OUTER HOUSE, COURT OF SESSION

[2025] CSOH 94

GP4/24

OPINION OF LORD SANDISON

In the cause

WILLIAM MACKIE

Representative Party

against

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

Defenders

(Mercedes-Benz Group NOx Emissions Group Proceedings)

Representative Party: McKenzie KC, G Reid, Perriam; Slater & Gordon Scotland Ltd
Defenders: Duncan KC, Breen, Mitchell; Brodies 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 29. The matter came before me for a debate on the defenders' preliminary pleas to the extent later set out. The debate proceeded in parallel with a debate in the similar group proceedings *David Batchelor* v *Opel Automobile GmbH* (*Vauxhall & Opel 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 Mercedes-Benz 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 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 Mackie, is a retiree with a claim of his own in respect of a diesel Mercedes GLC 220d 4MATIC Sport vehicle manufactured by the second defender and purchased from Mercedes-Benz of Aberdeen in January 2017. 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 be the parent companies of the other defenders, to have designed and manufactured engines containing prohibited defeat devices, and to have installed them into Mercedes-Benz vehicles which they then supplied to

the UK market. The third defender is said to be the sole importer and wholesale supplier of new and "approved used" Mercedes-Benz cars to the UK. The fourth defender is claimed to be the first defender's approved retail distributor of such cars, and the fifth defender to perform the same function in relation to Mercedes-Benz vans. The sixth defender is said to be a finance company which supplied financing and leasing services to some of the group members in relation to affected Mercedes-Benz vehicles.

[5] Diesel engines produce a range of polluting emissions, including NOx, which are harmful to human health and to the environment. Regulatory vehicle emissions standards and testing regimes exist in the UK and in the EU for the specific purpose of reducing the adverse effects of such emissions. Various legislative measures, including 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 Road Vehicles (Approval) Regulations 2009; the successor Road Vehicles (Approval) Regulations 2020; the UK Road Vehicles (Construction and Use) Regulations 1986; and the Road Traffic Act 1988, deal or have dealt with the matter. The parties dispute the nature and applicability of the EU measures to some degree, but that was not an issue dealt with in the debate.

[6] EC Council Directive 70/156 required any vehicle sold in the EC to have obtained a relevant type-approval issued by a competent relevant authority in a Member State. The approval was in respect of a particular make and model of vehicle and was designed to permit pan-EC conformity and harmony in engine performance and emissions. In 1976, that Directive was amended to introduce a single binding EC type-approval, so that once a competent authority in a particular Member State had granted type-approval for a particular vehicle, it was valid for the whole of the EC and did not need to be validated separately in

any individual Member State. The relevant authority for Mercedes-Benz vehicles in Germany was the Kraftfahrt-Bundesamt ("KBA").

[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 4.1 of the Framework Directive required Member States to ensure that vehicle manufacturers complied with their obligations under the Directive, Article 4.2 required them to approve only those vehicles which satisfied the requirements of the Directive, and Article 4.3 empowered them to register or permit the sale or entry into service of only those vehicles which satisfied the requirements of the Directive.

[8] Article 5.1 of the Framework Directive provided that

> "The manufacturer is responsible to the approval authority for all aspects of the approval process and for ensuring conformity of production, whether or not the manufacturer is directly involved in all stages of the construction of a vehicle, system, component or separate technical unit."

A manufacturer seeking type-approval was required by Article 7.2 to provide the relevant authority with the information listed in Annex III to the Framework Directive. Article 11 of the Framework Directive required demonstration that appropriate technical tests were carried out to affirm compliance with regulations, including the Emissions Regulations.

[9] Since 1 September 2020, by virtue of Article 13 of the Framework Regulation, manufacturers have been obliged 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"

in terms of the Regulation 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".

Further, Article 14.1 requires that

> "Where a vehicle, system, component, separate technical unit, part or equipment that has been placed on the market or that has entered into service is not in conformity with this Regulation or where the type-approval has been granted on the basis of incorrect data, the manufacturer shall immediately take the corrective measures necessary to bring that vehicle, system, component, separate technical unit, part or equipment into conformity, to withdraw it from the market or to recall it, as appropriate".

Article 33.1 obliges a manufacturer to inform the type-approval authority, without delay, of any change in the particulars recorded in the information package which accompanied the application for type-approval.

[10] Once the manufacturer of a vehicle has obtained type approval in respect of his vehicle, Article 18 of the Framework Directive requires it to deliver a Certificate of Conformity with each vehicle, certifying that the vehicle conforms in all respects to the applicable type-approval and that it can be permanently registered in Member States. Certificates of Conformity also set out the applicable emissions standard and the levels of NOx emitted during regulatory testing procedures. Article 3.36 of the Framework Directive defines a Certificate of Conformity as the

> "document set out in Annex IX, issued by the manufacturer and certifying that a vehicle belonging to a series of the type approved in accordance with this Directive complied with all regulatory acts at the time of its production.".

Point 0 of Annex IX provides that the Certificate 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."

Article 26.1 of the Framework Directive provides that Member States shall only register or permit the sale or entry into service of vehicles accompanied by a valid Certificate of

Conformity and Article 30 entitles them to withdraw type-approval should they discover that it ought not to have been granted.

[11] In terms of Regulation 6 of the UK Road Vehicles (Approval) Regulations 2009 Regulations and Regulation 21 of the UK Road Vehicles (Approval) Regulations 2020 Regulations, a vehicle cannot be registered or licensed for use in the UK unless it is accompanied by a Certificate of Conformity. Various criminal offences fence the proper use of such Certificates. In terms of section 42 of the Road Traffic Act 1988 Act and Regulation 61A of the Road Vehicles (Construction and Use) Regulations 1986, it is a criminal offence to drive a vehicle on a UK road which does not comply with the Regulations.

[12] Articles 4 and 5 of the Emissions Regulations require manufacturers to ensure and demonstrate that their vehicles comply with the Regulation, including meeting emissions limits. Article 5.2 prohibits the use of defeat devices, subject to three limited exceptions. Article 3.10 defines a "defeat device" 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."

[13] The representative party makes detailed averments about how he alleges that the engines in the vehicles which are the subject of these group proceedings did not comply with the required vehicle emissions standards when running under normal road use conditions. In essence, he alleges that the first and second defenders designed, manufactured and installed in the engines defeat devices intended to permit software in the vehicle to detect when it was running under test conditions and alter the performance of the vehicle so as to comply with the Regulations when under those conditions, while permitting

it to breach them when operating under normal on-road conditions. It is claimed that that was all done so as to cheat the emissions testing regime; to defraud and deceive regulators, purchasers and lessees of affected vehicles; to enable such vehicles to be supplied to and distributed within the UK market; to be registered, put into service, advertised and marketed as being environmentally responsible purchases; to induce purchasers and lessees to buy or lease them; and to maximise the defenders' own profits at the expenses of purchasers, lessees and the environment in general.

[14] In about September 2015, the use of defeat devices in Volkswagen vehicles is said to have been discovered by the KBA. It is further claimed that in May 2018 the KBA discovered the use of a defeat device in a Mercedes-Benz vehicle, and that in response the first and second defenders designed, manufactured and installed various software changes to the vehicles' engine control units, which nonetheless did not render the vehicles emissions-compliant. Averment is further made about claims by Deutsche Umwelthilfe eV concerning the commissioning by *inter alios* the first defender of defeat devices with the assistance of Robert Bosch GmbH, and concerning investigations into technology suppression cartels involving the first defender by the European Commission and the Korea Fair Trade Commission. Vehicle recall notices issued by the KBA, the UK Driver and Vehicle Standards Agency and the Dutch Dienst Wegverkeer in respect of the use of impermissible defeat devices in affected vehicles are also condescended upon.

[15] It is alleged that when applying for type-approval for their Mercedes-Benz vehicles from the KBA, the first and second defenders fraudulently misled the regulators, failed to disclose and knowingly concealed the use of defeat devices to meet emissions test standards, and that they thereafter acted together with the other defenders as part of a single corporate group in an unlawful means conspiracy, with the intention to inflict harm on prospective

purchasers and lessors of their vehicles, at whom their advertising and marketing materials were directed. It is said that they published information as to the NOx emissions and performance of the affected vehicles, knowing that information to be untrue and intending that customers would be influenced thereby into acquiring affected vehicles, and that following the issuing of regulatory recall notices, the third defender corresponded with group members, advising them that software updates to the emissions control system were being offered as part of a mandatory recall at the request of the KBA and in coordination with the DVSA in order to change "specific aspects" of the engine control system, without mention of the use of prohibited defeat devices or emissions levels being in excess of regulatory standards.

[16] The representative party maintains that type-approval for the affected vehicles was obtained on the basis of the fraud of the first and second defenders and is invalid, with the consequence that those vehicles could not be lawfully sold or leased. He claims that the Certificates of Conformity issued with each affected vehicle were invalid, and fraudulently misled and misrepresented to prospective purchasers and lessees that the vehicles were emissions-compliant. It is said that by importing, supplying and distributing affected vehicles to the UK market, the third, fourth and fifth defenders impliedly misrepresented that vehicles were emissions-compliant and could lawfully be used on the public roads, and that the sixth defender did likewise by agreeing to sell and finance the purchase or lease of an affected vehicle.

[17] The specific grounds of action advanced are:

(a) Unlawful means conspiracy amongst all the defenders. The first and second defenders are said unlawfully to have manufactured and installed prohibited defeat devices into the diesel engines of affected vehicles; 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 lessees that the affected vehicles complied with all regulatory and legislative emissions standards then in force. All of the defenders are said to have conspired together to play their part 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 to have made fraudulent misrepresentations in the course of marketing the affected vehicles as part of a single corporate group and with overlapping corporate ownership and leadership.

(b) Fraudulent misrepresentation by all the defenders, who are said knowingly and dishonestly to have misrepresented to the group members, with intent to deceive, that the diesel engines installed within their Mercedes 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; that the vehicles were fit lawfully to be registered, sold and put into service in the UK; and that they were environmentally friendly.

