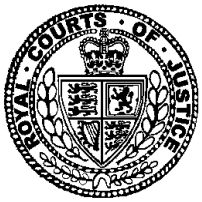

Neutral Citation Number: [2023] EWHC 512 (KB)

Case No: QB-2022-002405

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/03/2023

Before :

SENIOR MASTER FONTAINE

- -

Between :

AURORA CAVALLARI AND OTHERS	**Claimants**
- and -	
(1) MERCEDES-BENZ GROUP AG	**Defendants**
(2) MERCEDES-BENZ AG	
(3) MERCEDES-BENZ CARS UK LIMITED	
4) MERCEDES-BENZ FINANCIAL SERVICES UK LIMITED	
(5) MERCEDES-BENZ RETAIL GROUP UK LIMITED	
(6) – VARIOUS AUTHORISED DEALERSHIPS	

- -
- -

Oliver Campbell KC and Gareth Shires (jointly instructed by the proposed Claimant Steering Committee, comprising Leigh Day, Pogust Goodhead, Milberg London LLP, Keller Postman Limited, Slater & Gordon UK Limited, and Hausfeld & Co LLP) for the **Claimants**
Helen Davies KC Malcolm Sheehan KC and Richard Blakeley (instructed by **Herbert Smith Freehills LLP**) for the **Defendants**

Hearing date: 9 February 2023

- -

Approved Judgment

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SENIOR MASTER FONTAINE

Senior Master Fontaine :

1. This was the hearing of an application dated 22nd March 2022 by the Claimants in 72 claims (as listed in Annex 1) for a group litigation order ("GLO"). The Defendants support the making of a GLO.

2. The following witness statements were filed:
For the Claimants

   i) First and second witness statements of Martyn Day dated 22 March 2022 and 20 January 2023;

   For the Defendants

   ii) First witness statement of Natasha Kate Johnson dated 21 December 2022.

Background to the Application

3. The Defendants to these claims are companies which manufacture, sell or lease Mercedes-Benz ("MB") vehicles in the United Kingdom and elsewhere. The First to Fifth Defendants form part of the MB group. The Sixth Defendants comprise a number of authorised dealers of the First to Fifth Defendants ("the Authorised Dealers"). The Claimants allege that the Defendants are liable for the alleged inclusion of prohibited "defeat devices" ("PDDs") in certain MB passenger and commercial diesel vehicles ("Relevant Vehicles"). Liability is denied entirely.

4. Draft Generic Particulars of Claim have been served. The causes of action relied upon differ depending upon whether the Claimant is a consumer or a business. All Claimants bring claims against the First and Second Defendants, as manufacturers of the vehicles ("the Manufacturer Defendants") for:

   i) Breach of statutory duty in relation to the EU regulatory regime for emissions (Article 5(2) of Regulation 2007/715) and breach of statutory duty in relation to domestic legislation governing the sale of vehicles;

   ii) Breach of Article 101(1) TFEU (and associated breach of s. 2(1) of the European Community Act 1972) and/or breach of Chapter 1 of the Competition Act 1972; such claims are also made against the Third, Fourth, Fifth and Sixth Defendants;

   iii) Deceit.

5. The claims made solely by the consumer Claimants are:

   i) Claims for breach of the statutory guarantee provided when the vehicles were acquired and/or updated by the Manufacturer Defendants;

   ii) Claims for breach of agreements pursuant to which a consumer obtained an interest in a Relevant Vehicle by supplying goods and/or software of unsatisfactory quality in breach of terms implied by either the Sale of Goods Act 1979 or the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 against the Fourth and Fifth Defendants and the Authorised Dealerships;

iii) Claims for redress under the Consumer Protection from Unfair Trading Regulations 2008 ("CPUT") against the Fourth and Fifth Defendants and the Authorised Dealerships;

iv) Unfair credit relationship claims against the Fifth Defendant under the Consumer Credit Act 1974.

6. The claims made solely by the business Claimants are:

i) breach of contract by supplying goods and/or software of unsatisfactory quality in breach of the terms implied by s. 14 of the Sale of Goods Act 1979 against the Fourth and Fifth Defendants and the Authorised Dealers;

ii) for some business Claimants, unfair credit relationship claims against the Fifth Defendant under the Consumer Credit Act 1974.

7. The claims relate to a number of different vehicle and engine types, but both parties agree that there are sufficient linking features that mean that, although the claims are complex, a GLO is the appropriate vehicle for case management.

8. At the date of the hearing 299,224 claims had been issued by 12 firms of solicitors. A total of 17 firms of solicitors (including the 12 which have issued claims) have instructions in respect of 336,824 claims both issued and not yet issued.

