Neutral Citation Number: [2023] EWHC 2632 (KB)

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

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/10/2023

Before :

Senior Master Fontaine

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Between :

Ethan Thomas Wragg and others	**Claimants**
- and -	
(1) OPEL AUTOMOBILE GMBH	**Defendants**
(2) ADAM OPEL GMBH	
(3) VAUXHALL MOTORS LIMITED	
(4) IBC VEHICLES LIMITED	
(5) VAUXHALL FINANCE PLC	
(6) PSA RETAIL UK LIMITED	
(7) VARIOUS OTHERS (AUTHORISED DEALERS)	

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

Hearing dates: 15-16 June 2023

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Approved Judgment

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SENIOR MASTER FONTAINE

Senior Master Fontaine:

1. This was the hearing of applications issued by the First and Second Defendants (the "German Defendants") dated 11 October 2022, 24 January 2023, 17 February 2023 and 20 April 2023 in the claims listed at Schedule 1 to this judgment, for the following orders:

   i) To set aside orders for permission to serve claim forms out of the jurisdiction granted in 31 claims, pursuant to CPR Part 11 (the "Part 11 applications"); and

   ii) To set aside orders granting extensions of time for service in 29 claims pursuant to CPR 7.6(2) ("the extension applications").

   The applications are opposed by the Claimants.

2. The witness statements that were before the court are listed in Schedule 2 to this judgment.

The Factual Background to the Claims

3. This is multi-party litigation in which the Claimants propose have issued an application for a group litigation order ("GLO"). In summary the claims allege that the German Defendants and others installed defeat devices in the emissions control system of Vauxhall-branded vehicles which were acquired by the Claimants. It is alleged that the installation and/or incorporation of such defeat devices in the design of Vauxhall-branded vehicles was unlawful under EU Regulation 2007 715 (the "Emissions Regulation"). The Claimants' primary case is that the Defendants involved in the design and or manufacture of the affected vehicles (the "Manufacturer Defendants"), which includes the German Defendants, dishonestly misled both regulators and consumers, including by making representations in relation to defeat devices and regulatory compliance which they knew to be false or as to which they were reckless as to their truth or falsity. The Claimants advance causes of action in deceit, unlawful means conspiracy and breach of statutory duty **a**gainst the Manufacturer Defendants. Draft Generic Particulars of Claim have been served pending the hearing of any application for a GLO.

The Part 11 applications

4. The orders for permission to serve claim forms out of the jurisdiction were made on a without notice basis and without a hearing. The grounds relied upon in the applications are that the Claimants failed, when applying for those orders, to give full and frank disclosure to the court in two respects:

   i) the limitation defence available to the German Defendants ("the limitation non-disclosure"); and

   ii) the availability of Germany as a potential alternative forum ("the alternative forum non-disclosure").

Relevant Law

Service out of the jurisdiction

5. CPR 6.36 provides that:

> "In any proceedings to which rule 6.32 or 6.33 does not apply, the claimant may serve a claim form out of the jurisdiction with the permission of the court if any of the grounds set out in paragraph 3.1 of Practice Direction 6B apply."

6. The general principles to be applied when determining an application under CPR 6.36, were summarised in *Altimo Holdings v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7; [2012] 1 W.L.R. 1804 PC, at [71], [81] and [88] per Lord Collins and in *VTB Capital plc v Nutritek International Corp* [2012] EWCA Civ 808; [2012] 2 Ll. Rep. 313, CA, at [99] to [101] per Lloyd LJ. Those principles are that a claimant must satisfy the court that:

   i) there is a good arguable case that the claim against the foreign defendant falls within one or more of the heads of jurisdiction for which leave to serve out of the jurisdiction may be given as set out in para. 3.1 of PD 6B;

   ii) in relation to the foreign defendant to be served with the proceedings, there is a serious issue to be tried on the merits of the claim; and

   iii) in all the circumstances:

      a) England is clearly or distinctly the appropriate forum for the trial of the dispute (the *forum conveniens*), and

      b) the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.

Duty of Full and Frank Disclosure

7. 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 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."

8. The following authorities contain guidance in relation to the duty of full and frank disclosure.

9. In *Knauf UK GmbH v British Gypsum Ltd* [2002] EWCA Civ 1570*;* [2002] 1 WLR 907 at [65], 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;"

10. And in *ABC International Finance & Investment Co v Banque Franco Tunisienne* [1996] 1 Ll. Rep. 485 at p. 489 Waller LJ said:

> "That obligation [*of disclosure*] is to bring to the attention of the court any matter, which, if the other party were represented, that party would wish the court to be aware of in the context of exercising its discretion."

See also p. 491 last paragraph of that judgment:

> "It is important to emphasise the duty of disclosure. That duty, …… applies on any ex parte application. The judge who has to deal with an ex parte application is dependent on points which should be drawn to his attention being so drawn clearly."

See also *MRG (Japan) Ltd v Engelhard Metals Japan Ltd* [2003] *EWHC 3418 (Comm)* at [23] per Toulson J (as he then was) to similar effect.

The Alleged Material Non-Disclosure

The Limitation Non-disclosure

11. The German Defendants allege that the Claimants failed to inform the court when the service out applications were made, that in respect of Claimants who had purchased or leased Vauxhall vehicles prior to six years before the issue of their claim form, their claims in tort for deceit, negligent misstatement, unlawful means conspiracy, and their claims for breach of statutory duty, are *prime facie* time barred.

