



OUTER HOUSE, COURT OF SESSION

[2025] CSOH 18

GP10/23

OPINION OF LORD SANDISON

In the cause

DAVID BRIAN BATCHELOR

Representative Party for Pursuers

against

(FIRST) OPEL AUTOMOBILE GMBH

(SECOND) GM DEUTSCHLAND HOLDINGS GMBH

(THIRD) VAUXHALL MOTORS LIMITED

(FOURTH) IBC VEHICLES LIMITED

(FIFTH) STELLANTIS FINANCIAL SERVICES UK LIMITED and

(SIXTH) STELLANTIS & YOU UK LIMITED

Defenders

(Vauxhall & Opel NOx Emissions Group Proceedings)

Representative Party: Middleton, KC, Reid; Pogust Goodhead

Defenders: Ellis, KC, T Young; Morton Fraser MacRoberts LLP

13 February 2025

Introduction

[1] These are group proceedings in which the pursuing group members seek reparation for loss and damage said to have been suffered by each of them in consequence of the claimed presence of prohibited “defeat devices” in terms of Articles 3.10 and 5.2 of EU

Regulation 715/2007 ("the Emissions Regulations") in the diesel engines of vehicles which they bought or leased, or in which they otherwise had an interest. A defeat device operates to regulate the operation of the emissions control system ("ECS") of diesel engines by reducing its effectiveness in normal driving conditions. The combustion process of such an engine gives rise to particulate matter emissions, including nitrogen oxide ("NOx") which is toxic and harmful to health. An ECS uses techniques such as exhaust gas recirculation, diesel oxidation catalysation, particulate filtration, selective catalytic reduction and lean NOx traps to reduce or eliminate such emissions. In these proceedings – as in various other similar litigations before the court – it is claimed that the engines in question were designed in such a way as to reduce the effectiveness of the ECS in real world driving conditions (i.e. outside regulatory test conditions), as a result of software which interfered with or disabled its mechanisms in those conditions. It is claimed that regulatory approval for the engines was obtained without disclosing the use of such defeat devices to the relevant authorities, allowing the vehicles in which they were present to be put on the market along with a Certificate of Conformity falsely certifying that the vehicle complied with the legislation in force at the time it was produced.

[2] The vehicles in question in these proceedings are said to have been variously manufactured, marketed, sold or financed by the defenders, who claim that the vehicles had no such devices, that any device present was not unlawful in terms of the Emissions Regulations, or that any unlawful device present was the result of mistake or inadvertence. The representative party's claims have to date been based on publicly available literature, regulatory authority recall decisions and notices and a limited amount of testing of relevant vehicle models. In order better to state his case, the representative party now seeks to recover documents which, it is said, will cast light on the design and operation of the ECS in

the relevant engines. The defenders oppose his attempt to recover the documents in question and at the preliminary hearing I directed that the matter be argued fully before the court so that the matter could be determined by it.

Relevant Rules of Court

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

“Procedure in group proceedings

26A.3.—(1) Subject to the other provisions of this Chapter, the procedure in proceedings to which this Chapter applies is to be such as the Lord Ordinary is to order or direct.

...

Defences

26A.20.—(1) Defences in proceedings to which this Chapter applies are to be in the form of answers to the summons with any additional statement of facts or legal grounds on which it is intended to rely.

(2) There is to be appended to the defences in proceedings to which this Chapter applies a schedule listing the documents founded on or adopted as incorporated in the defences, which must be lodged as an inventory of productions.

...

Preliminary hearing

26A.21.—(1) An action in proceedings to which this Chapter applies is to call for a preliminary hearing within 14 days after defences have been lodged.

(2) At the preliminary hearing, the Lord Ordinary ..

(b) may make an order in respect of any of the following matters

...

(iv) disclosure of the identity of witnesses and the existence and nature of documents relating to the proceedings or authority to recover documents either generally or specifically;

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

...

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

Lodging of productions for proof

26A.25.—(1) Unless an earlier date is specified by the Lord Ordinary, any document not previously lodged but required for any proof in proceedings to which this Chapter applies must be lodged as a production not less than 7 days before the date fixed for the proof.

Power to make orders

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

Documents in question

[4] The representative party has lodged a list of documents in respect of which he asks the court to order production. He asks for that order to be made either in terms of RCS26A.21(2)(b)(v) or in the exercise of the court's general powers to grant commission and diligence for the recovery of documents, as regulated by Chapter 35 of the Rules of Court. The salient terms of that list (which are mirrored in a Specification of Documents for the purposes of that part of the motion directed at the grant of commission and diligence) are as follows:

"Certificates of Conformity

1. A COC delivered by the First, Second, Third and Fourth Defenders under Article 18.1 of Directive 2007/46/EC of the European Parliament and of the Council, in respect of each Sample Model (Cond 9).

Vehicle Emissions Control Systems and Devices and NOx Emissions Levels

2. All documents (including, but not limited to, NOx emissions levels testing results; software, hardware and firmware design and specification documents; engine failure modes, effects and analysis documents; and, written communications between the First, Second, Third and Fourth Defenders' engineers, between said engineers and said Defenders' management and between said engineers and said Defenders' internal regulatory compliance personnel) in the hands of said Defenders, relative to the design and manufacture of the ECS (including, but not restricted to Exhaust Gas Recirculation, Diesel Oxidation Catalyst, Diesel Particulate Filter, Selective Catalytic Reduction and Lean NOx Trap systems, referred to by the Defenders inter alia in Answers 11.3.1, 11.3.2 and 11.3.4 as 'technologies') installed into (i) the 2.0 litre Insignia vehicle model manufactured in 2010 and (ii) the 2.0 litre Insignia vehicle model manufactured in 2015 and showing or tending to show:

