



Neutral Citation Number: [2023] EWHC 3099 (KB)

Case No: QB-2022-002405 and others

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 1 December 2023

Before :

**MR JUSTICE CONSTABLE**

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Between :

**(1) AURORA CAVALLARI**  
**and others**

**Claimants**

- and -

**(1) MERCEDES-BENZ GROUP AG**  
**(2) MERCEDES-BENZ AG**  
**(3) MERCEDES-BENZ UK LIMITED**  
**(4) MERCEDES-BENZ FINANCIAL SERVICES**  
**UK LIMITED**  
**(5) MERCEDES-BENZ RETAIL GROUP UK**  
**LIMITED**  
**(6) AUTHORISED DEALERSHIPS**  
**As listed in Schedule 4 to the Group Litigation**  
**Order**

**Defendants**

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**Oliver Campbell KC, Tom de la Mare KC, Gareth Shires and Rachel Tandy** (instructed by the Steering Committee – **Pogust Goodhead, Leigh Day, Slater & Gordon UK Limited, Hausfeld & Co LLP and Milberg London LLP**) for the **Claimants**

**Malcolm Sheehan KC, James Purnell and Lia Moses** (instructed by **Herbert Smith Freehills LLP**) for the **Defendants**

Hearing date: 24 November 2023  
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## **JUDGMENT**

**This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 2:30pm on Friday 1<sup>st</sup> December 2023.**

**Mr Justice Constable:**

Introduction

1. The claim arises in relation to Mercedes vehicles owned or leased (or purchased subject to finance, in a number of different ways) that have diesel engines ('Relevant Vehicles'). The Claimants say the Relevant Vehicles contained prohibited defeat devices ('PDDs'), designed to cheat statutory controls on vehicle emissions. The claim is subject to a Group Litigation Order ('GLO') made on 22 May 2023. Pursuant to the GLO, which was approved by the President of the King's Bench Division, Fraser J and Cockerill J were appointed as the two Managing Judges. In light of his recent appointment to the Law Commission, I have replaced Fraser J.
2. The claim was last before the Court on 18-19 July 2023. At that hearing, Fraser J determined a disclosure application made by Claimants, and also considered issues of future case management following the directions order made on 26 May 2023 by Fraser J and Cockerill J. In outline:
  - (1) three trial dates were set down, in October 2024 (for 3 weeks), February 2025 (10 weeks) and October 2025 (10 weeks);
  - (2) a CMC was listed for two days in March 2024, the purpose of which was primarily to decide (i) whether all three trial dates could or should be used, (ii) what issues should be decided at each trial, and (iii) accordingly, what further case management steps were required; and
  - (3) two progress CMCs were listed, on Friday 24 November 2023 and Friday 19 January 2024 ('the Progress CMCs') to determine any issues between the parties required to ensure the effectiveness of the March CMC. Various directions were made for the service of applications relevant to case management to be served in good time before the Progress CMCs.
3. This judgment relates to a number of applications for further information, inspection and disclosure pursuant to CPR 18, 31.14 and/or 31.12 advanced by the Claimants during the first of the Progress CMCs.
4. There are presently nearly 300,000 claims on the Group Register. The First and Second Defendants are manufacturers (they are referred to in the Generic Particulars of Claim as "Manufacturer Defendants") and the others are subsidiaries, finance companies, distributors or retailers. As set out in the Generic Particulars of Claim, the Claimants accept that some forms of defeat devices are, in some circumstances, permitted, but the defeat devices about which complaint is made are said to be unlawful in that they were prohibited by Article 5(2) of Regulation 2007/715 (the "Emissions Regulation"), and are said to have had the effect that the vehicles produced far higher amounts of emissions than were permitted. It is alleged that the PDDs were installed with the Manufacturer Defendants' knowledge that they were unlawful and that such devices could not be justified by the need to protect components of the engine. These PDDs are said not to have protected components at all, or to have operated far beyond the circumstances necessary to do so, and/or to

have been unnecessary for component protection. Rather, the Claimants allege, the installation of PDDs was motivated by and/or connected with the participation by the Manufacturer Defendants in an unlawful technology suppression cartel (which is called "the TS Cartel") with other German car manufacturers, and various related anti-competitive arrangements, essentially to defeat the testing regime, and/or for other commercial reasons such as reducing the use of AdBlue (a lawful emission-suppressant additive to diesel fuel) in normal operation, rather than in test conditions.

5. As at the date of the hearing before Fraser J, the Generic Defence had not been served. It has now. The document is lengthy, but for present purposes it is enough to describe key features of the Defendants' position as follows, some of which are important in understanding the relevance of documentation sought not just substantively but, potentially, in the context of upcoming case management decisions:

- (1) The Defendants deny the existence, in any Mercedes model, of any functionality that would sense when a vehicle is being subjected to a test cycle and cause the Emissions Control System ('ECS') to behave differently. The design of the ECS requires consideration of a wide range of dynamic and interrelated parameters with direct and indirect effects on the combustion process and thus on emissions and emissions control, and potentially very serious consequences for the vehicle, its occupants, other road users and the environment. Pursuant to Article 3(10) of the Emissions Regulation, the Defendants contend that only a functionality that *'reduces the effectiveness'* of the ECS and does so *'under conditions which may reasonably be expected to be encountered in normal vehicle operation and use'* amounts to a PDD, and it is said that the Claimants' case fails to articulate how factually and/or technically these essential ingredients are met;
- (2) The Court's determination of whether any of the Relevant Vehicles contains a PDD requires consideration of the evidence relating to each and every functionality alleged to be a PDD, for each engine type and each vehicle model and permutation thereof in terms of, inter alia, production period, software and hardware deployed and other physical characteristics of the vehicle. It is specifically denied by the Defendants that any finding that any Relevant Vehicle contained a PDD can be relied upon to establish the existence of a PDD in any other Relevant Vehicle unless the latter Relevant Vehicle shared all relevant characteristics with the former;
- (3) Even if Relevant Vehicles ever contained PDDs, many have been subjected to Mandatory Updates or Voluntary Updates which have removed functionalities which the Claimants allege to be PDDs. As such, no claim arises since the alleged harm has been remedied and any alleged diminution in value has been reversed;
- (4) A key element of the Defence is the contention that the question of whether vehicles contain PDDs has been the subject of decisions by the KBA, being the national authority which granted Type Approval in respect of the Relevant Vehicles, and that KBA Decisions made prior to 31 December 2022 as to whether the vehicles to which they relate contain PDDs are binding on the Courts of this jurisdiction. The Defendants admit that the KBA has found in certain Recall Decisions that certain functionalities amount to PDDs. The Defendants accept

