures or advertisements. That consideration indicates the purpose for which the relevant defender is likely to have conceived itself to be making the statement and enhances the objective likelihood of the statement being relied upon for the purpose of acquisition of such an interest. Since the truth about the emissions compliance of vehicles being offered for sale or lease as part of the defenders' overall enterprise is a matter peculiarly or even exclusively within their knowledge, and not realistically capable of being otherwise verified, it was reasonable for the group members to rely on such statements, made in that context, when considering whether or not to enter into a transaction of the sort which the relevant defender evidently hoped by the making of the statement to encourage them to enter into. Overall, the situation is only slightly removed from the negligent making of statements in the course of actual contract negotiations; indeed, some qualifying statements may have been made in exactly that context, being contained in point-of-sale materials available at showrooms and the like.

[127] In practical terms that means that it appears that the case in negligent misrepresentation against the fifth and sixth defenders is irrelevant, they not being alleged

to have made any explicit statements about the emissions compliance of the vehicles they financed or supplied. Certain aspects of that case as stated against the other defenders are also irrelevant. Such statements as arguably meet the criteria mentioned above may form part of a proof before answer. However, given that at least some of the statements which are irrelevant for this purpose are relevant for the case in fraudulent misrepresentation, where the same duty of care issues do not arise, or for the cases advanced by the representative party in connection with the alleged unlawful means conspiracy or in dealing with section 6(4) of the Prescription and Limitation (Scotland) Act 1973, it may be that few or no averments concerning statements fall to be refused probation altogether. The parties' detailed submissions on this issue will be canvassed at a hearing fixed for the purpose before an interlocutor refusing probation to any averments is made.

[128] I note finally on this topic that I reject the defenders' submission (based on *RBS* v *O'Donnell*) that the various representations made the subject of criticism may be determined now to be nothing beyond than matters of opinion stated in good faith. Statements about the compliance of vehicles with legislative measures relating to emissions are properly to be regarded as mixed statements of fact and law, the factual elements of which, at least, are capable of being negligently advanced.

Unlawful means conspiracy

[129] Although the taxonomy of intentional delicts causing economic law was authoritatively restated nearly 20 years ago in *OBG*, a penumbra of uncertainty still surrounds many of the finer points of law concerned. At least for the purposes of Scots law, it is appropriate to focus on the underlying principles revealed by the jurisprudence rather than to become overly entangled in the skeins of thought woven by the (primarily English)

authorities dealing with the facts of specific cases. *JSC BTA Bank* is helpful in that regard. In that case, Lord Sumption and Lord Lloyd-Jones made it clear at [9] to [16] that conspiracy was not simply a particular form of joint wrongdoing, but was a distinct delict of primary liability. Where the means used in implement of the conspiracy were lawful, actionability for harm caused turned upon the presence of a predominant intention to injure, because a person has a legal right not to be harmed by a conspiracy to injure him. Where the means used were unlawful and directed at the pursuer, it was those elements that made the conspiracy actionable in respect of harm caused thereby.

[130] A conspiracy might fall to be regarded as directed against a pursuer notwithstanding that its predominant purpose was not to injure him but to further some commercial objective of the defender. As had been observed by the Supreme Court of Canada in *Cement LaFarge Ltd* v *BC Lightweight Aggregate Ltd* [1983] 1 SCR 452, 145 DLR (3d) 385, where the conduct of defenders was unlawful and was directed towards the pursuer (alone or together with others), and the defenders should have known that injury to the pursuer was likely to result, such circumstances might gave rise to the recognition of a constructive intent to harm.

[131] Their Lordships pointed out that the unifying feature of conspiracy was the absence of just cause or excuse for what was done, and that whether there was a just cause or excuse would depend on the nature of the unlawfulness and its relationship with the resultant damage to the pursuer. They observed that in *Total Network* the House of Lords had held that a criminal offence could be a sufficient unlawful means for the purpose of the law of conspiracy, provided that it was objectively directed against the pursuer, even if the predominant purpose was not to injure him. Situations in which harm to the pursuer was purely incidental because the unlawful actions were not the means by which the defenders intended to cause the harm to him were not actionable. Crimes and torts actionable by the

pursuer were sufficient unlawful means for the purpose of the law of conspiracy, provided that they were indeed the instrumentality by which harm was intentionally inflicted on the pursuer, rather than being merely incidental to that infliction. Breaches of civil statutory duties, delicts actionable at the instance of third parties, or breaches of contract or fiduciary duty were liable to raise more complex problems as they might well be specific to particular relationships and did not lend themselves to the formulation of any general rule.

[132] Against that background, it may be seen that, in support of the unlawful means conspiracy alleged in the present case, the representative party requires to aver facts and circumstances from which it may be possible to infer that some element at least of the intention of the defenders in carrying out the unlawful acts alleged was to harm a category of persons of which the group members have found themselves to be a part, recognising (per *Cement LaFarge* and *OBG*) that unlawful conduct "directed towards" that category of person in circumstances in which the defenders should have known that injury to persons in the category was likely to result from that conduct may suffice, either because such circumstances are capable of giving rise to a conclusion that there existed a constructive intent to harm or, put more simply, because directing deliberate and unlawful conduct towards that category of person where a reasonable person would be aware that the conduct would be likely to harm persons in the category is incapable of representing a just cause or excuse for the deployment of unlawful action.