- (a) the engine used in said models, including the engine model, code and engine capacity;
- (b) the elements of design of the ECS in said models which sense temperature, vehicle speed, engine speed, transmission gear, manifold vacuum or any other parameter for the purpose of activating, modulating, delaying or deactivating the operation of any part of said models' ECS, so as to reduce the effectiveness of said ECS as regards NOx emissions (hereinafter referred to as a 'device(s)') (Conds 10 and 11, Answers 11.6, 11.7, 11.10, 11.11, 11.12 and with reference to Article 3.10 of the Emissions Regulations);
- (c) the function and calibration of each software, hardware and firmware component that is, or contains, such a device(s) in said models (Cond 11 and Answers 11.5.3, 11.5.8 and 11.7.2.1);
- (d) the mode and parameters of the operation and effect of such a device(s) on the said models' NOx emissions levels while driven under regulatory test conditions (Cond 11);
- (e) the mode and parameters of the operation and effect of such a device(s) on said models' NOx emissions levels while driven outwith regulatory test conditions (Cond 11);
- (f) the internal analysis conducted by or on behalf of the First, Second, Third and Fourth Defenders relating to and demonstrative of what amount to driving 'conditions which may reasonably be expected to be encountered' by said models 'in normal vehicle operation and use', in terms of Article 3.10 of the Emissions Regulations (Answers 10.3, 10.4, 10.5, 12.2 and 12.4);
- (g) the nature, extent and consequences of the engine damage or accident (if any) which would be sustained to said models without the use and operation of such a device(s) (Answers 11.5.4, 11.6, 11.7.1, 11.7.2.1 to 11.7.2 to 11.7.2.7, 11.7.3, 11.7.4, 11.7.5, 11.8, 11.9, 11.13.1 and 12.3);

- (h) in what way said models could not be operated safely without the use and operation of such a device(s) (Answers 11.5.4, 11.5.5, 11.7.1, 11.10 and 12.3);
- (i) that such device(s) in said models do not function beyond the requirements of engine starting (Answer 12.3);
- (j) that the conditions in which such device(s) operate in said models are substantially included in the test procedures for verifying evaporative emissions and average tailpipe emissions (Answer 12.3); and
- (k) the levels of NO_x (measured in terms of milligrammes per kilometre or otherwise) emitted by said models when driven both under and outwith regulatory test conditions (Cond 11).

3. All documents (including, but not limited to, Adam Opel AG's completed written questionnaire) in the hands of the First, Second, Third and Fourth Defenders, relating to Adam Opel AG's consideration and compilation of their response to the written questionnaire issued to them by the European Parliament Committee of Enquiry into Emissions Measurements in the Automotive Sector in 2016 and showing or tending to show the nature, design and operation of the SCR systems in the Sample Models as regards NO_x emissions (Cond 14).

Type-Approval Authorities

4. All documents (insofar as not already called for in Call 2 hereof) submitted by the First, Second, Third and Fourth Defenders to and their correspondence with the Relevant Type Approval Authorities, in the hands of said Defenders, relevant to the applications for and granting of Type Approval for (i) the 2.0 litre Insignia vehicle model manufactured in 2010 and (ii) the 2.0 litre Insignia vehicle model manufactured in 2015, showing or tending to show (Answer 7):

- (a) the date, nature and content of the application package (including the 'information folder' and 'information package', as defined in Articles 3.38 and 3.39 respectively of said Directive 2007/46/EC) for EU Whole Vehicle Type-Approval submitted to said Relevant Type-Approval Authorities in respect of said models, insofar as relevant to the NO_x emissions of said models (Conds 6.7 and 8);
- (b) the date, nature and content of the application package (as defined in Call 4(a) hereof) for Emissions Type-Approval of the ECS submitted to said Relevant Type Approval Authorities, insofar as relevant to the NO_x emissions of said models (Conds 6.7 and 8); and,
- (c) the information provided to the Relevant Type-Approval Authorities by the First, Second, Third and Fourth Defenders for the purpose of satisfying said Relevant Type-Approval Authorities that said models conformed to the

relevant type approval as regards NOx emissions levels, in accordance with Regulations 4 and 5 of the Emissions Regulations, and that they met the NOx emissions limits set out in Annex I thereof (Cond 11).

Regulatory Investigations, Recalls and Software Updates

5. All documents (insofar as not already called for in Paras 2 and 4 hereof) in the hands of the First, Second, Third and Fourth Defenders, relating to (i) the recall notices issued by the KBA, RDW and DVSA detailed at Paras (i) to (xxi) in Cond 14; (ii) the ECS software updates offered to group members following the issuing of regulatory recall notices, referred to in Cond 12; (iii) the software updates to Euro 6 vehicles referred to in Answer 14.1; and, (iv) the software updates detailed in the Schedule of Group Members' vehicles lodged by the Defenders at No 7/3 of Process and referred to in Answer 14.2, showing or tending to show:

- (a) the date, nature, scope, content and outcome of the investigations by the KBA, RDW and DVSA into the NOx emissions levels of the Sample Models and the First, Second, Third and Fourth Defenders' responses thereto;
- (b) the date, nature, content and basis of said recall notices issued by the KBA, RDW and DVSA in relation to the NOx emissions levels of the Sample Models;
- (c) date, nature and content of and the basis for all objections and appeals filed or made by or on behalf of the Defenders against said recall decisions, including but not limited to the appeals filed by the Defenders against the KBA Recall Notices (Cond 14 and Answer 14); and,
- (d) for each of the Sample Models, to the extent that such recalls and software updates have been carried out:
 - (i) the brand and model (including the engine model, engine code, engine capacity and production period) relevant thereto;
 - (ii) the dates when the First, Second, Third and Fourth Defenders were first advised that such recalls and update programmes were required and how and by whom they were so advised;
 - (iii) the date when such recalls and software updates were implemented in the Sample Models by or on behalf of the First, Second, Third and Fourth Defenders;
 - (iv) the nature of all faults, issues and/or emissions strategies that such recalls and software updates were intended to rectify in relation to the NOx emissions of Sample Models; and,
 - (v) the nature and effect of said recalls and software updates on the NOx emissions levels of the Sample Models, including details of (a) what NOx ECS parameters were updated (b) the effect that said recalls and updates had on the operation of the ECS, with regards to

the level of NOx emitted outwith regulatory testing conditions, and
 (c) the effects of said recalls and updates in relation to fuel economy, engine damage and accident, component service life, diesel exhaust fluid refill interval and driveability.

