



Neutral Citation Number: [2024] EWHC 110 (KB)

Case No: QB-2021-001817
and other claims listed in Schedule 1

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/01/2024

Before :

MASTER FONTAINE (sitting in retirement)

Between :

ETHAN THOMAS WRAGG AND OTHERS

Claimants

- and -

(1) OPEL AUTOMOBILE GMBH

Defendants

(2) ADAM OPEL GMBH

(3) VAUXHALL MOTORS LIMITED

(4) IBC VEHICLES LIMITED

(5) VAUXHALL FINANCE PLC

(6) PSA RETAIL UK LIMITED

(7) VARIOUS OTHERS (AUTHORISED DEALERS)

Adam Heppinstall KC and Weishi Yang (instructed by Milberg London LLP, Leigh Day LLP, Pogust Goodhead and Keller Postman UK Limited) for the Claimants
Leigh-Ann Mulcahy KC and Charlotte Tan (instructed by Cleary Gottlieb Steen and Hamilton LLP) for the First and Second Defendants

Hearing date: 11 January 2024

Approved Judgment

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SENIOR MASTER FONTAINE

Master Fontaine:

1. This was a hearing (“the consequential hearing”) to determine costs and other consequential matters following the handing down of judgment in this matter [2023] EWHC 2632 (KB) on 23 October 2023 (“the applications judgment”) in respect of applications issued by the First and Second Defendants (“the German Defendants”) dated 11 October 2022, 24 January 2023, 17 February 2023 and 20 April 2023 in the claims listed at Schedule 1 to the applications judgment. The same abbreviations are used in this judgment as in the applications judgment, and this judgment should be read in conjunction with the applications judgment.
2. There are four consequential matters for determination:
 - i) What, if any, sanction in costs against the Claimants is appropriate in respect of my finding that there was material non-disclosure of limitation defences available to the German Defendants by the Claimants in without notice applications for permission to serve claim forms out of the jurisdiction in 31 claims;
 - ii) What costs order is appropriate in respect of the applications made by the German Defendants, taking into account any appropriate costs sanction;
 - iii) Application for permission to appeal by the German Defendants;
 - iv) The appropriate wording of the order to be made in respect of the applications judgment, and any other directions required.

Sanction and Costs

3. These issues are related so for convenience I deal with them together.
4. There were three issues dealt with in the applications judgment: (i) the limitation non-disclosure, (ii) the alternative forum non-disclosure and (iii) the extension applications (to which the limitation non-disclosure was also relevant). I consider that there should be a sanction in costs for the material non-disclosure of the limitation issues. I rely on the authorities referred to at §§17-23 and §§40 – 41 of the applications judgment. It is well established that an actual or potential limitation defence to a claim is a material factor in a judge’s decision as to whether there is a serious issue to be tried when considering an application to serve out of the jurisdiction.
5. The German Defendants seek an order that the Claimants pay the German Defendants’ costs of their applications on an indemnity basis, to be assessed if not agreed. The Claimants submit that the appropriate sanction would be that the German Defendants pay 50% of the Claimants’ costs of and occasioned by the Part 11 Applications in any event, on the standard basis and subject to detailed assessment if not agreed, subject to satisfying the indemnity principle.
6. I consider that the appropriate sanction is: (i) the Claimants to pay the German Defendants’ costs of the limitation non-disclosure issue on the indemnity basis and (ii) that the Claimants’ forgo some of the costs which they would otherwise been likely to

have received from the German Defendants in respect of the issues which they were successful in opposing. My reasons for this conclusion follow.

7. Although the Claimants succeeded in opposing the German Defendants' applications for setting aside the orders for service out of the jurisdiction in respect of the limitation non-disclosure issue, I found there had been such material non-disclosure, so it is appropriate for the Claimants to bear those costs, and on the indemnity basis, given that this issue concerned material non-disclosure, which also was not acknowledged by the Claimants in their opposition to the applications.
8. I also consider that a further sanction in costs should be imposed, to reflect the disapproval of the court in respect of material non-disclosure in without notice applications, and to enforce the deterrent effect of such conduct by other litigants.
9. I will evaluate the costs of each issue as a percentage of the total costs of the German Defendants' applications, based upon my own assessment of the likely work and time taken by each issue, as the increased costs of an issue based detailed assessment are likely to be disproportionate, and as the judge hearing the applications I am best placed to make an informed assessment of the likely work and time incurred by each issue. I consider that the limitation non-disclosure issue and the extensions applications each took up approximately 40% of the work and time involved, and the alternative forum non-disclosure issue took up approximately 20% of the work and time involved.
10. If the extensions applications and the alternative forum non-disclosure issue fell to be dealt with without any sanction, the general rule would be that as the successful party the Claimants would be entitled to their costs of those issues. I consider that an appropriate further sanction would be for the Claimants to forgo their costs of the extension applications, so there will be no order for costs in respect of that issue. I consider that the general rule should apply in respect of the alternative forum issue, where the German Defendants failed, and where in my view, it was always foreseeable that they would fail. Accordingly, the order that I consider to be appropriate in respect of costs is:
 - i) The Claimants to pay the German Defendants 40% of their costs of the applications on the indemnity basis.
 - ii) The German Defendants pay the Claimants 20% of their costs of the applications on the standard basis, such order to be subject to the Court's decision on the German Defendants' case that an order of costs in favour of the Claimants would infringe the indemnity principle, such argument to be considered at a hearing listed to be heard between 26 and 28 February 2024 before Senior Master Cook.
 - iii) There be no order for costs in respect of the remaining costs of the applications.
11. I will consider the amount of any interim payment on account of costs either of my own initiative, or upon receipt of brief written submissions from the parties, which I should be grateful to receive by 10.00am Tuesday 16 January 2024, so that the order can be made as soon as possible.