9. The court was informed at the hearing that the Claimants proposed that Leigh Day and Pogus Goodhead act as joint lead solicitors ("the Lead Solicitors") and that there be a steering committee ("the Steering Committee") to include the Lead Solicitors and four other firms, Hausfeld & Co LLP, Milberg London LLP, Slater and Gordon UK Ltd and Keller Postman UK Ltd. Those proposals are not opposed by the Defendants. There is also a Claimant solicitors committee ("CSC") consisting of 11 other firms which have either issued claims or have been instructed in respect of claims.

Whether it is appropriate to make a GLO, subject to the approval of the President of the King's Bench Division

10. CPR 19.10 defines a GLO as an order made under rule 19.11 to provide for the case management of claims which give rise to common or related issues of fact or law (the "GLO issues"). There is no dispute that the claims give rise to common or related issues of fact and law, and the parties agree that a GLO is the most appropriate way to manage this litigation and have been able to agree the GLO issues. I informed the parties at the end of the hearing that I agreed that the claims did give rise to common or related issues of fact and law, and that I considered it appropriate for the court to exercise its discretion to make a GLO in these claims, subject to the approval of the President of the King's Bench Division. This judgment therefore deals only with the remaining disputed issues between the parties in respect of the terms of the GLO and the Schedules of Core Information ("the SOCI") to be provided by each Claimant in place of individual particulars of claim, as is usual in group litigation.

The Draft GLO

11. The precise terms of the proposed order have been the subject of considerable discussion and debate in correspondence between the parties, with compromises being made by both sides. I commend both parties for their work in this regard. I have no difficulty in approving the terms which have been agreed between the parties, and I set out below my decision in respect of the wording of those paragraphs that remain in issue between the parties.

Section G – Standard Minimum Requirements

12. Paragraph 33 sets out all the standard minimum requirements for entry of a claim form onto the Group Register.

Paragraph 33 (c)

13. Paragraph 33 (c) reads as follows, with the disputed sentence underlined:

> "The Claimant must claim to be, or have been, the owner (including a joint owner) of a relevant vehicle, or to have, or have had, and interest in a relevant vehicle whether by purchase, hire purchase, leased, personal contract plan or other finance terms. Such ownership or interest must have arisen from a contract subject to the laws of England and Wales."

14. The Defendants seek to include the disputed sentence on the basis that it cannot be assumed that the claim of a Claimant whose interest derives from a non-English law contract will raise common issues with a Claimant whose interest derives from an English law contract. It is submitted that in any event it cannot be assumed that such a claim will have sufficient common interest issues to justify automatic inclusion in the GLO. It is not accepted that it would be burdensome for the Claimants to provide this information as they must know where they purchased their vehicles.

15. The Claimants submit that there is no issue with jurisdiction, the Third to Sixth Defendants being UK companies. The only Claimants whose contracts may include a non-English law clause are those where the contract may be subject to either Scottish or Northern Ireland law. The Claimants who are resident in either Scotland or Northern Ireland number about 1,000 in total, less than 1% of the total number of Claimants, and are those most likely to have entered into contracts subject to Scottish or Northern Ireland law. However that may not be the case for all of them. It is not necessarily the case that a Claimant who was living in Scotland or Northern Ireland at the time of acquisition of their vehicle purchased the vehicle pursuant to a contract subject to Scottish or Northern Ireland law, and some may have purchased their vehicle in England. The Claimants do not assert that the court should apply Scottish or Northern Irish law to any claims. It is submitted that if the Defendants contend that a foreign law applies it would be up to them to plead and establish that, and if there is no such contention the court will apply English law. The Claimants also submit that such a requirement would be impractical as it would necessitate a great deal of unnecessary additional work to establish which claims rely on contracts subject to Scottish or Northern Ireland law, and may not necessarily be straightforward.

16. However, the parties have subsequently indicated that they would accept alternative wording, albeit still not agreed. The Defendants would accept the words "The Relevant Vehicle must have been acquired in England and Wales" and the Claimants would accept the words "The Relevant Vehicle must have been acquired in the UK or the Channel Islands."

Decision in respect of Paragraph 33 (c)

17. I consider that it would be appropriate to include the wording now suggested by Mr Campbell KC for the Claimants, namely:

> "The Relevant Vehicle must have been acquired in the UK or the Channel Islands."

The alternative is that the c. 1,000 claims which may be based on a contract subject to Northern Ireland or Scottish law will have to proceed as unitary claims or as a smaller separate group of multi party claims, when the majority of the factual issues will be common to or related to the other claims in these proceedings. It is entirely likely that the parties may be able to agree that such claims be determined on an English law basis. Alternatively, the Managing Judge can, if they think it appropriate, decide at the first CMC whether it would be practical to include claims made subject to a non-English law clause, and if so, give directions to identify such categories of claim, and if not, give directions for those claims to be dealt with separately.