[133] In this analysis, foreseeability of the likelihood of harm remains not on its own capable of inferring liability, but the necessary control mechanism is found in the need for the unlawful conduct to be directed at a category of person. The courts in *WH Newson* and *Emerald Supplies* in effect decided that the unlawful conduct there in issue was not sufficiently directed towards a category of person including the ultimate plaintiffs; the

decisions in *CMOC*, *4VVV* and *ED & F* likewise in substance decided that in those cases the necessary element of direction was present.

[134] In the present case, the core of the allegation of conspiracy is that the defenders all combined to present the vehicles which some of them had manufactured as having certain attributes which, as they knew, those vehicles did not have. It is not difficult, for the purposes currently under consideration, to regard that presentation at having been directed at potential purchasers or lessees of those vehicles, a category to which the group members claim to belong. I conclude that it cannot be said that the representative party is in these circumstances bound to fail in establishing that the element of intention requisite to the alleged delict was present.

[135] A similar analysis may be applied to the suggestion that it has not been relevantly or specifically averred that the defenders had the degree of knowledge required to found liability in unlawful means conspiracy. Although there has latterly been some judicial disagreement about whether what is needed in some cases is knowledge that the means of implementing the conspiracy are unlawful, or merely knowledge of the facts that render them unlawful (*Racing Partnership*, *Kidd*), it may be doubted, taking account of what was said in *JSC BTA Bank* at [15] that that is a particularly helpful way of looking at matters, because the underlying question of principle is whether there is, in the circumstances, just cause or excuse for the deployment of unlawful means.

[136] It was decided in *Total Network SL* that the use of criminal actions could not be regarded as justifiable or excusable, seemingly whether or not there was any particular degree of knowledge, whether subjective or objective, as to their criminality. Outwith that context, there may be circumstances in which genuine and excusable ignorance of the unlawful quality of the means to be deployed in implement of the purpose of the

combination will fall to be regarded as rendering the use of those means insufficiently blameworthy to attract liability in conspiracy, as for example where the illegality arises out of some fact or circumstance understandably unknown to the conspirators. Although that sort of situation is more likely to arise in the context of private rights (however one might define that term), it does not follow that knowledge of the illegality will always be required in that context. Such a criterion is too crude to provide a reliable guide to what degree of knowledge will be required in any particular situation and although it may be required because of the role of precedent in English law, there is no reason why it should be pressed into service in the more principle-based law of Scotland. Indeed, the suggestion which emerges from *JSC BTA Bank* is, rather, to the effect that attempts at classification and formulation in the private law field could only ever represent chasing after a will o' the wisp.

[137] In the present case, the core allegation is, as already noted, that the defenders combined knowingly to make a false presentation of the attributes of the vehicles which some of them had manufactured to prospective purchasers thereof. The alternative suggestion, that the representations in question were merely negligent, is not relied upon in support of the allegation of unlawful means conspiracy. Whether that allegation will ultimately be made out against some or all of the defenders remains to be seen and cannot properly be made the object of speculation at this stage. If it is made out, however, then it could not sensibly be maintained that the deliberate statement of falsehoods was other than a state of affairs carrying a degree of knowledge of the circumstances which excluded the possibility of the existence of just or excusable cause for the defenders' actions. It follows that the representative party's case in unlawful means conspiracy is not irrelevant on this account.

[138] As to the sufficiency of the pleading of the unlawful means themselves, I have already described the core allegation which is made in support of the case of conspiracy. If there is any criticism to be made of the nature of the pleading involved, it is that it is over- rather than under-specific. As to the relevancy of the pleading concerning unlawful means, the requirement in law is that they should have formed the instrumentality by which the group members suffered their claimed losses. There is no difficulty with that requirement in this case. The making of false statements about the attributes of objects of commerce can scarcely be said to be merely incidental to harm suffered by purchasers or lessees of those objects in consequence of having bought or leased them in reliance on the statements.

[139] The defenders' more minor criticisms of the representative party's averments concerning the claimed unlawful means conspiracy are also without foundation. Particularly in circumstances where the formation of a combination may be tacit and liable or even likely only to be established by way of inference from primary facts, the representative party's averments about the matters of fact upon which he relies are sufficiently specific to give fair notice of what he will attempt to prove in that regard. Those averments could only be deemed irrelevant if it could be said that under no circumstances could they give rise to the inference that a combination was indeed formed. Again, while it remains to be seen to what extent, if at all, proof will actually make out the existence of the combination, it cannot be said that the averred facts are quite incapable of giving rise to the necessary inference.

[140] Similarly, while the combination must have occurred by, and subsist at, the time the unlawful means which cause the harm in respect of which the action proceeds are deployed (*Kuwait Oil Tanker*), there is no legal requirement that all parties join the combination at the same time or participate in all the activities to which it extends. It is clear what the

representative party offers to prove in that regard (in essence, that all the defenders joined in agreeing to disseminate false information about the vehicles which some of them had manufactured) and that offer is a relevant one. Whether he will actually be able to make that out is not a matter for current consideration.

