Neutral Citation Number: [2024] EWHC 1138 (KB)

Appeal Court Ref : KA-2024-000018
Claim No: QB-2021-001817 & Ors

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

ON APPEAL FROM:
SENIOR MASTER FONTAINE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 April 2024

Before :

MR JUSTICE CONSTABLE

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Between :

ETHAN THOMAS WRAGG & ORS	**Respondents/ Claimants**
- and -	
(1) OPEL AUTOMOBILE GMBH **(2) ADAM OPEL GMBH**	**Appellants/ Defendants**
(3) VAUXHALL MOTORS LIMITED **(4) IBC VEHICLES LIMITED** **(5) STELLANTIS FINANCIAL SERVICES UK LIMITED** **(6) STELLANTIS & YOU UK LIMITED** **(7) VARIOUS OTHERS (ALLEGED AUTHORISED DEALERS)**	

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Leigh-Ann Mulcahy KC, Charlotte Tan & Sophia Hurst (instructed by Cleary Gottlieb Steen & Hamilton LLP) for the Appellants
Adam Heppinstall KC, Ognjen Miletic & Weishi Yang (instructed by Milberg London LLP, Leigh Day LLP, Pogust Goodhead and Keller Postman UK Limited) for the Respondents

Hearing date: 17 April 2024

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Mr Justice Constable:

Introduction

1. The Appellants are the First and Second Defendants, domiciled in Germany, ('the German Defendants') in a claim brought by a large number of Claimants who allege that certain Vauxhall-branded diesel engine vehicles manufactured by the German Defendants and/or supplied by the Defendants contain unlawful defeat devices. A Group Litigation Order ('GLO') in these proceedings was made, following a hearing before Senior Master Cook on 17 and 18 January 2024. This is one of a number of GLOs which are being managed alongside other similar claims brought against all major diesel manufacturers, in what is known as the Pan-NOx Litigation.

2. Between 11 May 2021 and 15 November 2022, the Claimants issued 31 claim forms. During the early correspondence, Cleary Gottlieb Steen & Hamilton LLP ('Cleary'), acting on behalf of the German Defendants (1) denied liability including on the basis that "*a very significant number of your clients' claims will be time-barred in respect to at least some causes of action"*; (2) informed the Claimants that Cleary was authorised to accept service on behalf of certain UK domiciled defendants but no other entity (i.e. including the German Defendants).

3. From 10 November 2021 onwards, the Claimants issued *ex parte* applications seeking: (i) permission to serve the German Defendants in Germany (the 'Service Out Applications') and (ii) extensions of time in order to effect service (the 'Extension Applications') (the first of which was dated 10 November 2021 (the '10 November 2021 Application'). Those applications were granted (the 'Service Out Orders' and the 'Extension Orders'). Appendix A to the Appellants' Skeleton Argument, and appended as Appendix A to this judgment, tabulates for each of the 31 claim forms the date of issue, the original deadline for service out, the date of Service Out Application, the date of Extension Application(s), the date service out was permitted by Order of Senior Master Fontaine, the date that extensions were granted, the total period of extension granted as a result of Extension Orders by Senior Master Fontaine (ranging between 2 months and 3 days and 1 year, 4 months and 20 days), and the dates of service on each of the two German Defendants.

4. There is no dispute that the evidence in support of the first 26 applications failed to mention limitation entirely. In due course, it was found that this breached the duty to give full and frank disclosure, and on the appeal before me, there was no cross-appeal in this respect. Five subsequent applications for Service Out Orders (with two of those also seeking Extension Orders) relied upon evidence which referred to limitation, but the Appellants say that this remained in an incomplete and partial manner which still did not amount to full and frank disclosure to the Court.

5. In early September 2022, the first claim forms were served on the German Defendants in Germany. On 11 October 2022, within the time prescribed by the CPR, the German Defendants made their first applications pursuant to Part 11 to set aside the relevant Service Out and Extension Orders.

6. On 14 October 2022, Milberg London LLP ("Milberg"), solicitors for the Claimants, provided the German Defendants with a copy (for information purposes only) of a further *ex parte* application which the Claimants had made on 5 October 2022 for a further extension of time until 31 March 2023 for all claim forms (the "Omnibus Application"). The witness statement served in support of that application (Oldnall

10), did refer to limitation, and asserted that the Claimants would seek to rely on s.32 Limitation Act 1980. The Court granted the Omnibus Application by order dated 20 October 2022 and on 5 December 2022 of its own motion made an order authorising substituted service on Cleary in London.

7. As more claims were served on them, the German Defendants made additional Part 11 applications in materially the same form. The German Defendants' Part 11 Applications in total related to 31 claim forms which have been served on them pursuant to the Service Out Orders granted by the Court, of which 28 also had the benefit of Extension Orders.

8. By their Part 11 Applications, the German Defendants sought to set aside the Service Out Orders and the Extension Orders on the basis that (1) the Claimants failed to give full and frank disclosure of, insofar as material to the appeal before me, the limitation defence; (2) no good reasons and/or exceptional circumstances were shown by the Claimants for requiring the extensions of time. The German Defendants have not, within their Part 11 Applications, argued against England being the forum conveniens. They have, in addition, not sought to argue that the Court should not grant permission for the claims to be served in Germany upon them because they do not have a real prospect of success in relation to limitation (the form of Part 11 challenge based upon Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd [2011] UKPC 7 [2012] 1 WLR 1804 – asserting that the service out criterion at CPR r.6.37(1)(b) is not met).

9. The Part 11 Applications were heard by Senior Master Fontaine, ("the Judge") who had, as the Respondents rightly point out, enormous experience in *ex parte* applications, as well as managing group litigation within the King's Bench Division. Following a hearing on 15 and 16 June 2023, on 23 October 2023, the Judge handed down her Judgment declining, in the exercise of her discretion, to set aside the orders. At the consequential hearing following the handing down of the Judgment, the Judge imposed a sanction in costs in respect of her finding that there was material non-disclosure of limitation defences available to the German Defendants in the *ex parte* applications. This required the Claimants, who had ultimately been successful in defeating the German Defendants' Part 11 Applications, nevertheless to pay the German Defendants' costs of the limitation non-disclosure issue on the indemnity basis, and forego some of the costs which they would otherwise have been likely to have received from the German Defendants in respect of the issues which they were successful in opposing. An interim assessment of £105,000 was ordered to be paid (of costs claimed in excess of £230,000).

10. The Judge refused permission to appeal. I granted permission to appeal by an Order dated 12 February 2024, and heard full argument for a day from Ms Mulcahy KC, for the Appellants, and Mr Heppinstall KC, for the Respondents. I am grateful to each of them, and their respective teams, for the efficient and well-presented arguments.

The Applicable Legal Principles

The Appellate Court's Role

11. As set out in Royal & Sun Alliance Insurance Plc v T&N Ltd [2002] EWCA Civ 1964, the Court is afforded a wide discretion in the context of case management decisions and, accordingly, a party seeking to overturn such a decision must overcome a high threshold. The ambit of discretion entrusted to the Judge is generous.

12. An appellate court will only interfere with a discretionary evaluation where an appellant can identify one or more of the follows errors (Azam v University Hospital Birmingham NHS Foundation Trust [2020] EWHC 3384 per Saini J):

    (1) a misdirection in law;
    (2) some procedural unfairness or irregularity;
    (3) that the Judge took into account irrelevant matters;
    (4) that the Judge failed to take account of relevant matters; or
    (5) that the Judge made a decision which was "plainly wrong".

13. As Saini J then observed, the appellate court's role is to police a very wide perimeter and it will be rare that a judge who has exercised a discretion having regard to relevant considerations will have come to a conclusion outside that perimeter. He also emphasised that the weight to be given to specific factors is a matter for the trial judge and absent some wholly unjustifiable attribution of weight, an appellate court must defer to the trial judge.

14. I also note the guidance provided by Carr LJ (as she then was) in ST v BAI (SA) trading as Brittany Ferries [2022] EWCA Civ 1037 specific to appeals relating to the exercise of discretion to grant, or refuse, extensions of time under CPR 7.6(2):

> "*A rigorous approach to the limited scope of the appellate function may be of particular importance in the context of applications under CPR 7.6(2). In some cases, for example, the result of reversing a decision to grant an extension of time for service may be to deprive the claimant of the opportunity to issue a fresh claim within the relevant limitation period(s).*"

15. Given the numerous Claimants each of whose actions would accrue at different times, it seems likely that the effect of reversing the decisions to grant extensions of time or further extensions of time will be that some of those Claimants' claims would now have expired, but would not have done before (if the extensions of time had not been granted) had a fresh claim had been issued. Given this potential prejudice, it is particularly important in this case to adopt a rigorous approach to the limited scope of appellate function.

16. Where it is said, as it is here in relation to some of the grounds, that the Judge below has erred on a question of fact, the appeal court will only interfere where it properly determines that the "*finding of fact is unsupported by the evidence or where the decision is one which no reasonable judge could have reached*" (see paragraph 52.21.5 of the White Book and the cases there cited).

Sanctions for Non-Disclosure

17. As the Judge identified, it is well recognised that an applicant who makes a without notice application is obliged to make full and frank disclosure of all matters relevant to the court's decision, including matters adverse to the applicant; see King's Bench Guide 2023 at paragraph 11.9:

> "*Where an application is made without notice to the other parties, it is the duty of the applicant to fully disclose all matters relevant to the application, including those matters adverse to the applicant. The application must specifically direct the court to those passages in the evidence which disclose matters adverse to the application. Failure to do so may result in the order being set aside.*"

18. The Judge went on to consider a number of the authorities which contained guidance in relation to the duty of full and frank disclosure. The Judge highlighted the 'golden rule' passage from Knauf UK GmbH v British Gypsum Ltd [2002] EWCA Civ 1570; [2002] 1 WLR 907 at [65], in which Henry LJ, when handing down the judgment of the Court, referred to Brink's Mat Ltd v Elcombe and Ors [1980] 1WLR 1350 and other authorities and stated:

> "*...those authorities in this court bring their reminder of the essential principles: that there is a "golden rule" that an application for relief without notice must disclose to the court all matters relevant to the exercise of the court's discretion; that failure to observe this rule entitles the court to discharge the order obtained even if the circumstances would otherwise justify the granting of such relief; that a due sense of proportion must be maintained between the desiderata of marking the courts displeasure at the non-disclosure and doing justice between the litigants;*"

19. No criticism, rightly, was made of the way the Judge also set out those principles from Arena Corp. Ltd v Schroeder [2003] EWHC 1089 (Ch) at [213] to be applied to the exercise of discretion when considering what to do in the face of a breach of full and frank disclosure. These principles were endorsed by Christopher Clarke J, in RE OJSC ANK Yugraneft v Sibir Energy plc [2008] EWHC 2614 (Ch) at [102] (cited with approval by Bryan J in The Libyan Investment Authority v JP Morgan Markets Ltd [2019] EWHC 1452 (Comm) at [92]). I set these out for convenience, below:

> "*(1) If the court finds that there have been breaches of the duty of full and fair disclosure on the ex parte application, the general rule is that it should discharge the order obtained in breach and refuse to renew the order until trial.*
>
> *(2) Notwithstanding that general rule, the court has jurisdiction to continue or re-grant the order.*
>
> *(3) That jurisdiction should be exercised sparingly, and should take account of the need to protect the administration of justice and uphold the public interest in requiring full and fair disclosure.*
>
> *(4) The Court should assess the degree and extent of the culpability with regard to non-disclosure. It is relevant that the breach was innocent, but there is no general rule that an innocent breach will not attract the sanction of discharge of the order. Equally, there is no general rule that a deliberate breach will attract that sanction.*
>
> *(5) The Court should assess the importance and significance to the outcome of the application for an injunction of the matters which were not disclosed to the*

court. In making this assessment, the fact that the judge might have made the order anyway is of little if any importance.