Paragraph 33 (f)

18. The Claimants propose that the standard minimum requirements for entry onto the Group Register should include a requirement that:

> "the Claimant or their solicitors have reached agreement with the Steering Committee in relation to the method by which the Claimant is to contribute to the Steering Committee's costs."

This is opposed by the Defendants.

19. The Claimants submit that this group action is factually and legally complex, and will unavoidably give rise to very considerable legal costs. By paragraph 6 of the draft GLO, the Steering Committee are given responsibility for the management and coordination of the Claimants' claims and are to have "*sole conduct of all investigations, applications and proceedings in respect of the GLO issues including preparation for trial of any Lead Claims relating to any of the GLO issues subsequently ordered by the court.*" It is submitted that the Steering Committee will therefore incur very considerable cost in prosecuting the case on behalf of, and to the benefit of, all of the Claimants. Those costs will include very significant disbursements, particularly as extensive expert evidence will be required. It is only fair that all Claimants contribute to the costs as the case progresses.

20. Subject to one issue, the parties have agreed provisions in relation to cost sharing in Section J of the draft GLO. The cost sharing provisions deal with the apportionment of costs at the conclusion of the trial of any lead cases and/or the trial of the GLO issues, or in the event of discontinuance. However, they do not address contributions towards costs during the course of the litigation. It is submitted by the Claimants that a trial of

lead cases and/or GLO issues will inevitably not take place for some time and it would not be fair for the Steering Committee (or their clients and funders) to bear all of the costs of the litigation without contribution from other Claimants.

21. The issue of contributions towards the Lead Solicitors costs was considered by Hildyard J. in *The RBS Rights Litigation* [2014] EWHC 227 (Ch) at [51] to [55]. The judge agreed with the view of the lead solicitors that there should be contributions to their costs during the course of the litigation from other claimant groups. The judge supported a "pay as you go" order by which the other firms or groups would make contributions to the costs of the lead groups, although in the event he deferred the making of such order to allow further details of the process to be worked out.

22. It is submitted by the Claimants that as Hildyard J recognised in *The RBS Rights Litigation*, it furthers the objective of a GLO if all Claimants contribute towards costs and there are no "free riders". It was submitted that an agreement between the Claimants and the Steering Committee is more straight forward than a "pay as you go" order. There have been detailed discussions between the Steering Committee and the various other Claimant firms in relation to the terms of an agreement with the Steering Committee. Agreement has already been reached on costs contributions with all of the 11 firms in the CSC. It is submitted that if in the future a particular Claimant or their solicitors object(s) to the requirement, the court could consider the merits of their objection and whether an amendment to the requirement was required, but at the moment there is no positive opposition to this requirement from any Claimant.

23. This proposed requirement is opposed by the Defendants, for the following reasons:

    i) Individual Claimants are parties to the GLO proceedings and not Claimant law firms. It is already provided within the agreed terms of the draft GLO that *"taking responsibility for a fair share of the work being undertaken by the PSC[Provisional Steering Committee]"*. Common Costs are defined at paragraph 41(c), and paragraphs 41 (c) and 42 provide for each Claimant to be severally liable for a share of the Common Costs. Each Claimant therefore has a clear and enforceable liability for their share of Common Costs. The requirement for each Claimant to be liable for their share of common costs is a feature in many GLO proceedings and was included in the Volkswagen GLO.

    ii) The Claimants' proposal does not go to each Claimant's legal liability for Common Costs but instead seeks to give the Steering Committee firms a veto on any individual Claimant being allowed to participate in the GLO proceedings. Under the Steering Committee proposal, unless an individual Claimant *"or their solicitors"* enter(s) into an agreement with the Steering Committee on terms that the Steering Committee is content with, that Claimant's claim is excluded from the GLO proceedings. It is submitted that while this degree of control is no doubt convenient and desirable for the Steering Committee firms, it is inconsistent with the efficient management of the GLO proceedings as it risks claims that would otherwise be managed as part of the GLO being excluded from it.

    iii) The proposal risks unfairness to individual Claimants who are excluded from the GLO and would also be unjust to the Defendants, who would be required to

incur additional costs and resources dealing with unitary proceedings that would otherwise be properly managed within the GLO proceedings.

iv) It is not the function of the Court to make orders to promote the financial interests and position of the Steering Committee firms and give them leverage in discussions with other law firms or with individual Claimants.