(c) Alternatively to fraudulent misrepresentation, fault and negligence on the part of all the defenders. It is said, *inter alia*, to have been the first and second defenders' duty to take reasonable care to obtain type-approval and to issue

accurate and valid Certificates of Conformity for their vehicles without negligently misrepresenting the true NOx emissions performance of their engines, and to have been the duty of all the defenders to take reasonable care not to represent to the group members that the engines in question had been tested and complied with UK and EU statutory requirements, including regulatory emissions levels; that they were fit lawfully to be 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; that the emissions control systems were employed during normal use; and that they did not incorporate prohibited defeat devices, when they at least ought to have known that such representations were false and were likely to induce group members to buy and lease affected vehicles. It is claimed that the group members relied upon and were entitled to rely upon those representations when buying or leasing their vehicles.

(d) Breach of statutory duty on the part of the first and second defenders in relation to breaches 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; Regulations 15 and 33A of the 2009 UK Regulations; Regulation 14 of the 2020 UK Regulations; and sections 42 and 75(1) of the Road Traffic Act 1988.

(e) Breach of contract on the part of the sixth defender. It is claimed that the sixth defender was or ought to have been aware of the true state of the vehicles it financed and was accordingly in breach of the implied contractual terms 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 their satisfactory quality under

sections 11D(2) and 11(J)(2) of the Supply of Goods and Services Act 1982; and as to their satisfactory quality and fitness for purpose under sections 9(1) and 10(3) of the Consumer Rights Act 2015.

(f) Right of redress from the sixth defender under Regulation 27A of the 2008 Regulations in respect of various allegedly misleading and unfair, and thus prohibited, commercial practices and omissions, in terms of Regulations 3, 4, 5, 6, 27A and 27B, in particular dissemination of false information.

(g) Right to orders under Section 140B of the Consumer Credit Act 1974 in respect of an unfair contractual relationship between group members and the sixth defender, on account of the misrepresentations already described.

[18] The remedies sought for the group members consist firstly of damages in respect of : (i) pre-software update loss due to the uncertainty as to the effect of the update; (ii) post-software update loss due to decreased engine torque, loss of engine performance, acceleration, driveability and enjoyment of driving; (iii) post-software update loss due to decreased fuel efficiency, increased fuel consumption, reduced durability of engine components and increased running and maintenance costs; (iv) pre and post-software update loss due to a diminution in vehicle value; and (v) pre and post-software update loss due to the negative perception of diesel vehicles in terms of their life expectancy, stigma and loss of brand value, leading to a further lowering of value in the used car market.

[19] Further remedies which are sought comprise repayment of the purchase price, cost of leasing or cost of financing, which failing the difference between the price paid and the true value of a purchased vehicle, damages for financed purchasers and lessees under section 15B of the Sale of Goods Act 1979 or under section 11F of the Supply of Goods and Services Act 1982, or else an order under section 140B(1) of the Consumer Credit Act 1974

for repayment of finance payments already made and a remission of payments still to fall due, or a discount under the 2008 Regulations, together with damages for financial loss, distress and inconvenience under Regulations 27A and 27J thereof. An order for price reduction under section 19 of the Consumer Rights Act 2015 is also sought, as is an award of general damages for distress, inconvenience and loss of enjoyment of vehicles.

[20] Extensive averments are made about the issues arising under the law of prescription which are discussed below.

[21] The defenders deny essentially all of the allegations of wrongdoing made by the representative party and explain at length what they say actually happened, but for present purposes it is unnecessary to set out their position in any detail.

Relevant statutory provisions

[22] 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."

[23] 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;"

[24] 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 ..."

[25] 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

[26] On behalf of the defenders, senior counsel submitted that the court should sustain their general plea to the relevancy and specification of the representative party's pleadings to the extent to be indicated, as well as absolving the defenders from the claims of those group members who had purchased or leased vehicles more than 5 years prior to

commencement of proceedings on their behalf, on the basis that such claims had prescribed under section 6 of the Prescription and Limitation (Scotland) Act 1973.

Prescription

[27] Group proceedings were commenced by the service of the group register upon the defenders: RCS 26A.18(1), and in respect of group members who were added to that register after the proceedings in general commenced, the relevant date for each of them was the date on which the revised register bearing their name was lodged with the court: RCS 26A.18(2). For the purposes of prescription, the group members might usefully be divided into two categories. The first category was composed of those members whose rights of action had accrued prior to 1 June 2017. For that category, the prescription regime which pertained prior to the coming into effect of the amendment of the 1973 Act by section 5 of the Prescription (Scotland) Act 2018 was relevant. Group members in that category relied on section 11(2) and section 6(4) as those provisions of the 1973 Act then stood. The second category was composed of group members whose rights of action did not arise prior to 1 June 2017, as well as members of the first category whose rights of action had not prescribed prior to 1 June 2022. These group members relied on section 11(2), section 11(3) and section 6(4) of the 1973 Act as amended by the 2018 Act as applicable to them.

[28] All group members sought reparation for fraudulent misrepresentation, negligence, breach of statutory duty, unlawful means conspiracy and breach of contract. The losses claimed were principally economic in nature, involving capital and running costs, but there were also non-economic heads of loss, such as in respect of loss of enjoyment, uncertainty, distress and inconvenience.

[29] In relation to both categories of member, the "appropriate date" for the purposes of the commencement of the prescriptive period was the date when the obligation to make reparation became enforceable, being the date when loss occurred: section 6(1), section 6(3) and section 11(1) of the 1973 Act. The concurrence of *damnum* and *injuria* occurred at the latest when expenditure was incurred and vehicles were acquired: *Gordon's Trustees* v *Campbell Riddell Breeze Paterson* [2017] UKSC 75, 2017 SLT 1287 at [19]; *Glasgow City Council* v *VFS Financial Services Ltd* [2020] CSOH 92, 2020 SLT 1227 at [104], [2022] CSIH 1, 2022 SC 133, 2022 SLT 181 at [4]. There might be an argument in favour of any earlier date when group members had bound themselves to purchase or lease vehicles, but for the purposes of the debate the defenders were content to proceed on the basis that the date of acquisition was the appropriate date.

Section 11(2)

[30] Both categories of members sought to rely on section 11(2). Although that subsection was amended by the 2018 Act, the changes – "act or omission" substituted for "act, neglect or default" – were not material for present purposes. Where loss had arisen, section 11(2) had the effect of postponing the commencement of the prescriptive period while, and for as long as, the act or omission giving rise to the loss was continuing. It followed that the starting point was to identify the act, neglect, default or omission relied upon as causative of loss, and then to ask whether it – rather than the loss – was continuing. A realistic approach required to be taken. In the present case, loss was said to arise from the acquisition of vehicles. The prior acts and omissions said to have given rise to that loss were the inclusion of prohibited defeat devices within vehicles and misrepresentations about that matter.

[31] The basis for the engagement of section 11(2), so far as it concerned the cases against the first and second defenders, was said to lie in an alleged failure to remedy the presence and the effect of prohibited defeat devices and the misrepresentations supposedly made. The representative party claimed that supposed misrepresentations by the first and second defenders, in particular as contained in the Certificates of Conformity issued in respect of the relevant vehicles, were continuing in nature. The same claim was made in relation the content of sales and marketing material, which were said to constitute continuing misrepresentations even after the vehicle in question had been acquired. The ongoing supply of vehicles was said to amount to a continuing misrepresentation as to their compliance with emissions requirements. There was also said to be a continuing failure to comply with the relevant regulations and to disclose the presence of defeat devices. In relation to the third, fourth and fifth defenders, reliance was placed on a continuing failure to disclose the presence and effect of prohibited defeat devices and a continuing misrepresentation implicit in carrying on with the import and supply of vehicles. Essentially the same basis was relied upon for the sixth defender as regards vehicles sold and leased by them. It appeared also to be said that section 11(2) was engaged for the sixth defender in those cases where it continued to receive payments from group members in terms of finance agreements.

[32] For those group members who asserted claims under section 140A of Consumer Credit Act 1974, it was said that the prescriptive period only commenced when an unfair contractual relationship to which that provision was directed came to an end.

[33] All of those claims were misconceived. It was artificial to seek to avoid the effects of prescription by characterising claimed completed wrongs as continuing or to characterise breach of an obligation as being the point at which some kind of analogue and continuing

remedial duty arose. It was further misconceived to claim that the continuing nature of any loss suffered engaged section 11(2): *Johnston* v *Scottish Ministers* 2006 SCLR 5 at [17]; *Warren James (Jewellers) Limited* v *Overgate GP Limited* [2010] CSOH 57 at [5]; *John G Sibbald & Son Limited* v *Johnston* [2014] CSOH 94 at [8]; Johnston, Prescription and Limitation of Actions (2nd ed) at 4.64. *Cramaso LLP* v *Viscount Reidhaven's Trs* [2014] UKSC 9, 2014 SC (UKSC) 121, 2014 SLT 521 did not support the representative party's contention that a misrepresentation, as opposed to its potential consequences, fell to be regarded as continuing in nature. Reference was made to [16], [21], [23], [27] and [29] therein.

Section 6(4)

[34] Section 4 of the Prescription (Scotland) Act 2018 made certain amendments to section 6(4) of the 1973 Act and also introduced a new subsection, section 6(4A). As these changes did not take effect until 28 February 2025, they were unlikely to impact materially on this case. The operative version of section 6(4) for both categories of group members would, rather, be as it stood prior to amendment. It had been observed that questions about section 6(4) might matter only in cases of genuine doubt about when loss had occurred, and that its significance might be an issue more easily addressed at proof: see Johnston at 22.12 and *Heather Capital Limited (in liquidation)* v *Levy & McRae* [2017] CSIH 19, 2017 SLT 376 at [77]. On the other hand, it was not possible meaningfully to analyse the relevancy and adequacy of pleadings without first identifying where the pleading burden lay and what purpose it served.

[35] It was now generally accepted that the creditor in an obligation bore the burden of averring and proving that it had not prescribed: Johnston at 22.13 and cf section 13A of the 1973 Act. It was also generally accepted that the burden on the creditor extended to reliance

on the provisions of section 6(4) and section 11(3): Johnston, 6.88 and 6.107; Scottish Law Commission Discussion Paper on Prescription No 160 at 8.1; *BP Exploration Operating Co Ltd* v *Chevron Shipping Co* [2001] UKHL 50, 2002 SC (HL) 19, 2001 SLT 1394 at [16] and [26] – [29], [33]; *Adams* v *Thorntons WS (No 3)* 2005 1 SC 30, 2005 SLT 594 at [36], [73] and [74]. The onus on the creditor was to aver and prove: (1) that there was a period when it laboured under an error as to the scope of its remedies; (2) that the debtor caused or induced that error by words or conduct; (3) that the error so induced was the reason the creditor did not make a claim; and (4) when the period of error began and ended (or should, through the exercise of reasonable diligence, have ended): *Tilbury Douglas Construction Ltd* v *Ove Arup and Partners Scotland Ltd* [2024] CSIH 15, 2024 SC 383, 2024 SLT 811 at [50] and [59]; *Adams* at [66].