[141] It follows that the relevancy and specification of the representative party's case in unlawful means conspiracy cannot effectively be criticised in any of the respects advanced by the defenders, and that (subject to the issue of possible prescription of that case, a matter shortly to be dealt with) he is entitled to a proof before answer of his relative averments.

Consumer Credit Act 1974

Jurisdiction

[142] I consider that the elements of these proceedings which invoke the provisions of the 1974 Act fall properly to be regarded as falling under the ambit of section 140B(2)(c) thereof, being matters raised by the debtor in "other proceedings in any court where the amount paid or payable under the agreement … is relevant". I do not regard the phrase "other proceedings" as excluding from its ambit any proceedings which involve an application for a remedy under the Act by the debtor or a surety, or which are proceedings to enforce a relevant agreement. The more straightforward and natural meaning of section 140B(2)(c) is that it enables a debtor to raise the issue of a potential remedy under the Act in any proceedings where the amount paid or payable under the agreement is relevant to the determination of those proceedings, whether or not they are at the instance of the debtor or are otherwise concerned with the enforcement of the agreement.

[143] I am not persuaded by the suggestion that section 140B(2) as a whole should be regarded as restricting rather facilitating the options of debtors in seeking remedies under

the Act, and can see no apparent legislative purpose which would be served by such a restrictive reading. Section 140B(4) and (5) indicate that proceedings which simply involve an application by a debtor or surety for relief under the 1974 Act may be brought only in the appropriate local sheriff court, but do not require that all proceedings in which the question of such relief may arise should proceed there. An assessment of the factors informing the decision to grant or withhold such relief is not obviously something for which only the sheriff court is well-suited.

[144] Although as a matter of generality many applications for remedies under section 140B of the 1974 Act will involve a consideration of the particular features of the individual debtor/creditor relationship said to give rise to unfairness, in the present case all the debtors are, in effect, maintaining that that unfairness arose out the same behaviour of some of the defenders and the effect that that conduct had on the group members' decision to acquire and finance an affected vehicle. They are not maintaining that their own personal circumstances created or materially contributed to the unfairness. Remedies under the 1974 Act are not excluded from the ambit of group proceedings and the issues which arise when such remedies are claimed can conveniently be dealt with in the same way as other issues arising in the course of such proceedings.

[145] Turning to the remaining requirement of section 140B(2)(c), namely that the amount paid or payable under the agreement must be relevant to the "other proceedings" being figured, I regard "relevant" in the subsection as simply meaning capable having a bearing on a decision in fact or law which has to be made in those proceedings. In the present context, if a group member seeks payment from the defenders in respect of some harm suffered by him in consequence of some action or inaction on their part affecting the vehicle in which that group member is interested, the amount which he has paid or still has to pay

in respect of the financing of that vehicle is certainly capable of having a bearing on the amount of any payment which the current proceedings may allot to him. If sums which he has already paid under a finance agreement in relation to that vehicle are ordered to be repaid to him, or his liability to pay sums still outstanding thereunder is diminished or extinguished by the order of the court in these proceedings, those matters not only capable of affecting the amount of any further payment to which he may be found entitled in these proceedings, but are highly likely to have that effect. All of the requirements of section 140B(2)(c) are met in this case, and the court has jurisdiction to hear and dispose of those elements of these proceedings which invoke the provisions of the 1974 Act.

[146] Had it been necessary to do so, I would in any event have held that this court had jurisdiction to entertain those elements of these proceedings which invoke the provisions of the 1974 Act in terms of section 22(4) of the Civil Jurisdiction and Judgments Act 1982. For the reasons just stated, any entitlement to a remedy under the 1974 Act which a group member may be able to establish is at the very least properly to be regarded as ancillary or incidental to the assessment of the more substantive payment remedy sought in these proceedings. Simply ignoring the obligations (performed or yet prestable) which a group member had or has under a relevant finance agreement might well result in in over- or under-compensation for that group member. I would, indeed, regard a determination as to whether any remedy under the 1974 Act is to be afforded in respect of the obligations which arose under the finance agreement as a necessary part of the decision-making process required in the present group proceedings. Sections 22(4)(a) and (b) of the 1982 Act are thus both engaged.

[147] I observe finally in this connection that I do not consider that RCS26A.27 confers upon this court any jurisdiction which it would not otherwise enjoy; rather, it regulates

procedure where group proceedings are the appropriate mode of exercise of a jurisdiction which the court otherwise enjoys.

Prescription

[148] It is not in dispute, at least for the purposes of the debate, that the date when each group member acquired his or her interest in an affected vehicle could be taken as the *prima facie* date when there was a concurrence of *damnum* and *injuria* for that member and thus as the date when the quinquennial period of the short negative prescription began for him or her. These proceedings were commenced, thus interrupting that period, on dates between 18 July and 25 September 2023 in respect of the several defenders, for those members then on the group register, with members whose names were not on the register at those points interrupting the prescriptive period for their part when their names were subsequently added. In slightly simplified terms which nonetheless suffice for present purposes, the members can be broken down into those who acquired the relevant interest before 1 June 2017 (ie 5 years before the amendments to the 1973 Act which came into force on 1 June 2022) and whose claims are thus subject to the terms of the Act before the relevant amendments, and those who acquired that interest on or after 1 June 2017, whose claims will thus be subject to the prescriptive regime as amended. The more recent amendments to section 6(4) of the Act do not affect the claims of any member currently on the register and would in any event not result in any different conclusion in the present case from that indicated by the pre-amendment wording.