6. All documents in the hands of the Third Defenders produced by them to the DVSA in response to the DVSA Market Surveillance Unit's letter to the Third Defenders dated 15th September 2022 (referred to on Record) showing or tending to show (Cond 14):

- (a) the Sample Model vehicle types that the Third Defenders had placed on or sold into the UK market under the requirements of the Emissions Regulations, along with their start and (where appropriate) end of production dates;
- (b) which of the Sample Models the Third Defenders had reviewed, regarding the existence of NOx defeat devices, in light of the European Court of Justice judgement in CLVC case (No C-693/18);
- (c) the Third Defenders' review findings and their conclusions as to vehicle NOx emissions compliance for each Sample Model; and,
- (d) the details of any NOx emissions-related improvements that had been made (in the UK and in other European countries) since type-approval was originally issued, along with details and an explanation of any emissions-related hardware and software changes.

7. All documents in the hands of the First, Second, Third and Fourth Defenders, relating to the KBA's investigation in and after May 2023 into the failure of Opel Euro 5 engines to comply with emissions standards (referred to on p.44 of the Annual Report of Stellantis NV, dated 31st December 2023, lodged at No 6/20 of Process) showing or tending to show (Cond 14):

- (a) in what way(s) said Opel Euro 5 engines had failed to meet said emissions standards;
- (b) the reason for said failure(s);
- (c) the date, nature and content of the First, Second, Third and Fourth Defenders' and said Stellantis NV's response to the KBA's request for information regarding the use of NOx emissions strategies in said engines; and,
- (d) the date, nature and content of the remedial measures taken by the First, Second, Third and Fourth Defenders and Stellantis NV to address such NOx non compliance.

Software Updates and Communications with Authorised Vauxhall Repairers

8. All documents in the hands of the First, Second, Third and Fourth Defenders and the authorised Vauxhall dealerships and repairers (referred to in Condescence 3.1(iv)), relating to the software updates (referred to in Para 5 hereof) carried out on the Sample Models from 1st January 2016 to date and showing or tending to show the reasons given to the group member owners, registered keepers and lessees of said Sample Models as to why said software updates were required (Cond 12 and Answer 14).

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

[5] The “Relevant Type-Approval Authorities” referred to in the list are defined as (i) the German *Kraftfahrt-Bundesamt* (“KBA”); (ii) the French *Ministère de la transition écologique Direction générale de l’énergie et du climat Service du climat et de l’efficacité énergétique*; (iii) the Italian *Ministero delle Infrastrutture e dei Trasporti Dipartimento per i trasporti, la navigazione, gli affari generali ed il personale*; (iv) the Netherlands *RDW Divisie Voertuig Regelgeving & Toelating* (“RDW”); (v) the Czech Republic *Ministerstvo Dopravy*; and (vi) the UK Driving and Vehicle Standards Agency (“DVSA”).

[6] The “Sample Models” referred to in the list are defined by reference to a schedule of certain Vauxhall vehicle models appended to the list for which Type-Approval was obtained between 1 September 2009 (being the date of coming into force of the Euro 5 standard) and 30 September 2019 (being the date of coming into force of the Euro 6d standard).

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

Submissions for the representative party

[8] On behalf of the representative party, senior counsel submitted that, in the context of group proceedings, the court had very wide, novel and innovative procedural powers which could and should be exercised to ensure the fair and efficient progress and determination of

the proceedings. The powers given to the Lord Ordinary under RCS26A.21(2)(b)(iv) and (v) were virtually identical to those given to the Commercial Judge under RCS47.11(1)(iv) and (v). In Chapter 47 commercial actions, those powers were generally viewed as being wider than the court's common law powers to grant commission and diligence. The Chapter 26A powers should be similarly regarded. As paragraph 10 of Practice Note (No 2 of 2020) on group proceedings stated:

“The procedural framework which is, in parts, based upon the commercial actions model, provides the court with flexibility about how best to manage group proceedings. It allows for the early intervention and case management by the court to deal with what could be potentially complex litigation. The procedure in, and progress of, group proceedings is under the direct control of the Lord Ordinary, and the court will take a pro-active approach.”

[9] Chapter 27 of the Rules of Court, dealing generally with documents founded upon or adopted in pleadings, required such documents to be lodged in process by the party founding upon or adopting them at the earliest appropriate opportunity, and was expressly stated to be without prejudice of the power of the court to order production of any document or to grant commission and diligence for its recovery.

[10] Proceeding under RCS26A.21, as opposed to by way of commission and diligence, gave the court greater flexibility on how to deal with the recovery and handling of documents in various forms and volume. The court had such flexibility when ruling on how to recover and handle large volumes of documents, and should use its powers to ensure a fair and proportionate disclosure of information to the representative party which would enable him to progress his investigations, might well answer the criticisms which the defenders currently made of his pleadings, and would assist the court in the expedient determination of the issues. It was submitted that all of the documents sought were relevant to the proceedings generally, which was the criterion to which RCS26A.21(2)(b)(iv) and (v)

directed attention, as well as relating to matters already averred in the pleadings, including matters upon which the defenders themselves relied. The representative party's pleaded case was not lacking in essential specification, albeit there presently existed what was described in *Cavallari v Mercedes-Benz Group AG* [2023] EWHC 1888 (KB) at [36] as an "information asymmetry" between the parties. Comparison was drawn with the observations of Stuart-Smith LJ in *Alame v Shell plc* [2024] EWCA Civ 1500, at [83]:

" ... while the Court should always be alert to disallow applications that are nothing more than "fishing expeditions", in a case such as the present where the case that the Claimants wish to bring has been clearly articulated in their pleadings and associated documents, the Court should scrutinise with care any suggestion that the Defendants do not know the nature of the case they have to meet for the purposes of disclosure because it has not yet been pleaded with sufficient particularity. In principle, at least, the Court's approach to the Claimants' assertion that they need further disclosure should be informed more by the explanations they have given about why they need the disclosure before pleading a case with full particularity than by the present state of their pleadings. This is not to cast doubt for a moment upon the equally important principle that, before this litigation or any part of it can be brought to trial, the Claimants will be required to plead their case with sufficient particularity so that the Defendants know what case they have to meet and have a fair opportunity to meet it. That stage has evidently not yet been reached."

[11] The question of whether any particular document was exempt from recovery as having been created *post litem motam* depended on whether or not it had been prepared in contemplation of litigation. That was not simply a date-driven conclusion, but involved a qualitative judgment which could only be made after the document had been produced to and considered by the court. Similarly, any wider issue of confidentiality which might arise in the present context could only be decided once the court had examined the document in relation to which it was asserted. Questions of the expenses of the recovery exercise could competently be reserved until the conclusion of the case: *McGill v Ferrier* (1836) 15 S 178.