12. Brady-Banzet 3 at §§37 to 47 supports the German Defendants' submissions that the Claimants cannot have been unaware of this issue as it was the subject of correspondence between the parties, initially by the Defendants' solicitors' ("Cleary Gottlieb") letter dated 13 August 2021, also in Cleary Gottlieb's response to the letter before claim sent by Leigh Day LLP's, (one of the firms of Claimant solicitors), and again in Cleary Gottlieb's letter of 10 May 2022, where Cleary Gottlieb invited the Claimant firms to identify all Claimants who acquired their vehicles more than six

years before the relevant claim form was issued. The witness statement also identifies that the Claimant firms have not provided information to the German Defendants to identify how many of the claims brought are time barred, or the information which would enable the German Defendants to identify which claims were time barred on issue. On the basis of the information available to the German Defendants so far, it is estimated by them that of the approximately 75,000 Claimants, there will be thousands of time barred claims.

13. Brady-Banzet 3 at §§43 - 44 refers to the fact that the Claimant firms stated in correspondence that the Claimants in time barred claims would rely on section 32 of the Limitation Act 1980 ("section 32") to extend the six year limitation period, but that no information was provided as to the basis on which the Claimants claimed that section 32 would apply, or what it was said was concealed from them, so as to satisfy the requirements of section 32. It is submitted that the limitation problems with some of the claims would have been material to the court's decision on the service out applications had it been drawn to the court's attention, as it would have been relevant to the question of whether such claims raised a serious issue to be tried.

The Alternative Forum Non-Disclosure

14. The German Defendants also allege that the evidence in support of the service out applications should have drawn attention to the fact that Germany is a plausible alternative forum for the claims advanced against the German Defendants for the following reasons:

    i) The German Defendants are domiciled and carry out their business in Germany.

    ii) Most of the relevant vehicles were manufactured in Germany, and they were exported to England from Germany; the key stages of the development process happened in Germany, including their design and testing.

    iii) Most of the relevant vehicles were granted type approval in Germany by the German regulator.

    iv) The relevant witnesses in relation to questions of responsibility are unlikely to be based in England or have English as their native language. A trial in England is likely to require extensive translation of oral evidence, which will be expensive and inevitably be less satisfactory than if witnesses gave evidence in their native language.

    v) Much of the relevant documentary evidence is likely to be found in Germany and a substantial part of that evidence is likely to be in German. If the claim is tried in Germany those documents will need to be translated which will lead to additional expense and delay.

    vi) There was and is litigation in Germany arising out of the same issues.

    vii) The origin of the dispute could be said to be in Germany: see *VTB Capital v Nutritek* [2013] UKSC 5 at [7], [70] and [71].

Whether there was a breach of the duty of full and frank disclosure

15. It is accepted by the Claimants that neither of these issues were mentioned in the Claimants' evidence in support of the service out applications. The Claimants submit that neither of these matters were material to the court's decisions on the applications.

The limitation non-disclosure

16. It is conceded by the Claimants that it would have been better for limitation to have been raised and dealt with, but that it would have made no difference to the outcome of the service out applications.

The Relevant Law

17. In *Alliance Bank v Zhunus* [2015] EWHC 714 (Comm), a case also concerning the non-disclosure of a limitation defence, Cooke J. said at [65]:

> "The test of materiality of a matter not disclosed is whether it would be relevant to the exercise of the court's discretion. A fact is material if it would have influenced the judge when deciding whether to make the order or deciding upon the terms upon which it should be made."

18. Cooke J. also warned at [67] that:

> "…caution must be observed when the non-disclosure in question depends on proof of facts which are in issue in the action and the court must not conduct a mini trial."

19. In *MRG* at [27] Toulson J. cited Kerr J's judgment in *BP Exploration Co v Hunt* [1976] 3 All ER 879:

> "In my view, a failure to refer to arguments on the merits which the defendant may seek to raise in answer to the plaintiff's claim at the trial should not generally be characterised as a failure to make a full and fair disclosure, unless they are of such weight that their omission may mislead the court in exercising its jurisdiction under the rule and its discretion whether or not to grant leave."

20. Again, in *MRG*, Toulson J. commented on this point at [30] when he said:

> "There may be many points which would be relevant to the ultimate merits of an action, but which could not on any reasonable view affect the judge in deciding the "merits threshold" question (or the ultimate question whether to grant the application)."

21. Toulson J. also said in *MRG* at [31] that on an application for permission to serve out of the jurisdiction:

> "….the issues which the judge is required to consider are limited. This is because the judge is at this stage concerned with the question whether the court should assume jurisdiction, rather than with the question who is likely to win."

22. This is reinforced in *The Libyan Investment Authority v JP Morgan Markets Ltd* [2019] EWHC 1452 (Comm), which dealt with a failure to disclose that there was a limitation defence available to the defendants, in the judgment of Bryan J. at [104]:

> "Limitation on the English law... was on any view, and without any benefit of hindsight, a very important potential defence to the claims being advanced. Indeed (as I have found) it was a matter that meant that the LIA did not have a real prospect of success and as such service should be set aside. But whether that was so or not, it was 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. Equally, in terms of the duty of full and frank disclosure, the issues that arose in relation to limitation and matters which might reasonably have caused the judge to have doubt whether he should grant permission to serve out of the jurisdiction, in the context of whether the LIA had a real prospect of success and as such were relevant matters which ought to have been disclosed (*MRG (Japan) Ltd v Engelhard Metals Japan,* supra at [29] per Toulson J)."