Members who acquired vehicles before 1 June 2017

Section 11(2)

[149] It is hard to disagree with Johnston's observation (at 4.72) that it is "difficult to see precisely what the rationale is" for a provision such as section 11(2) of the 1973 Act. On its face, it prevents the prescriptive period from running when the creditor is fully aware of having suffered loss and damage as a result of the act, neglect or default of an identified debtor, even in circumstances where all the loss that is ever going to flow from that act, neglect or default has already accrued, a situation which at least appears anomalous in the overall scheme of the statute. However, perhaps especially in such instances, it is important to adhere closely to the words of the provision without seeking to gloss them in order to serve a figured purpose which may be entirely illusory. It was, after all, a refusal to gloss the words of the statute which led the Supreme Court in *David T Morrison* and *Gordon's Trustees* to hold that section 11(3) did not in fact perform the function which essentially the whole legal profession had for decades assumed it was designed to serve. I therefore reject the suggestion eventually advanced by the defenders that section 11(2) operates only where loss and damage is continuing to accrue as a result of some act, neglect or default. It may well cover such a situation (and that might, indeed, be the core issue to which it is directed) but its language and the interpretation which it has consistently received make it clear that its focus is on continuing acts, neglects or default rather than only on cases of continuing loss and damage.

[150] Against that background, it is convenient first to consider the effect of subsection 11(2) on that element of the representative party's case which is based on misrepresentations of various kinds. It is, I think, common ground that it is of the essence of virtually any operative misrepresentation that its effect survives the occasion of its making,

but the terms of section 11(2) and the authorities dealing with it make it clear that the subsection is directed at continuing acts, neglects or defaults and not their continuing effects.

[151] In *Cramaso*, which was not a case dealing with prescription, no clear distinction was drawn between the questions of whether a misrepresentation might be regarded as a continuing act, neglect or default and whether it might be regarded as having a continuing effect. Indeed, the case itself and the authorities it cites suggest, without perhaps quite ever arriving at the point of frankly holding, that a representation which falls reasonably to be regarded as having a continuing effect may well be treated in law as a continuing representation. Thus, it was observed that in *Smith* v *Kay* (1859) 7 HL Cas 750, 11 ER 299, Lord Cranworth had stated, in the context of a misrepresentation inducing the execution of a bond, that:

> "It is a continuing representation. The representation does not end for ever when the representation is once made; it continues on. The pleader who drew the bill, or the young man himself, in stating his case, would say, Before I executed the bond I had been led to believe, and I therefore continued to believe".

Similarly, in *With* v *O'Flanagan* [1936] Ch 575 Lord Wright in an analogous situation stated that a representation made as a matter of inducement to enter into a contract might be treated as a continuing representation if the court was satisfied in a proper case on the facts that it remained operative in the mind of the representee.

[152] In *Macquarie Generation* v *Peabody Resources Limited and Renison Limited* [2000] NSWCA 361, Mason J noted that it would not always be appropriate to treat a representation as continuing, but that it might be so appropriate where it was relied upon by the representee and that was a reasonable and natural thing for him to have done. Any duty to correct a representation would depend on the currency of the representation (and, presumably, any actual or deemed knowledge on the part of the representor that it was or

might still be current in the mind of a representee). Some representations were so closely connected to a transaction in time and context that they would apply up until its consummation; others were by their very nature implicitly renewed from minute to minute, but not every representation could be forced into such a framework.

[153] *Cramaso* further observed at [20] that a misrepresentation would cease to have a continuing effect if it was withdrawn or lapsed, or if the representee discovered the truth, and referred at [23] to the prospect, where a representation had a continuing effect, to the representor having a continuing responsibility in respect of its accuracy. Although all of these observations were made in the context of the use of a misrepresentation to avoid a contract, there is no reason to suppose that the question of the nature of a misrepresentation as continuing or otherwise ought to receive a materially different treatment for the purposes of section 11(2).

[154] *GI Globinvestment* also admits of the possibility of a misrepresentation being continuing in nature. It suggests, without explaining, that for these purposes a fraudulent misrepresentation might be treated differently from a negligent one. It is not immediately apparent to me why that should be so. In the present case, many alleged misrepresentations are said to be fraudulent or alternatively negligent. It would be odd if a fraudulent misrepresentation were to be held to be of a continuing nature and a negligent one to be otherwise where all the other surrounding facts and circumstances were the same.

[155] Drawing these strands together for present purposes, the alleged misrepresentations in the present case relate to a continuing state of affairs, being the attributes of vehicles manufactured by some of the defenders which had been made objects of commerce in various ways by them and the remaining defenders. They cannot be regarded as restricted in time to the point at which they were made. It is amply arguable that the representees

were acting reasonably and naturally in giving credence to them, not only up until the point of time when they entered into contractual relationships of various kinds, but until it ceased for them to be reasonable to rely on them – which may well resolve into the question of when they ought to have discovered that they were untrue. This analysis does not result in the prescriptive period not yet having commenced in relation to the alleged misrepresentations; every group member, as evidenced by his or her participation in the proceedings, has evidently in fact ceased by now to regard them as true and accurate. Nor does it raise the spectre of obligations not to make misrepresentations being effectively imprescriptible by dint of section 11(2), as the defenders contended; they, as any person in their position, may if they see so fit by appropriate means make it publicly known that their representations are no longer to be relied upon, whether or not by way of formally withdrawing them, and at that point it would cease to be reasonable for representees to rely on them and they would cease to be continuing in nature for the purposes of section 11(2).