[12] Paragraphs 2, 4 and 5 of the list set out the documents likely to be of the most general importance to the representative party's case; the others were directed at more specific issues, but it was not accepted that they were merely collateral to that case.

[13] The Certificates of Conformity sought in paragraph 1 of the list of documents were delivered by the manufacturer to the purchaser of a vehicle and certified to the latter that the vehicle he had acquired complied with the legislation in force in the European Union at the time it was produced. Such documents formed part of the direct misrepresentations made by the defenders to the group members that their vehicles were emissions compliant.

[14] Paragraph 2 listed documents relevant to the design and function of an ECS in the Sample Models and how those systems functioned in response to various parameters under and outwith regulatory test conditions. The list included internal communications between the relevant engineers working for the defenders. These documents were also relevant to how the defenders themselves approached emissions compliance and how they demonstrated it to the regulatory authorities. They were also relevant to the defence of technical justification which was available. If the reference to the whole range of Sample Models was thought to give rise to insuperable difficulty, then it could be limited to the specific Insignia models on which other paragraphs of the list focussed.

[15] Paragraph 3 related to the compilation of Adam Opel AG's response to a 2016 questionnaire by the European Parliament Committee of Enquiry into Emissions Measurements in the Automotive Sector. That response, which the representative party had seen, was highly suggestive of the use of defeat devices.

[16] Paragraph 4 concerned documents relating to the information submitted to Type-Approval authorities as part of the application for Whole Vehicle and Emissions Type-

Approval, subsequent notifications by those authorities of Type-Approval non-conformity, and the measures taken by the defenders to render their vehicles emissions compliant.

[17] Paragraph 5 dealt with regulatory investigations and recalls, the relevance and significance of which were obvious. Six regulatory authorities had given Type-Approval and three had issued recall notices.

[18] Paragraphs 6 and 7 respectively related to the UK DVSA's and the German KBA's enquiries as to emissions compliance.

[19] Paragraph 8 related to the ECS software updates carried out on Sample Models in and after 2016, along with the explanations given therefor to Vauxhall customers by authorised repairers and dealerships. The documents sought might inform the possible application of section 6(4) of the Prescription and Limitation (Scotland) Act 1973 to the representative party's case. If the inclusion of Vauxhall dealerships and repairers was thought to give rise to difficulty, then reference to them might be omitted.

Submissions for the defenders

[20] Senior counsel for the defenders invited the court to refuse the representative party's motions on either of the bases upon which it was presented, or at least radically to reduce the range of documents to be recovered.

[21] There was a difference between the court's approach to recovery of documents from parties to an action when compared to recovery from third parties. In the case of parties, the court could either authorise commission and diligence or order production of documents. In the case of third parties, the only method of discovery was by way of commission and diligence: MacLaren, *Court of Session Practice* (1916), p. 1056. Scottish courts had historically refused to grant orders for disclosure of documents from a party unless satisfied by a

suitable admission that the documents definitely existed, were within the party's possession and could be produced, because of the potentially draconian consequences of non-compliance with such an order: *National Exchange Co v Drew and Dick* (1858) 20 D 837 at 839, affirmed (1860) 22 D (HL) 9. The reasons for such an approach were obvious where a party was at risk of failure to obtemper an order of the court. The terms of the list of documents in the present application were wholly unsuitable for such an order.

[22] Secondly, the basic tests for recovery were well-known and familiar to the court. The documents were required to bear on the issues in dispute as they were formulated in the pleadings at the time of the motion for recovery. Before the closing of the Record, a party seeking to recover documents had to show that the documents were necessary for the purpose of making more pointed and specific that which was averred, or to make adequate and specific responses to his opponent's averments: *Civil Service Building Society v MacDougall* 1988 SC 58 at 61 and 62, 1988 SLT 687 at 689. It was clear that the onus was on the party applying for the recovery to demonstrate the necessity. It was thus inappropriate for a pursuer to bring proceedings following which "the first thing he does is to ask this diligence, in order to ascertain what kind of case he has": *Greig v Crosbie* (1855) 18 D 193, per Lord Curriehill at 195. The hallmark of such a "fishing diligence" was a specification that was not drawn under reference to the issues of fact averred in the party's pleadings or involved casting a net over as wide an area as possible in the hope that it would recover something to form the basis of a case not yet averred: *Paterson v Paterson* 1919 1 SLT 12, per Lord Hunter at 14; *Boyle v Glasgow Royal Infirmary* 1969 SC 72 per Lord Guthrie at 79, 1969 SLT 137 at 143; cf. *Civil Service Building Society* 1988 SC 62, 1988 SLT 689 – 690.

[23] It was often said by pursuers in an attempt to justify a broad recovery that the purpose of a specification was only to allow them to make their pleadings more specific or

respond to a defender's pleadings. However, recovery would be refused if the averments founded on as requiring to be made more specific were themselves far too vague: *Scott v Portsoy Harbour Co* (1900) 8 SLT 38, per Lord Low at 40, and the court should always examine such claims with care given that on analysis such an excuse was often used merely as a cloak for a fishing diligence: *Macrae v British Transport Commission* 1957 SC 195, per Lord President Clyde at 200, 1957 SLT (Notes) 30. Even if the calls in a specification were in principle relevant to the issues in dispute, the court should in the exercise of its discretion have regard to factors such as cost, disruption, and generally the proportionality of authorising a very broad recovery of documents: e.g., *Somervell v Somervell* (1900) 8 SLT 112, per Lord Stormonth Darling at 113 – 114. The question of proportionality ought to include consideration of the ability of the party seeking recovery to obtain the required information by other means. In this respect, the representative party's lawyers had already had extensive contacts with UK government authorities, including correspondence, meetings and conversations, and apparently did not want the nature and extent of such contact to be fully disclosed.