[36] It was not enough to engage section 6(4) for the creditor to say that it did not have enough information to plead a relevant *prima facie* case. Rather, the question to be asked was whether the knowledge that the creditor had "should have prompted them to embark on the preliminaries to a court action": *Glasgow City Council* v *VFS* (IH) at [52], [53] and [55] – [57]. Secondly, it appeared that it was not open to the creditor to say of the same conduct that it created a right of action and that it also engaged section 6(4): *Tilbury Douglas* at [61], despite apparent suggestions to the contrary in *Rowan Timber Supplies (Scotland) Ltd* v *Scottish Water Business Stream Ltd* [2011] CSIH 26 and in *Leonardo Hotel Management (UK) Ltd* v *Galliford Try Building 2014 Ltd* [2024] CSOH 43. Thirdly, there was some authority that the initial onus of averring that the exercise of reasonable diligence would not have resulted in the discovery of the error earlier than it was in fact discovered lay on the debtor: Johnston, 6.109; *Highlands and Islands Enterprise* v *Galliford Try Infrastructure Ltd* [2023] CSOH 21, 2023 SLT 1077 at [17].

[37] On the other hand, *Adams* at [36], [73] and [74] seemed to suggest otherwise, although it was accepted that (unlike in *Highlands and Islands Enterprise*) the question of onus was not the subject of argument or express consideration in the case. *BP* v *Chevron*, especially per Lord Millett at [107] – [110], as well as the proposition that the proviso to section 6(4) was to be seen as an exception to a general rule, and that normal rules of statutory construction placed the onus on the party seeking to rely on the exception, did not displace the suggestions in *Adams*. Lord Millett's discussion was not directed at the specific issue, and the analysis that the proviso was to be seen as being an exception to a general rule (despite that being exactly how both section 6(4) and 11(3) were described in *Tilbury Douglas* at [10] and [11]) risked taking a decontextualised view of section 6(4), which required to be construed within the context of the regime of negative prescription provided for within the 1973 Act as a whole: *Dryburgh* v *Scotts Media Tax Ltd* [2014] CSIH 45, 2014 SC 651 at [15] and [18] – [20]. A narrow construction might involve viewing section 6(4) as being designed to ensure that injustice did not arise where a creditor was misled by a debtor. On that narrow view, the proviso would be the exception to the general rule. But the better view would be to see section 6(4) as itself the exception to the general rule that claims be brought within 5 years in order to serve the broader and more fundamental purpose of the legislation that rights of action were asserted promptly and debtors protected from stale claims. That analysis would have the further benefit of being consistent with the approach that had usually been taken to interpretation of the constructive awareness provisions within s.11(3): Johnston, 6.88 but cf. *Highlands & Islands Enterprise* at [17].

[38] The application of the above principles led to the view that section 6(4) was not relevantly engaged in the present action. The representative party had the onus of averring how the group members stood to take the benefit of the section in every regard. His

averments barely engaged with the requirement to plead and prove facts relative to the pertinent issues. Such averments as were made focussed upon the representative party personally and said nothing meaningful about the remainder of the group members. Nor was there any real attempt to disaggregate amongst the defenders and to identify words or actions on the part of each of them for the purposes of engaging section 6(4). Such averments as the representative party did make were misconceived. There were no proper averments of fraud. He relied on alleged misrepresentations that occurred prior to the acquisition of vehicles; an ongoing failure to disclose the alleged presence of prohibited defeat devices; and the taking of contractual payments by the sixth defender. None of that was relevant. Much of it was everyday conduct of the kind said in *Tilbury Douglas* to be of dubious relevancy. More fundamentally, there was no attempt to explain why group members could not have disabused themselves earlier as regards their claimed error, or at any rate why the point identified in *Glasgow City Council* v *VFS* as the relevant point for ending any suspension of the prescriptive period had not been reached.

Section 11(3)

[39] The representative party's averments indicated that the second category of group members sought to rely upon section 11(3) in its amended form. The representative party bore the onus of satisfying the requirements of that section, including the reasonable diligence provisions. Thus, it was for him to aver circumstances from which it could be inferred that, for a period ending less than 5 years before proceedings commenced, group members were unaware, and could not with reasonable diligence have been aware, of the facts mentioned in section 11(3A). There was some similarity between the facts mentioned in section 11(3A) and those referred to for the purposes of the law of limitation in personal

injury actions in section 17(2)(b) of the 1973 Act. It was for a pursuer who sought to invoke those provisions to aver a relevant basis for doing so, including the question of constructive awareness: *M* v *Hendron* [2007] CSIH 27, 2007 SC 556, 2007 SLT 467 at [165]; *Cowan* v *Toffolo Jackson & Co Ltd* 1998 SLT 1000 at 1002F. The representative party's averments in relation to section 11(3) and section 11(3A) were sparse, and there was little to no explanation of the basis upon which he sought to invoke the provisions.

Prescription of claims under the Consumer Credit Act 1974

[40] The representative party's position on prescription in respect of group members' claims under the 1974 Act merited distinct consideration. The position in England was that a cause of action under section 140B of that Act did not arise until the court made a determination of unfairness, or the consumer agreement came to an end, whichever came first: *Smith* v *Royal Bank of Scotland Plc* [2023] UKSC 34, [2024] AC 955, [2023] 3 WLR 551. Even if *Smith* was taken to represent Scots law on this point notwithstanding the fundamental conceptual differences between the English law of limitation and the Scots law of prescription (and the defenders made no positive suggestion that it should not be so taken) the date on which time started to run in respect of group members' claims was the date on which the respective consumer agreements came to an end. The representative party did not relevantly aver that the present action was raised within five years of group members' respective consumer agreements coming to an end.

Fraudulent misrepresentation

[41] Turning to the representative party's averments on fraudulent misrepresentation, it remained the position in Scots law that to plead a relevant and sufficiently specific case of

fraudulent misrepresentation required averments of: (1) the act relied upon, (2) the occasion when it occurred, (3) the circumstances yielding the inference of fraud and (4) the identity or means of identifying the person who made the fraudulent representation: *Royal Bank of Scotland Plc* v *Holmes* 1999 SLT 563 at [569]– [570]. On the continuing importance of the principles discussed in that case, reference was made to *Richards* v *Pharmacia Ltd c/o Pfizer Ltd* [2018] CSIH 31, 2018 SLT 492 at [64] and *Advocate General for Scotland* v *Adiukwu* [2020] CSIH 47, 2021 SC 38 at [55]. Those principles also applied to cases involving abbreviated pleading: *Marine & Offshore (Scotland) Ltd* v *Hill* [2018] CSIH 9, 2018 SLT 239 at [16]. The same approach should be taken in group proceedings. It was acknowledged that ultimately the question was one of fair notice and that the matter fell to be determined in accordance with what it was proportionate to expect a claimant to aver and a defender to be told was the case against it. Finally, as part of considering the circumstances which were said to yield an inference of fraud, a pursuer had to aver that the representation was made in the knowledge that it was false and that it was relied upon: *Leander CB Consultants Limited* v *Bogside Investments Ltd* [2023] CSOH 26 at [26].

[42] The representative party's case of fraudulent misrepresentation did not satisfy those requirements, and accordingly should be excluded from probation. The case against the first and second defenders, although more nuanced than the cases against the other defenders, amounted to an allegation that they misled regulators and concealed from them, or failed to disclose, the use of defeat devices. Additionally, it was said that this had the consequence that Certificates of Conformity misrepresented and misled purchasers and lessees to the effect that vehicles were "regulation and emissions-compliant". Averments regarding representations to and dealings with regulators did not satisfy the requirements for pleading a relevant case of fraud against the defenders. Group members could not have relied upon

statements which were made directly to regulators, and there was no suggestion that they did so. There was no suggestion that group members were even aware of such statements prior to acquiring vehicles. An attempt was made to set out examples of representations made to both regulators and group members, but nothing said identified any representation as having been made by the first and second defenders to group members. Basic aspects of that alleged representation, such as to whom it was made, when and how, or why it was deceitful, were absent.

[43] The case against the third to fifth defenders did not rely on any representation made by those defenders beyond a bare assertion that all defenders, as part of the same corporate group,

> "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 into acquiring affected vehicles".

The act of importing, supplying and distributing vehicles to the UK market could not amount to a representation made directly to consumers. It was not averred that any of those defenders directly sold vehicles to any group members or made any form of direct representation to them which was relied upon. Nothing was said about the third to fifth defenders' employees' state of knowledge as regards the alleged underlying fraud.

[44] In relation to the sixth defender, the representative party averred that by agreeing to sell and finance the purchase of, or to lease, an affected vehicle, it also misrepresented to the relevant group members that the vehicles were emissions-compliant and could lawfully be used on the public roads. That fact, if proved, could not possibly give rise to an inference of fraud. There was no attempt to address the requirement to show that employees of the sixth defender did or said things from which an inference of dishonesty could be drawn.

Duty of care in negligence

[45] On the question of breach of a duty of care in negligence, the representative party averred that such breach on the part of the defenders had caused the group members pure economic loss and certain non-pecuniary impacts such as distress and inconvenience. It did not appear to be suggested that any of the defenders owed a duty of care not to cause the non-pecuniary elements of the claimed loss; and that, whatever relevance those elements had to other grounds of action, it could form no part of the case based in delict: *Page* v *Smith* [1996] AC 155, [1995] 2 WLR 644. In the case of each defender, it was said that the duty was breached by actions taken and by statements made, and the mechanism relied on for creation of the antecedent duty was an assumption of responsibility, which was necessary in point of law: *Robinson* v *PE Jones (Contractors) Ltd* [2011] EWCA Civ 9, [2012] QB 44, [2011] 3 WLR 815 at [67] and *NRAM* v *Steel* [2018] UKSC 13, 2018 SC (UKSC) 141, 2018 SLT 835 at [24]. Where a pursuer's case was based on an assumption of responsibility, it was for him to aver facts from which that could be inferred: *N* v *Poole Borough Council* [2019] UKSC 25, [2020] AC 780, [2019] 2 WLR 1478 at [82] and *HXA* v *Surrey County Council* [2023] UKSC 52, [2024] 1 WLR 335 at [104].