[156] It was suggested in the course of debate that most, if not all, group members had in fact become aware of the supposed falsity of the relevant representations in the course of the advertising campaign in around 2021 which preceded the raising of these proceedings. Whether and the extent to which that can be made out by the representative party remains to be seen, but as matters stand he is entitled to attempt to demonstrate at proof that the claims of some or all members based on misrepresentation which would otherwise have prescribed have been saved by the operation of section 11(2).

[157] Parties decided not to seek to discuss at debate the nature and effect of any of the EU legislation relied upon by the representative party. The defenders conceded that in that state of affairs it could not now be decided whether any duty incumbent on them in terms of the Emissions Regulations was of a continuing nature for the purposes of section 11(2). I go

slightly further and find that, in the absence of any discussion at all about the relevant features of any of the EU legislation invoked by the representative party, I do not consider it possible to reach any decision on the applicability of section 11(2) to the obligations said to have arisen from that legislation, and that matter will remain a live one until the requisite discussion about the relevant legislation is had, whether that be before or at the conclusion of any proof diet.

[158] There was some suggestion in the list of alleged acts, neglects and defaults advanced by the representative party that the fifth defender had an obligation to make reparation in respect of its sale of vehicles which were not of satisfactory quality or in compliance with any representations made about them. Section 11(2) would not operate to preserve any claim based purely on the vehicles not being of satisfactory quality. Similarly, it appeared to be suggested, albeit perhaps only faintly and in the context of the slightly puzzling observation in *Johnston* v *Scottish Ministers* that the existence of a series of breaches of duty of a similar character might assist in the conclusion that a continuing act, neglect or default had been committed, that the fifth defender was in actionable breach of duty by continuing to take finance or leasing payments in the situation which the representative part says pertained. It is not clear to me how that could constitute an independent breach of duty outwith the context of the misrepresentations complained of (and thus to which section 11(2) may apply) or the availability of remedies under the Consumer Credit Act 1974 (which have their own prescriptive regime later to be discussed).

Section 6(4)

[159] Until the practical demise of the former section 11(3) as a result of the decisions in *David T Morrison* and *Gordon's Trustees*, leaving a gap which litigants evidently thought –

sometimes over-confidently – that section 6(4) might be able to fill, that subsection was not a provision of the 1973 Act which had received a very great deal of judicial attention. Now that section 11(3)'s previously-understood role has been effectively restored by legislative intervention, it may be supposed that the severe testing to which section 6(4) has in the meantime been subject is all but over and that it will again be allowed to retreat into the relative obscurity from which it had so lately emerged. Whether and, of so, to what extent its time in the sun has enhanced the comprehension of exactly what role it plays in the overall scheme of the law of prescription in Scotland is less than obvious.

[160] The first issue concerning the proper interpretation of section 6(4) in the present case is whether a relevant and sufficiently specific case of fraud within the meaning of section 6(4)(a)(i) has been stated by the representative party. *Dryburgh* at [20] makes the point that in that context the concept of fraud is used to convey the sort of device or acting designed to disappoint the legal rights of others which is well-known in bankruptcy law. The relevant policy of the 1973 Act was said to be:

> "that, in any case where a creditor is induced to refrain from taking steps to enforce a debt because of some deliberate action on the part of the debtor, the prescriptive period should not run";

the court further observed that it was immaterial whether the debtor's actings were dishonest in the strict sense of that word, and that basic fairness demanded that where an intentional act of the debtor was the reason for the delay in making a claim, the creditor should not be prejudiced. The passage in [20] which is then supposed to summarise and give effect to those observations is that "what is required is a deliberate acting on the part of the debtor that is intended to induce and does induce the creditor to refrain from asserting its rights".

[161] I wonder whether the word "intended" in that passage might not to advantage be replaced with "calculated", in the sense of having the indicated result as its natural consequence even if the achievement of that result was not the subjectively-intended purpose of the debtor. That would appear better to serve the identified policy of the Act, be closer to the analogy drawn with bankruptcy law, and maintain more clearly the distinction between outright dishonesty and the lesser state of mind which suffices to establish fraud in this context. However, that does not matter for present purposes, since it is tolerably clear that the representative party's position is that the behaviour of the defenders of which he complains represents as a whole a machination or contrivance to deceive the group members as to the true attributes of the vehicles in which they acquired interests and thus, amongst other things, to cause them not to seek the legal remedies which they might have sought had the truth been told. In other words, the representative party offers to prove that the defenders' behaviour was positively dishonest in all requisite regards and not only meets, but surpasses, the test for fraud in this context which was posited in *Dryburgh*. Whether he will succeed in proving that remains to be seen, but I consider that his pleadings entitle him to the opportunity to try to do so.