(6) The Court can weigh the merits of the plaintiff's claim, but should not conduct a simple balancing exercise in which the strength of the plaintiff's case is allowed to undermine the policy objective of the principle.

(7) The application of the principle should not be carried to extreme lengths or be allowed to become the instrument of injustice.

(8) The jurisdiction is penal in nature and the court should therefore have regard to the proportionality between the punishment and the offence.

(9) There are no hard and fast rules as to whether the discretion to continue or re-grant the order should be exercised, and the court should take into account all relevant circumstances."

20. The sections underlined in the extract above were emphasised by italics when the Judge quoted this section. Unsurprisingly, the Appellant focussed in argument on the 'general rule' that a breach will lead to discharging of the Order and a refusal to renew, and that the discretion to disapply the rule should be used 'sparingly'; and the Respondent emphasised that there were no hard and fast rules and that the court should take into account all relevant circumstances.

21. Ms Mulcahy relied in argument on Re OJSC ANK Yugraneft, referred to above, to illustrate the strong inclination of a Court in the event of any '*substantial breach*' towards setting its order aside and not renewing it, so as to deprive the defaulting party of any advantage that the order may have given him (see [104] of Christopher Clarke J's judgment). However, the strong inclination may nevertheless be tempered by the justice required in all the circumstances of the case, as Christopher Clarke J then observed at [105]-[106]:

"As to the future, the court may well be faced with a situation in which, in the light of all the material to hand after the non-disclosure has become apparent, there remains a case, possibly a strong case, for continuing or re-granting the relief sought. Whilst a strong case can never justify non disclosure, the court will not be blind to the fact that a refusal to continue or renew an order may work a real injustice, which it may wish to avoid.

"As with all discretionary considerations, much depends on the facts. The more serious or culpable the non-disclosure, the more likely the court is to set its order aside and not renew it, however prejudicial the consequences. The stronger the case for the order sought and the less serious or culpable the non-disclosure, the more likely it is that the court may be persuaded to continue or re-grant the order originally obtained. In complicated cases it may be just to allow some margin of error. It is often easier to spot what should have been disclosed in retrospect, and after argument from those alleging non-disclosure, than it was at the time when the question of disclosure first arose."

22. Ms Mulcahy also relied upon the judgment of Popplewell J (as he then was) in Banca Turco Romana SA v Cortuk [2018] EWHC 662 (Comm) at [45] (Popplewell J). The following passage was, in fact, quoted by the Judge at [41], in clear recognition of her understanding of the importance of the penal element to be recognised within the overall exercise of discretion:

> "*It is the necessary corollary of the court being prepared to depart from the principle that it will hear both sides before reaching a decision, which is a basic principle of fairness. Derogation from that basic principle is an exceptional course adopted in cases of extreme urgency or the need for secrecy. If the court is to adopt that procedure where justice so requires, it must be able to rely on the party who appears alone to present the evidence and argument in a way which is not merely designed to promote its own interests, but in a fair and even-handed manner, drawing attention to evidence and arguments which it can reasonably anticipate the absent party would wish to make. It is a duty owed to the court which exists in order to ensure the integrity of the court's process. The sanction available to the court to preserve that integrity is not only to deprive the applicant of any advantage gained by the order, but also to refuse to renew it. In that respect it is penal and applies notwithstanding that even had full and fair disclosure been made the court would have made the order. The sanction operates not only to punish the applicant for the abuse of process, but also, ... to ensure that others are deterred from such conduct in the future*…"

23. Whilst contained within the Arena principles to which the Judge referred herself, particular emphasis was also placed (whilst accepting that there are no absolute rules either way) by Ms Mulcahy on (1) the level of culpability to be attached to the non-disclosure, and (2) the lack of importance to be attached to the fact that the Judge might have made the order anyway notwithstanding the non-disclosure.

24. In relation to the first of these two, the Court's attention was drawn (1) to Banca Turco, per Popplewell J at [45] where the Court observed that where the breach is deliberate, the conscious abuse of the Court's process will almost always make it appropriate to impose the sanction; and (2) Tugushev v Orlov [2019] EWHC 2031 (Comm), in which Carr J (as she then was) said at [7(x)]:

> "*Whether or not the non-disclosure was innocent is an important consideration, but not necessarily decisive. Immediate discharge (without renewal) is likely to be the court's starting point, at least when the failure is substantial or deliberate. It has been said on more than one occasion that it will only be in exceptional circumstances in cases of deliberate non-disclosure or misrepresentation that an order would not be discharged*".

25. In relation to the second, the point made is found in the penultimate sentence in quotation from Banca Turco Romana set out above. Carr J also emphasised in Tugushev v Orlov that [7(xi)], '[t]*he court will discharge the order even if the order would still have been made had the relevant matter(s) been brought to its attention at the without notice hearing. This is a penal approach and intentionally so, by way of deterrent to ensure that applicants in future abide by their duties…'*

26. Finally, in light of the particular emphasis placed upon The Libyan Investment Authority ('LIA') by Ms Mulcahy, it is necessary to consider this case in a little more detail. The Court considered whether to set aside orders to serve out on two defendants, Mr Giahmi and Lands Company Limited, (1) on the basis that the claims of the LIA against each of them stood no real prospect of success as they were time-barred under English law and (2) on the basis of what was said to be a very serious failure on the part of the LIA to comply with its obligation of full and frank disclosure on the without notice paper application for permission to serve out including in failing to identify or address the limitation issues that arose.

27. The case related to a US$200 million derivative transaction concluded between the LIA and Bear Stearns International Limited (who became the JP Morgan co-Defendant) which the LIA contended was procured by a fraudulent and corrupt scheme between Bear Stearns and a Mr Giahmi. There had been previous proceedings brought against Société Générale SA and Mr Giahmi ('the SocGen Proceedings'), during which the LIA said it became aware of what it was alleging to be Mr Giahmi's corrupt involvement in the trade at the centre of the case against JP Morgan.

28. In relation to the first ground, Bryan J found that the LIA either in fact knew or with the exercise of reasonable diligence could have discovered the facts necessary to plead its claims prior to the relevant limitation date and accordingly the LIA's claims against Mr Giahmi and one other stood no real prospect of success by reason of the limitation defences. In these circumstances, the order for service out of the jurisdiction was set aside.

29. In considering the full and frank disclosure issue, the judge was also clear, therefore, that the LIA knew (given that Mr Giahmi would undoubtably allege that the claims were time-barred under English law as Mr Giahmi had already done in the SocGen Proceedings) that the LIA would need to avail themselves of section 32 of the Limitation Act 1980 (as they had done in the SocGen Proceedings) so as to argue for a postponement of the commencement of the limitation period. As a result, the LIA bore the burden of demonstrating that the action was based upon a fraud of the defendant or that any fact relevant to the claimant's right of action had been deliberately concealed from the claimant by the defendant, and the claimant could not, with reasonable diligence, have discovered the fraud or concealment until after the relevant date. Unsurprisingly, in light of the conclusions to which he had already come, the judge considered that, without any benefit of hindsight, limitation was a very important potential defence to the claims being advanced. Indeed (as he had found), it was a matter that meant that the LIA did not have a real prospect of success. Irrespective of his prior finding, it was also a matter which indisputably might reasonably be thought to weigh against the making of the order for permission to serve out of the jurisdiction, as it went to the question of a real prospect of success of the LIA's claims.

30. Bryan J then held at [107] and [110]:

> "*In the present case, LIA should have identified that the claims sought to be advanced against Mr Giahmi and Lands were, under English law, prima facie time barred subject to the application of section 32 of the Limitation Act 1980, and should have provided sufficient particulars of the basis on which the LIA said that it could not with reasonable diligence have discovered all necessary elements of a proper plea of fraud until after 6 April 2012, so that the judge could consider whether he or she was satisfied that the claims nevertheless had a*

> *real, as opposed to fanciful, prospect of success. The LIA did not do so. It is no answer to say that limitation is a point taken by way of defence - when applying for permission to serve out of the jurisdiction the LIA knew that such a defence would be taken given the stance Mr Giahmi had adopted in the SocGen proceedings, and the fact that the JP Morgan proceedings had been commenced very much more than six years after the Bear Stearns note. It was obvious that limitation was relevant to a reasonable prospect of success.*
>
> *…*
>
> *Whilst it is rightly not suggested (and could not be suggested) that there was an intention to mislead the court, there was, nonetheless, a conscious, and therefore deliberate, decision not to inform the court of such matters, and the degree and extent of the culpability was of a high order. Nor did the LIA recognise the non-disclosure and apologise for the same. An assertion that there was no need to inform the court of such matters was maintained on behalf of the LIA throughout the three-day hearing before me, and indeed Mr Masefield stated that he wished to make clear that LIA apologised if it was felt that there had been a non-disclosure (my emphasis). That is not an apology, nor does it demonstrate true contrition on the LIA's part. Rather it is an attempt by the LIA to brazen matters out. Indeed, when pressed by the court, it was not accepted that there had been any non-disclosure. All that the LIA was willing to say (in the words of Mr Masefield) was that "with the benefit of hindsight…we accept that the alternative exposition under English law in Allen 1 could have been fuller and clearer". That is something of an understatement - the limitation position under English law was not properly addressed or drawn to the court's attention, as it should have been, and it is not a matter of hindsight. That the claims were prima facie time barred under the ordinary limitation period in English law (the only laws relied upon by the LIA) and that the LIA would have to rely upon section 32 of the Limitation Act, on which they bore the burden of proof, was known to the LIA and such matters should have been addressed together with what the LIA said as to why the LIA could not have discovered necessary matters for a proper plea of fraud prior to 6 April 2012.*"