Decision in respect of Paragraph 33(f)

24. It was stressed by Mr Campbell KC on behalf of the Claimants that all 11 Claimant firms on the CSC have agreed to the proposed term. It may well be the case that such a term would not cause any difficulty, to other Claimants or potential Claimants, who would be likely to reach agreement with the Steering Committee on their contribution to Common Costs. I accept that the likelihood of that being the case is high, as all other Claimant firms have been able to reach such agreement. However, I agree with the submissions of the Defendants that this is an issue of principle. It would not, in my judgment, be appropriate to prevent a Claimant with a claim that falls within the scope of the GLO, as defined in Paragraph 1, to be prevented from joining the group litigation and entering onto the Group Register because they could not reach agreement on costs contribution with the Steering Committee. They would then have to pursue their claims as unitary actions, which would be unsatisfactory and an inefficient use of resources. If any Claimant who meets the standard minimum requirements for joining the group litigation cannot reach agreement with the Steering Committee to contribute to Common Costs, the matter can be referred to the court for a "pay as you go" order to be imposed, if the Managing Judge considers it appropriate, so that such Claimants will not be "free riders" and will be ordered to contribute to Common Costs during the course of the litigation. The Defendants have confirmed that they would not have any objection to such an order.

Section J - Provisions for Costs Sharing and for Costs on Settlement or Discontinuance

Paragraph 42 (f) – Common Costs in the Event of Settlement

25. The parties are agreed that there should be a presumptive costs order in relation to Claimants who discontinue their claims, but disagree that there should be such an order in respect of Claimants who settle claims during the course of the litigation.

26. The Defendants seek a presumptive costs order in relation to Claimants who settle their claims in the following terms:

> "If in any quarterly accounting period a Claimant compromises their Claim with a Defendant on terms which provide for the Defendant to pay that Claimant their costs, then that Claimant shall be entitled to recover their Individual Costs, but the Defendant's liability for any Common Costs shall be determined following the trial of any Lead Claims and/or the trial of the GLO Issues (with permission to apply if such a trial does not take place). For the avoidance of doubt, the foregoing default position does not prevent parties, if so advised, from agreeing to compromise a Claimant's claim on terms providing for the payment of Individual Costs together with the share of that Claimant's Common Costs to the last day of the relevant quarterly accounting period."

27. The Defendants submit that this is a sensible provision that facilitates settlement and should be included for the following reasons:

    i) In the absence of such a provision, the default position would be unfair in the event that the Claimants' claims subsequently fail or aspects of Common Costs are disallowed;

    ii) The provision expressly provides that settling parties can agree some other treatment of Common Costs, so no Claimant is shut out from settling those costs in an appropriate case;

    iii) The same provision was included in the Volkswagen GLO;

    iv) The provision would create parity between the approach where a settlement is agreed on terms that a Claimant is liable for a Defendant's costs. The agreed paragraph 42 (g) is the mirror image of the proposed paragraph 42 (f).

28. The Defendants also submit that it would be appropriate to apply a mirror provision to that which applies in respect of discontinuing Claimants because of the size of this group litigation and the number of Claimant law firms involved. It is submitted that if the Defendants seek to reach agreement with one or more members of the Steering Committee or a member of the CSC where that agreement involves payment of Common Costs, there could be a problem in an assessment of Common Costs, because claims would be continuing against the Defendants from all other different groups of Claimants, but those other groups would also have an interest in the assessment, because once the Common Costs have been assessed to that point, they have been assessed for all of them. Such a provision has the potential to create significant satellite litigation which could distract from settlement with individual groups.

29. Another factor is that claims that are being brought by the Claimants involve a number of different causes of action, albeit that they are all designed to lead to the same or broadly the same relief. For example, the Competition claims, where three separate cartels are alleged (which were not a feature of the Volkswagen litigation), will undoubtedly add significantly to the costs of the litigation and hence to the Common Costs. Thus there may be arguments about whether costs relating to a particular cause of action should be allowed or not allowed for any settler. It is submitted that for those reasons it would not be appropriate to require the Defendants to accept that they pay all Claimants their share of all these Common Costs in every case. The question of Common Costs should await the outcome of the rest of the litigation and be determined at the end in the same way as for discontinuers. Thus it is submitted that assessment of Common Costs in this litigation should wait until the outcome of the proceedings.

30. The Claimants oppose the order proposed by the Defendants in relation to Claimants who settle their claims on the basis that it is unnecessary and contrary to authority.

31. The Claimants rely on the Court of Appeal's decision in *Sayers and ors v Merck SmithKline Beecham plc* [2002] 1 WLR 2274 at [16], which held that a distinction should be made between orders in respect of discontinuers and settlers, and that a presumptive costs order in respect of settlers was not appropriate "*since costs will be part of the discussion leading to settlement in any event*." The court further held that if

a presumptive costs order is made in respect of settling claimants, it should be in the form made by Master Ungley in the MMR litigation namely:

> "If in any quarter a claimant compromises his/ her claim with anyone or more of the defendants on terms which provide for such defendants to pay that claimant his/her costs then that claimant shall be entitled to recover his/her individual costs and his/her several share of the common costs incurred by the claimants up to the last day of that quarter."

This is also the approach adopted by the precedent for GLOs in *Atkins Court Forms* Vol 23(2) §219 form 19.