[24] Thirdly, whilst recognising that confidentiality was not an absolute bar to recovery of documents, the court was required to carry out a balancing exercise which involved weighing the confidentiality and importance of the documents to the haver against the degree to which a proper disposal of the litigation would be hampered by non-disclosure: *Healthcare at Home Ltd v CSA* [2011] CSOH 22, per Lord Menzies at [8] and [16]. That consideration took on particular importance where a party to litigation sought to recover information from a public authority that had acquired information in the exercise of its statutory functions: cf. *Marcel v Commissioner of Police of the Metropolis* [1992] Ch 225, [1992] 2 WLR 50. In such cases, the court had to balance very carefully two competing public

interests: the public interest that information obtained under compulsory or statutory powers should not be used for purposes other than those for which the powers were conferred, and the interest that all relevant information be available to the court in deciding the dispute: cf. *Marcel* at 237, per Sir Nicholas Browne-Wilkinson, V-C. The court should recognise both the private interests of the defenders and the public interest of the regulators in the former being able to provide answers to the latter which to some degree might be adverse to their own interests. Such information ought properly to be regarded as confidential and primarily to be reserved for the specific regulatory purposes engaged only. A similar point had been made in the context of information gathered by the police in the course of their investigations and the damage done to the public interest by collateral disclosure: *Bunn v BBC* [1999] FSR 70 per Lightman J at 76, [1998] EMLR 846 at 853. That was *a fortiori* the case where, as here, the agents for the representative party had (at least in connection with the corresponding English group litigations) made specific Freedom of Information Act requests to UK Government authorities and had been provided by those bodies with such information as they considered they could appropriately disclose under that legislation.

[25] Fourthly, the defenders were not obliged to disclose information which had been produced *post litem motam*. The preamble to the list of documents sought recognised an exception for documents produced “in contemplation of litigation”; but many of the documents on the list represented materials produced by the defenders long after the relevant threshold and it was appropriate to deal with the issue at this stage, rather than involving expenditure of resources and then making a decision about what was *post litem motam*. The relevant threshold was passed when there was “a real likelihood of a claim”.

That was most clearly established in personal injuries claims: *More v Brown & Root Wimpey*

Highland Fabricators Ltd 1983 SLT 669 at 670. Nonetheless, the principles there set out were clearly applicable *mutatis mutandis* to any type of claim. In the present case, civil claims for consumers in relation to NOx emissions from diesel engines were first made against companies in the Opel/Vauxhall group in Germany in 2017. The first such court claim against Opel was filed on 31 July 2017. In Austria and the Netherlands proceedings were first filed in March 2020 and July 2021. The first claims correspondence in the UK was in England in November 2020. The first claim in England was lodged in May 2021. For all of the defenders there was a real likelihood of proceedings from at least mid-2017 onwards, when the first German proceedings were brought making substantially the same allegations as were made in these proceedings. The legal and regulatory regime for emissions was harmonised across the EU and the further litigation that followed in other jurisdictions was in relation to the same alleged issues.

[26] Finally, given the new and unusual nature of these proceedings, the court should address or at least have some proposal for dealing with the issue of the cost of the proposed recovery exercise. The basic rules were clear. A haver, even when a party to the litigation, was entitled to a fee for his trouble in searching out the documents called for and copying them to hand them to the commissioner: *Forsyth v Pringle Taylor & Lamond Lawson* (1906) 14 SLT 658, per Lord Mackenzie at 660. In a modern action, this might legitimately include outlays on the technology required to perform a search and the time spent by individuals engaged by the haver in searching for the material through such technology: e.g. *Phoenicia Asset Management Sal v Alexander* [2010] CSOH 71, per Lord Hodge at [6] and [9] – [11]. The payment of that fee was a condition precedent to being required to hand over any documents: *Forsyth*. That fee was also a personal liability of the solicitor responsible for citing a haver to any commission, at least in the first instance: RCS35.4(6).

[27] The court should bear in mind a number of background features to the case when approaching the issue of the recovery of documents. It should have centrally in its mind the representative party's current averments regarding the alleged "defeat devices". He claimed that the defeat devices comprised: (a) strategies that modulated exhaust gas recirculation by reference to a thermal window and "other specific parameters either individually or in combination including but not limited to load and temperature"; and (b) unspecified "strategies" within the selective catalytic reduction system. That was the extent of the representative party's case on Record. He had instructed an expert and the defenders had repeatedly requested disclosure of that expert's report so that they could understand in more technical detail the case they had to meet and, more pointedly for present purposes, the relevance of the requests for recovery of documents being made. No report had been exhibited, which displayed a lack of candour on the part of the representative party and gave rise to a reasonable suspicion that he did not in fact know what case he wished to make and was seeking recovery of documents to help him find out if he had a case at all. More recently, the representative party had added averments about certain recall notices upon which he appeared to be relying to some extent, but did not explain their significance to any of his claims. This issue was inherently collateral. It was for the representative party to plead and prove his case. Decisions by different administrative bodies in different jurisdictions (many of which were, in any event, subject to ongoing appeals or challenges from both consumer bodies and manufacturers) were of limited value to this court in determining the core issues in dispute. The defenders were reasonably apprehensive that what was driving these requests was the perception that the regulatory decisions might disclose or suggest a different case to that which was currently stated. The Court should further bear in mind the defenders' criticisms of several averments regarding particular

grounds of liability alleged as being so vague as to be irrelevant, including the averments of misrepresentation, fraud, and unlawful means conspiracy.

[28] The defenders had lodged an affidavit explaining in detail the likely work, timescales, and cost that would be associated with an exercise of recovery of documents of the nature sought by the representative party. It could involve 60,000 person hours on document review alone, an exercise which would necessarily involve huge expense, estimated at nearly £5 million on an external e-discovery provider before the defenders' own costs and necessary solicitors' costs were accounted for. It also involved a substantial timescale of at least six months. That estimated expenditure of resources and time strongly indicated that a more focused and more relevant order was the only reasonable course to take.

[29] Turning to the specifics of the documents sought, the definition of "Relevant Type-Approval Authorities" was wider than was reasonably necessary. It was only averred that the German, UK and Dutch Type-Approval Authorities had granted Type-Approval. At the relevant times, only one Type-Approval Authority had actually granted Type-Approval and policed it throughout the EU. Calls relating to activity by alleged "Relevant Type-Approval Authorities" beyond that were likely to widen the searches to beyond what was reasonable. Further, the schedule of Sample Models was far wider than truly necessary. The current Group Register had approximately 19,600 entries and the definition of Sample Models covered 88% of those entries. It was likely that any proof which might take place in the case would realistically have to proceed using sample vehicles, and those which were not material to the group as a whole should probably not be part of that sample. Some of the Sample Models had only one vehicle represented in the group register. Other Sample Models were clearly outside the scope of the litigation. Further, each vehicle model as

described in the Schedule of Sample Models was likely to contain multiple (possibly dozens) of variants with differences germane to this dispute. There had been no engagement between the parties as to a sensible and proportionate list of sample vehicles. In the English proceedings, in the lead cases the parties had, with the benefit of technical input, identified sample individual vehicles to be representative of all vehicles of the same variant. No other course was practicable.