31. After considering a number of particular criticisms of the way in which the witness evidence had dealt with limitation related matters, Bryan J concluded at [119]:

> "*In the above circumstances, and for the reasons I have identified, the LIA's breach of the duty of full and frank disclosure was both conscious, and therefore deliberate, and was, in my view a substantial, indeed an egregious, breach of duty in relation to a matter, limitation, which, on any view, went to the heart of the merits of the application for permission to serve out against Mr Giahmi and Lands. I address in due course below the other allegations of failure to give frank disclosure. However, I consider that the breach under consideration in itself justifies, and indeed necessitates, that permission to serve out be set aside.*"

32. I accept, as submitted by Ms Mulcahy, that one can usefully draw from the judgment guidance that (1) a conscious decision can nevertheless be 'deliberate' notwithstanding the absence of any lack of intention to mislead; and (2) an absence of contrition on the part of the non-disclosing party may be relevant, and potentially highly relevant, to all the circumstances in the case. I accept, at the same time, the thrust of Mr Heppinstall's submission that it would be an overstatement to suggest that the circumstances before Bryan J were on all fours with the circumstances as they

presented themselves to Senior Master Fontaine in respect of the Service Out Applications, although there are of course some similarities which I will come back to in the analysis below. Ultimately, the case is an illustration of the refusal to exercise sparing discretion to allow to stand an Order procured by what Bryan J concluded was a '*substantial, indeed an egregious*' breach of the duty of full and frank disclosure.

33. In the context of 'deliberate' breach, the Judge also referred to the decision of Edwin Johnson J in Harrington & Charles Trading Co Ltd v Metha [2022 EWHC] 2960 (Ch). In that case, the judge declined to set aside a worldwide freezing order ('WFO'), notwithstanding the fact that he found that there was a failure of disclosure or fair presentation on the part of the applicants at the first hearing (namely the failure to draw the Court's attention to a particular later report which appeared to be a substantially reduced and excised version of the report in fact relied upon in the application for the WFO) on a number of grounds. The second related to culpability:

> "*Second, I do not think that the failure was a deliberate or reckless one. The Claimants went to considerable trouble, in Diss 1 and in their written and oral submissions at the First Hearing, to address their duties of disclosure and fair presentation. There was no pattern of misconduct on the part of the Claimants, at the First Hearing, in relation to non-disclosure and lack of fair presentation. The failure was isolated. The Claimants' skeleton argument for this hearing refers to the Claimants having made a "decision" not to make reference to the Kroll 2014 Report at the First Hearing; see paragraph 391 of the skeleton argument. I accept that this was a decision made in good faith, and was not deliberate in the sense of seeking to conceal from me the existence of the Kroll 2014 Report. Putting these factors together I do not think that I can or should infer that the failure was deliberate (in the sense in which I have just identified deliberate) or reckless. My finding is that the failure was the result of what was, in my judgment, the wrong judgment call on whether reference to the Kroll 2014 Report was required at the First Hearing. In that sense I regard the failure as inadvertent and innocent."*

34. Thus, Edwin Johnson J made a distinction between two types of 'deliberate' act: a conscious decision is 'deliberate' but may be made in good faith, inadvertent and innocent; or it may be deliberate or reckless, made in the sense of seeking to conceal a matter. Distinguishing between these, as is clear from Christoper Clarke J's judgment in Re OJSC ANK Yugraneft and principle (4) from Arena, is obviously necessary in order to calibrate the seriousness of the breach as part of the discretionary exercise. I note that the other reasons taken into account by Edwin Johnson J were (1) the failure was a single non-disclosure; (2) if the matter had been drawn to his attention, the decision would not have differed and (3) discharging the WFO would "*work an injustice to the Claimants and would carry the principles which support the duties of full disclosure and fair presentation too far*".

Extensions of Time

35. As Senior Master Fontaine correctly identified at [55] of her Judgment, in Qatar Investment v Phoenix Ancient Art S.A. [2022] EWCA Civ 422, at [17] Whipple LJ identified what were described as 'key points' arising in that appeal, which were also relevant to the set aside application:

> "*(i) First, the Court's power to extend time is to be exercised in accordance with the overriding objective (Hashtroodi v Hancock [2004] 1 WLR 3206 at [18]; Al-Zahra at [49(2)];*
>
> *(ii) Second, it is not possible to deal with an application for an extension of time under CPR 7.6(2) "justly" without knowing why the claimant has failed to serve the claim form within the specified period (Hashtroodi at [18]; Al-Zahra at [49(3)]. Thus, the reason for the failure to serve is a highly material factor. Where there is no good reason for the failure to serve the claim form within the time permitted under the rules, the court still retains a discretion to extend time but is unlikely to do so (Hashtroodi at [40]; Al-Zahra at [49(5)].*
>
> *(iii) Thirdly, a "calibrated approach" is to be adopted, so that where a very good reason is shown for the failure to serve within the specified period, an extension will usually be granted; but generally, the weaker the reason, the more likely the court will refuse to grant the extension (Hashtroodi at [19]; Al-Zahra at [49(4)]). Weak reasons include: a claimant who has overlooked the matter (Hashtroodi at [20]; Al-Zahra at [49(5)]), and an applicant who has merely left service too late (Hashtroodi at [18], citing from Professor Zuckerman on Civil Procedure at p 180; Al-Zahra at [50]).*
>
> *(iv) Fourthly, whether the limitation period has expired is of considerable importance; Al-Zahra at [50] and [51(3)]; Hoddinott v Persimmon Homes (Wessex) Ltd at [52]. Where an application is made before the expiry of the period permitted under the rules for service, but a limitation defence of the defendant will or may be prejudiced, the claimant should have to show at the very least that he has taken 'reasonable steps': (Cecil v Bayat [2011] EWCA Civ 135 at [48]; Al-Zahra at [52(3)]. A claimant's limitation defence should not be circumvented save in 'exceptional circumstances' (Cecil v Bayat at [55]; Al-Zahra at [52(3)]).*"

36. As to what constitutes a 'good reason' (referred to in (ii) and (iii) above), generally speaking, the good reason must be a difficulty in effecting service: Cecil v Bayat [2011] 1 WLR 3086 at [49] (Stanley Burnton LJ).

37. The authorities also demonstrate that a defendant should not be criticised for refusing to accept service otherwise than in accordance with the CPR, and that a defendant has no duty to help the Claimant in effecting service. See:

(1) American Leisure Group Ltd v Garrard [2014] EWHC 2101 (Ch), [2014] 1 WLR 4102 at [27] David Richards J) at [32]:

> "*As is common on applications of this sort, the claimant submitted that success for the first defendant would produce a windfall for him and reward the playing of technical games. There is nothing technical about a defendant insisting on service of a claim form within the period for its validity set down in the Rules and resisting an extension of that time when it is not justified on the facts. … I say nothing as to whether new proceedings against the first defendant would be statute-barred but, if they are, the responsibility for the claimant's inability to pursue a claim against the first defendant would not lie with him*."

(2) SMO v TikTok Inc [2022] EWHC 489 (QB), in which the defendants had instructed English solicitors (Hogan Lovells) who the claimants asked to accept service; Hogan Lovells informed the claimant that she would need to apply for permission to serve out and the defendants did not agree to accept service via Hogan Lovells. Nicklin J relied upon the distillation of principles set out by Blackburn J from Sodastream Ltd, adding (on the basis of Euro-Asian Oil SA v Abilo (UK) Ltd [2013] EWHC 485, "*Joinder of a foreign defendant is an exercise of extra territorial jurisdiction, and no criticism can be made of such a defendant who refuses to instruct English solicitors to accept service*"). At [77] Nicklin J then held:

> *"The Claimant's side is entirely at fault for the position the Claimant now finds herself in. The Defendants have done nothing to obstruct service of the Claim Form. They did not mislead the Claimant as to the position on service. This is not a case where the Claimant has been lulled into believing that service will be accepted only for the position to change shortly before the deadline for service. The Defendants have simply refused to accept service otherwise than in accordance with the CPR. They are entitled to do so, and Hogan Lovells have been consistent in making the position clear throughout. It is for a claimant to establish the jurisdiction of the Court over a defendant by service of the Claim Form in the time permitted and, where necessary, to obtain the Court's permission to serve out of the jurisdiction. These might be considered to be fundamental and basic principles of civil litigation."*

38. Not criticising the defendant for refusing to accept service otherwise than in accordance with the CPR is not, of course, inconsistent with recognising that the additional time required to effect service through the Foreign Process Service ('FPS') process or difficulties which present themselves during the FPS process which are outside the control of the claimant can amount to a good reason by which a party may justify an extension of time. They clearly can: for example, it was the justification for the first (successful) application for an extension of time being granted by Senior Master Cook in Sodastream. However, it is necessary to consider what the *actual* reasons for delay were, before determining whether or not they are 'good'. This was explained and illustrated by Whipple LJ in the context of potential FPS delays in Qatar at [36]-[37]:

> "*But the Court's task when faced with an application for extension of time under CPR 7.6(2) is to determine the reasons for the application for extension. That is a fact-finding exercise rooted in the evidence provided to the Court. Once the facts are found, the Court evaluates the reasons as good (i.e., are they sufficiently good to justify extension?) or not so good. The Claimants are wrong to suggest that the Court should investigate what the position would or might have been "in any event". That is a different exercise altogether.*
>
> *It is possible to envisage a case where the closure of the FPS might have been a good reason for the extension application. Mr Cooper gave the example of two claimants who issue on the same day against foreign defendants: the first makes*

sensible preparations for service and submits the papers to the FPS, only to find that the FPS is closed for the remainder of the period for service; the second does nothing towards service and then finds out that the FPS has in fact been suspended and that service could not have been effected anyway; both are in the same position so far as the outcome is concerned, because the FPS is closed; both make applications for extensions of time for service. Mr Cooper submits that the Court's sympathy might very well be with the first claimant, who can show that the FPS' closure was a reason for seeking an extension, but not with the second claimant who (like these Claimants, he argues) did nothing until it was too late and then relied on the fact of closure opportunistically. I agree that the closure of the FPS would be a reason (arguably, a good reason) for the first claimant seeking an extension of time, but it would not be a reason for the second having to do so. I agree that this example illustrates the flaw in the Claimants' argument."