that these findings are binding, subject to appeals which are pending before the German Administrative Court;

- (5) It is denied that any alleged Cartel Arrangements existed beyond that contained in the express findings made in the Commission's decision dated 8 July 2021 ('the TS Decision'). The Defendants deny that any alleged Cartel Arrangements as are admitted (or established) were motivated by or resulted in the use of PDDs; and
  - (6) Breaches of statutory duty, deceit, consumer claims and business claims based on representations are denied. The Defendants claim that each of the features which the Claimants allege would have existed but for the PDDs meant that in fact the existence of the PDDs was financially advantageous for the Claimants, and credit to reflect such benefits needs to be given.
6. By agreement between the parties, the Reply is due by 21 December 2023. Some of the documents sought have been said to be relevant in order fully to plead the Reply (although the emphasis in oral submissions has focussed on matters of significance to make the most of the CMC in March 2024).
  7. It is clear that one of the key matters shaping up to be in issue in March is the use of the three hearing windows ordered, as set out in paragraph 2(1) above. Presently, the Claimants contend that no use can or should be made of the October 2024 three week window and, instead, they seek a trial in February 2025 (the first 10 week slot) of factual and technical matters dealing, centrally, with the existence or otherwise in the Relevant Vehicles of PDDs in what they describe in their intended draft Order as a 'Representative Sample' of Relevant Vehicles. The Claimants envisage the Representative Sample being agreed in advance of March, or, if not agreed, ordered at that CMC. As can be seen from the summary of the Defendants' case set out above, the existence of any sample which could be considered 'Representative' is substantively disputed. By contrast to the Claimants' present proposal, the Defendants consider that use should be made of the three week window commencing in October 2024 to determine the legal status of various KBA Decisions (as set out in its Generic Defence) which, as identified above, they contend are binding (subject to appeal) both as to the existence and absence of PDDs in a proportion of the Relevant Vehicles (the 'KBA Binding Issue'). They presently contend that use of the 2025 hearing windows should only be determined after the October 2024 hearing (and, presumably, judgment resulting therefrom). In practical terms, the consequence of this is that it is improbable that any sensible use could be made of the February 2025 window, there not being enough time for preparation if its purpose is only identified at the end of 2024. Whilst it may ultimately not be possible, and this is a matter of course to be determined in March, the Court presently retains a general desire to use each of the presently identified hearing windows.
  8. It is also necessary to record by way of introduction that a number of the applications were borne out of documentation which has been disclosed subject to a Confidentiality Ring Order dated 13 February 2023. Therefore a number of the submissions relating to those documents were conducted in private because the submissions involved considering the substance of those documents. There were a large number of individuals in the Court room from the public observing those parts of the hearing which were able to be conducted openly and I was anxious that, in accordance with general principles of open justice, as much of the hearing as possible

took place in public. With the assistance and co-operation of Counsel, the order in which applications were heard was adjusted and certain agreements were reached limiting reference to documents which were not otherwise referred to in the public part of the hearing. As such, most of the hearing took place in public. This judgment has also been drafted with no reference to the substance of material within the Confidentiality Ring, although reference to documents within the Confidentiality Ring is made to identify that document or class of documents to the parties. Confidentiality of such documents obviously remains notwithstanding my reference to those documents within this judgment.

9. In reaching my decisions, I have read the Fifth, Sixth and Seventh Witness Statements of Mr Day (Senior Partner of Leigh Day, for the Claimants) and the Third and Fourth Witness Statements of Ms Johnson, a Partner at Herbert Smith Freehills LLP (HSF), supporting their clients' respective positions in relation to the applications before me (as well as parts of their witness evidence given in relation to earlier aspects of this litigation). I thank Mr Campbell KC and Mr de la Mare KC, for the Claimants, and Mr Sheehan KC, for the Defendants, for their efficient and focussed oral submissions.

#### The Spreadsheet Application

10. The Spreadsheet Application sought information from the Defendants about the firmware and hardware installed in, initially, each Relevant Vehicle but as finally advanced, in a sample of 1% thereof. Having heard the parties, I gave a brief *ex tempore* ruling in relation thereto during the course of the hearing, a perfected version of which is provided at Appendix A to this judgment.

#### The Disclosure Applications

11. Some of the disclosure applications are brought pursuant to CPR 31.14. Some are brought pursuant to CPR 31.12, either primarily or in the alternative. I therefore set out, first, the principles which apply to applications brought pursuant to these provisions of the CPR.