[46] The representative party appeared to say that the first and second defenders owed a virtually limitless duty to all future acquirers of vehicles to take care not to cause pure economic loss. The only limit on the duty would be the volume of motor vehicles that the first and second defenders were able to design and manufacture at any given time: everyone who subsequently purchased one of those vehicles would have been owed a duty of care prior to that point. That approach did not engage with the requirement to demonstrate the sort of special relationship that would be necessary for duties of that nature to be owed prior to and outwith individual contracts: *Royal Bank of Scotland International*

Limited v *JP SPC 4* [2022] UKPC 18, [2023] AC 461, [2022] 3 WLR 261 at [61] – [64]. The case based on negligent misstatement was no better. The pleadings again suggested reliance on communications between the defenders and regulators, when communications between the defenders and group members ought to be the focus: *Royal Bank of Scotland International Limited* at [63]. Insofar as there was any indication of the communications with group members that were relied upon, such as the issue of Certificates of Conformity, there was no meaningful explanation and no attempt to engage with the requirements for pleading a case of this nature, notably as regards reliance, including the timing, foreseeability and reasonableness of that reliance: *NRAM* v *Steel* at [18] – [24].

[47] If the representative party was also suggesting an assumption of responsibility by the third to sixth defenders, there was no explanation at all of how that assumption arose. The same deficiencies that beset the cases against the first and second defenders were present here too. No basis was suggested for the proposition that a duty of care arose from the import, supply or distribution of vehicles or from the provision of leases or finance, far less how it was breached. On their own, those things did not give rise to a duty of care not to cause pure economic loss. As to the averments of negligent misstatement, those were no more meaningful than those in relation to the first and second defenders.

Consumer Credit Act 1974

[48] This court did not have jurisdiction to determine group members' claims insofar as they sought orders under section 140B of that Act. Jurisdiction to determine group members' claims under that section was prorogated to the sheriff court. The representative party offered to prove that the credit agreements between relevant group members and the sixth defender were unfair, and invited the court to make orders under section 140B of the

Act to remedy that alleged unfairness. That was an "application" which fell within the scope of section 140B(2)(a). It was plainly not an attempt to enforce credit agreements between the sixth defender and any group member, and so did not fall within the ambit of section 140B(2)(b).

[49] Similarly, the present action did not fall within the scope of section 140B(2)(c), namely "other proceedings in any court where the amount paid or payable under the agreement or any related agreement is relevant". The sums paid or payable by group members under relevant credit agreements did not arise incidentally to the representative party's claim, such that this action constituted "other proceedings" in which the amount paid or payable "is relevant". Rather, it was a core and express element of the representative party's claim that the relevant agreements were unfair for the purposes of section 140A, and an order should be made in respect thereof under section 140B. Accordingly, the present action constituted an "application" for the purpose of section 140B(2)(a). Section 140B(4)(a) provided that an application under subsection (2)(a) might only be made, in Scotland, to the sheriff court. The statute accordingly conferred exclusive jurisdiction on the sheriff court to determine applications under section 140B(2)(a). That was apparent from the mandatory language of section 140B(4)(a). This court did not have jurisdiction to determine the representative party's claim insofar as it related to the 1974 Act.

[50] The representative party contended that, even if his claim under the 1974 Act would otherwise fall within the exclusive jurisdiction of the sheriff court, this court nevertheless had jurisdiction to determine that claim by virtue of section 22(4)(a) and (b) of the Civil Jurisdiction and Judgments Act 1982. However, the representative party's claim against the sixth defender in respect of credit agreements plainly did not require to be determined in the course of this action, nor was that matter ancillary or incidental to these proceedings. While

it was not disputed that certain factual matters that the representative party offered to prove (such that misrepresentations were made by the defenders) could be a relevant consideration as to whether a given credit agreement was fair, the fairness or otherwise of those agreements for the purpose of section 140A of the 1974 Act was neither ancillary nor incidental to these proceedings. The opening up and re-consideration of individual credit agreements was not ancillary or incidental to a claim for a global award of damages.

Competition law

[51] The representative party made averments about two regulatory decisions which, it was said, evidenced the existence of a "technology suppression cartel". There was no proper basis upon which to allege that any such cartel caused the use of prohibited defeat devices or amounted to an agreement or concerted practice to increase NOx emissions in affected vehicles, and the representative party did not offer to prove that the conduct which formed the subject of the regulatory decisions caused loss to him or any group member. He did not conclude for any remedy in respect of the conduct referred to. The averments did not inform the assessment of any matter relevantly in issue in these proceedings. That was why the court had previously refused to order the production of documents bearing on the alleged cartel: [2025] CSOH 29 at [54]. They might appropriately be refused probation at this stage; if they remained, the court should be vigilant to ensure that the issue did not become an irrelevant sideshow, wasteful of time and expense.

Unlawful means conspiracy

[52] The representative party's case in unlawful means conspiracy was irrelevant. The requirements of such a claim were summarised by Nourse LJ in *Kuwait Oil Tanker Co SAK* v *Al-Bader (No 3)* [2000] 2 All ER (Comm) 271 at [108] in the following terms:

> "A conspiracy to injure by unlawful means is actionable where the claimant proves that he has suffered loss or damage as a result of unlawful action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do so."

Reference was also made to *Roche Diagnostics* v *Greater Glasgow Health Board* [2024] CSOH 55, 2024 SLT 880 at [77].

[53] The representative party failed relevantly to plead an essential ingredient of the delict, namely an agreement or combination amongst the defenders. It was recognised in *Kuwait Oil Tanker* at [112] that, in the absence of an express agreement, "it will be necessary to scrutinise the acts relied upon in order to see what inferences can be drawn as to the existence or otherwise of the alleged conspiracy or combination". Reference was also made to [110] – [111], [118], [120] and [132]. The representative party did not aver that there was an express agreement amongst the defenders to employ unlawful means to injure the group members. He further failed to aver relevant acts on the part of each defender from which an agreement or combination could be inferred. The only averments in support of an agreement between the defenders were that they formed part of the same corporate group "with overlapping corporate ownership and leadership". No specification as to that "ownership and leadership", including by reference to any natural individuals through whom leadership was said to have overlapped, was offered. Mere membership of the same corporate group fell far short of affording a basis from which an agreement to injure group members could be inferred. The pleadings appeared to be directed more towards an

allegation of joint liability on the part of the defenders rather than an unlawful means conspiracy, particularly where the agreement was said to have been to sell and lease vehicles on the false pretence that they were compliant with relevant regulatory standards. It was expressly averred that the first and second defenders were responsible for regulatory compliance. The actual regulatory compliance of relevant vehicles was plainly a matter for proof, but no basis was stated on which the third to sixth defenders could be said to have been party to an agreement to sell or lease vehicles "on a false pretence". There was no averment from which it might be inferred that the third to sixth defenders were aware of any such false pretence.

[54] Further, the unlawful means which were said to have been employed by the defenders hinged on the advertisement and marketing of relevant vehicles as amounting to actionable misrepresentations. For the reasons already set out, no relevant case of negligent or fraudulent misrepresentation had in fact been made out, and certainly not one which involved all the defenders. It followed that the representative party had failed relevantly to plead the unlawful means said to have been deployed, which was an essential element of the delict of unlawful means conspiracy.

[55] A further essential element of unlawful means conspiracy was an intention on the part of the defenders to injure the claimant, albeit that did not require to be the predominant purpose of the conspiracy: *JSC BTA Bank* v *Ablyazov* [2018] UKSC 19, [2020] AC 727, [2018] 2 WLR 1125 at [9] and [13]. The representative party failed relevantly to aver sufficient intention on the part of any of the defenders to injure any group member. The insuperable difficulty faced by the representative party was that he attempted to derive an intention to injure group members from the issuing of advertising and marketing material to the world at large. It was insufficient, for the delict of unlawful means conspiracy, to plead an

intention on the part of the alleged conspirators to injure anyone who might by some mechanism or other find themselves affected by the agreement. That amounted merely to an allegation that loss was foreseeable, which did not suffice: *WH Newson Holdings Limited* v *IMI plc* [2013] EWCA Civ 1377, [2014] Bus LR 156 at [16] [34] [35] and [41]; *Emerald Supplies Ltd* v *British Airways plc* [2015] EWCA Civ 1024, [2016] Bus LR 145 at [169]. The advertising and marketing materials relied on by the representative party were, by their very nature, directed at the world at large. They were not directed towards group members, nor even towards an identifiable class of consumers. Any harm caused to the group members, in the form of additional costs and loss of capital value, were not the "other side of the same coin" to supposed additional profit made by the defenders. There were, in any event, no relevant averments about how the defenders had hoped to, or had, profited from their alleged behaviour.

[56] Following the decision in *Kidd* v *Lime Rock Management LLP* [2025] CSIH 11, 2025 SLT 651, Scots law should be regarded as requiring knowledge of unlawfulness on the part of each conspirator in order to establish the delict of unlawful means conspiracy. In *Racing Partnership Ltd* v *Sports Information Services Ltd* [2020] EWCA Civ 1300, [2021] Ch 233, [2021] 2 WLR 469 at [133], [139] and [171] the majority of the Court of Appeal determined that it was sufficient to establish that each alleged conspirator had knowledge of all the facts which made the means unlawful. Lewison LJ opined at [265] that where the unlawful means consisted of a violation of some private right, as was the case here, knowledge of unlawfulness was an ingredient of the tort of intention to injure by unlawful means and of conspiracy to commit that tort. *Kidd* at [82] held that dissent wholly convincing. Reference was also made to [75] and [77]. The representative party failed relevantly to aver knowledge of unlawfulness on the part of all defenders, or even knowledge of all the facts which were

said to make the means employed by the defenders unlawful. In circumstances where he expressly pleaded that the first and second defenders were those responsible for regulatory compliance, he offered no basis from which it could be inferred that the third to sixth defenders had any relevant knowledge. His claim against those defenders was further irrelevant for that reason.

[57] If the court should be minded to sustain the defenders' pleas, the mechanics by which such a decision could be given effect might most usefully be considered at a by order hearing.