32. Accordingly, the Claimants say that the settling Claimants' entitlement to Common Costs should not be postponed to the conclusion of the trial of the lead cases/generic issues, but rather should have an entitlement to a share of the Common Costs up to the end of the relevant accounting period. It is submitted that there is a good rationale for Master Ungley's order and for treating a Claimant's entitlement to Common Costs differently from a Defendant's costs, namely that a Claimant who succeeds via early settlement would only have been able to achieve that success and obtain that settlement by virtue of their participation in the GLO. They should therefore recover their share of the Common Costs which resulted from their participation in the GLO.

33. The Claimants' position is that a presumptive costs order is not necessary or appropriate for the reasons given by the Court of Appeal in *Sayers*, but if one is to be made it should be in the form of that made by Master Ungley as adopted in *Atkins* and not that proposed by the Defendants.

Decision Paragraph 42(f) – Presumptive Costs Order

34. In my judgment it is appropriate for the reasons advanced by the Defendants for there to be a presumptive costs order that the common costs of settling Claimants be determined after trial of the lead claims and/or the GLO issues. The parties can of course reach a different agreement on any particular settlement, but the very substantial number of claims and the different causes of action indicate that it would be preferable to avoid disputes about what issues fall into Common Costs at any particular stage in any particular claim during the course of the litigation. The approach in *Sayers* does not necessarily apply to all group litigation claims. It is of course appropriate where all Claimants are claiming the same cause or causes of action, arising out of the same event, which is frequently the case, so there will then be no argument about what proportion of Common Costs have been incurred at any particular point in the litigation. This is a complex action and there is a compelling need to avoid satellite litigation if the proceedings are not to become unmanageable.

The Schedules of Information ("SOCI")

35. CPR Practice Direction 19B states at Para.14 that where the court orders Group Particulars of Claim, it can order either:

> "14.1 (2) a schedule containing entries relating to each individual claim specifying which of the general allegations are relied on and any specific facts relevant to the claimant";
>
> or
>
> "14.3 The specific facts relating to each claimant on the Group Register may be obtained by use of a questionnaire. Where this is proposed, the management court should be asked to approve the questionnaire. The management court may direct that the questionnaires completed by individual claimants take the place of the schedule referred to in paragraph 14.1(2)".

The SOCI is intended to be the questionnaire referred to in CPR PD19 para.14.3.

36. As with the proposed GLO, the precise terms of the SOCI have been the subject of considerable discussion and debate in correspondence between the parties, again with compromises being made by both sides, and again I commend the parties for being able to reach considerable agreement. However, there still remain a number of items in the SOCI which are not agreed.

37. The approach adopted by the Claimants has been that, whilst it is accepted that it is necessary to provide information to the Defendants and the court about the individual claims, the amount of information ought to be limited to what is necessary and proportionate, per Lord Woolf in *Boake Allen v Revenue and Customs Commissioners* [2007] UKHL 25 at [33]. The Claimants referred the court to the rulings of Lord Ericht dated 1st July 2021 and 5th July 2022 in the case of *Cameron and others v Volkswagen AG* in the Volkswagen Group Litigation in Scotland. The level of information directed by the judge that should be provided by each claimant was far less than is proposed to be provided by the Claimants in this litigation. Only 8 pieces of information were required, even though there were fewer than 10,000 claimants pursuing claims against Volkswagen in Scotland.

38. The Claimants also submit that as outlined in Day 1 and Day 2, the task of preparing over 300,000 SOCIs is very considerable. The cost of adding even a single question or data point is significant. It has been calculated that at an hourly rate of £175 for a paralegal, each extra 15 minutes in dealing with a query from a client on a particular question would cost £15,312,000 over all 300,000 SOCIs. In order to keep costs as low as possible and proportionate, the Claimants submit that the SOCI ought to be kept as short and simple as reasonably possible. Before deciding whether all of the Claimants should provide a particular piece of information, the court should be satisfied that the piece of information is genuinely necessary, and the benefit of providing that information will justify the inevitably substantial costs of providing the information.

39. The court is reminded that the wording of the SOCI in the Volkswagen litigation was agreed between the parties, and was not the subject of any determination or ruling by the court. The Lead Solicitors and Slater & Gordon in particular, have learned from their experiences of the process of completing SOCIs in the Volkswagen litigation and the difficulties that arose. This is explained in Day 2 at paragraphs 62.1 – 63, and I have found this very helpful in explaining the complex and time consuming process involved. However I also note the Defendants' submissions that they consider the

degree of complication involved in obtaining the answers to the questions sought by the Defendants to be overestimated.