[162] I have already expressed the view that the specification of the allegations of fraudulent conduct made against the defenders is sufficient for the purposes of these proceedings. The reasons already stated for that conclusion apply with the same or greater force to the somewhat attenuated concept of fraud in issue for the purposes of section 6(4)(a)(i). I deal with the "reasonable diligence" proviso to both sections 6(4)(a)(i) and (ii) below.

[163] Turning to the representative party's case to be entitled to the protection of section 6(4)(a)(ii), it is in this connection that the subsection has undergone its most rigorous

testing in recent years. That is perhaps slightly surprising, since this provision firstly sets out a factual state of affairs to be enquired into, namely whether or not the creditor was induced to refrain from making from making a relevant claim in relation to the obligation in issue as a result of error induced by words or conduct of the debtor or any person acting on his behalf and, if that question is answered positively, poses a further mixed question of fact and law to be addressed, namely whether at any relevant time the creditor could with reasonable diligence have discovered the error. The substance of the provision was explained in *Adams*, *Rowan Timber* and, at length, in *Heather Capital*, to which discussion very little can usefully be added. The only moderately interesting matter which arises out of section 6(4)(a)(ii) is why, standing the clear breadth of its terms, section 6(4)(a)(i) requires to exist at all, but that is not a question to which much attention has been given and does not require to be addressed here.

[164] Leaving aside for later discussion the import of the "reasonable diligence" proviso, it ought to be borne in mind that, for the purposes of debate, section 6(4)(a)(ii) simply requires the creditor to aver that he was induced to refrain from making a relevant claim as a result of error induced by words or conduct of the debtor, together with such specification of the basis upon which he advances that contention as gives the debtor fair notice of that basis. There is no warrant in the provision for limiting the sort of conduct which may qualify as inducing an error, although it appears that there may be highly exceptional circumstances where it can be determined that the conduct alleged was incapable as a matter of fact (not as a matter of law, because no limit on the types of qualifying conduct is truly provided by law) of causing a relevant error. That may explain the doubts expressed in *Tilbury Douglas* that "everyday conduct" (whatever that expression might comprehend) could justify the invocation of section 6(4)(a)(ii) and the observation in *Legal and General Assurance (Pensions*

Management) Limited v *Halliday Fraser Munro* [2025] CSIH 24 at [89] that averments which go no further than claiming that the creditor had merely asserted that he had performed his contractual obligations or had not been negligent would be insufficient for that purpose. In the present case, the representative party maintains that the group members were in relevant error as a result of a course of conduct on the part of the defenders which involved not merely denying allegations made against it but positively asserting, in the various ways condescended upon, that its vehicles had certain attributes which they did not in fact have, all allegedly as part of a greater scheme to defraud the regulators and the public at large. That is materially different from simply denying culpability as and when challenged, or letting vehicle buyers assume, by silence or inaction, whatever they wanted to assume about the state of the vehicles.

[1] On a related issue, it is important to note that the reference in *Heather Capital* at [64] to whether conduct on the part of the debtor, *viewed objectively*, induced or contributed to inducing some or all of the claimed error, needs to be read with circumspection. It appears from the context to be a reference to what was said in *ANM Group Ltd* v *Gilcomston North Ltd* [2008] CSOH 90, 2008 SLT 835 at [75] under reference to a passage in *BP Exploration* per Lord Millett at [104] which contains nothing of relevance to the subject. Nonetheless, it seems clear that what was actually being said in both *Heather Capital* and *ANM Group* was that there was no need for the debtor to have intended to lead the creditor into error or indeed to have had any particular mental attitude towards the consequences of his actions or inaction; the question was, rather, the objective one of whether was what done or left undone did in fact lead the creditor into relevant error. Unfortunately, the rather oblique way in which that position was expressed in *ANM Group* and *Heather Capital* led the court in *Greater Glasgow Health Board* v *Multiplex Construction Europe Limited* [2025] CSOH 56,

2025 SLT 989 (encouraged by the submissions of counsel) to observe at [139] that "the conduct founded on must have been sufficient to induce an objective reasonable person into error". That is not the law. Conduct may be relevant for the purposes of induced error within the meaning of section 6(4) if as a matter of fact it did induce error. There is no requirement that it requires to have had such a quality as to have been capable of inducing relevant error on the part of a reasonable person. If it does not have that quality, then there may well, firstly, be practical difficulty in establishing that it in fact did induce relevant error, and secondly, the same kind of difficulty in persuading the court that the creditor could not with reasonable diligence have discovered the error during the relevant period. To attempt to move the reasonableness criterion in section 6(4) from the stage of examination of the diligence that could have been used to discover the error into the prior stage of determining what qualifies as relevant conduct for the purposes of the subsection in the first place is, however, to seek to rewrite the statutory provisions in a way that lies beyond the proper ambit of the judicial function, whether or not one might think that the subsection as so rewritten might represent a distinct improvement on its current form.

[165] If it does not have that quality, then there may well be practical difficulty in establishing that it in fact did induce relevant error, but the matter goes no further than that.

[166] On the question of the "reasonable diligence" proviso which applies to both section 6(4)(a)(i) and (ii), there is little that can usefully be added to the recent extensive discussion of the proper interpretation of that provision contained in *VFS*.