12. In reaching this determination of costs I take account of the penal nature of the sanction for material non-disclosure, the need for the court to mark its displeasure, and the necessary deterrent effect to other litigants. I temper the sanction with the recognition that this is effectively satellite litigation, which has not advanced the issues between the parties, and incurred very substantial amount of time and costs. As noted by the Claimants' leading Counsel, there was no application to set aside such order on jurisdictional or *forum non conveniens* grounds, where the issue of such non-disclosure would make no difference.

Permission to Appeal

13. The German Defendants seek permission to appeal all issues save for the alternative forum issue, and have provided draft grounds of appeal. There are nine grounds of appeal in relation to the limitation non-disclosure issue and 11 grounds of appeal relating to the extension applications. The German Defendants submit that such grounds would have a real prospect of success, and also that there is some other compelling reason for the appeal to be heard, pursuant to CPR 52.6(1) (a) and (b).
14. The determinations that were made in the applications judgment were primarily matters of discretion, in particular those in relation to the appropriate sanction for the limitation non-disclosure. Where a ground is said to be also based upon an alleged error of law I respectfully disagree, as the instances relied upon all appear to be based upon an exercise of discretion based upon the guidance in the authorities. In some of the grounds based on alleged errors of law, I disagree with the description of the paragraph(s) of the judgment.
15. There are three grounds based upon an alleged error of fact, in respect of information held by both Claimants and Defendants relating to dates of acquisition of vehicles by Claimants, relevant to limitation. It is unclear why neither party notified me of such an error of fact after receipt of the draft judgment on 31 August 2023, and in any event before judgment was handed down on 23 October 2023, in particular as I have been informed that there was correspondence about the issue between the parties following their receipt of the draft judgment. My understanding is that parties should inform the judge of any typographical errors and obvious errors of fact in a draft judgment, so that the judge has the opportunity to correct these, if they consider it appropriate, before judgment is handed down. However, I consider that this is not an error that would have been likely to have changed my decision as to the consequences of the non-disclosure, as the judgment recognised that a substantial number of claims were likely to be time barred, and there remained the question of not being able to identify what proportion of the time barred claims would have been able to rely on S. 32 Limitation Act applications, a matter that could not have been dealt with in a paper application for permission to serve out of the jurisdiction where there were over 100,000 Claimants at the time of the applications. It is apparent from the order of the President of the King's Bench Division, and Cockerill and Constable JJ dated 11 December 2023 that limitation is recognised to be a substantial issue and directions have been given in that order for a hearing in October 2024 for disposing of common issues of principle in all existing NOx group litigation, including limitation. The German Defendants will have the opportunity to participate in that exercise, and to submit limitation defences in appropriate claims.
16. I therefore consider that the grounds of appeal have no real prospect of success.