40. There is a fundamental issue of principle between the parties on the approach to the questions in the SOCI which relate only to quantum. The Claimants' position in respect of a number of the disputed questions is that it is unnecessary to provide such information at this stage. The SOCI are not intended to be Schedules of Loss, and such Schedules are likely to be required only for lead Claimants. Many Claimants will not be in a position to provide exact information, or provide some information without advice from and/or discussion with solicitors, which will be time consuming and expensive.

41. The Defendants' approach is that the Claimants should be expected to provide the same information as they would if advancing a unitary claim allocated to the small claims track in the County Court. They refer to the consideration given to the requirements of a SOCI by O'Farrell J in *Alame & Others v Royal Dutch Shell & Others* [2022] EWHC 989 (TCC), when determining a dispute about the extent of information to be included in SOCIs. The judge held:

    i) The pleading of the case in general terms in the generic particulars of claim "*does not exempt each claimant from the requirement to set out in a schedule to the group statement of case, or in a questionnaire or other pleading in the group register, the facts necessary for the purposes of formulating a complete cause of action*." (at [59]).

    ii) In reliance on *Varney v Ford* [2013] EWHC 1226 (Ch) at [39]-[40] the judge rejected the argument that it would be disproportionate to require the claimants to provide the requested details about the date, location, time and interest in land of each individual claimant in relation to damage alleged to arise from oil pollution. She held that "*if the necessary facts are not pleaded in respect of each individual claimant, there will be no rational basis on which the Defendants will be able to identify their chosen claimants for the pool from which the lead claimants will be selected*" (at [69])

    iii) The judge recognised "*that this task will be expensive and time consuming but it is necessary to ensure that the material issues in dispute can be identified and determined in the trial of the lead claimants. The preparation of the questionnaires will make the exercise focused and manageable*….." (at [76]).

42. I note the Claimants' submissions that both *Alame* and *Varney* concerned far fewer numbers of claimants than in this litigation, and that the approach to the amount of detailed information to be provided in one set of group litigation cannot necessarily be applied in very different group litigation. This group of claims contains numbers of Claimants and potential claimants far in excess of most group actions.

43. I agree with the approach of the Defendants that, on the whole, it is more efficient and cost effective for all information to be provided on a single occasion and in one document, rather than to have to revisit the exercise. This would no doubt also be more convenient to individual Claimants.

44. I recognise that is necessary to strike a proportionate balance between:

i) including what is strictly necessary in terms of specifying a complete cause of action, assisting the parties and/or the Managing Judge to identify potential lead cases, and providing the Defendants with sufficient information to obtain a reasonably informed view about the likely quantum of claims; and

ii) keeping the exercise as straightforward as possible, so that excessive and costly queries are kept to a minimum, and where possible more detailed information be provided at a later stage in proceedings, possibly by a more limited group of Claimants, when identifying an appropriate pool of Claimants from which to identify potential lead claimants.

45. The disputed questions, and my determinations in respect of them, are as follows.

Section A

Section A applies to all Claimants.

Question 13

46. Q13 is proposed by the Defendants, and follows up on Q12 "*capacity in which the Claimant claims*", to which the potential answers are "*owner, former owner, lessee or former lessee".* The proposed Q13 asks:

> "If the answer to Q12 arises from an agreement where the counterparty is not one of the defendants, please confirm the type of agreement entered into by the Claimant".

with potential answers: "*purchase, hire purchase, lease, personal contract plan or other*".

47. The question applies only to those Claimants that have not entered into a purchase or lease, hire purchase or other agreement with a Defendant, which the Claimants estimate is about 33-40% of Claimants.

48. The Defendants submit that this is information which is ascertainable and necessary. Without this information the Defendants will have no way of knowing what category certain claims fall into, or how any general findings whether as to liability or to quantum made in relation to that category will apply to those claims. The requirement is far more restricted than that which was required in the Volkswagen SOCI.

49. It is also submitted that most car purchasers would not find it difficult to answer this question, as this would be a major purchase for most car owners, and the purchase of a Mercedes vehicle in particular, as these are expensive compared to vehicles from most other manufacturers. It is accepted that there may be some circumstances where advice will be needed but most Claimants would be able to answer this question. The options mentioned are those which are available on most car dealer websites. Further it is not accepted that every single Claimant will need to spend 15 minutes on the phone in answering this question. There may be some cases where further assistance is sought but most will be able to answer this without assistance. The question of the best value method of financing for a particular individual is one which many Claimants will have

given careful thought to, as a vehicle lease will be one of their largest financial commitments.

50. The Claimants point out that Claimants in this category will not be bringing contractual claims against any Defendant. The Claimants submit that where a Claimant is relying only on a non-contractual claim the information sought cannot be said to be information necessary to establish a cause of action, which was the touchstone in *Alame*. It has some potential relevance to quantum but is not crucial information. It is submitted that it will be difficult for many Claimants to identify the nature of the agreement under which they acquired the vehicle as many will simply not know whether the agreement in question is a lease, a hire purchase agreement or a personal contract plan. Examples were provided of documents where the answer was not clear, and in many cases a Claimant may not have retained the contractual document. It is submitted that it is sufficient for the Defendants to know the answer to this question in the two thirds of cases where Claimants have contracted with the Fourth Defendant.