[167] As to the question of whether the onus of making relevant and specific averments about the proviso lies on the creditor or the debtor, I continue to be of the view which I expressed in *Highland & Islands* that, where prescription has *prima facie* operated to extinguish obligations which it is sought to enforce, it is for the putative creditor in the

obligations in question relevantly and specifically to aver circumstances capable of bringing the case within the ambit of the primary provisions of section 6(4) and, if it does so, it will be for the putative debtor in the obligation in question relevantly and specifically to aver circumstances capable of bringing the case within the ambit of the "reasonable diligence" proviso thereto. That is, indeed, the view of the other judges who have specifically considered the issue (Lord Coulsfield in *Arif* v *Levy & McRae* 17 December 1991 and Lord Hardie in *Graham* v *Bell* 24 March 2000), is accepted by Johnston (at 6.109) as the result of what he calls "normal principles of statutory construction", and is, moreover, the only practical approach to the operation of the proviso; it would normally be extremely difficult or frankly impossible for the creditor to negative in advance any matter which the debtor maintains could with reasonable diligence have led him to discover the fraud or error. In any event, in the present case the pleadings disclose that battle has certainly been joined on the question of reasonable diligence, not least in relation to what publicity concerning the Volkswagen "Dieselgate" scandal ought to have led a reasonable person in the position of the group members to discover and do. A similar situation was discussed, to like effect, in the passages in *VFS* at [46] and [47] already set out. Although there is an element of law in that issue, it is not possible to determine that the representative party is bound to fail on it, either in relation to some or all of the group members, and the matter will require to be determined after whatever evidence the parties wish to lead in relation to it has been heard and assessed.

Members who acquired vehicles on or after 1 June 2017

[168] Section 11(2) is not, post-amendment, in any terms materially different for present purposes than it was in relation to the cohort of members who acquired vehicles before

1 June 2017, and the same conclusions as already set out apply equally to that cohort. Section 6(4) is now in different terms from those which have been discussed, but the new terms do not apply to any cohort of members currently on the group register and similarly is not in any event now productive of any different outcome.

[169] The defenders' attack on the relevancy of the representative party's case for this cohort of group members based on section 11(3) and 11(3A) of the 1973 Act turns on the proposition that these members could with reasonable diligence have discovered the matters set out in section 11(3A) more than 5 years before the relevant dates for their claims. As already explained, what any group member could or could not have discovered with the exercise of reasonable diligence, and the consequences of any such discovery, are mixed questions of fact and law in relation to which a substantial dispute exists between the parties on the pleadings and which cannot presently be resolved by a conclusion on the papers alone that the representative party is bound to fail in relation to some or all of the group members. The case in this respect for this cohort of members is adequately specified and relevant for proof before answer.

Prescription of the unlawful means conspiracy case

[170] The representative party's case in unlawful means conspiracy was first explicitly advanced in adjustments made on 27 September 2024, raising the prospect that, if the relevant quinquennial period began and ran without suspension from a point in time before 27 September 2019, that case would have prescribed before it was stated. The representative party's primary position in relation to prescription of the unlawful means conspiracy case is that it is merely a development, refinement or exemplification of a generalised case in bad faith which had been advanced in the pleadings from the inception of the proceedings,

essentially based on the allegations of fraud made in connection with the obtaining of type-approval and with the dissemination of false information about the attributes of the affected vehicles. That proposition cannot be sustained. Although the law on quite what a pursuer needs to say in pleadings in order to interrupt prescription on a case closely related but not identical to that explicitly advanced is not particularly clear and in many respects may accurately be said to rest to an undesirable extent on matters of impression only, the question for decision in the circumstances of this case is not a narrow one.

[171] Whether in theoretical or practical terms, an obligation to make reparation in respect of fraudulent misrepresentation is not materially the same as an obligation to make reparation in respect of an unlawful means conspiracy, even if fraudulent misrepresentations are the chosen means to give effect to the purpose of the conspiracy. Fraud and conspiracy are both intentional delicts, and although the former may play a role in the latter, conspiracy raises a number of additional and fundamental issues (some of which have already been discussed in this opinion) of which no notice is given by the initial statement of a case in fraud alone. *Coulter* in no way suggests the contrary, being concerned with the requirements of specification rather than the principles of prescription.

[172] The position in this case is similar to that in *Devos Gebroeder NV* v *Sunderland Sportswear Ltd (No 2)* 1990 SC 291, where a different legal analysis was applied after the expiry of a timebar to the same facts as had originally been stated in order to advance a case on a new legal basis, which the court held had been stated out of time. Whatever the position may be in relation to an initial and general allegation of negligence which is then developed by reference to grounds of fault not timeously mentioned (and even in that connection I find *British Railways Board* rather difficult to reconcile with *J G Martin Plant Hire Ltd*) the different features which go to make up the various intentional delicts make it

inherently unlikely that an initial claim based on one such delict will contain enough to save the later assertion of another outwith the relevant prescriptive period.

[173] It follows that, in relation to the unlawful means conspiracy case, the representative party requires to rely on either section 11(2) or section 6(4) of the 1973 Act. As to the former, the defenders deny that any such conspiracy ever existed; the representative party appears to claim that it exists and is continuing (or at least that it continued into the relevant quinquennial period). Given that the alleged means of giving effect to the aims of the alleged conspiracy as against the group members was the making of fraudulent misrepresentations, I do not consider that the conspiracy can be regarded as constituting a continuing act after the resultant misrepresentations fall to be regarded as having ceased to have a continuing effect along the lines already discussed. It follows that section 11(2) is of potential application to the unlawful means conspiracy case as it is to the misrepresentation cases more widely and the representative party is entitled to attempt to make out its application at proof.