Submissions for the representative party

[58] On behalf of the representative party, counsel submitted that a proof before answer with all pleas standing should be allowed. Any pleading deficiency or issue of doubtful relevancy substantially arose out of matters that were linked to documentation which the defenders had been ordered to disclose and which they had not yet produced. In the meantime, the court in such circumstances ought to draw all possible inferences adverse to the defenders' debate submissions; avoid the risk of, in effect, conducting a trial by pleading (cf. *Heather Capital* at [100]); take a benevolent view of the representative party's pleadings (cf. *Leonardo Hotel* at [98] and [105] – [113]; and refuse any motion for the deletion of averments. At this stage, it could not be said that the representative party was bound to fail – *Jamieson* v *Jamieson* 1952 SC (HL) 44 at 49 – 50, 1952 SLT 257 at 257; *Heather Capital* at [70].

Preliminary submissions

[59] A representative party had a statutory entitlement (with the permission of the court) to bring group proceedings on behalf of two or more persons, each of whom had a separate

claim which might be the subject of civil proceedings: Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018, sections 20(2) and 20(5). The court might only give permission for group proceedings to be brought if it considered that all of the claims made in the proceedings raised issues (whether of fact or law) which were the same as, or similar or related to, each other: section 20(6)(a). In group proceedings, the representative party might (a) make claims on behalf of the members of the group, and (b) subject to provisions which might be made by Act of Sederunt, do anything else in relation to those claims that the members would have been able to do had they made the claims in other civil proceedings: section 20(9). The purpose of group proceedings procedure was to make it possible for justiciable issues affecting two or more person to be determined by means of a single representative court process, thereby avoiding the need for each member of the group to commence separate proceedings: *MacKay* v *Nissan Motor Co Ltd* [2025] CSIH 14, 2025 SLT 629 at [6]. It was not a system for managing numerous actions brought by different pursuers with individual claims, but permitted a single action to be brought by one person on behalf of others who each had a separate claim. The court did not grant a separate decree in respect of each individual person, but rather granted a decree in respect of the action brought by the representative party: *MacKay* at [17]; *Bridgehouse* v *Bayerische Motoren Werke AG* [2024] CSOH 2, 2024 SC 270, 2024 SLT 116 at [9].

[60] There was a tension between the nature of group proceedings and the fact that determination of the claims advanced in the summons might come to depend upon specific issues which were unique to sub-groups or to individual group members. That tension had been recognised, but its practical and legal implications had yet to be fully explored. The proceedings might require the resolution of generic issues of fact and law for all in the group, whereas specific issues, such as prescription, causation or quantification of losses,

might require sub-group or individual resolution: *MacKay* v *Nissan Motor Co Ltd* [2024] CSOH 68, 2024 SLT 827 (OH) at paras [40] – [41], referred to without disapproval by the Inner House at [29]; *Campbell* v *James Finlay (Kenya) Limited* [2022] CSIH 29, 2022 SLT 751 at [5].

[61] The objectives of the group procedure system included helping to broaden access to justice, and facilitating collective redress, thereby potentially deterring harmful behaviour on the part of businesses and encouraging corporate social responsibility. The procedure was intended to be streamlined and efficient. The court was expected to handle group proceedings in a flexible and cost-efficient manner: *MacKay* (IH) at [7], [73] – [74]. Against that background, the court's focus should generally be on seeking to resolve the generic issues of fact and law affecting the group as a whole, in the first instance, before seeking to resolve specific issues requiring sub-group or individual consideration, particularly where, as here, the group consisted of tens of thousands of people. Unless and until a judicially case-managed process for focussing and determining specific issues at a sub-group or individual level had been established and implemented, it would not be appropriate for the court to seek to resolve such issues on the basis of general averments made in the summons.

Prescription

[62] These proceedings commenced in terms of RCS 26A.18(1) when the Group Register was originally served on 4 May 2022 in respect of the third to sixth defenders, 20 July 2022 in respect of the second defender, and 21 July in respect of the first defender. In terms of RCS 26A.18(2), additional group members' claims commenced when revised versions of the Group Register containing their details were lodged with the court. Section 11 of the Prescription and Limitation (Scotland) Act 1973 was amended with effect from 1 June 2022

by the Prescription (Scotland) Act 2018. The amended section 11 applied to any right or obligation which had not been extinguished before 1 June 2022. An amendment to section 6 of the 1973 Act came into force on 28 February 2025. The amended section 6 applied to any right or obligation which had not been extinguished before 28 February 2025, subject to the transitional provisions set out in para 4 of the Prescription (Scotland) Act 2018 (Commencement, Saving and Transitional Provisions) Regulations 2022.

[63] The practical result was that within the group members there were a number of sub-sets, each requiring slightly different analysis for the purposes of prescription. The application of the relevant statutory provisions fell to be carried out on a sub-set or even individual basis, particularly as regards the issue of "reasonable diligence" for the purposes of sections 6(4) and 11(3) and (3A). A few group members would be subject to the provisions of section 6(4) as amended by the 2018 Act with effect from 28 February 2025, but the amended section 6(4) did not require any materially different analysis and would not result in any different outcome for such members. The representative party's position was that it was premature to take a finalised view of his prescription averments, at least in relation to section 6(4), without the hearing of evidence.

[64] Subject to the application of section 11(2) of the 1973 Act, the "appropriate date" for the purposes of the commencement of the prescriptive period was the date of purchase or lease by each individual group member; that is to say, when expenditure was incurred and vehicles were acquired. The theoretical possibility of there being an earlier date of loss than when expenditure was incurred and vehicles were acquired was not critical for the purposes of the debate.

Section 11(2)

[65] The representative party agreed with the defenders that the amendments to section 11(2) resulting from the 2018 Act were not material for present purposes. Section 11(1) was subject to the effect of section 11(2), which provided (pre-amendment) that:

> "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."

The first task for the court was to identify the act or neglect founded upon; the second to consider if it was continuing, and 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 provision: *Johnston* v *Scottish Ministers* at [11] and [20]. Further, a persistent failure to implement a piece of legislation (e.g. a European directive or regulation) was a "continuing neglect": [19]. Regarding the second part of the test, in *John G Sibbald* it was accepted that it had to be the breach of duty (reflected in an act or omission) which continued for the purposes of section 11(2), and that for as long as a continuing duty subsisted and remained unfulfilled, there might be a continuing neglect or default capable of falling within section 11(2): [8]. Accordingly, section 11(2) was habile to cover the situation where: (i) a duty to do or not do something existed and had been breached; (ii) that duty so to act or not act subsisted, i.e. was continuing; and, (iii) that duty remained unfulfilled i.e. the breach of that duty was ongoing. Further, it was clear that a misrepresentation could be an "act or omission".

[66] The decisions in *Cramaso LLP* at [16] – [22], [23], [31] and [57] – [63] and in *McGowan* v *Springfield Properties Plc* [2024] CSIH 31, 2025 SC 10, 2024 SLT 1161 at [7] vouched

that a representation 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 representee discovered the true state of affairs. The legal consequences of a representation were not fixed at the time it was made. The representor assumed and had a continuing duty to ensure its accuracy. A failure to withdraw a misrepresentation continued impliedly to assert its accuracy. Where there was a continuing responsibility for its accuracy, the representor could not wash his hands of responsibility for its continuing consequences. Accordingly, a failure to withdraw was a continuing breach of the ongoing duty as to its accuracy. There was no reason why those principles ought not to apply to a breach of an ongoing delictual duty or of an existing contractual term.

[67] The law was capable of imposing a continuing responsibility upon the maker of a pre-contractual representation in situations where there was an interval of time between the making of the representation and the conclusion of a contract in reliance upon it, on the basis that, where the representation had a continuing effect, the representor had a continuing responsibility for the accuracy of the representation. It was also possible for a representation made prior to entry into a contract to remain extant after the contract was concluded. Whether a representation made prior to entry into a contract remained extant after the contract was concluded was a question which was fact-specific. The answer might well depend at least in part upon whether the representation was alleged to have been fraudulent, negligent or innocent: *GI Globinvestment Ltd* v *XY ERS UK Ltd* [2024] EWHC 481 at [139], [141] – [145]. There was no reason why the defenders' uncorrected representations should not have continued after the points in time at which the group members purchased or leased their vehicles. In these circumstances, the representative party's averments as to the application of section 11(2) were relevant.

[68] The defenders suggested that any acts or omissions on their part were completed. However, cessation of an act or omission was not always easy to determine. The representative party relied upon section 11(2) and submitted that the defenders' omission (their ongoing failure to fulfil their continuing duties of care) was continuing and that, as a result, the prescriptive period had not yet even been deemed to have commenced; which failing, at the very earliest, the effect of the defenders' acts (their representations) continued at least until the group members discovered that they were false in or after December 2020, when they saw the advertisements for these proceedings.

[69] In greater detail, the relevant "neglects", "defaults" or "omissions" founded upon were:

(i) the first and second defenders' ongoing failure to fulfil their subsisting duties to implement and apply the terms of the following 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 that by effective software update:

(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 they were 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 had been 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 which do not conform with the Regulations; and,

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

(ii) the sixth 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 [it] or any employee or agent of [its] 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 third and fifth defenders' duty under Article 16.1 of the Framework Regulations only to place on the market vehicles that complied with those Regulations;

(iv) the third and fifth 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 fourth and fifth defenders' duty under Article 19.1 of the Framework Regulations not to make non-conforming vehicles available on the market until they were 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 and second defenders), marketed and advertised (first to sixth defenders), supplied and distributed (third, fourth and fifth defenders) and financed/leased (sixth defender) by them; and,

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

[70] Those aspects of omission were all of the same character, 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.

[71] 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, upon which the group members were entitled to rely – see Case C-100/21 *QB* v *Mercedes-Benz Group AG*:

> "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 2022, *Porsche Inter Auto and Volkswagen* C-145/20, EU:C:2022:572, paragraph 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 and second defenders), marketed and advertised (first to sixth defenders),

supplied and distributed (third, fourth and fifth defenders) and financed/leased (sixth defender) by them were regulatory- and emissions-compliant;

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

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

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

[72] 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 could only have commenced, at the earliest, when the group members discovered the true state of affairs. They claimed that that had occurred less than five years before proceedings were raised, but evidence would be required about that.

[73] Further, the misrepresentations in question 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 & Co Ltd* v *ICL Plastics Limited* [2014] UKSC 48, 2014 SC(UKSC) 222, 2014 SLT 791 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.