#### *CPR Part 31.14*

12. The rule states that, '*A party may inspect a document mentioned in ... (a) a statement of case*'. Once a party establishes that a document has been mentioned in a pleading, the onus then falls onto the other party to show good cause why they should not produce it (see Quilter v Heatly (1883) 23 Ch. D. 42, CA, *White Book* at 31.14.1; and National Crime Agency v Abacha [2016] EWCA Civ 760 at [30], stating that whilst the Court has a residual discretion, the burden is on the party seeking to resist inspection to justify displacing this general rule).
13. '*Mentioned*' in the context of CPR 31.14 means that a document or class of documents has been "*directly alluded to*" : see Expandable v Rubin [2008] EWCA Civ 59; [2008] 1 WLR 1099 at [22]-[23]. The Court of Appeal continued at [24]:

*"the expression 'mentioned' is as general as could be. This is not to my mind intended to be a difficult test. The document in question does not have to be relied*

*on or referred to in any particular way or for any particular purpose, in order to be mentioned... The general ethos of the CPR is for a more cards on the table approach to litigation.”*

14. The right to inspect is not unqualified. As set out by Gross LJ in Abacha at [30]:

*‘Thus, “proportionality” is part of the overriding objective CPR r.1.1(2)(c) and, in an appropriate case, it would be open to a party to oppose inspection on the ground that it would be “disproportionate to the issues in the case”: CPR r.31(3) (2). In determining any such issue of proportionality, a Court would very likely have regard to whether inspection of the documents was necessary for the fair disposal of the application or action. So too, the mere mention of a privileged document in (for example) a statement of case may not of itself lead to a loss of the privilege; CPR r.31.14 is to be read with and subject to CPR r.31.19(3) and (5): see, *Rubin v Expandable Ltd (supra)*, at [39]; *Civil Procedure, Vol. 1, 2016*, at 31.14.5 and 31.19.1.1.’*

15. When considering whether, notwithstanding that a document has been ‘mentioned’ in a pleading, the resisting party has established that inspection should nevertheless be refused, the reason for the mention may be relevant. See Popplewell J (as he then was) in W M Morrison Supermarkets Plc & Ors v Mastercard Incorporated & Ors [2013] EWHC 2500 (Comm):

*‘But it is a relevant factor where there are other reasons why inspection would not be in accordance with the overriding objective. In this context, it is significant that the mention of the documents was not for the purposes of putting their contents in issue and relying on their contents, but was simply as part of a recitation of the history of events as part of the background to the proceedings. That is not sufficient to prevent there being a mention within the meaning of Rule 31.14, nor is it sufficient of itself to justify the discretion being exercised to refuse inspection, but in the context of an overall assessment as to where the interests of justice lie, it is, in my view, a significant reason for declining to order inspection.’*

16. Some of the documents sought under this rule in the present case are documents annexed, appended and/or referred to in documents which are plainly mentioned in the Generic Defence. In this context, both parties draw Re Hinchcliffe [1895] 1 Ch 117 to the Court’s attention. In that case (somewhat anachronistic in that it related to an appeal in the Chancery Division from the now defunct ‘Master in Lunacy’), the Court of Appeal considered (at page 120):

*‘When a person makes an affidavit, and states therein that he refers to a document marked with the letter A, the effect is just the same as if he had copied it out in the affidavit. It is only made an exhibit to save expense. Therefore any person who is entitled to see the affidavit is equally entitled to see the document referred to therein.’*

17. I would add, giving effect to the principles derived from Abacha and W M Morrison Supermarkets, that the right to inspect identified in Re Hinchcliffe as extended to documents annexed or referred to in the ‘primary’ document mentioned may itself also be tempered in practice by a consideration of the relevance and/or purpose of the ‘secondary’ document being appended or referred to in the primary document.

Again, the burden should fall on the resisting party to establish why the secondary document ought not be considered an integral part of the primary document for the purposes of inspection. However, the context and purpose of the annexation or reference will assist in determining whether the secondary document may not, in the circumstances of a particular case, be considered an integral and necessary part of the primary document such that there is a good reason, potentially in combination with questions of proportionality, that inspection should be declined.

18. Therefore, I extract the following brief summary of principles relevant to my determination of the applications under CPR 31.14:
- (1) there exists a prima facie right to inspect any document mentioned, or directly alluded to, in a statement of claim (or other document listed in CPR 31.14). That is because mention of a document is treated as a form of disclosure;
  - (2) the right to inspect a document will generally include secondary documents annexed to or referred to in that document;
  - (3) once the right to inspect has been established, the burden falls upon the resisting party to persuade the Court that inspection should not be granted; and
  - (4) reasons why inspection may not be granted include proportionality, consideration of the reason for and context of the ‘mention’ of the document, and, in the context of a secondary document, the extent to which the secondary document should properly be considered an integral part of the primary document.

*CPR Rule 31.12*

19. An application for specific disclosure made pursuant to CPR 31.12 may be made at any stage in the proceedings. As regards early specific disclosure, both parties rely upon the decision of Coulson J (as he then was) in Bullring Ltd v Laing O’Rourke Midlands [2016] EWHC 3092 (TCC). At [20], in which he stated:

*“It does not seem to me that, in reality, the parties are very far apart in terms of their formulation of the test that I should apply. Mr. Hargreaves formulates it in this way:*

*‘Taking into account the overriding objective and the respective consequences of making or not making the order, whether, in all the circumstances of the case, the applicant has demonstrated that there is a proper basis for early disclosure as opposed to disclosure after close of pleadings.’*

*I think that is apposite, although I would say that, for a proper basis to be identified, there does need to be something important or significant which can be achieved by ordering early disclosure”.*

20. After considering a number of factors said to be relevant (specificity of documents, proper reasons for the value and impact of early disclosure, importance of the underlying issue, costs), Coulson J concluded: *‘Ultimately, it does seem to me it*



*comes back to a question of proportionality and the justice of the individual circumstances of the case taking into account all of those relevant factors’.*