39. Therefore, although delays in fact caused/predicted to be caused by a defendant insisting (as it is entitled to do) upon a particular form of service can amount to good reasons justifying an extension of time, the authorities demonstrate that fondly hoping that the defendant will agree to accept service in a way other than that which a defendant is entitled under the rules to require (subject to any order obtained, for example, for substituted service) does not constitute "good reason". See:

(1) Sodastream Ltd v Coates [2009] EWHC 1936 (Ch), on an application to set aside various extensions of time (made prior to expiry of the claim form) Blackburne J clearly identified the following principle as part of his distillation of the authorities at [50(9)]:

> *"Provided he has done nothing to put obstacles in the claimant's way* a *potential defendant is under no obligation to give any positive assistance to the claimant to serve the claim form, so that the fact that the potential defendant has simply sat back and awaited developments (if any) is an entirely neutral factor in the exercise of the discretion.";*

(2) Al-Zahra (PVT) Hospital and Others v DDM [2019] EWCA Civ 1103, the Court of Appeal allowed an appeal against the decision of Foskett J, itself overturning a decision of Senior Master Cook who had set aside an extension of time granted in the context of service through the FPS in the UAE. Haddon-Cave LJ at [79] observed:

> "*...Foskett J was wrong to place weight, let alone considerable weight, on the fact that the Defendants had not responded to the Claimant's initial communications and to suggest that "all" the Claimant's preparations had been hampered by the Defendants' failure to respond to any of the correspondence from the Claimant's solicitors ....*"

And Sir Timothy Lloyd held at [93]:

> *"Claimants' representatives need to bear in mind that, unless and until proceedings are validly served on the foreign Defendant, that party is under no obligation to respond at all. Correspondingly, they need to give proper attention to the requirements of the rules as regards service outside the jurisdiction...."*

> The Court of Appeal determined that, post-issue of proceedings, there were lengthy unexplained delays by the Claimant, amounting to some 12-14 months, notwithstanding that the limitation period had already expired and that they should have been progressing the claim as quickly as possible.

40. Ms Mulcahy also relied upon Barton v Wright Hassall LLP [2018] 1 WLR 1119 at [23] (Lord Sumption) to advance the proposition that a claimant who waits to the end of a limitation period or service period to apply for an extension "*courts disaster*" and "*can have only a very limited claim on the court's indulgence*". Barton related to an application for a retrospective validation of service once the claim form had expired and where the action was statute-barred, so the observations of Lord Sumption were particularly acute. Even where an application is made within time, however, it remains correct that problems which are of a party's own making will not amount to a 'good reason' and, even though the effect of refusing to grant an extension of time may have a significant impact because the claim is statute-barred, the absence of good reason will still mean that the court's indulgence (even when the extension is sought within time) will be limited.

41. Sub-paragraph (iv) of the passage from Qatar Investment emphasises that whether the limitation period has expired is of considerable importance, as Senior Master Fontaine also identified at [56] of her judgment when quoting the explanation for this approach by Rix LJ in Aktas v Adepta [2010] EWCA Civ 1170 at [91]:

> "*The reason why failure to serve in time has always been dealt with strictly… is in my judgment bound up with the fact that in England, unlike (all or most) civil law jurisdictions, proceedings are commenced when issued and not when served. However, it is not until service that a defendant has been given proper notice of the proceedings in question. Therefore, the additional time between issue and service is, in a way, an extension of the limitation period….. In such a system, it is important therefore that the courts strictly regulate the period granted for service. If it were otherwise, the statutory limitation period could be made elastic at the whim or sloppiness of the claimant or his solicitors.*"

42. Rix LJ also gave the following guidance in Cecil v Bayat [2011] EWCA Civ 135 at [108] and [109]:

> "*… It is therefore for the claimant to show that his "good reason" directly impacts on the limitation aspect of the problem, as for instance where he can show that he has been delayed in service for reasons which he does not bear responsibility, or that he could not have known about the claim until close to the end of the limitation period. If he cannot do that, he is unlikely to show a good or sufficiently good reason in a limitation case.*
>
> *…That means that in a limitation case, a claimant must show a (provisionally) good reason for an extension of time which properly takes on board the significance of limitation. If he does not do so, his reason cannot be described as a good reason. It is only if a good reason can be shown that the balance of hardship should arise".*

43. Ms Mulcahy relied upon the judgment of Longmore LJ in City & General (Holborn) Ltd v Royal & Sun Alliance Plc [2010] EWCA Civ 911 at [7] (Longmore LJ), in which he said:

> "*It is well-settled that when debatable issues of limitation arise, it is inappropriate to attempt to decide them on an interlocutory application for an extension of time for service of a claim form. If the claimants' argument that the claims are not time-barred is correct, they can always begin a fresh action in which, if a time-bar is asserted, it can be adjudicated upon. It is enough for a defendant to show that he* ***might*** *be deprived of a defence of limitation if time for service of a claim form is extended;* ***if he can show that, an extension should not be granted or, if granted without notice, such extension should be set aside****, see Hashtroodi v Hancock [2004] 1 WLR 3206 (paragraph 18) and Hoddinott v Persimmon Homes (Wessex) Ltd [2008] 1 WLR 806 (paragraph 52)*."

44. The emphasis in bold comes from Ms Mulcahy's submissions. Taken at face value, the words highlighted would appear to suggest that in circumstances where a defendant can show that he might be deprived of a limitation defence, the discretion, even if there are exceptional circumstances, all but disappears. Looking at the two cases referred to by Longmore LJ, I do not regard his words in City & General (Holborn) Ltd should be read as going that far. Paragraph 18 of Hashtroodi certainly falls short of such a proposition. In it, Dyson LJ is dealing with the exercise of discretion under CPR 7.6(2) in accordance with the overriding objective, and refers to a passage from *Civil Procedure* by Zuckerman which contains the following: "*Whether the limitation period has expired is also of considerable importance. If an extension is sought beyond four months after the expiry of the limitation period, the claimant is effectively asking the court to disturb a defendant who is by now entitled to assume that his rights can no longer be disputed.*" The element of paragraph 52 of (again) Dyson LJ's judgment in Hoddinott to which Longmore LJ was undoubtedly making reference stated: "*In such a case, the approach of the court should be to regard the fact that an extension of time might "disturb a defendant who is by now entitled to assume that his rights can no longer be disputed" as a matter of "considerable importance" when deciding whether or not to grant an extension of time for service*", quoting his earlier judgment in Hashtroodi.

45. Thus, it is plain that City & General (Holborn) Ltd should be read as clearly supporting, but not going further than, the twin propositions that, (1) on an application such as this, it is not generally appropriate to resolve the limitation issue (so establishing that limitation 'might' be relevant is sufficient); and (2) where limitation 'might' be an issue, it is to be regarded as a matter of '*considerable importance*' in deciding whether or not to grant an extension of time for service. In other words, and consistent with Whipple LJ in Qatar Investment, the word '*ordinarily'* is to be read into the normative word '*should*' used by Longmore LJ. This conclusion is also consistent with the judgment of Carr LJ in ST v BAI (SA) (t/a Brittany Ferries) at [63] where she explained that the phrase '*exceptional circumstances'* needs to be approached with care:

> "*At their outer limit, the words 'exceptional circumstances' can be taken to mean 'very rare' (or 'very rare indeed'). In the present context, however, the phrase should not be taken to mean more than its literal sense, namely 'out of the ordinary'. It means, as identified for example in Hoddinnott at [52], that the*

actual or potential expiry of a limitation defence is a factor of considerable importance. The factors in favour of an extension of time will have to be, either separately or cumulatively, out of the ordinary. Only in this way can the phrase "exceptional circumstances" be reconciled with the primary guidance in Hashtroodi (at [18]) and [22]) that the discretion under CPR 7.6(2) is to be exercised in accordance with the overriding objective and in a "calibrated" way, as emphasised in Qatar at [17(iii)]. It is neither helpful nor necessary to go further in terms of guidance, by reference to a need for "powerful good reason", as the judge suggested, or otherwise."

Material Non-Disclosure and Service Out

The Judgment Below

46. The first part of the Judgment addressed (in the context both of the service out and extension of time issues) the question of whether there had, or had not, been full and frank disclosure in respect of the two issues alleged. The Judge agreed that there had not been full and frank disclosure in respect of the limitation defence available to the German Defendants, but there had been no breach in relation to the availability of Germany as a potential alternative forum. Neither of those findings are the subject of appeal or cross-appeal.

47. In her consideration of the limitation issue, paragraph [26] set out the explanation given in Oldnall 13 for the reason for non-disclosure of the known potential limitation defence, and the requirement to rely upon section 32 of the Limitation Act 1980. This was because Mr Oldnall set out in his evidence in response to the Part 11 Applications his explanation for not referring to limitation. He explained that (i) determination of the limitation defence and the section 32 issue involved a detailed factual analysis, which would rarely be appropriate when considered in a summary judgment threshold context, even in a unitary case; (ii) this issue was even more stark in the context of a group action after mass claim forms which contain the claims of tens of thousands of claimants. Each of these Claimants will have dates of purchase / acquisition of vehicles and personal circumstances that were individual to them. As such, there was no straightforward or plausible analysis that could be applied so as to determine limitation on a summary and generic basis; and (iii) it was unclear how, therefore, the court would have dealt with the service out and extension applications any differently had it been informed that there was a potentially contested issue of limitation. The non-disclosure came about because of the applicants' view that the court could not sensibly be expected, at such an early stage in the proceedings, to evaluate the limitation position in relation to each of the many thousands of Claimants on each claim form and only grant the orders sought in respect of those that fell on the right side of some summarily determined hypothetical line.

48. The Judge stated that, although she agreed with this analysis of the likely effect of the issue of limitation had it been identified, it was nevertheless a factor relevant and material to whether there was a serious issue to be tried and ought to have been included. The Judge found (in essence):

    (1) had she known of the limitation problems in respect of potentially a very large number of Claimants, that would not have made any difference to the decision made to order service out (at [28]);

    (2) the non-disclosure was 'deliberate' (in that it was a conscious decision) but as the result of a wrong judgment call, rather 'deliberate or reckless' with no intention to conceal (adopting the distinction drawn by Edwin Johnson J in Harrington I have identified above) (at [30]).