51. I consider that Q13 should be included, subject to one additional potential answer. I agree with the Defendants that only a relatively small proportion of the Claimants to whom this category is applicable will find it difficult to answer, and all that is required is to enter one answer in a drop down box. Any difficulty in answering could be addressed by adding an option of "Not known" that any Claimant who is uncertain can utilise. There will be likely to be sufficient numbers of Claimants who can answer accurately to allow the Defendants to gain sufficient information for quantum purposes at present.

Section B

Section B applies only where a Claimant is an owner or a former owner of a vehicle.

Question 17

52. Q16 asks the Claimant for the date of purchase, and the proposed Q17 asks the Claimant to identify whether the date of purchase is exact or approximate. The Defendants seek this information because the date, and its accuracy, may be important in a number of respects, including understanding which general representations may have applied at the time of the transaction. They submit that each Claimant should know whether the date is exact or approximate.

53. The Claimants oppose this question on the grounds that it is not necessary, and the answer to be provided to Q16 is sufficient. It is submitted that the additional question adds significantly to the complexity of the SOCI and the answers would be of limited relevance, not least because the Defendants will in most cases have the documents in their possession that show the date of purchase or lease. Further it will be complicated for many Claimants to answer because the relevant dates on the contractual documents routinely include multiple dates so that the exact date is not always clear to a lay person. In cases where the Claimant is unclear fee earner input will be required to either examine the document or discuss with the Claimant.

54. I see no difficulty or disproportionality in a Claimant being required to answer this question. Claimants would have to take a view whether the date is exact or approximate in any event in order to respond to Q16. There should be no need to enter into

discussions or examine the document. If contractual date is unclear from the document itself the answer can be "approximate".

Question 18

55. Q18 asks for the "price paid" for the vehicle to be stated. The Claimants wish to add the following words: "*if known, exact price paid, otherwise approximate price*".

56. The Claimants submit that there may be a number of circumstances in which answering Q18 precisely is difficult. Many Claimants no longer retain documentation relating to the purchase of their vehicle if it was sold a number of years ago. Such Claimants are only able to provide a response to the best of their recollection without going to the expense of making data subject access requests to the relevant dealership, which is a slow and expensive process. Further, even where the documentation is available it is not always clear what the exact purchase price is as the invoice may often include extras such as delivery charges, tyre insurance, vehicle excise duty and registration fees. The documentation often distinguishes between the net total price and the gross total price including taxes. This was illustrated by reference to an invoice for purchase of a Mercedes vehicle. It is the Lead Solicitors' experience that many Claimants are uncertain which is the purchase price. Some Claimants may have exercised their right to purchase at the conclusion of a hire purchase agreement or personal contract plan. During the course of the personal contract plan a Claimant may have become liable for additional payments because, for example, they exceeded the permitted annual mileage under the agreement. In short, answering this question is more difficult than might at first appear, and is likely to lead to much additional work in answering queries and examining Claimants' documents. Further, in the majority of cases the Defendants will be the counterparty to such agreement and what they will know what the price is.

57. The Defendants oppose this addition on the basis that stating the purchase price of goods that are the subject matter of a contractual dispute is fundamental information and therefore a core part of providing the concise statement of the facts on which each Claimant relies. It is also fundamental to the breach of statutory duty and negligence claims. It is submitted that even if the information has not already been obtained from Claimants as part of the claims scrutiny process, ascertaining the price paid will be a simple task in the majority of cases as the information will be contained in multiple easily available sources such as emails, bank or credit card statements, text messages or retained sales documentation or receipts. Without knowing the actual price paid an accurate calculation of any entitlement to damages will not be possible, and the Claimants will have created a position in which they could be overcompensated as a as a result of failure to provide information which was reasonably available to them. It is noted that the Volkswagen SOCI required the price paid to be stipulated.

58. I agree with the Defendants' submissions that this is core information that should be provided, and which Claimants to such litigation will have expected to be asked. The majority of Claimants would not find it difficult to answer this question. It appears that one method of calculating damages, if the claims are successful, is for the diminution in value of a Claimant's vehicle, so the purchase price paid is information that is fundamental to their claim. I do not consider that the additional words sought by the Claimants should be added.

Section C

Section C applies only where a Claimant is in a category other than an owner or a former owner of a vehicle.