[30] Dealing with paragraph 1 of the list of documents, although it was the defenders' view that there was no proper Record for this element of the list, they were willing voluntarily to produce one example Certificate of Conformity for each of the models in the Schedule of Affected Vehicle Models (in so far as those models existed) within 28 days.

[31] Turning to paragraph 2 of the list, dealing with vehicle emissions control systems and devices and NO_x emissions levels, this was a fishing exercise. The paragraph bore no relation to the specific exhaust gas recirculation and selective catalytic reduction "strategies" alleged by the representative party to constitute defeat devices in the pleadings. It sought all documents relative to the design and manufacture of the NO_x ECS (including, but not restricted to, the design and manufacture of exhaust gas recirculation, diesel oxidation catalyst, diesel particulate filter, selective catalytic reduction and lean NO_x trap systems). Most of those documents were irrelevant to the pleaded case. Even if it were relevant, such a wide disclosure would be wholly disproportionate at this stage. The volume of documents that would be covered by the paragraph was potentially huge. There was no justification given for such a broad and unfocused trawl through the defenders' documents. The representative party appeared not to be founding significantly on his own vague pleadings, but was trying to found on portions in the defenders' pleadings as justifying recovery. He did not need to recover information about the design and operation of elements of the

emissions control system that he did not allege were prohibited defeat devices. He was seeking to expand his case into new directions. Further, any investigations undertaken by the defenders into the operation of the alleged devices and dealing with regulatory inquiries were confidential and *post litem motam*, as well as potentially representing the expression of matters of opinion as opposed to matters of fact.

[32] In relation to paragraph 3 of the list of documents, it appeared to be sought for the same general purpose as paragraph 2, and was objected to for the same reasons. The fishing nature of the paragraph was acute. The Committee of Enquiry was concerned with the actions of regulatory authorities rather than specifically about the presence of unlawful defeat devices. The paragraph had no apparent relation to any stated cause of action. The questionnaire response was publicly available, and as far as the defenders were aware the representative party already had it.

[33] Paragraph 4 of the list, dealing with Type-Approval Authorities, was based on the vaguest possible pleadings to the effect that the first to fourth defenders had “fraudulently and deceitfully misled the regulators” when applying for type approval. No specification of that claim had been provided. The matter was collateral to the core issues in dispute, as the minutiae of the information folder and information package provided to regulators for all of the Sample Models had no particular relevance to the case or any of the grounds of action. Any material provided to regulators after Type-Approval was sought and obtained might well be *post litem motam* and confidential.

[34] In relation to paragraph 5, concerning regulatory investigations and recalls, the paragraph extended beyond the specific regulatory decisions condescended upon by the representative party, and sought to see if there might be other such decisions to enable the making of a case not presently set out. More generally, the documents sought were

irrelevant as the regulatory decisions had no bearing on the representative party's case or his grounds of action. It was unlikely that such broad collateral factual investigations and evidence would help the court determine for itself whether there were prohibited defeat devices or not. The paragraph also called for the recovery of documents which were *post litem motam* and confidential.

[35] Paragraph 6 sought to recover a response to a letter from a regulatory authority, and the information called for in that letter. Its effect would be to require the defenders to provide the findings of any investigations undertaken by them in response to regulatory activity. The representative party had already been in extensive contact with the relevant authorities and such information as they considered it proper to make available was likely already to have been provided to him. Further, the matter was not materially relevant to the cases made by the representative party in his current pleadings. The material called for was *post litem motam*.

[36] Paragraph 7 sought responses to a further regulatory authority investigation. It went well beyond the scope of the current averments and in any event the regulatory investigation in question was irrelevant. The documents called for were *post litem motam* and confidential. Paragraph 8 sought recovery of records held not only by the defenders but by "authorised Vauxhall dealerships and repairers". That would require a very wide and unreasonable width of searches. Any documents such third parties might hold would merely be duplicative of what the defenders themselves held and could provide. The paragraph sought information about software updates on a basis wider than was averred in the representative party's pleadings.

[37] If the court was minded to grant some form of order in respect of the representative party's motion, it had the widest possible powers in terms of RCS26A.27 to make case

management orders. The size and scale of recovery sought demanded some degree of case management. It was questionable whether third parties should have imposed on them the onerous task of complying with the demands made of them. It would be contrary to principle to grant an order for the recovery of broad categories of documents that might exist rather than actual documents which the defenders admitted having. The likely costs of complying with any order could not accurately be predicted until its precise form was known, but they might well be extensive. The potential costs of the exercise tended to emphasise the wholly unreasonable scope of what was being sought. Liability for such costs in the first instance would fall on the representative party's agents. There was reason to doubt that it could meet the sort of costs which might be incurred. It would be unjust for the defenders to have to incur those costs and then be unable to recover them from anyone. Accordingly, the defenders would seek an order from the court that the representative party or his agents should provide caution for the costs and expenses likely to be involved. The defenders had also estimated that it would take them at least six months to complete the exercise sought by the representative party, and the court should expressly allow them that length of time to comply with any order made.

Decision

[38] The powers given to the court relating to the provision of documentary material in group proceedings are, in common with its powers under the rules governing commercial and intellectual property actions, wide indeed. RCS26A.21(2)(b)(iv) enables it to order disclosure of the existence and nature of documents "relating to the proceedings" and to grant authority for the recovery of documents (apparently without even that very mild limitation) generally or specifically. I can see no reason why such recovery may not be from

persons who are not parties to the proceedings. RCS26A.21(2)(b)(v) further enables the court to order the lodging (in this instance presumably by a party) of documents constituting, evidencing or relating to the subject-matter of the proceedings within a specified period. Those specific provisions are supplemented by the Lord Ordinary's general power in terms of RCS26A.27 to make such order as he thinks necessary to secure the fair and efficient determination of the proceedings. One reason for the existence of such powers is that group proceedings are likely to constitute, as the relative Practice Note puts it with considerable understatement, "potentially complex litigation". Against that background, the suggestion that the room for manoeuvre afforded to the court in this context ought to be regarded as circumscribed by direct reference to the principles which might operate to determine the disposal of an application to its residual power to grant commission and diligence for the recovery of documents cannot be accepted. The provision of the specific powers relating to documentary material granted to the court by Chapter 26A would have been without meaning were it to be the case that those powers fell to be exercised in the same way as the general powers of the court to grant commission and diligence. I therefore propose to consider only that part of the representative party's motion seeking orders under the provisions of Chapter 26A, and find it unnecessary to deal with the alternative branch of his motion for the grant of commission and diligence.