49. The Judge then set out the principles from Arena, and the passage from Banca Turco which emphasised the penal nature of the potential sanction of discharge, and the limited relevance of the fact that, even if full and fair disclosure had been given, the court would have made the order.

50. The Judge then identified the following factors as relevant to her discretion at [42] and [44]:

> "*42. Factors that I consider to be relevant to the issue of discretion, in relation to this* [limitation] *issue are that:*
>
> *i) Limitation was referred to in the Claimants' omnibus application applications for extension of time (see Oldnall 13 at §16.1(c)).*
>
> *ii) If the orders were set aside, this would not only affect those claims where a limitation defence was available, but those claims which were brought before the expiry of limitation.*
>
> *iii) The Claimants' solicitors did not know, and still do not know, whether and if so, how many, or what proportion of claims, may be prima facie time barred, so had only limited information to provide to the court. The English domiciled Defendants had access to the relevant information (see Oldnall 14 §§6 – 33).*
>
> *iv) The Claimants made the decision to include both time barred and non-time barred claims in all claim forms.*
>
> *v) This is a group action, with tens of thousands of claimants whose claims would be affected by the sanction, rather than a unitary action.*
>
> *vi) If the orders granting permission to serve out are set aside, the Claimants can still proceed against the remaining English-domiciled Defendants.*
>
> …
>
> *44. Factors relevant to both issues of non-disclosure are that:*
>
> *i) The German Defendants had been provided with the first service out and extension applications by way of information (not by way of service) on 11 November 2021, but did not mention any concerns regarding failure to mention the issues of limitation or Germany as an appropriate alternative jurisdiction or ask that these issues be included in the evidence when the applications were issued and brought before the court. That would have dealt with any prejudice that the German Defendants say was caused by the omissions.*
>
> *ii) The German Defendants have noted that there has been no acceptance of the breaches, or contrition or apology to the court by the Claimants.*"

51. The Judge then concluded:

(1) she considered that, in context, the failure was a '*much less serious transgression than in a unitary action*' [45] and the cases which emphasise the importance of identifying limitation issues arising out of unitary actions can be distinguished [47];

(2) it would have been costly and disproportionate for the Claimants to provide information as to which, how many and/or before were *prima facie* time-barred at such an early stage in the litigation. The type of information to be supplied would generally be provided at the GLO application. As such this is different from a unitary action [46]-[47], [49];

(3) in the context of contrition, the Claimants recognised late in the day that limitation should have been addressed (this is a reference to the reference to limitation in the Omnibus Application), but she accepted that a full and credible explanation had been given and it amounted to a misjudgment;

(4) the German Defendants had the opportunity to write to the court when they received the draft applications to draw the court's attention to the existence of potential limitation defences [50];

(5) setting aside the orders would have the effect of terminating the claims of all those Claimants whose claims were not susceptible to a limitation defence [50];

(6) it would be '*inappropriately draconian*' and '*not in accordance with the overriding objective*' to set the orders aside [50];

(7) an appropriate order of costs can be made as a sanction for non-disclosure [50].

The Grounds of Appeal : Material Non-Disclosure

52. Ms Mulcahy submitted that the Judge erred in (at least) 9 ways. I consider each ground of appeal in turn.

(1) The Judge failed to apply the correct approach given that this was a case of deliberate non-disclosure.

53. It was clearly open to the Judge to conclude, as she did, that whilst the decision to omit a reference to the limitation defence was a '*deliberate*' breach of the duty to make full and frank disclosure, it nevertheless was, on the evidence before her, a 'wrong judgment call'. The Judge was carrying out the exercise required by principle (4) of Arena in assessing culpability. It was for the Judge to weigh the evidence and conclude whether the 'deliberate' (conscious) failure to mention limitation was '*egregious*' (as Bryan J found in LIA) or '*innocent*' (as Edwin Johnson J found in Harrington).

54. On the evidence, the Judge's view that the Claimants' transgression in the present case was much closer to '*innocent*' than '*egregious*' was plainly open to her on the evidence before her and was far from 'plainly wrong'. In LIA, there could have been no possible reason for the claimant reasonably to think that, not least given the prior proceedings, limitation would not be front and central to the defendants' opposition to service out on the basis that, under the Altimo test, the Court could determine summarily that the claim stood no real prospect of success. Indeed: that is what the defendants in LIA argued on the set aside application, and succeeded. This is a

different case and limitation is capable of being a significantly more complicated issue where there are multiple claimants. As Christopher Clarke J said, in complicated cases it may be just to allow some margin of error in determining whether a particular known feature of the case should be referred to on a without notice application. The difference with LIA is illustrated by the fact that the German Defendants did not, in their application to set aside, seek to argue that there were no reasonable prospects of success on limitation grounds. The Judge was not only justified, but in my judgment right, in concluding that it was, in the context of the Service Out Application, a transgression much further towards the less serious end of the spectrum.

(2) The Judge placed undue reliance on her view that if she had known of the limitation problems in respect of potentially a very large number of Claimants, that would not have made any difference to the decision made.

55. The complaint is that 'undue' reliance was placed on this factor. It is not said, rightly, that this is an irrelevant factor which should have played no part in the decision making. The weight to be given to specific factors is a matter for the Judge. I do not regard, in the circumstances of this case, that it was given a wholly unjustifiable attribution of weight. The judge properly reminded herself of the penal element of the potential sanction and its justification on policy grounds. This was one of the factors which Edwin Johnson J relied upon in Harrington to conclude that the sanction of discharge was disproportionate in the circumstances of that case, and Senior Master Fontaine was equally entitled to consider it amongst the relevant factors to weigh together in this case.

(3) The Judge's conclusion that she would have granted permission to serve out in any case because "in the particular circumstances of a group action, where it is not known with accuracy which claims are or may be time barred out of a very large number of claims it would not be proportionate to refuse permission on that ground" was obviously wrong.

56. Ms Mulcahy argued that the Judge was wrong at paragraph [28] in the quoted sentence above, as matter of law, because the grant of permission to serve out has nothing to with "*proportionality*". It is simply a question of whether the relevant requirements (gateway, *forum conveniens*, serious issue to be tried etc) have been satisfied. The criticism of the Judge, however, takes her words out of context. It is plain from the very next sentence that the Judge (unsurprisingly) knew what the correct test under Altimo was and considered it correctly. The Judge said:

> "*In Altimo Holdings at [71] a "serious issue to be tried on the merits" was said to be "a substantial question of fact or law, or both" and the test was stated to be the same test as for summary judgment. I would have been so satisfied had the issue of limitation been disclosed, because it would not have been possible to conclude that there was no real prospect of success for many individual claims relying on section 32, where oral evidence may be required. I would have considered that there was a real issue to be tried, both for those claims where the claims were not prima facie time barred and those which would have to rely on a section 32 application in order to defeat a limitation defence.*"

57. The Judge's reference to 'proportionality' was, in my judgment, a reference to the point she went on to make at [46], namely that at the very early stage in the litigation

at which the claims were, it would be costly and disproportionate to have carried out the work that would have enabled them to provide information about how many and/or which proportion of the Claimant's claims were time barred. Without this information, it would not (at the stage of an application to serve out) have therefore been possible to summarily conclude there was no real prospect of success (which is the point she makes in the passage quoted above). I consider this further below, in the context of Ground 4.

58. The Judge did not, in the sentence relied upon, make an error of law.

(4) The Judge essentially held that the fact that this is group litigation created special circumstances which excused the material non-disclosure, concluding that "in the particular circumstances of this group litigation, the failure [to disclose the limitation defence] was a much less serious transgression than in a unitary action.

59. The Grounds of Appeal set out 3 sub-points.

60. Ground 4(a) is that the Judge reached an evaluative conclusion as to sanction based on a fundamental misunderstanding of the facts, namely that the Claimants had not provided to their solicitors the dates of acquisition of the vehicles and that they could not identify or even estimate what claims or proportion of claims were *prima facie* time barred and that such information could not therefore be provided to the Defendants and the Court. Ms Mulcahy then argues that:

(a) the date of acquisition of the vehicle is basic information relevant to whether a claimant has a valid claim, which the Claimant firms would inevitably have sought from their clients upon sign-up. The evidence before the Court was that the Claimant firms likely do have that information, at least for a very significant number of Claimants, and their position was merely that they did not have "*complete*" or "*verified*" dates of acquisition.

(b) at a minimum (a) the Claimants have confirmed they have records of VINs and VRNs which can be used to check the last date of registration. Whilst only a proxy for dates of acquisition, this would have been a starting point in being frank with the Court as to the potential extent of the limitation problem; (b) the Court had information before it (which it did not refer to at all) of the results of analysis of limited samples (showing that at least 17% - 35% of claimants in those samples are *prima facie* time barred).

(c) in all the circumstances, the Court erred in assuming that the Claimants had no information at all.

61. I accept the submission of Mr Heppinstall that this argument overstates the Judge's factual conclusion. First, at [28], the Judge concluded that it was not known '*with accuracy*' which claims are time barred, not that there was no information '*at all*'. This conclusion seems entirely justified by the German Defendants' own submission at (b) above that having records of VINs and VRNs which may provide the last date of registration is at best a 'proxy' for dates of acquisition. Secondly, it is not a fair reflection of the Judge's conclusion at [46] in which the Judge recorded her finding of fact that it would simply not have been proportionate to have carried out the work that would have enabled them <u>to provide</u> this information at such an early stage in the litigation.

62. This conclusion was based upon the evidence before her, as cross-referenced in her Judgment. In Oldnall 14, Mr Oldnall said:

> "*Neither I nor the Claimant Firms have sufficiently complete and verified data across the Claimant cohort so as to put forward a confident and competing percentage to the Defendants' own analysis of the sample of 4,202 Claimants. As already addressed above, it would also be unnecessary, unreasonable and disproportionate to expect the Claimants to carry out such an exercise now, in advance of appropriate directions being set at a GLO hearing*".

63. Whilst there was (and remains) an ongoing dispute between the parties as to what information the Claimants would or would not have or the ease with which the information could be ascertained, the Judge was justified – particularly in light of her significant practical experience of managing group litigation and the basis and timing of particular procedural steps in a GLO – in concluding that the task of providing such information in such a way as may sensibly have informed a judge at the early stage of serving out is not something which she considered would have been proportionate. That was a conclusion based upon practical case management that the Judge was more than entitled to come to on the evidence before her.