21. Fraser J also considered the proper approach when considering a previous application for disclosure in this case [2023] EWHC 1888 (KB), both acknowledging the asymmetry of information in group litigation such as this, but recognising Coulson J’s touchstone of the importance or significance to the documents sought in the context of the particular stage the litigation was at (at [36]-[39]):

*‘In my judgment, although group litigation is of course governed by the CPR generally and also must take account of the overriding objective in the CPR, there are differences in terms of scale that mean when the general principles to disclosure – and in particular early disclosure - are applied, a different outcome might occur in respect of this subject. This is because in group litigation it is more likely that if a particular discrete document is known to exist, and to be directly relevant to the issues ...it would be more usual to order early disclosure of it, than if the litigation were more conventional involving very few parties. In group litigation such as this, I struggle to see that disclosure of some of these documents ought to be delayed merely because pleadings have not closed. I am not for a moment suggesting that early disclosure will more readily be ordered in group litigation; such orders will be relatively rare. But the “something important or significant” in group litigation may more readily be satisfied in group litigation than otherwise.*

*This is for two main reasons. Firstly, early disclosure of a document ... may, and in this case probably will, assist the parties in refining the issues between them in the group litigation generally. This assistance to the parties will also help to inform the court as to the direction of the group litigation in terms of what issues can usefully be resolved, when, and in which order. Case management is important in most, if not all, complex cases, but in group litigation it is even more important, given the nature, scale and duration of such cases....*

*...“Early disclosure in this case also assists in correcting what Mr de la Mare correctly describes as the information asymmetry between the parties. There is sufficient information in the public domain concerning the diesel emissions landscape for these many hundreds of thousands of claimants to consider, or suspect, they have a claim, and for the Generic Particulars of Claim to be drafted. However, the sooner their legal advisers are aware of the full content of the KFTC Decision the better, as this will help those advisers realise either their case is weaker than they thought, stronger, or perhaps about the same. Such detail can only helpfully advance the group litigation at an early stage.”*

22. Thus, group litigation like all litigation will be expected to proceed through generally defined phases, and one of those phases, after the close of pleadings, will be disclosure. This is the ‘ordinary’ sequence of the phases. There must be a reason to seek disclosure outside the ‘ordinary’ sequence: this is for the straightforward reason that to do so necessarily adds to the costs of the disclosing party by requiring documents to be searched for through more than one exercise. However, there will be times when the likely importance of particular documents to the understanding of the issues, potentially coupled with the ease with which those documents can be provided, provides the necessary significance in the context of managing the litigation

to justify subverting the ordinary sequence to some degree. In this context, it is plain that the factors that Fraser J identifies simply mean that the test identified by Coulson J may more readily be satisfied in the context of group litigation. I readily accept, of course, that it is to overstate the position to say that early disclosure in group litigation becomes the ordinary course of events: it remains necessary for claimants to justify why particular, and specific, documents or classes of documents ought to be provided prior to the usual phasing of disclosure within the litigation. In the most general of terms, the more onerous the consequences of being required to provide the documents earlier than would ordinarily be the case, the more justification will be required.

*Enclosures and Annexes (Paragraph 1(a) of the draft Order)*

23. The Claimants seek enclosures and annexes to documents already provided pursuant to CPR 31.14. ‘Type Approvals’ and ‘Voluntary Update Decisions’ are both categories of documents which, it is not disputed, are plainly mentioned in the Generic Defence. They are documents not merely mentioned, but form a central part of the Generic Defence in that they are two of the categories of documents which are relied upon as establishing, in a way which is said to bind this Court, the absence (at least as at the date of the relevant document issue) of PDDs
24. Early disclosure of each Type Approval and Voluntary Update Decision relied upon has been provided pursuant to CPR 31.14. In relation to Type Approvals, both referred to in and stated to be annexed to each such document are (a) an index to the information package, (b) the information package itself and (c) test results. Some also refer to an attached ‘list of modifications’ and / or a ‘list of requirements’. Voluntary Update Decisions refer to a ‘range of application’ document, a list of documents making up the approval file, attachments according to an index, and test reports. These are the annexes which are sought.
25. I have no hesitation in concluding that these are documents which form an integral part of the Type Approval or Voluntary Update Decision and should, pursuant to the principle in Re Hinchcliffe, be disclosed pursuant to CPR 31.14. They are documents which form part of, and insofar as necessary are likely to be necessary to understand the meaning and implications of, documents which themselves have been disclosed by their mention within the Generic Defence and, as such, there is exists a prima facie right to inspection.
26. In resisting inspection, the Defendants contend that the annexes are not necessary to understand the documents disclosed because the primary documents (i.e. those mentioned in the pleading) state on their face the conclusion to which the KBA has come. However, this is solely to look at the issue through the lens of the Defendants’ case. Whilst the Generic Reply has not yet been served, it is plain that the Claimants intend to challenge the contention that this Court is bound by the decisions of the KBA. One basis upon which they may seek to do so is to contend that the KBA was misled when reaching its determinations and/or that the context of the information provided to the KBA for the purposes of its determination is, in any event, relevant to the question of whether and in respect of what any KBA issued document is binding. In support of this, the Claimants draw to the Court’s attention the decision of the Schleswig-Holstein Administrative Court Case No: 3A 113/8, relating to a claim by DUH, the German environmental organisation, against the German government, represented by the KBA. The case arose out of (in the language adopted in this

litigation) a mandatory update decision in relation to a class of VW vehicles. The potentially relevant finding for present purposes is found at page 90 of the Administrative Court's decision. The Court found:

*'The EC type-approvals originally granted by the defendant for the vehicle types in question in 2008/2009 and 2011 approved the vehicle types without the inadmissible defeat devices existing at that time. Contrary to the defendant's earlier legal opinion, the existing inadmissible defeat devices were not tacitly approved. This is because the approval only legalises the object to the extent that it has been applied for and a positive decision has been made by the authority in this respect.'*

27. Simply put, the Claimants contend that the information provided to the KBA is, or may be, relevant to whether and to what extent any KBA determination is binding (if, as a matter of law, it is binding in this jurisdiction at all). The immediate case management context is the impending hearing at which a key decision will be made as to whether, and if so how, to determine the KBA Binding Issue in advance of the factual and technical investigation into the existence of PDDs. It is clear that in order to arrive at a considered decision, the Court will need to have a full and proper understanding of what the KBA Binding Issue will or may entail. For example, the Court may wish to understand whether it is purely an issue of statutory interpretation, or whether it is likely to involve factual and/or technical considerations as well. The answer to this question may impact the Court's view as to whether, or to what extent, divorcing the KBA Binding Issue from any broader factual and/or technical investigation into a sample of Relevant Vehicles is feasible or sensible. The Court may also wish to understand to how many or to which Relevant Vehicles the KBA Binding Issue applies, and whether there are different sub-categories in circumstances where different KBA Decisions may (or may not) be binding in different ways or to different extents. In the context of the impending management of this case, a full and proper articulation of the Claimant's Generic Reply in response to the question of whether or to what extent the KBA Decisions are, or are not, binding is likely to be of real importance. The provision of the annexes to the Type Approvals and Voluntary Update Decisions at this stage is likely to be of significant benefit to the parties, and the Court, in advancing its understanding of the nature of the KBA Binding Issue for the purposes of case management. The documents are specific and identifiable, and their disclosure at this stage of the litigation is proportionate. They should be made available for inspection.
28. I add only that it may be that there may be elements of the 'Information Packs' sought which are obviously irrelevant, and that this may be obvious from the 'Information Pack Index'. For example, it may be readily ascertainable, from looking at the Information Pack Index, that parts of the Information Pack relate to the approval of parts of a vehicle which have nothing to do with the ECS or other parts of the vehicle which could conceivably relate to the matters in dispute. It would be sensible if the parties liaise, by reference to the Index documents, in order to reduce, if appropriate, the scope of documents to be provided. It is in neither parties' interests for swathes of irrelevant material within the Information Pack relating to a vehicle to be produced.

*Generic Defence Para 255 (Paragraph 1(b) of the draft Order)*

29. By a further 31.14 Request, the Claimants have sought copies of the documents referred to at paragraph 255 of the Generic Defence. This paragraph was responding to paragraph 159 of the Generic Particulars of Claim.
30. The Claimants' pleaded case at paragraph 159 is as follows:
- “Pending disclosure of the Type Approvals and Model Information, as well as relevant correspondence between the Manufacturer Defendants and the KBA and/or other Type Approval authorities, the Claimants' best understanding is that Type Approval was obtained by the knowing misrepresentations set out in I.3”.*
31. The Defendants' response at paragraph 255 is as follows:
- “GPOC §159 is denied. It is noted that GPOC §159 (and by extension GPOC Section I.3) is premised on what the Claimants' describe as their “best understanding”. It is noted that the Claimants have not inspected Type Approvals, model information and relevant correspondence between the Manufacturer Defendants and the KBA and/or other type approval authorities. In those circumstances, the Defendants aver that the Claimants do not have a sufficient evidential basis to plead fraud/knowing misrepresentation as set out in GPOC Section I.3. In any event, it is denied that the representations made to the KBA at the time of obtaining Type Approval were false. The Defendants' response set out in GD Section I.3 is repeated.”*
32. Disclosure is sought of *‘Type Approvals and Model Information, as well as relevant correspondence between the Manufacturer Defendants and the KBA and/or other Type Approval authorities’*. There can be no doubt that these documents are ‘mentioned’ in the Generic Defence. However, this is plainly an instance in which it is necessary for the Court to consider the context of the ‘mention’ in the context of the Defendants' objection on grounds of proportionality. The categories of documents were referred to in the Claimants' own pleading as type of documents which the Claimants had not seen. This assertion was merely ‘noted’ by the Defendants (and did so in a way which repeated, and therefore ‘mentioned’ the classes of unseen material). Mention of the documents was not (in the words of Popplewell J in W M Morrison Supermarkets ‘for the purposes of putting their contents in issue and relying on their contents’
33. *‘[R]elevant correspondence between the Manufacturer Defendants and the KBA and/or other Type Approval authorities’* is an extremely broad and unfettered phrase. Mr Campbell candidly admitted that a specific disclosure application framed in this way under CPR 31.12 would be ‘ambitious’. I accept that the type of disclosure exercise which would need to be undertaken to capture this very broad category of documents is not one which can be justified under CPR 31.14 given the nature and purpose of their ‘mention’ with the pleadings. As regards the other classes of documents mentioned, Type Approvals have already been provided and a sample Model Information has been volunteered, which for present purposes is in my judgment sufficient.
34. Disclosure and/or inspection of such documents, whether under CPR 31.14. or CPR 31.12, is refused.