Section 6(4)(a)(i) – defenders' fraud

[74] Further, while section 11(2) postponed the start of the prescriptive period, a claimant could 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 and/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] In section 6(4)(a)(i), the word "fraud" had to be broadly construed and meant "any form of concealment by the debtor" – see *VFS* (IH) 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)*, discussed above (see para 19). 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* (IH) 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.

Section 6(4)(a)(ii) – error induced by the defenders' words or conduct

[76] Turning to error induced by the defenders' words or conduct, a claimant had to establish (i) that there was a period when he laboured under an error as to the scope of his remedies; (ii) that the debtor caused or induced that error by words or conduct; (iii) that the error so induced was the reason the creditor did not make a claim; and (iv) when the period of error began and ended (or should, through the exercise of reasonable diligence, have ended): *Greater Glasgow Health Board* v *Multiplex Construction Europe Ltd* [2025] CSOH 56 at [126]; *Tilbury Douglas* at [50]; *Adams* at [66].

[77] 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], referring to *BP Exploration* at [65]. 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."

Reference was also made to *Golden Lane Securities Ltd* v *Scarborough* [2022] CSOH 76. Further, the relevant conduct did not need to post-date the coming into existence of the obligation – *Rowan Timber* at [17] and [18]; *Leonardo Hotel* at [60]. *Tilbury Douglas* at [61] did not suggest otherwise. There was nothing to prevent the conduct giving rise to the cause of

action also constituting or being part of the conduct inducing error for the purposes of section 6(4). The requirement that the conduct relied upon for the purposes of section 6(4) must be viewed objectively suggested that "normal, everyday conduct" might be insufficient to engage section 6(4); such conduct would not generally, viewed objectively, be sufficient to induce error: *Greater Glasgow Health Board* at [139]. The defenders' deliberate concealment of the truth about the presence and effect of prohibited defeat devices in the group members' vehicles amply qualified as relevant conduct for the purposes of section 6(4)(a)(ii).

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], referring to *BP Exploration* at [33].

[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], followed in *Greater Glasgow Health Board* at [125]; Johnston at 6-109.

That was the only approach to the proviso which made any sense in practical terms. The preliminary question, however, was whether the group members had any reason to exercise such diligence in the first place – see, in the context of reasonable diligence for the purposes

of section 11(3), *Adams* at [22], [24] and [30], with reference to *Glasper* v *Rodger* 1996 SLT 44 at 47F. If so, the creditor was not held to some absolute or extreme assessment of whether he had carried out the necessary inquiries – Johnston at 6.100. In that scenario, reasonable diligence meant not the doing of everything possible, not necessarily the using of any means at the plaintiff's disposal, not even necessarily the doing of anything at all; but the doing of that which an ordinarily prudent creditor would do having regard to all the circumstances: see *Adams* at [23], with reference to *Glasper* at 48, quoting *Peco Arts Inc* v *Hazlitt Gallery Ltd* [1983] 1 WLR 1315 at 1323.

[79] Further, in *VFS* (IH) the court had observed at [45] that what reasonable diligence could have discovered at a particular date was a matter of inference drawn from primary facts, and went on to say 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."

Insofar as section 6(4)(a)(i) fraud was concerned, the defenders had deliberately concealed from the group members the presence of prohibited defeat devices, the effect of those devices on their vehicles' NOx emissions, and that the vehicles were not emissions-compliant or registrable for use, so as to disappoint the legal rights of those members, and as a result, those members were induced to refrain from raising proceedings. Concealment of fact could amount to fraud: *VFS* (IH) at [52]. 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 wrongdoing and statements that all vehicles were Euro 5 and 6 compliant and environmentally friendly. The defenders were carrying out software updates from the autumn of 2018, but their correspondence with group members still did not disclose the presence of prohibited defeat devices and their effect on their vehicles' NOx emissions, nor that their vehicles were not emissions-compliant. Further, if the names of the individual fraudsters were required to be stated, the signatories to the Certificates of Conformity, which failing the board members or company officers from time to time could be identified.

[80] Insofar as section 6(4)(a)(ii) error was concerned, both before and after they purchased or leased their vehicles, 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 by way of sales, advertising and marketing materials and brochures; the effect of the Certificates of Conformity; and 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. Additionally, the sixth defender continued to take contractual payments from relevant group members, perpetuating the defenders' fraud and the members' errors. The defenders had put the issue of reasonable diligence in issue, but the mere existence of information in the public domain did not carry with it any implication that it was public knowledge. Whether a group member came across some media reporting, ought to have looked into the matter further, or could with reasonable diligence have discovered therefrom, were matters for proof: *Leonardo Hotel* at [61]. Those group members who were consumers 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 around December 2020.

[81] In relation to group members to whom the provisions of the amended section 11(3) and section 11(3A) of the 1973 Act applied, the "appropriate date" for the quinquennium to commence was postponed – subject to section 11(2) – to the date when the creditor was aware or could with reasonable diligence have become aware that loss, injury or damage had occurred, that such loss, etc., was caused by a person's act or omission, and the identity of that person, whether or not the creditor knew that the act or omission was actionable in law.

[82] There was no authority on the interpretation of the amended provisions of section 11(3) of the 1973 Act, but it seemed clear that actual or constructive awareness of the facts set out in section 11(3A) was required before the prescriptive period started to run. For the purposes of section 11(2), even if a creditor had section 11(3A) awareness, the loss, injury or damage was still deemed to have occurred on, and prescription started to run from, the date when the continuing act or omission ceased. Accordingly, in respect of these group 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. Alternatively, 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 December 2020, and 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 spring 2022. In any event, any running of time was immediately suspended until the date when they saw the advertisements for the current proceedings in December 2020 by virtue of the defenders'

fraud and the group members' induced error under section 6(4)(a)(i) and (ii). The representative party's averments were sufficient to engage sections 11(2), 11(3), 11(3A) and 6(4)(a)(i) and/or (ii) but would require the hearing of evidence before a final determination could be made.

Prescription of the Consumer Credit Act claims

[83] Insofar as group members with applications for orders under the Consumer Credit Act 1974 were concerned, the prescriptive period only started to run when the unfair relationship came to an end: *Patel* v *Patel* [2009] EWHC 3264 (QB), [2009] CTLC 249 at [65] and [66]. In the case of a credit relationship which was ongoing, a cause of action arose under section 140B of the 1974 Act at the time when the court made an order thereunder. In the case of a credit relationship which had come to an end, a cause of action arose on the date when the relationship ended: *Smith* v *Royal Bank of Scotland* at [44] – [45]. It was acknowledged that the representative party did not aver that these proceedings had been commenced within 5 years of each of the group members' respective credit agreements coming to an end. Investigations were ongoing and the representative party sought an opportunity to update his pleadings in this regard once those investigations were complete. Insofar as any credit agreements ended more than 5 years before a relevant claim was made by a relevant group member, the representative party relied on section 6(4) of the 1973 Act for the reasons already stated.

Fraudulent misrepresentation

[84] The representative party accepted that a high degree of specification was usually required where an allegation of fraud was made. *Royal Bank of Scotland* v *Holmes* at 569K to

570D noted 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. The representative party's averments were sufficiently relevant and specific in these aspects as to be suitable for enquiry. The fraud founded upon was the unlawfully concealed use of prohibited defeat devices and the unlawful representation to group member consumers that the vehicles purchased or leased by them complied with all relevant rules and regulations as to NOx emissions and that they could be registered for use on the road.

[85] There were two frauds; the underlying and enabling fraud perpetrated by the first and second defenders upon the German KBA type-approval regulatory authority as regards the use of prohibited defeat devices, without which the third, fourth and fifth defenders could not have supplied the affected vehicles to the UK market, the sixth 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.

[86] The fraud in respect of which remedies were sought was the second of these. It was not suggested that the underlying fraud on the regulatory authorities directly sounded in damages for the group members. Further different pleading requirements should apply in respect of each of the two frauds; 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 ultimately depend upon whether a defender had fair notice of the case brought against him; and 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 to B. In *Richards* v *Pharmacia Ltd c/o Pfizer Ltd* [2018] CSIH 31, 2018 SLT 492 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 fraud on the regulators was the underlying fraud which set in motion the chain of events that enabled the ensuing operative fraud on the group members. The representative party averred the act or representation founded upon – namely, the concealment (or at least failure to disclose the presence) of prohibited defeat devices; the occasion on which the act was committed or the representation made – namely, when type-approval was applied for; and the circumstances relied on as yielding the inference that that act or representation was fraudulent – namely, that the manufacturer defenders knew that type-approval would not

be granted if they disclosed the use of those devices. Further, this fraud was part of the factual background and pleading requirements did not apply 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. In the event that the fraudsters 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 boards of directors and company officers from time to time. At the very least, it might be said that the signatories of the Certificates of Conformity were implicated. Their certification that the vehicles complied with type-approval must mean that they were aware of the relevant requirements, and that the vehicles did not comply without the use of prohibited defeat devices.

[87] Turning to the operative fraud on the group members, the representative party's averments were relevant for enquiry. Whatever might be required in pleadings where the circumstances surrounding a fraud might easily be defined and capable of precise averment, the situation in group proceedings was likely to be different. 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 might 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: cf. *Leonardo Hotel* at [105].

[88] The representative party averred the acts or representations founded upon – namely the false pretence about, concealment of or failure to disclose the presence of the 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 sales and advertising materials and offers of finance. He averred 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. He averred the circumstances relied on as yielding the inference that those acts or representations were fraudulent – namely that the affected vehicles were not emissions-compliant, that the manufacturer defenders knew that they were not so compliant and that the sixth defender knew that the vehicles that it financed, leased or supplied were not so compliant. He averred the persons who made the fraudulent misrepresentations – namely the signatories to the Certificates of Conformity and the members of the boards of directors and company officers from time to time. In relation to the issue of reliance, averments were made to the effect that had the group members known that the vehicles they purchased or leased were not compliant with laws in place at the time of its production, they would not have purchased or leased. Those averments were sufficient for inquiry on the issue of reliance: *Crossley* v *Volkswagen* [2021] EWHC 3444 (QB).