23. However, as long as the judge hearing an application for permission to serve out of the jurisdiction is satisfied that there is a serious issue to be tried, there is no requirement to delve further into the merits of the dispute: see *MRG* at [26] per Toulson J:

> "26. An application for permission to serve out of the jurisdiction is of a very different nature. The general principles about disclosure on without notice applications still apply, but the context is different. The focus of the inquiry is on whether the court should assume jurisdiction over a dispute. The court needs to be satisfied that there is a dispute properly to be heard (i.e. that there is a serious issue to be tried); that there is a good arguable case that the court has jurisdiction to hear it; and that England is clearly the appropriate forum. Beyond that, the court is not concerned with the merits of the case."

Limitation Non-Disclosure - Discussion

24. I consider that the issue of limitation should have been raised. The applications for permission for service out did not need to go into the merits in any degree of detail. But the potential availability of a limitation defence to the claims of a substantial proportion of the numerous Claimants, who could only defeat a limitation defence by successfully relying on section 32, was material to whether there is a serious issue to be tried on the merits of many of the claims. In relation to a foreign defendant to be

served with the proceedings, the applicant must satisfy that requirement, and it is therefore a factor relevant to the judge's decision on the application for service out (see Paragraph 6(ii) above).

25. As to whether the non-disclosure was innocent or deliberate, it is apparent from the correspondence that Mr Oldnall was aware that the Defendants would be likely to rely on a limitation defence in respect of at least a significant proportion of the claims, and that not all of the Claimants had provided information as to when they acquired their vehicles so as to identify with accuracy whether their claims were *prima facie* time barred or not.

26. Mr Oldnall's evidence at paragraph 16.1 (b) of Oldnall 13 is as follows:

> "Limitation as an issue was not raised in the original witness statement supporting the Claimants' *ex parte* applications for service out and extensions of time as it was not considered a material issue. This is because: (i) determination of a limitation defence / reliance upon s.32 (1)(a) and (b) of the Limitation Act 1980 involves a detailed factual analysis, which will rarely be appropriate when considered in a summary judgement threshold context, even in a unitary case; (ii) this issue is even more stark in the context of a group action mass claim forms which contain the claims of tens of thousands of claimants. Each of these Claimants has dates of purchase / acquisition of vehicles and personal circumstances that are individual to them. Insofar as those Claimants rely upon s. 32 of the Limitation Act 1980 so as to extend primary limitation periods, there is no straightforward or plausible analysis that can be applied so as to determine limitation on a summary and generic basis; and (iii) it is unclear to me how 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 court cannot 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."

27. Although I agree with Mr Oldnall's analysis of the likely effect of the issue of limitation, had it been mentioned, it was and is a factor relevant and material to the question of whether there was a serious issue to be tried and should have been included. I note from Oldnall 13 at §16.1 (d) that the issue of limitation was raised in the evidence supporting the Claimants' "omnibus application" to extend time for service, but that application was made at a later date than the application for permission to serve out, so was not before the court when the service out application was made.

28. I agree with the Claimants' submission that had I 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. That is 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. 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.

29. However, the fact that the judge dealing with the application would not have made a different decision had they known of the material information makes no difference to the question of whether there was a breach of the obligation.

30. The non-disclosure was deliberate, in that Mr Oldnall accepts that he was aware of the issue, but decided not to include it for the reasons given in his evidence quoted at Paragraph 26 above. There would have been ultimately no advantage to the Claimants by withholding such information, as it was already known to the Defendants. Similarly to the position in *Harrington & Charles Trading Co Ltd v Mehta* [2022] EWHC 2960 (Ch) per Edwin Johnson J. at [232], on the basis of Mr Oldnall's evidence, I conclude that the failure to disclose this issue was not deliberate or reckless, but as a result of a wrong judgment call.

<u>Alternative forum non-disclosure - Discussion</u>

31. There is no specific requirement in CPR 6.37 for an applicant to address the question of whether there is an appropriate alternative jurisdiction, although CPR 6.37(3) states:

> "The court will not give permission unless satisfied England and Wales is the proper place in which to bring the claim."

32. And in *VTB Capital* at [99] to [101], in a joint judgment delivered by Lloyd LJ, one of the requirements to be satisfied for such an application was stated to be that:

> "…the claimant must satisfy the court that in all the circumstances England is clearly or distinctly the appropriate forum for the trial of the dispute (forum conveniens)… "

33. A note in the White Book Vol. 1 at 6.37.5, in relation to rule 6. 37(3), says:

> "In effect it flags up sophisticated conflict of law rules, particularly as regards the doctrine of forum non conveniens, which would come into play, whether or not their existence was noted and acknowledged in r. 6.37."

34. In *Knauf* at [70], the court considered the effect of the non-disclosure of an exclusive jurisdiction clause in an application to serve a claim form by an alternative method,

where there was an issue between the parties as to whether the exclusive jurisdiction clause was applicable, it was said:

> "… when a court is being asked to make an exceptional order, in the exercise of its discretion, for the making of which a "good reason" must be found, and that order is designed to affect and does affect the jurisdiction or potential jurisdiction of the English court in respect of foreign parties, it is absolutely necessary to bring to the court's attention the possible existence of an exclusive jurisdiction clause in favour of a foreign jurisdiction."