*Correspondence referred to in KBA letter dated 5 July 2023 (Paragraph 1(c) of the Draft Order)*

35. A letter dated 5 July 2023 from the KBA addressed to the Second Defendant, which was not (and not so far required to be) disclosed by the Defendants, has been published publicly by the DUH, apparently having been provided to them by a whistleblower. Not least by virtue of its provenance and public status, this document is not within the Confidentiality Ring. It relates to the E350 BlueTEC EURO 6 and a particular family of engine, OM642. The letter states:

*‘On the basis of our own investigations and on the basis of the information provided by you on the [relevant vehicles], it was established with the original series of software that the effectiveness of the exhaust gas recirculation system (EGR) and the dosing control of the ASCR catalytic converter was reduced in an inadmissible manner in the vehicles affected by this*

*For the affected vehicles ... the vehicle manufacturer is already carrying out a measure to improve the emissions. This measure has already been tested by the KBA and approved with ABE 91750 (family 14)*

*As a result of the investigations carried out by the KBA on a vehicle E350 Blue TEG with different software versions of the engine control unit (A-item number 6429034508 (1<sup>st</sup> production status) and 6429030215 (FMS data status), the following strategies were assessed as critical or as inadmissible defeat devices’.*

36. The letter then details what the KBA considered to be three defeat devices: in summary, (1) switching from storage level mode to online dosing mode dependent on intake air temperature; (2) switching from storage level mode to online dosing mode depending on average urea-water solution consumption and (3) EGR correction dependent on engine start temperature. These overlap with the types of PDDs alleged in this case. The letter expressly refers to a submission made by the Second Defendant to the KBA on 12 September 2022 following which the KBA reached their conclusions. The letter also required a response by 27 July 2023 (i.e. just three weeks later) from the Second Defendant providing what it considered were appropriate remedial measures. In addition to this remedial plan, the Second Defendant was given until the same date:

*‘to provide for all vehicles produced which are affected by one or more of the above described inadmissible emission strategies, registration-relevant identification characteristics (make, commercial name, engine capacity (ccm), power (kW), engine code, type/variant/version, emission level, WVTA-Approval No. including extension statuses, Emission Approval No. including extension statuses. Furthermore, the number of vehicles produced (worldwide, of which EU27 [including Germany], of which Germany) must be stated.’*

37. The Claimants seek the two documents referred to expressly, namely the submission dated 12 September 2022 and the response (on the assumption that the requirement was complied with) which was to be submitted by 27 July 2023.
38. The Claimants say that these documents are critical, and go to the heart of the case in the KBA determining that there are defeat devices of the type pleaded. It is pointed

out, with obvious justification, that it is an extremely limited and specific request relating to two documents. It is also said that the manner in which the Defendants both made submissions and responded to the request made may shed light on the question of homogeneity/heterogeneity and, therefore, the question of sampling for the purposes of case management.

39. The Defendants argue, in essence: ‘Not Yet’. It is accepted that these documents are likely to be relevant and disclosable in due course, but it is said that there is no significant or important basis, pursuant to the test in *Bullring*, which means that the documentation should be provided earlier than would ordinarily be the case.
40. In the context of litigation of this nature, I consider that early disclosure should be provided. There is significant asymmetry of information between the Claimants and the Defendants, and I accept that these two, specific documents, may be particularly illuminating and significant in the case as a whole. The sooner they are provided, the better it is for both parties, and indeed the Court. There is, in addition, a further justification in the context of the impending decision of the Court which will involve considering whether and, if so, how the Court may manage the case by way of sample. Whilst the question of whether any particular vehicle might be representative will remain a substantive issue in the case to be determined on its merits as long as it is disputed by the Defendants, the Court may have to form a view as to the extent to which that pleaded issue should shape the sequence or manner in which claims are investigated and determined by the Court. It seems likely that, in one direction or another, submissions made in relation to remedies applicable to a family of vehicles, and/or the identification of vehicles (of varying characteristics) which were accepted by the Second Defendant in any response to the KBA to be ‘*affected by one or more of the above described inadmissible emission strategies*’ may illuminate potential case management options as to sampling (notwithstanding the pleaded issue of heterogeneity). Given that the provision of these two documents will be entirely straightforward (and it has not been suggested otherwise by the Defendants), it is appropriate that these two documents are provided now.

*Letters and emails identified within the Recall Decisions and Mandatory Updates (Paragraph 2(a) and Annex 2 to the draft Order)*

41. At Annex 2 of the draft Order, the Claimants identify various documents referred to on the face of the Recall Decisions and Mandatory Updates. Each is specifically identifiable and there are generally between one and five such document references. There is a degree of duplication so that the actual number of documents referred to across all of the Recall Decisions is somewhat less than the aggregate of the line items sought. In relation to Mandatory Updates, there are just two different classes of document sought. Although each document sought is clearly and explicitly referred to on the face of documents which themselves were mentioned in the Generic Defence, the application is brought not under CPR 31.14 but CPR 31.12. It is said that the documents referred to are essential to be able fully to understand the nature of the Recall Decisions and Mandatory Updates, and to determine the basis upon which the KBA reached the determinations it did.
42. The Defendants seek to resist disclosure in relation to the Recall Decisions on the basis that there is, in effect, no pleaded issue in relation to the Recall Decisions. They are alleged to be binding by the Claimants, and that assertion is admitted by the

Defendants. Whilst there is some superficial force in this point (in relation to Recall Decisions – it does not relate to the Mandatory Updates), I accept that in the context of this litigation as it stands, where the binding nature of KBA Decisions is in issue and it is one which is being promoted as one to be determined as a preliminary issue, the proper provision of clarity to the Claimants in respect of the material upon which KBA decisions were reached (at least insofar as can be determined from the face of the Decision itself) is likely to be both significant and important, and go some way to redress the present asymmetry of information in this context. This has particular importance, for the purposes of the test in *Bullring*, in the context of the debate on the table for March. Given the small number of specifically identifiable documents concerned, there is nothing disproportionate about their present provision for disclosure by the Defendants at this stage in the litigation.