17. With regard to the additional basis upon which permission is sought, namely some other compelling reason for the appeal to be heard, the German Defendants submit that the unique position of this particular group action, with multiple claimants on each claim form, including both time barred claims and non-time barred claims, has the ability for the appeal court Emissions Judges to provide some guidance in relation to group actions, in particular the 13 groups of vehicle emissions claims currently issued in this court, with over 1 million Claimants overall, which would satisfy this criteria. In particular, certain matters have been suggested, such as the extent to which the right of foreign defendants to require service in their place of domicile is to be balanced with the principle of proportionality in group litigation, the extent to which parties in group litigation can be treated differently to parties in unitary actions, and the correct approach to the mixing of meritorious and non-meritorious claims on one claim form.
18. I do not consider that the applications judgment raises issues of general application and the matters that I have addressed concern the particular steps taken in this group action. Further, proportionality is part of the overriding objective and applies to group litigation as much as unitary claims.
19. With regard to the extension applications, the facts are particular to this claim and not relevant to the facts in any of the other group claims. I am not aware of any other of the NOx Emissions group claims having experienced similar issues, save that some other defendants who have instructed London solicitors have also insisted on their right to be served in their own jurisdiction via the Hague Convention route. In some, or possibly all, of those claims the court has made an order for substituted service on the defendants' London solicitors, primarily for reasons concerned with the court's resources. As far as I am aware none of those orders have been the subject to challenge. If the German Defendants were concerned that the order made to that effect in this case was unfair, or did not properly balance the application of proportionality with the rights of a foreign defendant to be served in their own jurisdiction, the German Defendants could have applied to set aside that order, and the issue could have been considered with the benefit of their submissions, but they have not done so. I understand that at least one defendant in a NOx emissions claim which has instructed London solicitors has reached a sensible agreement with the Claimants for service on their London solicitors, whilst preserving their rights to challenge jurisdiction.
20. I do not consider that the reasons given demonstrate some other compelling reason for the appeal to be heard.
21. Accordingly, I do not give permission to appeal. The German Defendants are of course entitled to renew their application to a High Court judge, which is likely to be one or both of the Emissions Managing Judges. The parties have helpfully agreed a date of 29 January 2024 for Notice of Appeal to be lodged and served, so that the permission hearing, and if granted, an appeal hearing can be listed before the March hearing, as required by the letter from Cockerill and Constable JJ dated 8 January 2024. I shall recommend to the Managing Judges that a "rolled-up" permission and appeal hearing be listed in order to expedite the process.

Form of order

22. Using material from both parties' draft orders I have prepared a proposed form of draft order for the parties to consider. The parties will note that I have accepted the

submissions of the German Defendants as to acknowledgements of service and granted the extensions sought in respect of filing any further acknowledgments of service. I have also removed the reference to the Additional Applications in the Claimants' draft order, as I accept that I cannot deal with these when they have not come before me. They will have to be dealt with in the usual way. I have not included the German Defendants' paragraph 3, as that is a matter for determination at the costs hearing before Senior Master Cook. The parties have now sent amended draft orders and I will make an order in the form of the Defendants' draft order, with the addition of paragraph 4(iv) in the attached amended draft, when judgment is handed down.

Interim Payment

23. The German Defendants seek an interim payment on account of their costs. The parties addressed this issue in written submissions. The German Defendants seek a sum of £140,160, being 60% of the 40% of their total costs as set out in their statement of costs. The Claimants submit that a sum in the region of £30,000-£40,000 is an appropriate figure for an interim payment of costs.
24. CPR 44.2(8) states that: "*Where the court orders a party to pay costs subject to detailed assessment it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so*". Neither party has suggested that there is good reason not to do so in this case. The commentary in the White Book Vol I at 44.2.12 provides assistance as to the principles set out in the relevant authorities as to how the court should determine "a reasonable sum", which I do not repeat here.
25. The following factors are, in my view, relevant to the amount of the interim payment:
 - i) The total amount of the German Defendants' costs for the hearing and whether they are excessive in any respect;
 - ii) The fact that costs are to be awarded on the indemnity basis;
 - iii) Whether there should be any notional "set-off" of costs due or likely to be due to the Claimants.

The Amount of Costs claimed by the German Defendants

26. The hearing of the German Defendants' applications was listed for two days on 15 and 16 June 2023 (although it in fact lasted only 1.5 days). The consequential hearing was listed for one day, but in the event took only half a day, and the parties had to prepare written submissions on the issue of the appropriate interim payment. The German Defendants' statement of costs amounts to a total of £584,753.53, which is in my experience a sum outside the norm of costs usually allowed for interlocutory hearings of such length. However this is group litigation with tens of thousands of claimants so different considerations may apply in such cases.
27. The Claimants submit that an appropriate starting point for 100% of the German Defendants' costs is £300,000. The Claimants have criticised the hourly rates charged by the German Defendants' solicitors, which are well in excess of the guideline hourly rates. However, in complex commercial litigation the guideline hourly rates can and often are exceeded. Both parties have referred me to the judgment of Males LJ in

Samsung Electronics and ors v LG and ors [2022] EWCA Civ 466 where the judge noted that the fees charged by Cleary Gottlieb Steen and Hamilton LLP (the same solicitors as those instructed by the German Defendants) charged rates well above the guideline rates and reduced their fees for a one day appeal from c. £72,000 to c. £55,000, including a reduction in hourly rates. The German Defendants point out that the rates charged in that case were significantly higher than those charged here, and that Males LJ allowed rates in excess of the guideline rates, which were also higher than charged in these applications. Leading Counsel for the German Defendants has also noted that their solicitors' hourly rates are generally less than those charged by the Claimants' solicitors. That does not necessarily mean that such rates will be allowed on detailed assessment in this case.