35. This case does not involve the non-disclosure of an exclusive jurisdiction clause, but rather a related issue of whether the country of the place of business of the German Defendants might be an appropriate alternative jurisdiction.

36. *Brink's Mat* and other authorities emphasise that the duty of full and frank disclosure requires the applicant to "*bring to the attention of the court any matter which, if the other party were represented, that party would wish the court to be aware of*". The German Defendants may have been likely to have wished for the court to be made aware of the fact that they considered that Germany was an appropriate alternative jurisdiction. However, this is not entirely clear, in circumstances where they have throughout not stated whether they intended to challenge the jurisdiction of this court, and have not now brought any *forum non conveniens* challenge to jurisdiction.

37. Oldnall 3, in support of the application for service out of the jurisdiction, refers at §§40-46 to the correspondence between the parties on the issue of jurisdiction, and at §43 of that witness statement, to the Claimants' view that the German Defendants had:

> "…no realistic prospect that, on any consideration of *forum non conveniens*, the English Court would require consumers in England and Wales to sue the First Defendant ("Opel") in Germany, in circumstances in which cars were deliberately placed on the market in England and Wales for sale to consumers in this jurisdiction, and where England and Wales is the jurisdiction in which their causes of action accrued."

> And at §72.7:

> "… the post-Brexit jurisdiction changes have reaffirmed the principles set out in Section 4 of the Brussels Recast Regulation, that English-domiciled consumers have the right to sue and be sued in their domicile, regardless of the domicile of their contractual counter-parties.....a policy choice which the Court ought to take into account where such consumers also wish to pursue the foreign manufacturers of goods sold to them in England."

To that extent, the issue of an alternative available jurisdiction was brought to the court's attention, although not further developed to address the factors in favour of Germany as an alternative forum.

38. I consider that these paragraphs (§§40-46, 43, 72.7) sufficiently identify to the court the existence of an appropriate alternative forum. Although the factors in favour of Germany as a forum are not stated, the rule, in my judgment, does not require such factors to be included in an application for service out of the jurisdiction. The rule requires only that the court is satisfied that England & Wales is the proper place to bring the claim. Accordingly, I do not consider that the Claimants were in breach of the duty of full and frank disclosure in relation to the identification of an appropriate alternative forum. I note that in the many applications for permission to serve out of the jurisdiction that are dealt with by the King's Bench Masters, it is rare to find one where the applicant goes beyond the express requirements of the rule and identifies an appropriate alternative jurisdiction and/or factors in favour of such available alternative forum.

39. However, I recognise that my interpretation of the rule may be wrong, and that it is at least arguable the there is such an obligation to go further than the Claimants did. Accordingly, I will consider, if I am wrong that there was no breach of the duty of full and frank disclosure in respect of this issue, how the court's discretion should be exercised.

Exercise of Discretion – Appropriate Sanctions

The Relevant Guidance

40. In *OJSC ANK Yugraneft v Sibir Energy plc* [2008] EWHC 2614 (Ch) at [102] (cited with approval in *The Libyan Investment Authority v JP Morgan Markets Ltd* [2019] EWHC 1452 (Comm) at [92]) Christopher Clarke J endorsed the summary of the principles to be applied to breaches of full and frank disclosure as set out in *The Arena Corp. Ltd v Schroeder* [2003] EWHC 1089 (Ch) at [213] as follows:

"(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.*"

41. This was emphasised by Popplewell J in *Banca Turco v Cortuk and ors* [2018] EWHC 662 (Comm) at [45]:

> "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 a 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 to the court which exists in order to ensure the integrity of the court's process. 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 Limitation Non-Disclosure

42. Factors that I consider to be relevant to the issue of discretion, in relation to this 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.

The Alternative Forum Non-Disclosure

43. I consider that the relevant factors are:

i) Oldnall 3 had raised the issue of Germany as an alternative forum at §§40-46 and §43 (see Paragraph 37 above). To that extent the issue of an alternative available jurisdiction was brought to the court's attention, although not further developed.

ii) The German Defendants did not give any reasons for reservation of their position on jurisdiction in the correspondence prior to issue of the application despite requests from the Claimants' solicitors that they agree to not to take any issue in respect of jurisdiction.

iii) The German Defendants' Part 11 applications do not challenge this court's jurisdiction on *forum non conveniens* grounds.

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.

Conclusion in respect of the limitation non-disclosure

45. Although it is clear from the authorities that limitation is an issue that should be included, in the particular circumstances of this group litigation the failure was a much less serious transgression than in a unitary action, in my judgment, for the reasons referred to in Oldnall 13 and Paragraph 28 above.

46. In particular, with regard the information as to which, how many and/or which proportion of the Claimants' claims were *prima facie* time barred, I accept the

evidence and submissions of the Claimants that it would simply not have been proportionate to have carried out the work that would have enabled them to provide this information at such an early stage in the litigation. This issue is addressed in some detail in Oldnall 14 §§28 to 33.