Common Law duty of care in negligent misrepresentation

[89] The case pleaded against each of the defenders fell within established principles and required no novel analysis. The group members' claims (at least insofar as they proceeded at common law) were largely for pure economic loss and, as a generality, such loss was recoverable in delict only if there was some special relationship between the parties. The case against the defenders fell squarely within the category of cases in which the courts had found a duty of care to arise due to a special relationship between parties having been created by an assumption of responsibility. Such an assumption of responsibility required no active acknowledgment. What was required was an assessment of whether the

circumstances were such that the law would deem the maker of the statement to have assumed responsibility: *Smith* v *Eric S Bush* [1990] 1 AC 831, [1989] 2 WLR 790. The governing principle was that there should be a relationship between the parties, which might be general or specific to the transaction, in which one party had assumed responsibility towards the other: *Henderson* v *Merrett Syndicates Ltd* [1995] 2 AC 145, [1994] 3 WLR 761. Absent a direct undertaking from a defender, the court was entitled to consider the position objectively and determine whether there had been an assumption of responsibility as a matter of inference from the defender's conduct: *Customs and Excise Commissioners* v *Barclays Bank Plc* [2006] UKHL 28, [2007] 1 AC 181, [2006] 3 WLR 1.

[90] In a case (such as this) of negligent misstatement or misrepresentation, one indicator of the existence of a duty of care was whether the statement was made for the purpose of inducing a person to take an action which resulted in loss: cf. *Cramaso* at [33] – [34]. In the present case, the representative party sought to prove that the defenders made misrepresentations of regulatory compliance in order to induce group members to purchase their vehicles. Another indicator of the existence of a duty of care was where a defender knew that its statement would be communicated to a class of persons of which a pursuer was part. The present case, where consumers could foreseeably and reasonably be expected to rely on representations made by the manufacturers, suppliers and financers of their vehicles without the need for further independent inquiry, stood in contrast to a commercial transaction where both sides might generally be expected to take independent advice, such as in *NRAM*. In drawing these indicators of the existence of a duty of care together, it was important to note the significance of the issuing of Certificates of Conformity by the first and second defenders in respect of each affected vehicle, the nature of which the representative party averred the other defenders either knew or ought reasonably to have known, and of

the defenders' advertising, sales and marketing materials. Reference was made to the passages in *QB* v *Mercedes-Benz Group AG* at [81] and [82] already set out.

[91] In the present case, the representative party's position was that Certificates of Conformity were issued by the first and second defenders, having been obtained from the regulators by virtue of the concealment of prohibited defeat devices and represented factual misrepresentations made by the signatories of the Certificates, those defenders' board members and by company officers directly to customers as members of a class of persons to whom such statements foreseeably would be made. A Certificate of Conformity represented a statement made by a manufacturer and reliance was reasonably and foreseeably placed thereon by the ultimate customers. It was, in effect, a direct representation to the consumer that the relative vehicle complied with the applicable regulatory requirements. Suppliers, distributors and finance companies (such as the third to sixth defenders) were links in the chain from the manufacturer to the consumers and in effect stood behind the Certificates of Conformity. The representative party averred that the third to sixth defenders knew (or ought reasonably to have known) about the nature and significance of the Certificates of Conformity, and that they knew (or ought reasonably to have known) that group members would place reliance on such misstatements as to the emissions compliance of the vehicles. These were matters for proof.

[92] In relation to advertising, marketing and sales materials, the representative party's case was that the affected vehicles were all supplied, marketed, advertised, sold and leased 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 first and second defenders as vehicle

manufacturers, by the third, fourth and fifth defenders as vehicle suppliers and distributors, and by the sixth defender as a vehicle financer. They were all party to group-wide marketing and sales strategies and knew, or ought reasonably to have known, about the existence of prohibited defeat devices. Misrepresentations in this respect were contained in sales and marketing brochures and price and specification guides produced by the first, second and third defenders alongside offers of finance from the sixth defender. Further, by expressing themselves to be bound by the New Car Codes, the third and fifth defenders falsely portrayed themselves as consumer-friendly and falsely reassured the group members regarding their obligations as manufacturers. The sixth defender also made additional misrepresentations to certain group members when they entered into finance agreements with it. Such misrepresentations were made on the responsibility of the defenders' board members and company officers.

[93] In all of these circumstances, established legal principles were sufficient to impose a duty of care on the defenders in respect of the misstatements made by them to consumers, including the group members. The defenders assumed a responsibility to the group members by their conduct, creating a special relationship and a corresponding duty of care in which pure economic loss was recoverable by the group members for any breach. The representative party's averments were at least sufficiently specific for inquiry. It could not be said at this stage that he was bound to fail in this aspect of his case.

Consumer Credit Act 1974

[94] Certain group members sought orders against the sixth defender under section 140B(1) of the 1974 Act, claiming that the contractual relationship between the relevant parties was "unfair" under section 140A(1). Those claims fell under either or both

of sections 140B(2)(b) and (c) and could therefore be pursued in this court. Failing jurisdiction on that ground, this court had jurisdiction by virtue of Schedule 8 to and section 22(4) of the Civil Jurisdiction and Judgments Act 1982. The defenders did not dispute that this court had jurisdiction to hear the group members' claims 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 imputed to the sixth defender as an "associate" of the first and second defenders by virtue of sections 140A(3) and 184(3) of the 1974 Act. The claims against the first and second defenders constituted "any proceedings" for the purposes of section 22(4) of the 1982 Act, and the group members' applications under the 1974 Act were matters which were either ancillary or incidental to those proceedings (insofar as they occurred in subordinate conjunction with the other claims advanced) or which required to be determined for the purposes of a decision therein. The meaning of the word "incidental" was "occurring or liable to occur in fortuitous or subordinate conjunction with something else of which it forms no essential part". The representative party offered to prove certain matters, such as that misrepresentations were made by the defenders, which could be relevant considerations as to whether a given credit agreement was fair. That was sufficient to make the question of whether the credit agreements were fair ancillary or incidental to these proceedings.

[95] It was accepted that the court was not empowered, under section 140B of the 1974 Act, to make an award of damages in respect of an unfair credit agreement. However, the representative party's pleadings made it plain that the second conclusion of the summons included sums which might be ordered for payment under section 140B(1) of the 1974 Act, including repayment of past, and reduction of future, sums due.

Competition Law

[96] The representative party averred that the first defender, under its previous name Daimler AG, participated in a technology suppression cartel relating to vehicle production. Between around 2006 and 2014 Daimler AG was, together with Audi, Volkswagen and BMW, part of a group of manufacturers which was found to have breached competition law by regulators in both Europe and South Korea. The group did so by colluding to restrict the development of emission control systems and avoid competition on NOx cleaning beyond regulatory requirements, despite the relevant technology being available to do so. The European Commission's investigation and subsequent settlement decision of 8 July 2021 and the Korea Fair Trade Commission's analogous findings of February 2023 were set out.

[97] The representative party believed and averred that the sanctioned cartel activity in which the first defender engaged related to the use of prohibited defeat devices as part of a broader restriction of NOx emissions controls in affected vehicles. The current proceedings did not directly seek remedies for any breach of competition law. The existence of prohibited defeat devices in the defenders' vehicles was, however, of central importance to this action and the remedies sought. The representative party offered to prove that the first defender had previously been part of a technology suppression cartel which involved emissions reduction systems. The European Commission's settlement decision noted that the cartel's members, including the first defender, held regular technical meetings to discuss the development of NOx-cleaning selective catalytic reduction technology. The outcome of this was collusion to avoid competition on improved NOx cleaning despite the relevant technology being available. That was important factual context, particularly when read in conjunction with the representative party's averments relating to the involvement of Robert Bosch GmbH in supplying software to Daimler AG, Audi, Volkswagen and BMW.

[98] The representative party sought to establish that the defenders were aware from an early stage that they were using prohibited defeat devices. The defenders' own pleadings in respect of their emissions control system design were also of significance; they averred that the development and design of those systems in relevant vehicles took approximately four years for each vehicle model, beginning between 2005 and 2006 for Euro 5 vehicles and between 2009 and 2010 for Euro 6 vehicles, at a time when key technologies, such as selective catalytic reduction, had only recently been introduced for use in passenger cars. The breaches of competition law in Europe and Korea related to the development and availability of selective catalytic reduction technology over the same period.

Unlawful means conspiracy

Agreement or Combination

[99] An express agreement might found a claim for unlawful means conspiracy, but was not required: it was sufficient that there was evidence of "combination": *Kuwait Oil Tanker* at [111]. 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]; *Kuwait Oil Tanker* at [112]. The representative party 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 distinct role. The defenders had a common ownership structure and there were overlaps in their corporate leadership. That provided sufficient material from which the court might infer a conspiracy in respect of the affected vehicles. The first and second defenders had undertaken the manufacture of the relevant vehicles and the others had played their various separate roles towards the ultimate aim of selling or

leasing those vehicles to group members on a basis that was known to be false. It had been further observed in *Kuwait Oil Tanker* at [111] and [132] that it was not necessary for the conspirators all to join the conspiracy at the same time, but simply that they were sufficiently aware of the surrounding circumstances and shared the same object so that it might properly be said that they were acting in concert at the time of the acts complained of.

Unlawful means

[100] The unlawful means relied upon by the representative party were fraudulent misrepresentations. If any relevant case had been stated in that respect, that was sufficient for the purposes of his pleadings on unlawful means conspiracy. It was accepted that the allegations of negligent misrepresentation could not constitute unlawful means for the purposes of the delict of unlawful means conspiracy.

Intention to harm

[101] The representative party's case on intention to harm was straightforward. The vehicles manufactured, distributed 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 thus caused to group members by means of the purchase of a vehicle on a basis which was untruthful. Targeting of specific individuals, or knowledge of the identity of the victims of the conspiracy, were not essential elements 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), [2019] Lloyd's Rep FC 62 at [126] and *4VVV Ltd* v *Spence* [2024] EWHC 2434 (Comm) at [636].

[102] Neither *WH Newson* nor *Emerald Supplies* established a contrary proposition, both being concerned with circumstances in which it was not possible to establish that the conspiracy would, in fact, have caused a loss to any victims (whether of known or unknown identity): *E D & F Man Capital Markets Ltd* v *Come Harvest Holdings Ltd* [2022] EWHC 229 (Comm) at [490]ff, especially [502] to [516]. 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 the relevant behaviour was directed at all purchasers of the affected vehicles rather than a single purchaser was of no moment. The group members brought themselves within the scope of the dictum of Lord Nicholls in *OBG Ltd* v *Allan* [2007] UKHL 21, [2008] 1 AC 1, [2007] 2 WLR 920 at [167]:

> "Take a case where a defendant seeks to advance his own business by pursuing a course of conduct which he knows will, in the very nature of things, necessarily be injurious to the claimant. In other words, a case where loss to the claimant is the obverse side of the coin from gain to the defendant. The defendant's gain and the claimant's loss are, to the defendant's knowledge, inseparably linked. The defendant cannot obtain the one without bringing about the other. If the defendant goes ahead in such a case in order to obtain the gain he seeks, his state of mind will satisfy the mental ingredient of the unlawful interference tort."