*Other Type Approvals (Paragraph 2(b) of the draft Order and Annex 3)*

43. As at the date of the hearing, there was no remaining issue in relation to this category of documentation.

*Recall Decision Appeals (Paragraphs 5 and 6 of the draft Order, and Annexes 4 and 5)*

44. Paragraph 5 of the draft Order seeks copies of grounds of appeal / justifications and / or any other kind of written statements or representations or records of any other (oral) representations made by the Defendants to the KBA in furtherance of (in each case) Mercedes' intention to appeal a KBA Decision (i.e. an appeal internal to the KBA). It relates to around 11 Recall Decisions identified at Annex 4.
45. Paragraph 6 seeks copies of the grounds of appeal / justifications and / or any other kind of written statements or representations or any other (oral) representations or filings made by the Defendants to the Administrative Court in furtherance of (in each case) Mercedes' intention to appeal a final determination by the KBA (i.e. an appeal external to the KBA, to the Administrative Court). It relates to 4 Recall Decisions identified at Annex 5.
46. The history of the communications between the parties in relation to the Recall Decision Appeals is relevant. The Claimants sought further information and disclosure pertaining to the grounds on which the Recall Decision Appeals have been (and/or continue to be) pursued since January 2021. It is important to note that there was not, in the correspondence I have seen, any ambiguity about the fact that the Claimants were seeking disclosure of the grounds of appeal themselves, not just a document demonstrating the fact that any appeal had been lodged. So, for example, in October 2022, Pogust Goodhead (then writing on behalf of the Proposed Steering Committee of which Leigh Day is a part), identified one of the four categories of early disclosure then sought as Recall Decision Appeals. The relevant letter stated:

*'Category 2: Appeals against the recall decisions. As we understand it, the Defendants' case is that the recall decisions are not binding because they are being appealed. The basis of such appeals is plainly evidentially very relevant. For example, it will be relevant to see whether the basis of the appeals is consistent with the law as recently clarified by the CJEU Judgments. Again, these documents must be easily available to your clients, and disclosure of them would not be onerous.'*

47. Whilst a debate about relevance continued, the exchange concluded with HSF stating on 7 December 2022 that their client was willing to disclose voluntarily (subject to the Confidentiality Ring):

‘6.2 *Letters of appeal sent to the KBA on behalf of the Defendants in respect of the Recall Decisions.*

6.3 *The KBA's decisions in respect of the appeals of the Recall Decisions.*

6.4 *Appeals in respect of the Recall Decisions filed by the Defendants at the Administrative Court in Schleswig.’*

48. What, however, was provided in accordance with paragraph 6.2 was, in effect, merely the covering letter to the substantive appeal. In a passage which it was agreed between Counsel, and sensibly so, could be read in open Court, the letter from a well known law-firm to the KBA stated:

*‘A power of attorney in our name is enclosed; the grounds for objection remain reserved for a separate letter’.*

49. It is entirely obvious that the provision of this letter is, in terms of its responsiveness to the request for disclosure of the substantive grounds of appeal completely useless. The approach taken, to adopt the apposite word used by Mr de la Mare in his submissions, was obtuse; and it is difficult to avoid the conclusion that it was deliberately so. The Claimants had for some considerable time and across numerous letters been explicitly seeking not just a document demonstrating the fact of an appeal but the grounds upon which the appeal had been made. In this context, the reasonable and objective construction of what HSF offered in response in December 2022 was just that which had been sought: the grounds of appeal themselves. Presumably in the knowledge that there was, however, a distinction between (a) a letter filing an appeal and (b) a document submitting the substantive grounds, HSF made an offer worded in such a way which could, technically and in light of that distinction, carefully reflect a subjective intention to limit the offer to the (pointless) provision of (a) alone. This is not, however, the way in which a lawyer seeking to engage constructively, as the Courts expect in the modern world of litigation, should act. If the Defendants wished to continue to resist disclosure of the substantive grounds of appeal, they of course could have done so. That objection could be judged on its merits. But they should properly have made their position clear. The letter could simply have explained that there were two sorts of documents potentially responsive to the request being sought (i.e. (a) and (b) above), and that the Defendants were offering voluntarily to disclose (a) but not (b). No doubt, the offer would not have satisfied the Claimants, but at least the position between the parties would have been transparent. The remaining debate could have continued to a point of agreement or it could be resolved by the Court. It should not have been left for the Claimants’ solicitors to (justifiably) believe that their request had been acceded to, only to find out a number of months later that they were being provided with no such thing.

50. In light of this history, the first answer to the application presently before me is that on an objective construction of the correspondence passing between the parties’ representatives, the Claimants asked for, and the Defendants agreed to provide, the Recall Decision Appeals, including such document as contained the substantive



grounds of appeal, as part of early disclosure voluntarily; and that there is no good reason to permit the Defendants to resile from that agreement.