64. Ground 4(b) is that, in any event, the Judge's approach was wrong in law. It is argued that there is no authority to support the suggestion that Claimants are absolved of their obligations to the Court to make proper inquiries and draw the Court's attention to material matters just because their solicitors intend to apply for a GLO (which may never be granted). Such an approach would, it is said, be heterodox and contrary to principle.

65. No part of the Judge's judgment can sensibly be read as 'absolving' the Claimants of their obligations to the Court to make proper inquiries and draw the Court's attention to material matters. Indeed, the Judge made a finding that such an obligation existed, and that it had been breached in relation to limitation issues. This was entirely orthodox and in line with principle. Having identified the breach, the Judge was then required to consider, in light of the principles derived from the authorities which she correctly identified, whether discharge of the order was the appropriate sanction.

66. I have dealt, above, with the reason why her view as to the seriousness of the transgression was well within the bounds of a reasonable conclusion based on the evidence. The judgment cannot be read as suggesting that the duty to give full and frank disclosure in an application to serve out in group litigation is subject to different principles. It plainly is not. But, the Judge should consider the culpability of the breach as part of the exercise of discretion. The limitation position in relation to a claim with multiple claimants may well, depending on the circumstances of the case, be significantly more complicated to resolve summarily than in a unitary action. It is unreal to suggest otherwise, and the fact that the German Defendants did not go on to argue on the set aside application that the Court *could* summarily determine limitation in their favour as part of the Altimo test is a demonstration of that obvious truth. It does not follow that the obligation to make full and frank disclosure is different in group litigation : as the Judge found, the Claimants were in breach of that obligation. But culpability remains a factor which the Judge is entitled to consider when exercising discretion. The conclusion that the Judge's decision lay within the wide perimeter of her decision-making is plainly not a green light to claimants in group litigation to reflect differently upon the golden rule that full and frank disclosure is required on a without notice application.

67. Similarly, nothing in the Judgment suggests that the duty of full and frank disclosure does not include a duty to make proper inquiries. However, the Judge was fully entitled to take into account proportionality, as part of the overriding objective, when considering the stage at which the Claimant firms would be required to undertake the very costly exercise of obtaining individual claim specific information. Moreover, the Judge was entitled to make the practical point (at [47]) that, even if such information had been provided, the court would never have been able to address this issue in relation to the merits of the claim on the applications for service out. The Judge was right that this is a distinction from a unitary action. That this is so does not dilute the obligation for full and frank disclosure. It just means that the information that it may be reasonably proportionate to provide on an application to serve out relating to a limitation defence in a unitary action may potentially be different from that which is proportionate in a large group action. This is not heresy. It is the application of the universally applicable principles to the circumstances of a particular case.

68. Ground 4(c) is that, in deciding not to set aside the permission to serve out orders, the Judge erred in law in focusing on the position of each individual Claimant rather than the position of a substantial cohort of Claimants all of whose claims have the same fundamental weakness which should have been disclosed in compliance with the Claimants' duty of full and frank disclosure (as the Judge concluded). In my judgment, this does not add to grounds 4(a) and (b). The Judge was plainly aware that many thousands of claims may be affected by limitation issues, just as in general terms she was aware that the number of viable claims that might be ended if the application was set aside could be tens of thousands.

(5) The Judge erred in failing to take into account the Claimants' lack of contrition for the non-disclosure.

69. The Judge did not fail to take the lack of contrition into account. The German Defendants' argument in this respect was referred to expressly at [44(ii)] and [48]. The Judge clearly considered the fact that the failure '*was recognised rather late in the day*', which was a reference to the fact that the Claimants then did identify limitation as an issue in their later Omnibus Application. The Judge evidently formed the view, which she was entitled to do, that the Claimants had 'got the point'. The Judge clearly considered that the conditionality of apology on losing the argument about full and frank disclosure in relation to limitation was in a different league to LIA in which Bryan J saw the applicant as effectively brazening an egregious breach out. The Judge was entitled to form the view she did on the evidence and place such weight on the manner in which the application to set aside (in circumstances where no Altimo substantive case in relation to limitation was being advanced) was resisted as she saw fit.

(6) The Judge wrongly relied on the suggestion that the German Defendants were aware that there were likely to be limitation defences and "had the opportunity to write to the court…to draw the court's attention to [the failure to disclose] or to ask that the applications be on notice".

70. Ms Mulcahy argues that the Judge, in this respect, put the boot on the wrong foot. I do not read the Judge's language as suggesting that (contrary to authority) there was a positive duty upon the German Defendants, who were not a party to the application, to

do the Claimants' job for them so as to relieve them of their obligation for full and frank disclosure. Indeed: the Judge plainly did not conclude that the duty upon the Claimants had been extinguished or reduced by giving, as they did, informal notice, because the Judge found that the duty existed and that it had been breached.

71. The Judge does not appear within her judgment to place any weight on this factor in mitigating the Claimant's conduct; instead, the point is referred to at [44(i)] in the context of potential prejudice to the German Defendants, which (if it existed), the German Defendants could – if they had wanted to – taken steps to avoid. However, in reality, where the limitation point was not taken as a substantive defence, any question of actual prejudice to the German Defendants rather falls away in any event. Reading her judgment in the round, even if the Judge was wrong to make any reference to this issue at all, it did not appear to be a material factor the absence of which would have affected the exercise of her discretion.

(7) The Judge erred in concluding that the orders should not be set aside because it would affect non-time barred Claimants.

72. Ms Mulcahy contends that to consider the effect on the non-time barred Claimants was unsupported by authority and unprincipled. I do not agree. The fact that there are many claims potentially affected by a limitation argument and many claims which are not does not, of itself, affect the duty of disclosure. However, it is necessary for a Judge to consider whether the application of the general rule that an order will be discharged would become, in the specific circumstances of any given case, an instrument of injustice. The effect on Claimants whose case was unaffected by limitation issues is obviously a factor which the Court was entitled to weigh when considering this question. In oral argument, Ms Mulcahy rightly conceded that she was not arguing that the factor was 'irrelevant' or 'unprincipled', and limited her argument to the point that it would not go to the egregiousness of the breach. I have dealt with the interrelationship of the complexity of the limitation point in the context of this group litigation and the Judge's view on the seriousness of the transgression above. In the context of the broader evaluation of what sanction is necessary to do justice in light of the breach, the weight that this (relevant) factor was given was a matter for the Judge.

73. Ms Mulcahy states that the Judge failed to give effect to the possibility of bifurcating or severing bad claims from good ones. This seems to me, at least on the facts of this case, to be a wholly impractical suggestion, in circumstances where the Judge had already found (as, I have decided, she was entitled to do) that the provision of information in order to provide a clear view on *prima facie* limitation dates was, at this stage of the litigation, disproportionate.

(8) The Judge erred in failing to take into account the need for an appropriately penal sanction and to ensure a sufficient deterrent effect.

74. Ms Mulcahy argued that the need for a penal and deterrent sanction was entirely absent from the Judge's reasoning in her judgment on the Part 11 Applications. Reading the Judgment as a whole fairly, this is unjustified. The Judge directed herself correctly on the authorities, specifically drawing attention to the Arena principles and the emphasis placed on the penal nature of the sanction by Popplewell J

in Banco Turco. The Judge recognised the need for a sanction, notwithstanding her view that the orders should not be discharged, at [50] when concluding that a costs sanction can be made. I note that the costs sanction ultimately applied by the Judge was not an insignificant one: the order to pay the German Defendants' costs plus the deprivation of the recovery of their own costs together will amount to the equivalent of a 'fine' of several hundred thousand pounds.

(9) Insofar as the Judge relied upon the factors at paragraph 42(i), (iii) and (iv)she was wrong to do so.

75. These 3 factors are quoted at paragraph 50. above. I agree with the manner in which this point is articulated, in that it is far from clear that these were factors that ultimately did feature in the Judge's conclusions on the exercise of discretion within her jugdment.

76. Although it is not as clear as it could have been, I consider that the reference to the Omnibus Application ([42(i)]) relates to the Judge's acknowledgement of the fact that the Claimant referred to the limitation issue in the later applications. This does not seem to be particularly material, but may have gone to the Judge's overall view on the Claimants' general attitude in the context of considering the question of culpability and contrition. It was not an entirely irrelevant factor in this context, and the Judge was entitled to consider it.

77. As to [42(iii)], it is not clear where the finding that the English-domiciled Defendants had access to information as to which Claimants were likely time-barred; Mr Heppinstall could not point to any evidence. Both on the face of the Judgment and on the basis of paragraph 15 of the Judge's refusal of Permission to Appeal, however, it seems clear that to the extent this was a factual error it did not in fact materially influence the exercise of her discretion.

78. As to [42(vi)], the point being made by the Judge was, as Mr Heppinstall put it, that the claims were going to continue against the broader group of Defendants with whom the German Defendants were sued. It is difficult to see how this is particularly relevant. Mr Heppinstall submits that the ability to pursue the English domiciled defendants means that the claims in the context of a group of companies who are intertwined will continue and there will be no saving of court resources. He submits that this is not a significant point but it cannot be said to be irrelevant. This was not a point made in the concluding section on the exercise of discretion and it is not clear that the Judge gave any material weight to it in any event.

Conclusion

79. I do not consider that the exercise of discretion proceeded on the basis of any error of law or finding of fact that was not open to the Judge, save in respect of paragraph 42(iii), which did not in fact materially influence the decision. It fell within the wide perimeter permitted to the Judge. To the extent relevant, I would have exercised my discretion in the same way had I proceeded on the basis of the same factors (and excluding those facts referred to at paragraph 42(iii)), and considered that the not

insignificant financial penalty by way of costs sufficiently marked the breach of duty in the context of the Service Out Applications.

The 10 November 2021 Application

The Judgment

80. Having considered the relevant general authorities, as I have identified above, Senior Master Fontaine rightly identified at [57] that it was important to consider the Claimants' evidence as to the reasons why the extensions were sought. The reasons were summarised at paragraph [58] under the headings '(i) Timing', '(ii) Co-ordination of Group Litigation' and '(iii) Hope that the German Defendants would accept service on their English solicitors'.