47. In a group action individual information is usually be provided in schedules of information or questionnaires, the form and content of which would be discussed between the parties before, and considered at, the hearing of the GLO application. It is generally a very costly exercise for Claimant firms to obtain individual information from claimants in a group action involving very large numbers of claimants (beyond the basic information needed to commence a claim) so it is generally not proportionate to do so until the parties have agreed, and/or the court has approved, the form and content of the manner in which such information is to be provided. This is a fundamental distinction from a unitary claim, where it is generally very straightforward to identify whether there is likely to be a limitation defence available to the defendant. 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 simply because this is a multi-party litigation with some [75,000] Claimants. In my judgment this distinguishes the facts of this case from those authorities which emphasise the importance of identifying limitation issues in applications for service out, none of which appear to have been in multi-party or group actions.

48. The German Defendants point to the Claimants' lack of contrition for the omission, and I agree that it was recognised rather late in the day by the Claimants that limitation was a matter that should have been addressed in the evidence supporting their applications, but Mr Oldnall has given a full explanation as to why he considered at the time that it was not a matter that needed to be included, which I accept is a credible explanation, albeit a misjudgement.

49. The fact that both potentially time barred and non-time barred claims were included in all claim forms, and that no details of how Claimants could or may be able to rely on a section 32 application, are again, consequences of this being multi-party litigation. In order to obtain that information before issue of claim forms, a considerable amount of work and costs would have to be carried out which would have been disproportionate at that stage. There is in any event an issue between the parties as to when limitation starts to run, as to whether it is the date of acquisition of a vehicle, as the Defendants allege, or some later date dependent upon date of knowledge, as the Claimants allege. If the GLO application is successful and approved, the managing judge will determine how the various issues will be dealt with. It is entirely possible that the managing judge would decide to determine liability issues excluding limitation initially, as if the Claimants were unsuccessful there would be no need for a trial on limitation. (See *Various Claimants v MGN Ltd* [2022] EWHC 1222 (Ch); *Davies v Secretary of State for Energy & Climate Change* [2011] EWHC 11 (QB) and *Hutson v Tata Steel UK Ltd* [2019] EWHC 1608 (QB) for different approaches to limitation issues in group actions).

50. I consider that it would be an inappropriately draconian sanction to set the orders aside. This breach was not one of the most serious transgressions, for the reasons I have set out. The German Defendants were always aware that there were likely to be potential limitation defences in a significant proportion of claims and had the

opportunity to write to the court when they received the draft applications and evidence, to draw the court's attention to this failure or to ask that the applications be on notice. Further, setting aside such orders would have the effect of terminating the claims of all those Claimants whose claims are not susceptible to a limitation defence, or Claimants who might be able to avail themselves of a section 32 application. I have no means of knowing what proportion of potentially viable claims would be ended if the orders were set aside, but it could be tens of thousands of Claimants, and it would not in my view be in accordance with the overriding objective to make such an order in such circumstances. I consider that an appropriate order of costs can be made as a sanction for the non-disclosure.

Conclusion in respect of the Alternative Forum Service Non-Disclosure

51. Had I reached the view that the Claimants were in breach of their duty of full and frank disclosure on this issue, the following would have been my view as to the exercise of discretion. I would have concluded that the failure to draw the court's attention to Germany as an appropriate alternative jurisdiction constituted a very minor transgression, particularly given the references to the correspondence between the parties on the issue of *forum non conveniens* in the underlying evidence, the reference to the relevant law at §72.7 of Oldnall 3, and the failure of the German Defendants to engage with this issue. Although the question of an alternative forum was not developed further it would have been clear to the court from that evidence that Germany was a potential alternative forum for the proceedings. In circumstances where the German Defendants do not, it appears, intend to challenge the jurisdiction of this court on *forum non conveniens* grounds, and have London solicitors acting for them but are not willing to provide instructions to those solicitors to accept service of proceedings, this basis for challenge to the orders for service out of the jurisdiction is unattractive, in my view.

52. In the event that this was a breach of full and frank disclosure, similarly to the position in *Harrington & Charles Trading Co Ltd v Mehta* I would have concluded that the failure to disclose this issue further than was addressed in Oldnall 3 was not deliberate or reckless, rather as a result of a minor wrong judgment call. This would not be a matter that I would consider to be appropriate for the draconian sanction of setting aside the orders granting permission to serve out of the jurisdiction, and I will not make such an order. I shall consider in due course whether there should be any costs sanction for the non-disclosure.

The Extension Applications

53. The ground for the extension applications is that there was no good reason shown by the Claimants, nor exceptional circumstances, to support their applications seeking extensions to the validity of the claim forms.

54. The applications for extensions of time were made in respect of 31 claim forms listed in Schedule 1, relating to claims brought by some [75,000] Claimants. The Claimants had six months from issue of the claim forms to serve the German Defendants pursuant to rule 7.5(2). Service was not effected during that six months period. The Claimants made applications for extension of time under rule 7.6(2).

The Relevant Law

55. The authorities relevant to CPR 7.6(2) were summarised by Haddon-Cave LJ in *Al-Zahra (PVT) Hospital and ors v DDM* [2019] EWCA Civ 1103 at [48] to [54]. 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 are also relevant to this 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)])."

56. In *Aktas v Adepta* [2010] EWCA Civ 1170 at [91] Rix LJ explained the reason for the approach as follows:

> "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."