51. However, I am in any event persuaded that the small and specifically identifiable documents ought to be disclosed irrespective of the prior correspondence. Sight of the documents will not likely be determinative of any of the issues to be considered in March 2024, but in circumstances where the Defendants will be asserting that the Court should consider the binding nature of the KBA Decisions, *subject to* any appeal, sight of the grounds of appeal which have been advanced is likely to give the Claimants and, importantly, the Court a greater understanding of the potential implications of the appeal process for any procedure to be adopted by this Court.
52. The Defendants have submitted that the grounds of appeal submitted to the KBA are irrelevant as they have been superseded because the very fact of appeals to the Administrative Court demonstrates that the appeals to the KBA did not succeed. However, this point is significantly undermined by the fact that, according to Mr Sheehan's instructions, there exist no documents responsive to paragraph 6 of the draft Order: i.e. there are no grounds of appeal which have yet been submitted to the Administrative Courts (although appeals have been filed). In these circumstances, and on the reasonable assumption that the grounds of appeal advanced in front of the KBA are likely to be the same as or similar to grounds of appeal to be lodged in front of the Administrative Court, the KBA grounds are the only documents which shed light on the basis of the Defendants' appeals. The apparent absence of documents responsive to paragraph 6 of the draft Order increases the potential significance (at least in terms of understanding the nature of the issues for the purposes of impending case management) of the documents sought under paragraph 5.
53. For these reasons, I conclude that the limited category of documents sought at paragraph 5 of the draft Order should be provided.
54. As to paragraph 6 of the draft Order, I have already indicated that Mr Sheehan's instructions are that, if ordered, the answer will be that there are no such responsive documents. Ms Johnson in her Third Witness Statement deals with this at paragraph 44(ii) in which she states, '*as set out in the letter dated 2 October 2023, the Defendants have 'not yet been directed by the Administrative Court to file detailed ground of appeal (and therefore the documents which you appear to consider to be 'centrally relevant' do not exist*'. Whilst I do not doubt the truth of Mr Johnson's statement on instructions, I note that the statement of non-existence is in fact framed more narrowly than the present draft Order. In these circumstances, I consider it appropriate to make the draft Order as sought. If the Order made produces a statement that there is still a 'nil return', then it efficiently deals with the matter conclusively and avoids any ongoing suspicion or concerns about what may or may not exist.
55. I therefore direct that information and/or inspection and/or disclosure be provided to the extent indicated above (and at Appendix A), and the parties are to draw up the appropriate Order. If consequential matters cannot be agreed, they can no doubt be dealt with at the next Progress CMC (if considered appropriate by the relevant Managing Judge).

**APPENDIX A**

1. This is an application for the provision of information relating to the firmware and hardware of what is now a sample of 1% of the vehicles on the Group Register. 1% approximates to something under 3,000 vehicles, when one takes account of the fact of the existence of duplicates on the Group Register which both parties, as I understand it, are working towards eliminating.
2. One of the pleaded issues appearing in various places within the Generic Defence, but by way of example, paragraph 51, is that:

*"... it is denied that any finding that asny Relevant Vehicle contained a PDD can be relied on to establish the existence of a PDD in any other Relevant Vehicle, unless the latter Relevant Vehicle shared all the relevant characteristics with the former ..."*
3. The nature and existence of whether vehicles might be 'Representative' may be relevant to issues that have to be determined in March, which is when the two-day case management hearing in this group litigation is fixed. It will be, at least presently, the Claimants' position that the first stage in the substantive litigation should be a factual and technical investigation on the existence of PDDs within what it describes presently as a 'Representative Sample' or a sample which it anticipates it will be able to establish in due course is representative. On the basis of the substance of paragraph 51 and indeed on the basis of the submissions made by Mr Sheehan today, it is clear that that will be a live substantive issue as to whether or not any vehicle can be said to be representative of any other vehicle.
4. It is plain to me that the court, in March, is unlikely to be able to form any substantive view on whether a sample identified by the Claimants can be described as 'Representative'. That will likely be a matter that can only be determined at a substantive hearing. Of course, I note that the Defendants will be saying in March, at least as presently formulated, that such a factual and technical investigation is not the place where the Court should start its substantive determinations of the matters in dispute. Instead, it should start with consideration of what is called the KBA Binding Issue. Which of these is the right approach, or indeed some other approach, is a matter obviously for another day.
5. The question before me, however, is whether, in light of the case management decisions which are looming in the immediate future, it is reasonably necessary and proportionate to require the Defendants to provide what is, in my view, effectively particularity of its pleaded position in relation to the heterogeneity at this stage. Such information/further particularity can be ordered pursuant to CPR Part 18 and the joint touchstone for making such an order is reasonable necessity and proportionality.
6. In my view, it plainly is both reasonably necessary and proportionate at this stage to provide the information sought on the basis of the sample of 1%. On any view, the Court will have to form a view of the best use of the time set aside and I consider that

a greater understanding of the question of relevant diversity within any sample is likely to assist the Court at the forthcoming hearing. I readily accept that the provision of the 'headline' information relating to firmware strings and hardware types of itself cannot be determinative of potential homogeneity, but it is reasonable to assume at this stage that it will provide a greater understanding of the potential implications of what appears to be a key plank of the Defendants' defence (the absence of any 'Representative' vehicle in light of heterogeneity) and whether or to what extent that should shape either the timing at which a factual and technical investigation should take place and/or the sample which should be investigated.

7. In his submissions today, Mr Sheehan has indicated that the Defendants can provide details of the hardware and software part numbers of around 10% of the Group Register by the end of January 2024, but not in relation to any more than 1% of the firmware version strings by the end of January. In his latest update to me, and on the basis of some evidence before the Court, the present position is that by the end of December, the Defendants, using two engineers (said to be the maximum available with the appropriate skillset), can provide 1,440 line items of firmware version strings, which is approximately 0.5% of the Group Register.
8. The evidence before the Court is that it will take about five minutes per VIN in order to provide the sought firmware version string and hardware details. That will (for something less than 3,000 vehicles) equate to about 200 to 230 hours, depending on the precise number of VINs, given duplicates. There is, in fact, no evidence before the Court that there are only two people in the entirety of the Mercedes-Benz Group that would be capable of carrying this task out.
9. It is my view that, taking a constructive approach, the sort of offer that is now made (albeit as a secondary position following some indications that had been given by the Court during submissions), is one that ought to have been made some time sooner by the Defendants. It is necessary for the information to be provided by the end of December if it is to permit the appropriate and consequential application for firmware which is likely to follow in time for any disagreement about that application to be resolved at the January 2024 meeting. In my view, it is appropriate that the Defendants are ordered to provide the 1% sample (not 10% in relation to hardware). It is to be provided by 21 December 2023.