81. Under (i), the Judge identified that the letter before action ('LBA') from Leigh Day was sent to the First and Third to Fifth Defendants on 1 April 2021. A reply was sent by Cleary on 1 July 2021, indicating that the German Defendants' position on jurisdiction was reserved and that a response to the LBA would be provided in due course. The letter of response was sent on 13 August 2021 and stated that Cleary was not authorised to accept service other than for the English domiciled Defendants. At this point, three months of the six month validity period had passed, and the Claimants must have known by this point that unless the German Defendants changed their position then, without an extension of time, it was at least a realistic possibility that the Claim Forms would expire.

82. In a letter dated 26 August 2021 Leigh Day sought agreement from the Defendants for an extension of time for service on the German Defendants. The Claim Forms, issued on 11 May 2021, had been served on the English domiciled Defendants. By then other Claimant firms, Milberg, Harcus Parker, Keller Lenkner and Pogust Goodhead had been instructed, and Milberg wrote to Cleary on 3 September 2021, stating that the Claimant firms had been instructed in respect of more than 100,000 clients to pursue claims, replying to Cleary's letter of response dated 13 August 2021, seeking agreement to ADR, and also seeking the German Defendants' agreement to service of proceedings on Cleary within the jurisdiction. The Judge identified the fact of subsequent correspondence in September and October 2021 where the Claimants requested that no issue be taken on jurisdiction, giving reasons, and asking for reconsideration of the decision to require the Claimants to serve the German Defendants out of the jurisdiction. Neither of those requests were agreed to by the German Defendants. At [71] the Judge found that once Cleary had 'finally responded' in their letter of 15 October 2021 and given no indication that the German Defendants would authorise their firm to accept service on their behalf, it was incumbent on the Claimants to prepare and submit requests for service via the FPS.

83. Under (ii) the Judge said:

> "*The Claimants were hoping in that correspondence to narrow the issues between the parties both as to the subject matter of the claims on the case management issues. In the light of relevant judicial guidance provided over the years, particularly in the VW NOx Emissions Group Litigation, the Claimant firms were attempting to coordinate and engage in substantive discussions so as to adopt a common approach at the time of making the application and it was not possible to rush such coordination in advance of the impending deadlines for*

service, partly because of delays in engagement by the Defendants in pre-action correspondence, and the lack of information from the German Defendants in relation to the claim."

84. The 10 November 2021 Application was made, as the Judge noted at [58], the day before the expiry of the six month validity (for service out) of the first claim form issued on 11 May 2021. It led to Senior Master Fontaine's Order of 16 March 2022 extending time in the first eleven claims as listed in Appendix A until 15 July 2022, immediately prior to and leading into the dates when requests for service were submitted in the FPS between July and September 2022.

85. At [65] the Judge accepted, subject to one reservation, the submissions of the German Defendants that the time spent trying to persuade them, through the medium of their English solicitors, to accept service in this jurisdiction does not constitute a good reason for the delay. The Judge rightly indicated that the appropriate course was to issue the application for permission to serve out of the jurisdiction shortly after the claim form has been issued, and if English solicitors have made it clear that they are not instructed to accept service, the Claimants' solicitors must then make appropriate arrangements to submit the relevant documents to the FPS for service on the German Defendants in Germany. The fact that, even if those steps had been taken more promptly, the extensions given would still have been required, did not render this a good reason for the extension: Qatar Investments per Whipple LJ at [79].

86. The reservation articulated at [66] was that:

"*in this litigation the Defendants had instructed London solicitors, who were actively corresponding in the litigation. This was not a factor in either Sodastream or Al-Zahra. In SMO v Tik Tok the relevant defendant had instructed London solicitors, who were not willing to accept service, similarly to this litigation. But SMO v Tik Tok was not a case involving an order for an application for an extension of time for service, but an application for service by an alternative method. The reason why Nicklin J. would not grant such an order was because the claimants had not attempted service by means of The Hague Convention and had applied for an order for alternative service on the defendant's solicitors. Nicklin J. said at [93]:*

> *"On its own, delay caused by the requirement to serve a claim form on a defendant in compliance with the Hague Convention cannot justify bypassing its requirements by the simple expedient of an alternative service order. A litigant must recognise this, factor in the potential delay and prosecute his litigation accordingly…. There is neither a good reason for authorising alternative service nor exceptional or special circumstances justifying such an order in respect of the Fifth defendant."*

So it seems to me that there are distinguishing factors in this case to all of those cases. The Claimants did not attempt to bypass the requirements of the Hague Service Convention, as in SMO v Tik Tok. In circumstances where the Defendants had instructed London solicitors to act in the litigation, it was not unreasonable, in my view, given the very substantial additional time and costs involved in serving numerous group claims via the Hague Convention, for the Claimants to make concerted efforts to persuade the German Defendants to take a co-operative approach, as parties are encouraged to do by the CPR, and agree to

instruct their solicitors to accept service, although recognising that ultimately foreign defendants can insist upon service in their own jurisdiction."

87. The Judge therefore distinguished between Sodastream and SMO on the basis that the German Defendants had instructed London based solicitors, and that in the period through to the making of the application for an extension the Claimants were acting reasonably in making concerted efforts to persuade the German Defendants to take a co-operative approach and to agree to accept service.

88. At [69] the Judge identified '*the final reason'* which related to the need to co-ordinate multi-party litigation, with 31 claim forms and tens of thousands of Claimants. At [70], the Judge said:

"*In my judgment this factor, namely the co-ordination of multi-party litigation, with tens of thousands of Claimants, is sufficient to constitute the exceptional circumstances referred to in Qatar Investments at [17(iv)] with regard to both the potential circumventing of a defendant's limitation defence, and in respect of "good reason" for the delay. There were of course four firms of solicitors acting for the Claimants, and solicitors acting in complex high value High Court litigation are expected to act efficiently and in an organised manner. But the amount of work and difficulties involved in litigation involving approximately 90,000 Claimants should not be underestimated, particularly where the rules relating to issue and service of claim forms are the same whether for unitary or group claims. I do consider that this factor is a sufficiently good reason for the extensions granted by the order of 16 March 2022. It was reasonable for the Claimant firms to seek agreement on service before embarking to the very complex and expensive exercise of producing thousands of pages of documents, incurring the costs of translation and the administrative burden of submitting judicial documents for service via the Hague Service Convention (see Oldnall 13 §§96-99). That was a proportionate decision in respect of this particular multi-party litigation. It may not have been so in respect of a single claim or claims in single figures.*"

The Grounds of Appeal

(1) The Judge erred in law by taking into account the fact that the German Defendants had instructed English solicitors.

89. The Judge was unfortunately but clearly in error when distinguishing SMO on the basis that it was not a case involving an order for an application for an extension of time for service, but only an application for service by an alternative method. The quotation included with the judgment from [93] of SMO was, indeed, taken from that part of the judgment dealing with the application for alternative service (commencing at paragraph [79]), but Nicklin J also considered, and rejected, the application for an extension of time for service at [68] – [78] on the basis that there was no good reason for the delay. Similarly, as I think the Judge recognised, the fact that in this case the Defendants together had instructed London solicitors is not of itself a distinguishing feature of SMO, where the defendants (including one defendant domiciled in England and the four others domiciled in various countries abroad) had likewise instructed London solicitors who had made it clear, as Cleary had done in this case, that they would not be accepting service on behalf of those of the defendants domiciled abroad.

90. The 'reservation' or departure from the general principle (correctly drawn from the authorities that time spent trying to persuade a defendant domiciled abroad to accept service in this jurisdiction does not constitute a good reason for delay) based on the fact that the German Defendants domiciled abroad had, together with co-defendants domiciled in the UK, instructed English/London-based solicitors is not justified. The general principle is based upon the need for parties to give proper attention to the requirements of the rules as regards service outside the jurisdiction, and that need is not diluted by the fact that a party domiciled abroad may have instructed solicitors based in London.

91. Far from being clearly distinguishable, Nicklin J's judgment in SMO is highly relevant. The Judge recognised that some litigation (such as that brought on a representative basis) may be particularly complex. Nevertheless Nicklin J makes clear that a defendant who has instructed English solicitors is entitled to refuse to accept service otherwise than in accordance with the CPR; and is not obliged to accept service via his English solicitors. In that case, as in this, the defendants' solicitors did nothing to mislead the claimants, and this is not a case where the claimant has been lulled into believing that service will be accepted only for the position to change shortly before the deadline for service. It is for a claimant to establish the jurisdiction of the Court over a defendant by service of the Claim Form in the time permitted and, where necessary, to obtain the Court's permission to serve out of the jurisdiction. As Nicklin J said, "*[t]hese might be considered to be fundamental and basic principles of civil litigation*".

92. I accept that it was an error of law to depart, as the Judge appeared in fact to do, from the authorities that make it clear that the fond hope that a defendant domiciled abroad will change its position as regards the method of service on the ground that the German Defendants had instructed solicitors based in London is not a good reason for delay.

(2) The Judge erred in law in concluding that 'the co-ordination of multi-party litigation' could constitute 'exceptional circumstances' that justified circumventing a defendant's potential limitation defence and/or that it provided a 'good reason' for delay in failing to serve a claim form. Moreover, there was no evidence that delays had been caused by 'co-ordination' difficulties.

93. The starting point is to identify the reason or reasons advanced for the delay in service which has given rise to the need for an extension of time, and then to go on and consider whether they are good reasons.

94. The judgment indicates at paragraph [58] that the evidence relied upon by the Claimants is that provided in paragraphs 34-47, 52.4 and 73-81 of the third witness statement of Mr Oldnall.

95. Paragraphs 34-47 sets out, as the heading preceding paragraph 34 suggests, the current procedural status of the Vauxhall claims and describes the initial pre-action correspondence. At paragraph 35 Mr Oldnall complains about the 4.5 month period in responding to the letter before action (from 1 April 2021 to 13 August 2021). Paragraph 37 relates to the 26 August 2021 request for an agreement to an extension of time for service of the Claim Forms. The statement merely says that the parties were unable to agree an extension so the application for an extension was made. Paragraphs 42 to 46 identified the further 4 letters between 3 September 2021 and 15

October 2021 in which there were communications about whether the German Defendants would authorise Cleary to accept service. It does not refer to any particular co-ordination difficulties or issues between the Claimants. Other than a description of the attempts to persuade the German Defendants to accept service through Cleary, this evidence does not provide any good reason for the delay in making the application to serve out, or to the commencement of the FPS process. Even though criticism is made of the Defendants taking 4.5 months to provide a substantive response to the LBA, as the Claimants themselves acknowledged and averred, the LBAs were lengthy and detailed. That the Claim Forms were issued, no doubt for protective reasons, prior to the conclusion of the pre-action correspondence is not of itself a good reason to delay making the necessary applications to serve out. Even if the Claimants were justified in waiting for the substantive response, in August 2021, it was clearly incumbent upon them from 13 August 2021, when they were told in terms that service could not be effected through Cleary on the German Defendants, to start the necessary application process to effect service out, even if in parallel they continued in their efforts to reach an agreement which obviated the need for service in that manner.