28. The Claimants also criticise the extent of partner and senior associate involvement which exceeds that of junior associates and paralegals, and submit that there is therefore likely to be an element of duplication in the work done. There is criticism of the amount of work done on documents.

Costs awarded on the indemnity basis

29. This is of course a factor to be considered, although costs awarded on this basis are not intended to be penal in nature, but rather the burden of proof of demonstrating that the costs claimed are reasonable shifts to the paying party. Thus the receiving party cannot be awarded costs that are unreasonable. But the fact that costs are awarded on an indemnity basis is, in my view, a factor that a court is entitled to take into account in its approach to what is a reasonable sum for an interim payment, as it is likely that the costs awarded will be higher than if assessed on the standard basis.

Whether there should be any notional "set-off" in respect of the Claimants' costs

- i) The Claimants' submit that, taking a figure of 40% of its suggested starting point of £300,000, namely £120,000, reducing that sum by 50% to reflect the likely level of recovery, to include a margin for error in the estimation of costs, reduces the amount of what would be a reasonable sum for an interim payment to £60,000. The Claimants further submit that this figure should be reduced by a notional set-off of the costs that are due or likely to be due to them in respect of the following:
- a) the German Defendants are to pay 20% of the Claimants' costs, on the standard basis (subject to the court's determination in respect of the indemnity principle to be determined at the costs hearing in February); and
 - b) there is likely to be an expedited rolled up hearing of the German Defendants' application for permission to appeal, and, if granted, appeal, and that such applications are unlikely to be successful so that there is likely to be a further award to costs in the Claimants' favour.
30. With respect to the first issue, I accept the submissions of the German Defendants that this would be inappropriate, first the Claimants have not served or filed a costs statement so I cannot estimate the likely amount of any notional interim payment, secondly the Claimants expressly stated that they did not seek an interim payment on

account of such costs, and thirdly because the costs payable to the German Defendants are by way of sanction for the limitation non-disclosure. With regard to the second issue, it would be inappropriate for me to take into account any costs order that may or may not be made by an appeal judge at a permission/appeal application that has not yet been heard.

Determination of the amount of the interim payment to the German Defendants.

31. The German Defendants' costs claimed in respect of the limitation non-disclosure issue amount to £233,901.41, or rounded up to the nearest £100, £234,000. The usual percentage ordered in respect of an interim payment is 60% of the costs claimed, which is what the German Defendants seek. Even allowing for the fact that the costs are awarded on the indemnity basis, and the fact that this is complex commercial group litigation, I consider that the costs claimed in respect of hearings totalling 2 days are very high indeed. I consider it is highly likely that the hourly rate and the time allowed for work done would be reduced on detailed assessment. I therefore consider that in order to arrive at an estimate of a reasonable sum for an interim payment, and to ensure that the interim payment is well within the margin of the likely total of costs to be awarded, the percentage of the costs claimed should be reduced to approximately 45%, namely £105,000.

SCHEDULE 1- Claim Numbers of Claims to which this Judgment relates

1. QB-2021-004264 (*Godó*)
2. QB-2021-004312 (*Oxendale*)
3. QB-2022-000197 (*Ambrose*)
4. QB-2022-000200 (*Barton*)
5. QB-2022-002671 (*Thompson*)
6. QB-2022-002654 (*Waring*)
7. QB-2022-002663 (*Jeffery*)
8. QB-2022-002667 (*Pattinson*)
9. QB-2022-002388 (*Swindells*)
10. QB-2021-004287 (*Abbasi*)
11. QB-2021-003743 (*Ayers*)
12. QB-2021-004302 (*Smith*)
13. QB-2022-000204 (*Sherwood*)
14. QB-2022-002106 (*Burns*)
15. QB-2021-001817 (*Wragg*)
16. QB-2022-000139 (*Caddick*)
17. QB-2022-000206 (*Wainwright*)
18. QB-2022-001753 (*Mercury*)
19. QB-2021-002284 (*Sabbagh*)
20. QB-2021-002521 (*Doyle*)
21. QB-2021-003141 (*Haque*)
22. QB-2021-003492 (*Ryan*)
23. QB-2021-004036 (*Scanlan*)
24. QB-2021-004615 (*Wilde*)
25. QB-2022-000201 (*Naylor*)
26. QB-2022-000641 (*Mason*)
27. QB-2022-001269 (*Willis*)
28. QB-2022-001285 (*Aarre*)
29. KB-2022-003132 (*Abbey*)
30. KB-2022-003233 (*Rogers*)
31. KB-2022-004479 (*Butcher*)