57. It was made clear in *Collier v Williams* [2006] 1 WLR 1945 at [87] that there is a distinction between the considerations in applying rule 7.6(2) and rule 7.6(3):

> "CPR r.7.6 (3) is subject to preconditions: relief cannot be granted if the conditions are not satisfied. Under CPR r.7.6 (2), there are no preconditions, so that relief can be granted under the rule even if the court is not satisfied that the claimant has taken all reasonable steps to serve and has acted promptly. The decision in *Hashtroodi's* case… highlights the importance of the reason why the claim form was not (if it was not) served within the four months.. We would agree that the CPR r.7.6 (3) requirements are *relevant* to the exercise of the discretion given by CPR r.7.6 (2). …… When deciding whether to grant an extension of time under CPR r.7.6 (2), what is required to consider how good a reason there was for the failure to serve in time….. the stronger the reason, the more likely the court will be to extend time; and the weaker the reason, the less likely. This involves making a judgment about the reason why service has not been effected within the four months. It is a more subtle exercise than that required under CPR r.7.6 (3) which provides that unless *all* reasonable steps have been taken, the court will not extend time."

Thus it is important to consider the Claimants' evidence as to the reasons why the extensions were sought.

Reasons for the extensions sought

<u>The application dated 11 November 2021</u>

58. Oldnall 3 at §§ 34-47, 52.4 and 73-81 deals with this application, which led to the order dated 16 March 2022 granting an extension for the claim forms in the fifth to eighth, eleventh, fifteenth, and nineteenth to twenty-third claim listed in Schedule 1 (then encompassing 3,197 Claimants) to 15 July 2022. The dates of issue of those claim forms were between 11 May 2021 and 27 September 2021. The first application was made on 10 November 2021, the day before the expiry of the validity of the first claim form issued. I summarise the reasons given for the need for an extension as follows:

    i) <u>Timing</u>

a) The letter before action ("LBA") was sent to the First and Third to Fifth Defendants on 1 April 2021. A reply was sent by Cleary Gottlieb 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 Gottlieb was not authorised to accept service other than for the English domiciled Defendants. Leigh Day sent a detailed letter in reply on 3 September 2021.

b) In a separate 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 had been served on the English domiciled Defendants. By then other Claimant firms, Milberg London LLP ("Milberg"), Harcus Parker, Keller Lenkner and Pogust Goodhead had been instructed, and Milberg wrote to Cleary Gottlieb 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 Gottlieb'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 Gottlieb within the jurisdiction.

c) There was 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.

ii) Co-ordination of Group Litigation

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.

iii) Hope that the German Defendants would accept service on their English Solicitors

The Claimants' solicitors corresponded with the German Defendants' English solicitors on this issue from August to October 2021.

The Omnibus Application

59. Further applications for extensions were made on various dates in 2022 in these claims and claims subsequently issued and extensions granted by a number of

different Masters in different claims. Oldnall 10 supports the last application made on 5 October 2022 ("the omnibus application"). The Appendix to that statement has a detailed chronology of relevant events from 8 September 2021. The omnibus application was made in respect of all claims and was intended to supersede those previous orders and achieve harmonisation of the extension date for all claims: Oldnall 10 §§6.1-6.2. It is therefore only necessary to consider that application in addition to the application of 11 November 2021. The order of 20 October 2022 made in respect of the omnibus application extended time for service to 31 March 2023.

60. That evidence outlines in detail the difficulties encountered by the Claimants' solicitors in trying to achieve service on the German Defendants in Germany via the Hague Service Convention, with an extensive table at Oldnall 10 §8 setting out the relevant steps taken, and the dates and claims to which these relate. The dates when the claim forms and other service documents were submitted to the Foreign Process Section of the High Court ("the FPS") for the various claims commenced on 15 July 2022, and continued on various dates in July and August with the last being submitted on 20 September 2022. At the date of that statement, of the 27 claim forms and ancillary documents submitted for service, only two certificates had been received from the German Central Authority confirming service on the Second Defendant, and none had been received for service on the First Defendant. At Oldnall 10 §§9-40 there is an extensive summary of the history of those attempts at service, a sorry tale, through no fault at all of the Claimants' solicitors, and which must have caused a substantial amount of additional work and costs.

61. The apparent impasse in achieving service via The Hague Service Convention route was resolved only as a result of my order dated 5 December 2022, made of the court's own initiative, ordering service by an alternative method under CPR 6.15 by service on Cleary Gottlieb's London business address. There was no application by the German Defendants to set aside that order.

Whether the reasons for requiring the extensions were good reasons

62. The position of the German Defendants is that:

    i) the Claimants did not take all reasonable steps to serve the claim forms within the six months period; and waited until the last day before the expiry of the six months for service in respect of one claim form (QB-2021-001817) and one to three months prior to the expiry of others;

    ii) the Claimants failed to act expeditiously in effecting service;

    iii) the German Defendants were entitled to insist on the Claimants applying for permission to serve out of the jurisdiction and for service to be effected pursuant to The Hague Service Convention;

    iv) the German Defendants have suffered prejudice, as the result of the extensions granted is that limitation defences that would otherwise have been available to them in some claims are no longer available.