The foundation of the delict was fault. A high degree of blameworthiness was called for, because intention served as the factor which justified imposing liability for loss caused by a wrong otherwise not actionable: *OBG* at [166]. 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. An intention to injure might, in such circumstances, be inferred from the act giving rise to liability: *Kuwait Oil Tanker* at [120]. Moreover, tested against the broader standard of blameworthiness which underlay the requirement for intention, such conduct was clearly sufficient to justify the imposition of liability.

Knowledge of unlawfulness

[103] The majority of the Court of Appeal in *Racing Partnership* held that a claimant must prove that the defendants knew (or at least turned a blind eye to) 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* at [103]. Lewison LJ dissented on this point, but only where the unlawful means consisted of a violation of some private right (at [265]).

[104] Whether by expressing support for the dissenting view of Lewison LJ the Inner House in *Kidd* v *Lime Rock Management LLP* 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 lay in the unlawful conduct of the first and second defenders towards the KBA type-approval regulatory authority as regards the use of prohibited defeat

devices – without which the third, fourth and fifth defenders could not have supplied the affected vehicles to the UK market, the sixth defender would not have been 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. 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 amongst 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: cf. *Moray Offshore* at [72].

Decision

[105] 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* (IH) at [73].

[106] 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. The members of the group number many thousands. 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, at least at the stage of debate, quite all of the material for proof preparation which in other proceedings it would be entitled to expect.

[107] 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.

[108] 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 is 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

[109] At the heart of the representative party's case is the allegation that the group members were defrauded by the deliberate making of statements, whether explicitly or implicitly, about the affected vehicles which were known to be false and for which the various defenders are said to be responsible, against the background of a separate but related fraud against the regulators by the first and second defenders which is not in itself relied upon by the group members but explains why what was said to the members is alleged 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.

[110] 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.

[111] Turning from the abstract to the particular, the representative party has made it sufficiently clear 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. I accept that, against the regulatory background already described, the importing of vehicles for the purposes of sale on the UK end-user market, and their supply, distribution and financing in that market by those associated with their manufacturers, may well objectively be regarded as carrying with it an implied representation to those end users that the vehicles in question are indeed emissions-compliant. 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.

[112] The mode by which the statements in question were made, and when they were made, is also adequately specified for the purposes of these group proceedings. Equally, the circumstances which are said to render the statements false is very clear; they all 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 made by or attributed to each 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.

[113] 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 all of the defenders from time to time are 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 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. 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 corporate 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.

[114] I conclude that the representative party's averments about the fraud allegedly perpetrated on the group members are in every necessary respect suitable for enquiry.

Duty of care in negligence for misrepresentations?

[115] The representative party's claim in negligence seeks reparation in respect of losses 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 claimant group members on the other, that having been suggested as the touchstone for liability in this sphere of law 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.

[116] 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* 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*; *Henderson* v *Merrett Syndicates Ltd*; *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*; *HXA*).

[117] 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.

[118] Applying these principles to the averred facts of the present case, 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.

[119] 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.

[120] 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.

[121] In practical terms that means that it appears that the case in negligent misrepresentation against the third to sixth defenders is irrelevant, they not being alleged to have made any direct statements about the emissions compliance of the vehicles they respectively imported, supplied, distributed or financed. Certain aspects of that case as stated against the first and second defenders may also be irrelevant, but that based on their issue of Certificates of Conformity is undoubtedly relevant. 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.

[122] A further argument was advanced, under reference to *Page* v *Smith*, to the effect that certain heads of loss claimed, specifically distress, inconvenience and loss of enjoyment of vehicles, could not relevantly be sought in respect of the negligence alleged in this case. I do

not find *Page* helpful in resolving that question, and the matter was not otherwise touched upon. At this stage, particularly where it remains unclear just quite what might be comprehended within the broad heads of claim mentioned by the representative party and to what extent losses under those heads may be regarded as arising naturally and directly out of the wrong said to have been done and thus to have been reasonably foreseeable to the defenders, I am not persuaded that it would presently be appropriate to refuse probation to any averments on this ground.

Unlawful means conspiracy

[123] Although the taxonomy of intentional delicts causing economic law was authoritatively restated nearly twenty 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.

[124] 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.

[125] Their Lordships pointed out that the unifying feature of the law 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.

[126] 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. In this more nuanced 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. 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.

[127] 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 those means 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.

[128] 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.

[129] In the present case, the core allegation is 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 of 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.

[130] 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. 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.

[131] The defenders' other 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.

[132] 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.

[133] 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

[134] 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. 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.

[135] 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.

[136] 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 award 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.

[137] 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.

Prescription

[138] 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 4 May and 21 July 2022 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 on the one hand 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 governed by the terms of the Act before the relevant amendments, and on the other those who acquired that interest on or after 1 June 2017, whose claims will thus be governed by the prescriptive regime as amended. The more recent amendments to section 6(4) of the Act are not claimed materially to affect the position of any member currently on the register.

Members who acquired vehicles before 1 June 2017

Section 11(2)

[139] 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. The language and interpretation which section 11(2) has consistently received make it clear that its focus is on continuing acts, neglects or default and not only on cases of continuing loss and damage.

[140] 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.

[141] 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.

[142] 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.

[143] *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).

[144] *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.

[145] 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 believe in 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).

[146] 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 at around the end of 2020 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).

[147] Parties did not discuss at debate the precise nature and effect of the EU legislation relied upon by the representative party. In those circumstances, 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 the 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.

[148] It is arguable that a legal duty to correct a misrepresentation may arise if and so long as it remains current in the sense already discussed and a reasonable person in the position

of the representor would appreciate that representees might still be relying on it. Those elements of the representative party's case asserting that such a continuing duty arose in relation to the representations complained of are suitable for enquiry. That applies, too, to the case advanced based on the implicit representations said to flow from the supply, distribution, financing, etc., of affected vehicles, even though I have already determined that that case is relevant only insofar as based on the allegation that those representations were fraudulent and not merely negligent.

[149] The representative party further claims that the sixth 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, though it would apply to a case based on misrepresentation, and a claim based on quality failure has the potential to be saved by the operation of section 6(4) of the 1973 Act, next to be discussed. 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 sixth 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 implied 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)

[150] 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 if 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.

[151] 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.

[152] 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". 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.

[153] 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.

[154] 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.

[155] 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.

[156] I do not accept that *Tilbury Douglas* goes so far as to assert that the conduct which gives rise to a cause of action can in no circumstances also be prayed in aid by the creditor in the obligation for the purposes of section 6(4), and would not accept that proposition if independently advanced. The operation of section 6(4) is altogether more subtle than that. 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 them but positively asserting, in the various ways condescended upon, that their 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.

[157] 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* (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.

[158] 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* (IH).

[159] 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 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*, unreported OH 17 December 1991 and Lord Hardie in *Graham* v *Bell*, unreported OH 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 might maintain could with reasonable diligence have led him to discover the fraud or error.

[160] In any event, the question of onus in this connection is of no moment in the present case, as I permitted in the course of the debate the reinstatement of averments by the representative party which he had for an obscure reason previously deleted by adjustment, and which set out clearly what the representative party's position is on what reasonable diligence could and could not have discovered, so that battle has now certainly been joined on the pleadings in relation to that question, not least in relation to what the 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* (IH) 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. It is quite clear from the pleadings that the representative party's case on section 6(4) extends to all group members, is specified sufficiently in the context of group proceedings, and alleges that a concerted fraud (whether or not separately amounting to an unlawful means conspiracy) was carried out on all group members. The extent to which he will ultimately be able to establish that remains to be seen, but he entitled to the opportunity to try to do so.

Members who acquired vehicles on or after 1 June 2017

[161] Parties were agreed that there was no material difference for present purposes between the unamended and amended versions of section 11(2), and thus the same conclusions as already set out in relation to the unamended version apply equally in this context. Section 6(4) is, as from 28 February 2025, in slightly different terms from those which have been discussed, and a new subsection (4A) has been added, but the changes are essentially confirmatory of the construction which the provisions had already been judicially given, and would not produce any different outcome for any group members who might be compelled to rely on its present form.

[162] 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 effectively stands or falls on a determination of what these members could with reasonable diligence have discovered about the matters set out in section 11(3A) – i.e., that loss, injury or damage had

occurred, that it was caused by a person's act or omission, and the identity of that person – more than five years before the relevant dates for their claims. As already explained in the context of section 6(4), 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 (in effect, that reasonable diligence on the part of group members could not have discovered the relevant matters until about the end of 2020) is adequately specified and relevant for proof before answer.

[163] The question of onus was again raised in this context, but given that the pleadings for the representative party plainly and sufficiently put the matter in issue and represent a case which requires inquiry to resolve, it is an academic question which requires no answer. I do not consider that the analogy which the defenders sought to draw with the question of the onus of showing "reasonable practicability" in the context of the personal injury limitation provisions contained in section 17 of the 1973 Act is a helpful one, not least in that the language and structure of section 17 is rather different from that of section 11(3), and because it will – as a matter of generality at least – be easier for a pursuer to give an account of the state of his knowledge or lack thereof about the relevant questions in the personal injury context than will necessarily be the case in the much wider range of situations in which section 11 finds a role. As indicated, however, the matter is of no moment in the present proceedings.

Prescription of Consumer Credit Act claims

[164] 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. The defenders did not seek actively to argue otherwise. 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.

[165] It follows that any claim for a remedy under the 1974 Act which was made in these proceedings within the five-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.

"Competition Law" averments

[166] I accept the representative party's submissions that his averments about the collusive practices which he says are evidenced by the outcome of the competition law investigations upon which he condescends are relevant to that part of his case which asserts that the first and second defenders were well aware of the effect of the engine arrangements which formed part of their vehicles and indeed intended that effect. That is in turn relevant to the allegations of fraud made by the representative party and is a matter suitable for enquiry.

Disposal

[167] 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.