[174] Turning to section 6(4), the general observations already made in relation to the import of that provision apply equally to its application to the representative party's case in unlawful means conspiracy, which is therefore fit for probation.

Prescription of Consumer Credit Act claims

[175] For reasons which it set out at length, the Supreme Court in *Smith* v *RBS*, accepting the reasoning in *Patel*, held in construing the provisions of the Consumer Credit Act 1974 that the credit agreement debtor's cause of action in a claim under section 140B was a continuing one which accrued from day to day until the relevant relationship ended. It followed that an application under section 140B could be made at any time during the

currency of the relationship arising out of a credit agreement, based on an allegation that the relationship was unfair to the debtor in the agreement at the time when the application was made, or at any later time until the expiration of any applicable period of limitation after the relationship had ended. Although *Smith* and *Patel* were cases in English law, there is no room for any suggestion that different principles fall to be applied in Scots law, with the sole adaptation that the applicable timebar will be that provided in Scots law. I consider that the obligation on a creditor in a credit agreement to provide a remedy envisaged by the 1974 Act, albeit only recognised by an appropriate decree of court, is an obligation arising from a contract, which failing an obligation to make a payment arising under an enactment, thus falls within either paragraph 1(g) or (h) of the first Schedule to the Prescription and Limitation (Scotland) Act 1973, and is accordingly subject to the short negative prescription provided for by section 6 of the Act.

[176] It follows that any claim for a remedy under the 1974 Act which was made in these proceedings within the 5-year period beginning on the termination of the relationship created by the relevant credit agreement was timeously made. Any group member whose claim under the 1974 Act was first made outwith that period will require to seek to rely on section 6(4) of the 1973 Act to avoid some or all of that period being reckoned as part of the quinquennium. The summons presently does not disclose which members fall within which group, and it may be that further case management orders will be appropriate in order to draw that information out before proof, but there is no proper basis upon which any element of the cases advanced under the 1974 Act may currently be refused probation.

Alternative and inconsistent averments

[177] I accept the defenders' submissions that it is not inconsistent with substantial justice to permit them to attempt to prove (a) that the vehicles in question did not contain a defeat device with the meaning of the Emissions Regulation (that being a mixed question of fact and law in which the factual element predominates but may be technically complex); (b) that if there were defeat devices, they were not prohibited defeat devices (another mixed question of fact and law, possibly with a greater legal element); or (c) that the presence of any prohibited defeat device was unintended and inadvertent (a matter relevant, at least, to the allegations of fraudulent behaviour in the action).

[178] The defenders primarily offer to prove that there were no defeat devices, or at least no prohibited defeat devices, in the vehicles. Proof of either of those matters would constitute a relevant defence to some or even all of the claims in the action. To guard against the possibility that the court may ultimately rule against them in both of those regards, whether as a matter of fact, law or both, they have, as a last redoubt, an *esto* position that the presence of any prohibited defeat devices was inadvertent, which – if established – might operate as an effective defence against at least some of the grounds of action stated against them, or at least might mitigate their liability in some respects.

[179] The factors (a) that the claimed inconsistency between the defenders' primary positions that there were no defeat devices or that, if there were, they were not prohibited defeat devices, is not simply a question of fact, but of fact and law, and that both such positions would amount to a relevant defence; (b) that the "inadvertence" defence is expressly set out as a fallback position, not as an alternative primary position, and would operate as a defence to some elements of the claim; and (c) that the supposedly inconsistent averments are made by defenders rather than a pursuer, individually and in combination

take the case well outwith the scope of the weaker alternative rule as described in the authorities.

[180] The declarator first concluded for, and which the representative party submits I should now summarily pronounce, in any event narrates that the purpose of the incorporation of prohibited defeat devices in affected vehicles was to control NOx emissions during regulatory engine testing with a view to obtaining EU type-approval, which is what the third and supposedly most problematic alternative stated by the defenders offers to negative, so only a limited version of the order sought could ever have been granted even if the weaker alternative rule had applied. The representative party's first plea-in-law, seeking the grant of that declarator on the grounds of the supposed irrelevancy and lack of specification of the defences, may be capable in due course of being sustained on other grounds, and will accordingly not be repelled at this stage.

[181] I add only that the court has in more recent years developed a free-standing jurisdiction which entitles it to restrain most if not all forms of abuse of its processes. The statement of multiple inconsistent positions of fact for no adequate reason might well be regarded as such an abuse, whether or not the circumstances fit squarely within the limits of the weaker alternative rule as they have been developed. It may be that a simpler (at least in expression) test of whether a form of pleading is or is not in accordance with the requirements of the proper administration of justice should fall to be regarded as having nowadays subsumed the particular expression of the same theme found in the current state of the weaker alternative rule. For the reasons already stated, the form of defence in this case does not offend against the principle as so more widely formulated.

Disposal

[182] The case will be put out by order so that the court can receive the parties' submissions on whether the content of this opinion requires the refusal of probation to any averments, and on the next appropriate stage of procedure more generally.