63. The German Defendants rely on a number of authorities to support the submission that the Claimants are unable to show a good reason for the failure to serve the proceedings within the initial six-month period:

i) Generally speaking, the good reason must be a physical difficulty in effecting service: *Cecil v Bayat* [2011] EWCA Civ 135 at [49] per Stanley Burnton J.

ii) A claimant who waits until the end of a limitation or service period to apply for an extension "*courts disaster*" and "*can have only a very limited claim on the court's indulgence*": *Barton v Wright Hassall LLP* [2018] UKSC 12 per Lord Sumption JSC at [23].

iii) A hope that a foreign defendant will co-operate in relation to service is not generally a good reason for delay: *Al-Zahra* per Haddon-Cave LJ at [79]; *Sodastream Ltd v Coates* [2009] EWHC 1936 (Ch) per Blackburne J at [50(9)]; *SMO v Tik Tok* Inc [2022] EWHC 489 (QB) per Nicklin J. at [93].

iv) Where the effect of an extension might prejudice any limitation defence available to the defendant, a claimant is required to show that they took reasonable steps in the available time, and the defendant's limitation defence should not be circumvented save in exceptional circumstances: *Qatar Investments* per Whipple LJ at [17(iv)]. The extent of the limitation defence is irrelevant save where the loss can be characterised as de minimis: *Malcolm-Green v And So To Bed Limited* per HHJ Hacon at [39]; and the fact that an arguable limitation defence affects only part of a claim is not necessarily a sufficiently good reason for the extension to be shown in relation to all the claims: *The Public Institution for Social Security v Amouzegar* [2020] EWHC 1220 (Comm) per Jacobs J. at [123]. It is inappropriate for a court on an interlocutory application for an extension of time for service of a claim form to determine debatable issues of limitation and 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: *City & General (Holborn) Ltd v Royal & Sun Alliance Plc* [2010] EWCA Civ 911 per Longmore LJ at [7].

Application dated 10 November 2021

<u>Discussion</u>

64. This application led to the order of 16 March 2022 extending time in the first eleven claims in the German Defendants' Appendix A, to 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.

65. I accept, but subject to the reservation outlined below, 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, in accordance with the authorities referred to above. The appropriate course is 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, does not render this a good reason for the extension: *Qatar Investments* per Whipple LJ at [79].

66. My reservation is 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."

67. 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.

68. The fact that a significant proportion of the claims were likely to be *prima facie* time barred, and the German Defendants may have lost limitation defences by reason of the extensions, is a relevant factor in deciding whether or not the extension should be granted. However, there are further complications in these claims, first that there is an issue between the parties as to when time starts to run for the purposes of limitation (see Paragraph 49 above), and secondly, some or all of the Claimants whose claims are *prima facie* time barred may be able to rely successfully on a section 32 application, so that there may ultimately be no risk or a lower risk of prejudice to the Defendants than anticipated by reason of the extensions. But I note, as Jacobs J. said in *The Public Institution for Social Security* at [123]:

> "The authorities indicate that a strict approach is taken to extensions of time when limitation defences are in play and are

potentially impacted by the extension sought." (My emphasis)

Thus, even the fact of the potential loss of a limitation defence might indicate that an extension should not be granted.

69. The final reason relates to the need to co-ordinate multi-party litigation, with 31 claim forms and tens of thousands of Claimants, in circumstances where it is said that the Defendants were being slow in responding to correspondence and requests for information. That factor puts these claims into a different category from all the cases considered by the authorities, all of which save one, *Viner v Volkswagen Group United Kingdom Ltd* [2018] EWHC 2006 (QB), concerned unitary actions, as far as I am aware. *Viner* was my decision, the factual circumstances were very different, and in my view that case is of no assistance in relation to the applications before me.

70. 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.

71. In my judgment, once Cleary Gottlieb 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. It was also necessary to apply for extensions of time for service because it would not have been possible to serve via The Hague Service Convention route by the time when the validity of the claim forms issued by that date (which numbered 31, the final claim form being issued on 15 November 2021) would expire. An extension of 4 months was reasonable in such circumstances, and indeed proved to be inadequate, as explained in Oldnall 10 §8 and Paragraphs 60 and 51 above.

The Omnibus Application

Discussion

72. This application covered differing periods for different claim forms, as set out in the German Defendants' Appendix A. The first 11 claims had received an extension to 15 July 2022 by the order of 16 March 2022. Accordingly I must consider whether

there was a good reason for the extensions granted from 15 July 2022, the expiry of the period granted by the order of 16 March 2022.

73. The first date when documents for service were lodged with the FPS was 9 June 2022 (Oldnall 10 Appendix) and by 20 September 2022 documents for service had been lodged with the FPS for all claims. There was a period of almost 8 months from Cleary Gottlieb's letter of 15 October 2021 before the first of those requests for service were submitted. Requests for service were lodged in June and July and by early August 2022 requests had been lodged in respect of 23 claims, and in the final claim that had been issued by that date, on 30 September 2022. [The remaining claims were issued from 20 April 2022 to 15 November 2022 and are not included in the table [or Appendix] in Oldnall 10].

74. The Appendix to Oldnall 10 sets out in tabular from the events from 3 September 2021 to 30 September 2022, which I summarise as follows, (save as already summarised above). In November and December 2021 applications for permission to serve out of the jurisdiction and extensions of time for service were made, including in County Court claims later transferred to the High Court. From February 2022 to 20 April 2022 there was further correspondence between Claimant firms and Cleary regarding the issue of service on the German Defendants, with no resolution. In April and May 2022 further applications were made for permission to serve out of the jurisdiction and extensions of time in certain claims. 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.

75. Clearly a reasonable period of time was required for preparation of the documents for service in the 31 claims following the end of the correspondence from Cleary Gottlieb on this issue in mid-October 2021. But there is no real evidence as to when that preparation commenced and how long it took. There were numerous submissions of requests for service made to the FPS from June to October 2022, so clearly considerable work had been done in the interim, but without evidence I am unable to conclude that a period of some 8-9 months was required for that work or constituted a good reason for the extension.