[39] The Chapter 26A powers may be exercised serially – i.e., the court might require the existence and nature of documents to be disclosed in the first instance, and only then order some or all of the documents so disclosed to be recovered or lodged – but there is no requirement that matters proceed in that way given that the power to order recovery may be made either "generally or specifically". The consequences of an apparent failure to comply with an order of the court relating to documents are entirely a matter for the court itself; if a

party was able to show that it had done all that it reasonably could to comply with an order (in the court's estimation, not its own) then any difficulties which had emerged in achieving full compliance would be unlikely to be visited with meaningful sanction.

[40] None of that is to say that the underlying rationales of the principles developed in the context of applications for commission and diligence are now necessarily, to borrow a phrase famously used in another area of law, merely "old intellectual baggage" (*Investors Compensation Scheme Limited v West Bromwich Building Society* [1998] 1 WLR 896 per Lord Hoffmann at 912G) ruthlessly to be discarded when considering applications concerning documentary disclosure and recovery made in group proceedings subject to Chapter 26A. Those principles were, after all, simply expressions of the requirements of what would nowadays be called proportionality in the context of a highly adversarial system of dispute resolution. Although group proceedings (like the other forms of process where rules similar to those found in Chapter 26A are to be found) remain at their core adversarial, modern understanding of what that entails by way of the requisite co-operation amongst parties and between parties and the court, coupled with an increasing recognition of the benefits of proactive judicial case management, necessarily results in a need for adaptation of the principles underlying document identification and recovery in order to reflect what now falls to be regarded as a fair balance amongst the interests which the exercise engages. The proper application of powers such as those set out in RCS26A.21(2)(b)(iv) and (v) will thus turn on (a) consideration of how directly or otherwise the material sought to be recovered appears to bear upon matters properly in (or likely properly to be in) dispute, (b) the respective positions of the parties in relation to access to potentially significant information (including their ability or inability to access it without the assistance of the court) and (c) the

respective legitimate benefits and burdens (in time, trouble and expense) of the making of the order sought or something approximating to it.

[41] While these observations might be thought to pertain with equal or at least similar force to applications for the grant of commission and diligence more widely, and not simply to cases involving the exercise of specific powers such as those in Chapters 26A, 47 and 55 of the Rules of the Court of Session, this is not an appropriate occasion upon which to deal with such applications. It may be observed, however, that the experience of many practitioners will be that the principles traditionally said to underlie the grant or refusal of commission and diligence might be thought presently to be honoured at least as much in the breach as in the observance, and that may well reflect a tacit acknowledgment of the significance of the factors underpinning modern concepts of the proper conduct of litigation to which I have adverted.

[42] Questions about orders relating to documents to which the description *post litem motam* properly applies, and more generally about the import of a claim of confidentiality pertaining to documents called for, will also arise in the context of applications under Chapter 26A and its cognates. Dealing with the first of those issues, in previous editions and in the current edition of Walker and Walker on *Evidence*, the learned authors observe, under reference to *Anderson v St Andrews Ambulance Association* 1942 SC 555, 1942 SLT 278, per Lord President Normand at 1942 SC 557, 1942 SLT 279 that “The general rule is that no party can recover from another material which that other party has made in preparing his case” and go on to say that:

“This, it is thought, is the true meaning of the proposition that communications *post litem motam* are confidential. So stated, the proposition is too wide. First, the mere date of the communication is immaterial. Secondly, an admission, confession or indeed a casual remark about the dispute is not necessarily confidential. It must be

something said or written with a view to preparation of the case" (3rd ed., 2009, 10.3.1; earlier editions at paragraph 394).

[43] In *Marks & Spencer Ltd v British Gas Corporation (No 1)* 1983 SLT 196, Lord Hunter

observed at 197 that:

"So far as any clear rules can be derived from the numerous authorities bearing upon this area of law and practice, one principle would appear to be that reports prepared shortly after an accident for a person who subsequently becomes a party to litigation arising out of the accident will not be recoverable if they are prepared and submitted *post litem motam*, using that term in the particular sense which it is understood to convey in the present context. (See *Walkers on Evidence*, p. 416 .) It is a question of circumstances whether this particular stage has been reached in any particular case, but in general it may be said that the contrast is between reports which are designed to put the person concerned in possession of the true facts, on the one hand, and reports made in contemplation of judicial proceedings, on the other ..."

The case cited in this connection by the defenders, *More v Brown & Root*, was similar on its facts to *Anderson* and was decided in the same way. I see nothing in it which casts doubt on the rationale drawn by the learned authors of *Walker on Evidence* from the latter case, or on the further observations made by them about the true nature of the concept of *post litem motam* documents. It follows that an approach to the status of documents as *post litem motam* which turns simply on the date of their compilation or creation cannot properly be adopted. If the defenders wish to claim that certain documents enjoy that status, they may advance a reasoned claim in relation to specific documents which they would otherwise be obliged to disclose, and the court will rule on that claim in that context and on the basis of the true test set out above.

[44] Turning to the question of confidentiality more generally, the list of documents sought by the representative party as ultimately drawn does not ask for any regulatory body to hand over documents furnished to it by the defenders. This case is accordingly materially unlike *Marcel*. It may be that the defenders consider that they have, in relation certain documents which they would otherwise be obliged to disclose, a claim to confidentiality in

the sense that a private or public interest in maintaining the privacy of the material in question ought to be regarded as outweighing the public interest in the administration of justice on the basis of the fullest possible information. If so, then again they can assert that claim in relation to specific documents and the court will rule on the matter as it does in every other instance where such a claim is asserted. This applies to documents containing or reflecting matters of opinion as it does to those setting out matters of fact.