96. Paragraph 52.4 deals with co-ordination between the Claimants in the context of preparing for the GLO application, essentially as part of the explanation for why there were no draft Particulars of Claim before the Court. It has nothing to do with the delay to service out. If the Judge considered this evidence relevant to whether there was a good reason for the delay, she was wrong to do so.

97. Paragraphs 73-81 repeat the gist of the correspondence referred to previously, and assert that it would have been reasonable for the German Defendants to accept service through their London solicitors. Paragraph 79 contains the meat of the reasons placed before the Court to justify the grant of an extension of time. Paragraphs 79.1 and 79.2 are the only 'backward looking' sub-paragraphs and, again, refer to the fact of the correspondence and the hope that the German Defendants would change their mind. Paragraph 79.1 refers in the most general terms to the Claimants' attempts in their correspondence, "*to narrow the issues as to the subject-matter of the claims themselves and case management issues*". Paragraph 79.3 refers to the delays which would lay ahead caused by the need to effect service out, and paragraph 79.4 deals with the absence of prejudice to the German Defendants. It is to be noted at this point that the witness statement did <u>not</u> refer to the fact that some unknown number of Claimants' claims were already statute barred or the fact that it was likely that the very real effect of permitting an extension of time would be that the statutory limitation period was, in respect of some Claimants at least, effectively being extended.

98. Ms Mulcahy is plainly right in her submission that '*the co-ordination of multi-party litigation, with tens of thousands of Claimants*' was not in fact relied upon in evidence by Mr Oldnall as being the '*good reason*' or '*exceptional circumstance'* to justify why no attempts had been made to that point to commence the service out process. Other than the hope that the German Defendants would change from the position adopted in Cleary's letter of 13 August 2021, no other specific reason was given for the failure to have started the process in relation to serving out. Senior Master Fontaine was undoubtedly right that it was reasonable for the Claimant firms to seek agreement on service before embarking on the very complex and expensive exercise of producing thousands of pages of documents, incurring the costs of translation and the administrative burden of submitting judicial documents for service via the Hague

Service Convention. That was a proportionate decision in respect of this particular multi-party litigation. However, once Cleary had made clear that the German Defendants would not agree, it cannot have amounted to a good reason justifying delay between August 2021 and the date of the application, on 10 November 2021. There is, in addition, no explanation at all for the delay from 15 October 2021, the point at which even on the Judge's analysis, it was incumbent upon the Claimants to prepare and submit requests for service via the FPS and apply for extensions of time.

99. Thus, there may be cases where the burden imposed by group litigation is *in fact* the cause of delays which justify an extension of time. If, for example, the Claimants had applied to serve out promptly, either following issue of the Claim Form or (at the very latest) sometime in August, the very heavy administrative process of dealing with the FPS in the context of document-heavy claims may very well have been good reasons to justify an extension of time and would have been relevant to the length of additional time needed. The failures in the FPS process which eventuated in fact and which were out of the Claimants' control no doubt would also have justified ongoing extensions. It is much more difficult, however, to see how, after an initial attempt to persuade a defendant domiciled abroad to accept some form of service other than that which they are entitled to insist upon, the difficulties presented by the process justify a delay to the *commencement* and timely progression of the process or a delay in applying for any inevitable extensions of time which are required in circumstances where a defendant is insisting, in accordance with their entitlement at law (unless and until substituted service is ordered), on such processes being followed.

100. In the circumstances, I consider that proceeding on the basis that there was 'a good reason' for not having commenced and progressed the service out process in relation to the German Defendants at any time between May 2021 and November 2021 was a clear error in principle which led the Judge to exercise her discretion in a manner outside the wide ambit permitted to her. Similarly, concluding that the inevitable complexities of group litigation were, without more, 'exceptional circumstances' where the limitation period in respect of some of the claims had expired was also an error. There was no factual evidence before the Judge to permit a finding that particular complexities arose so as to amount to exceptional circumstances.

101. I therefore conclude that the Order arising out of the extension of time application of 10 November 2021 must be set aside.

102. In these circumstances, it is for me to determine whether, in a fresh exercise of discretion, I should nevertheless grant the necessary extensions of time. I cannot find myself able to do so. Applying the authorities, there was no good reason for the delays, let alone exceptional circumstances, which justified the granting of extensions of time in circumstances where limitation had expired in relation to at least some part of the claimant cohorts.

103. I would add that the Judge does not appear to have refocussed, when considering the applications for an extension of time, upon the failure within the applications to give full and frank disclosure of the position relating to limitation. Unlike in the context of the Service Out Applications, the existence of potential limitation defences was highly material to the initial exercise of considering whether, and if so for how long, an extension of time ought to have been granted. The existence of limitation defences changed the very test the Judge had to consider and apply when considering the matter *ex parte*: it was not enough to show a 'good reason': the circumstances were required to be exceptional, in the sense of something out of the ordinary, as

considered above. Seen through this lens, the conscious decision not to refer to limitation issues in the evidence supporting the Extension Applications was, in my view, a significantly more serious transgression of the duty of full and frank disclosure. In the exercise of my discretion this factor, of itself, militates much more strongly towards setting aside the order and strongly supports the determination I have otherwise arrived at, namely that the extensions of time sought from 10 November 2021 should not be granted.

The Omnibus Application

104. Submission to the FPS of documents for service commenced on 9 June 2022 and continued, with resubmissions where requests were rejected by the FPS or the German Central Authority, until 30 September 2022. The Claimants made a further *ex parte* application on 5 October 2022 for a further extension of time until 31 March 2023 for all claim forms - the Omnibus Application. The Judge held that she was unable to conclude that there was a "*good reason*" given for the 8-9 months delay between the letter from Cleary dated 15 October 2021 and making the first request for service to the FPS in June 2022. The Judge also held (at [76]) that, with regard to the period when applications for extensions were made after the documents for service were lodged with the FPS, it was entirely apparent from the very detailed information provided in Mr Oldnall's Tenth Witness Statement that there was a good reason for the extensions granted. This element of the judgment is not appealed.

105. The Judge then said that, as she had concluded that no good reasons were provided for some of the period of extensions from 15 October 2021 to June to September 2022, and in the event that she was wrong in relation to her conclusion that there were good reasons for the extensions in respect of the remaining periods of extensions granted, she would consider whether the court's discretion should be exercised in favour of retaining the orders for extensions.

106. There is no dispute that, as a matter of law, such a discretion existed notwithstanding the absence of any good reason.

107. However, Ms Mulcahy is justified in her criticism that the Judge appears not to have been proceeding on the basis that, in light of the existence of potential limitation defences, '*exceptional circumstances*' were required to justify the exercise of discretion. In failing to apply the correct test, I accept the Judge fell into error.

108. I also accept that the Judge made an overarching error in placing what seems to have been considerable weight on her clear, and to some extent entirely justifiable, sympathy for the Claimants on account of the cost and time implications which followed from the German Defendants' insistence on being served through the FPS process in circumstances where there was no evidence, on her own findings, that this was responsible for the delay. As I have identified above, the fact that a party may be put to particular expense and time because a defendant is insisting, as the rules entitle it to, upon a certain type of service can amount to a good reason for obtaining an extension of time. However, the insistence has to be the cause of the delay which the extension of time is required to alleviate. In circumstances where the Judge was unable to conclude on the evidence that the German Defendants' insistence on the FPS process was in fact the reason for the delay of (at least) a number of months prior to commencing the FPS process in June 2022, it is not possible to conclude that, nevertheless, that insistence, which lay at the heart of her criticism at [81], amounted to an 'exceptional reason' to grant an extension of time.

109. Ms Mulcahy makes the related point that the Judge's discretion appeared to be influenced by her conclusion that the German Defendants' insistence on the process of service by the strict rules amounted to a lack of co-operation of which she was critical. Ms Mulcahy submits that that criticism is itself misplaced in circumstances where, as the authorities make clear, a defendant is under no duty to co-operate with the service process. This submission is correct. Subjecting a defendant who insists

on its legal rights with regard to service to criticism effectively imposes a duty to co-operate by the back door, which duty the authorities make clear does not exist. Criticism of the insistence by the German Defendants on being served in accordance with the rules should not play a part in the analysis: the effect of insistence on the process can, as I have said, readily amount to a good reason for an extension of time, providing it has actually been the cause of the relevant delay/anticipated delay. If it has not in fact caused the relevant delay/anticipated delay, it should not be a relevant factor in the exercise of discretion.

110. I consider that the Judge was, in addition, wrong to place particular weight on the fact that the Defendants took until 13 August 2021 to respond substantively to the LBA. The LBA was, on the Claimants' own case, a full and lengthy document. In line with the observations of Haddon-Cave LJ and Sir Timothy Lloyd in Al-Zahra (PVT) Hospital, unless and until proceedings are validly served on the foreign Defendant, that party is under no obligation to respond at all. Moreover, even if taking this amount of time was objectively unjustified (which is far from clear on the evidence), it cannot in fact have hampered (and there was no evidence before the Judge to suggest it did in fact hamper) the Claimants' ability to take the necessary steps to serve the Claim Form in accordance with the rules.

111. I therefore consider that the Judge's decision not to set aside Order arising out of the Omnibus Application was in error and must be set aside.

112. In these circumstances, it is for me to determine whether, in a fresh exercise of discretion, I should nevertheless grant the necessary extensions of time. Again, I cannot find myself able to do so. Applying the authorities, there was no good reason for the delays, let alone exceptional circumstances, which justified the granting of extensions of time in circumstances where limitation had expired in relation to at least some material part of the Claimant cohorts.

113. In these circumstances, I allow the appeal in respect of the Extension Applications. In light, however, of the Judge's conclusion about applications for extensions made after the documents for service were lodged with the FPS, to which I have made reference at paragraph 104 above, and further to submissions made by the Claimants and the German Defendants having seen the draft of this Judgment, I will (subject to any agreement reached between the parties) hear further submissions from the parties in order to consider the precise scope of the Order consequential upon this Judgment as it applies to particular extension of time applications.