76. With regard to the period when applications for extensions were made after the documents for service were lodged with the FPS it is entirely apparent from the very detailed information provided in Oldnall 10 at §9 -29 in the Appendix that there was a good reason for the extensions granted.

Discretion

77. *In ST v BAI (SA) (t/a Brittany Ferries)* [2022] EWCA Civ 1037 Carr LJ, in summarising the relevant general principles in relation to CPR 7.6(2) said at [62(iii)] that:

> "Where there is no good reason for the need for an extension, the court still retains a discretion to grant an extension of time but is not likely to do so;"

78. Applications made under rule 7.6(2) do not require there to be a good reason: but the reason, and how good it was, is relevant: *Collier v Williams* at [87]. The reason is "*a highly material factor": Qatar* at [17]. The fact that a limitation defence may be prejudiced is of considerable importance: *Al-Zahra* at [49(3)].

79. Thus, as I have 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 I am wrong in relation to my conclusion that there were good reasons for the extensions in respect of the remaining periods of extensions granted, I will consider whether the court's discretion should be exercised in favour of retaining the orders for extensions.

80. I have concluded that the court's discretion should be exercised in the Claimants' favour and the orders granting extensions of time will not be set aside for the following reasons.

81. Although it is clear that a foreign defendant is entitled to insist on service of judicial documents in the country of their domicile/residence, (see *SodaStream* at [50(9)] and *SMO v Tik Tok* at [77]), the German Defendants were particularly and unnecessarily un-cooperative in this regard, in my judgment namely:

    i) Despite having instructed English solicitors, taking over 4 months to respond to the letter of claim and either disregarding or failing to give early and clear answers to the Claimant firms' requests for agreement to service on the German Defendants' London solicitors, nor any reasons why this would not be agreed.

    ii) Declining to agree to a request for service by a method included in Art 5 of The Hague Service Convention, namely "informal delivery" as explained in Oldnall 10 at §§25, 29, 35-37 and Oldnall 13 at §36, and their refusal to even confirm whether they would accept the documents for service if delivered by this method (which requires the agreement of the recipient): Oldnall 10 at §§35-37, 39-40; Oldnall 13 at §36.

    iii) The fact that the exercise of submitting requests for service via the Hague Convention in numerous claims each requiring the inclusion of thousands of pages of translated and untranslated documents in duplicate, which had already been provided to the German Defendants' London solicitors, greatly increased the costs of this exercise, far more than would be the case in a unitary action.

    iv) The delay in notifying the Claimants whether there would be a challenge to jurisdiction. The German Defendants had been aware of this claim since Leigh Day's letter before action dated 1 April 2021 but have never formally notified the Claimants that there would not be a *forum non conveniens* challenge to the jurisdiction of this court.

82. The fact that the extensions have had the consequence of potentially extending the limitation period:

    i) This constitutes a potential prejudice to the German Defendants, but equally they were well aware of the potential limitation defences and could have limited such prejudice had they agreed to service on their London solicitors.

ii) The fact that limitation was not mentioned in the 10 November 2021 application but was addressed in the omnibus application.

iii) The fact that there are likely to be a substantial number, possibly the majority, of Claimants where limitation defences will not be available to the German Defendants.

83. The fact that the periods of time which I have found did not constitute a good reason for an extension, constituted probably only a few months out of the total extensions granted, i.e. whatever period of the 8-9 months between 15 October 2021 and the submission of requests for service to the FPS, was not reasonably required for preparation and submission of those documents, if any.

84. The fact that the extensions of time would have been unnecessary had the German Defendants agreed to the request for service on their solicitors within the jurisdiction, particularly in circumstances where it transpired that there would be no challenge to jurisdiction on *forum non conveniens* grounds, and no grounds for such a challenge were ever articulated in correspondence.

85. The fact that the majority of applications for extensions were made well in time, and there was only one claim form out of 31 where the application was made the day before expiry of its validity Oldnall 3 at §40.

86. Accordingly the Defendants’ applications are dismissed.

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

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

SCHEDULE 2

Witness Statements before the court

For the Claimants

Third witness statement of James Robert Oldnall dated 10 November 2021

Fourth witness statement of James Robert Oldnall dated 15 December 2021

Fifth witness statement of James Robert Oldnall dated 16 February 2022

Sixth witness statement of James Robert Oldnall dated 21 April 2022

Seventh witness statement of James Robert Oldnall dated 22 April 2022

Eighth witness statement of James Robert Oldnall dated 28 April 2022

Ninth witness statement of James Robert Oldnall dated 26 May 2022

First witness statement of Peter Alexandre Gallagher dated 28 July 2022

Second witness statement of Peter Alexandre Gallagher dated 29 July 2022

First witness statement of Benjamin Victor Croft dated 16 September 2022

Tenth witness statement of James Robert Oldnall dated 5 October 2022

Eleventh witness statement of James Robert Oldnall dated 6 October 2022

Thirteenth witness statement of James Robert Oldnall dated 10 March 2023

Fourteenth witness statement of James Robert Oldnall dated 9 May 2023

For the Defendants

Third witness statement of James Brady-Banzet dated 11 October 2022

Fourth witness statement of James Brady-Banzet dated 19 December 2023

Fifth witness statement of James Brady-Banzet dated 31 March 2023