[45] On the issue of the prospective expenses of complying with any order which may be pronounced, I do not accept that there is any general rule of law, even in the context of the grant of commission and diligence, that a party to an action is entitled in the first instance to payment or security from his opponent in respect of the costs of complying with an order for the recovery of documents. *McGill*, despite its antiquity, is a decision of the Second Division which is inconsistent with the existence of any such rule, and rather affirms that the court has a discretion in this matter, which is precisely what one would expect in a matter concerning expenses. The decision in the Outer House in *Forsyth*, while acknowledging *McGill*, states no ground for distinguishing it and cites no contrary authority. *Forsyth* cannot be regarded as governing the matter. *Phoenicia* deals with rather different question of the expenses of a stranger to the litigation in complying with an order granting commission and diligence, where it is easy to see why payment of reasonable expenses should as a matter of principle be a pre-condition of document recovery. In the particular context of a document recovery application made in proceedings subject to Chapter 26A, the wide general discretion given to the Lord Ordinary further militates against the application of any general rule such as that for which the defenders contend. Such a rule would have certain practical disadvantages, such as providing very little incentive indeed for due economy in the execution of the order, and requiring a subsequent balancing of accounts should it transpire

that the ultimate cost of the exercise should rest on the party who required to carry it out.

Overall, I agree with the observation of Lord Medwyn in *McGill* that there is great inconvenience in dealing with incidental claims such as this in the course of a litigation, and propose to reserve the question of the expenses of the document recovery exercise in this case until a conclusion on the more substantive issues at stake is arrived at.

[46] Turning to the application of the identified principles to the facts of the present case, the defenders' offer voluntarily to provide one example Certificate of Conformity for each of the models in the Schedule of Affected Vehicle Models (in so far as those models exist) within 28 days was acceptable to the representative party and thus no order of the court is required in this regard.

[47] Paragraph 2 of the list in essence seeks recovery of documentation in the hands of the defenders relative to the design and manufacture of the ECS in two specific models of the 2.0 litre Vauxhall Insignia range, said to represent a substantial proportion of the vehicles with which group members are concerned. The criticisms advanced by the defenders of this paragraph largely turned on the claim that the documents in question exceeded by some measure the averments presently made by the representative party as to the nature of the unlawful defeat devices said to have been installed in the vehicles manufactured and sold by the defenders. While that criticism may well be true as a matter of fact, it is not a valid objection to the recovery sought. The representative party has made allegations about the presence of defeat devices in those vehicles based, at the very least as a matter of clear inference, on material emerging from the various regulatory interventions upon which he condescends. What he is unable at present to do (because of the "information asymmetry" inherently present in the circumstances of the present case) is to specify in detail the full features of the alleged defeat devices in question. Any claims to confidentiality or as to the

post litem motam status of documents otherwise falling within any this or any other aspect of the court's order may be advanced simultaneously with their production in a confidential envelope to the court. I shall make an order for the production by the defenders of the documents described in paragraph 2.

[48] Paragraph 3 of the list of documents seeks material which went towards the response of Adam Opel AG to a European Parliament Committee of Enquiry in 2016 dealing in particular with the nature, design and operation of the selective catalytic reduction systems in all Sample Models. I shall not make any order for recovery in terms of this paragraph. The representative party has the actual response made to the Committee of Enquiry, and the undoubted interest which he has in the nature, design and operation of the selective catalytic reduction systems in the defenders' vehicles is adequately catered for by the order which I am to make in relation to paragraph 2 of the list.

[49] Paragraph 4 of the list in essence seeks documents submitted to Type-Approval Authorities by the relevant defenders and in their hands, in connection with the applications for Type-Approval of the Insignia models already mentioned, and relevant to the NO_x emissions of those models. A substantial part of the representative party's case is that the relevant defenders fraudulently misled Type-Approval Authorities in the applications in question. The material sought by the paragraph may well, in conjunction with that sought by paragraph 2, inform the validity or otherwise of that allegation, which could not otherwise be established on any direct basis. I shall make an order for production of the documents sought by this paragraph.

[50] Paragraph 5 of the list is very widely drawn and seeks recovery of documents in the hands of the relevant defenders casting light upon the nature of certain recall notices issued by the KBA, the RDW and the DVSA and the software updates offered in consequence

thereof, in relation to all Sample Models. I consider that an order should properly be made only in relation to parts of the range of documents called for. That order will require the production of the recall notices in question (i.e., part only of sub-paragraph (b)), and of documents showing the timing, nature and effect of any consequential software upgrades carried out (i.e., sub-paragraph (d)). No further order in terms of paragraph 5 will be made. The order to be made will furnish the representative party with details of the nature of the problem or problems identified by the regulatory authorities and of any remedial measures taken. It will not necessarily provide him with details of the investigations undertaken by the authorities or with what the defenders had to say about the issue of the recalls, but I do not consider that such details are required by him in order fairly and proportionately to advance his case.

[51] Paragraph 6 addresses itself to material produced by the third defender to the DVSA, and held by that defender, responding to a letter from that authority dealing with the potential consequences of the decision of the European Court of Justice in the case of CLVC (No. C-693/18). I do not consider that this material is of central significance to any matter with which the representative party requires to deal in order fairly to advance his case, and shall accordingly make no order in terms of this paragraph.

[52] Paragraph 7 seeks similar material in response to a regulatory investigation by the KBA. For the same reasons, I do not consider that an order in terms of this paragraph is reasonably required and will refuse to make any.

[53] Paragraph 8 seeks recovery of documentation showing what group members were told about the reasons why software upgrades were required to their vehicles. It did not appear that the inclusion of Vauxhall dealers and repairers amongst those required to produce such documents was likely to add anything to the nature of the material which

would otherwise be recovered by the grant of the desiderated order, and they will be excluded from it. Beyond that issue, the documents identified in the paragraph are of potential relevance to the representative party's case on misrepresentation and, possibly, the impact of the law of prescription, and I shall make an order in terms of it, subject to the exception already mentioned.

[54] The order to be made will, as is usual, include copies or duplicates of the documents it comprehends if principals are not available.

Disposal

[55] The case will be put out By Order to discuss the practical implications of the order to be pronounced along the lines indicated, and in particular to determine the time to be afforded to the defenders to commence and complete the production of the documents in question.