Question 23

59. Q23 relates to Q22, which asks for the date of the applicable hire purchase/lease/personal contract plan/other finance agreement. The Defendants seek to know whether the date given is exact or approximate. The Claimants oppose this on similar grounds to those advanced in relation to Q17, namely that the Defendants will know the date in the approximately two thirds of claims where the finance agreement was made with the Fourth Defendant, and that because of uncertainty in some of the documentation, which may contain a number of dates (e.g. the date inserted in a pro forma contract, the date of signature of the finance company and the date of signature of the Claimant), so that advice may have to be given to a Claimant as to whether they are able to insert an exact date, which would incur additional unnecessary and disproportionate costs. It is submitted that it is not necessary for the Defendants to know the exact date of each finance contract.

60. I consider that the question is straightforward and can be included. The date of the contract is relevant where there is a contractual claim. A Claimant will either be able to ascertain the date from the relevant documents or if they are not sure they can state it is approximate. They would have to exercise that judgment in response to Q22 in any event.

Question 26

61. Q25 asks a Claimant to provide the name of the other party or parties to the finance agreement, if known. Q26, sought by the Defendants, asks the Claimant to state the total amount payable and/or monthly payment amount under the finance agreement. The Defendants seek this information because, where finance has been obtained from a party other than the Fourth Defendant, the Defendants have no information about the extent of the relevant Claimant's financial obligations under the relevant agreement, which is likely to be an essential element of the proper assessment of the quantum of that Claimant's claim. It was submitted that the answer to this question would resolve the ambiguity identified by the Claimants in relation to the value of a Claimant's interest in a vehicle that the Defendants would gain from the SOCI. It is submitted that it is more proportionate to collect and provide such necessary information as part of the SOCI process than for Claimant firms to incur more costs later in proceedings by going back to Claimants to seek this information. Many Claimants will not have to engage with this item, because they are either current/former owners or have obtained finance from the Fourth Defendant. It is noted that the Volkswagen SOCI required all Claimants, including those with claims against Volkswagen Financial Services, to provide copies of finance agreements or details of deposit contributions and discounts.

62. The Claimants submit that this question goes entirely to quantum, and is only of limited relevance in circumstances where many Claimants who are required to respond to this question will have neither contractual nor CPUT claims. Many Claimants are unlikely to be able to answer this question if they no longer retain the documentation, which would not be unusual if the vehicle had been sold or otherwise disposed of. The question

lacks clarity as it is unclear whether the total amount payable means the total amount when the agreement was entered into or the amount still to be paid. Although the Lead Solicitors and the Defendants can agree what is meant, and it is recognised that it is probably the amount payable when the agreement was entered into, this will inevitably still cause confusion with some Claimants. Even if the meaning is further defined to mean the total amount payable when the agreement is entered into, there will be some Claimants who terminated their agreement early, reducing the interest payments, and rendering the figure provided when the agreement was entered into incorrect.

63. This question will apply only to a limited number, those Claimants who have acquired their interest in their vehicle through a finance agreement with a company other than the Fourth Defendant, and thus the Defendants will have no information about the extent of their financial interest. The Defendants are entitled to be able to take a view as to the suitability for any Claimant in this category of claims to be a lead claimant, and the likely extent of quantum of these claims. I consider that the question should be made clearer, and Claimants who are unsure be allowed to respond to say so, by amending to read as follows (amendments underlined):

> "If "other" is stated in response to Q24, state the total amount payable under the finance agreement <u>when the finance agreement was entered into</u> and/or monthly payment amount under the finance agreement, <u>if known</u>".

64. In my judgment there will be likely to be sufficient numbers of Claimants who are able to provide the information to enable the Defendants to take a reasonably informed view as to the quantum of such claims, and those who are unable to do so will not have to raise a query with the Steering Committee.

Section D

Section D applies only if the Claimant has indicated that the vehicle is no longer in their possession.

Question 29

65. Q29 asks the Claimant to state whether or not the date of the sale or disposition of the vehicle is exact or approximate, similarly to Q17 and Q23. The Claimants object on the basis that the question is unnecessary, as the Defendants will have a record for vehicles that have been disposed by sale or return to them. Where they have otherwise been disposed of, an approximate date is sufficient and the exact date of disposition is of limited, if any, relevance.

66. Similarly to Questions 17 and 23, the question can be easily answered, and in any event the Claimants will have to have considered this in answering Q28. It is better dealt with by the Claimants when they are answering Q28, and in the same document, than at a later stage.

Question 30 (a) and (b)

67. Q30 asks Claimants who have disposed of their vehicles, or where these have been written off or stolen, to provide (a) the sale/part exchange price, or (b) the value of any

insurance payment received. The Claimants wish to add the words "(if known, exact price, otherwise approximate price)" in each category, because where Claimants no longer retain documentation relating to the sale, part exchange or insurance payment of their vehicle, it is proportionate that these Claimants provide a response to the best of their recollection. The only alternative offered by the Defendants' proposal is to leave the answers to these questions blank which would clearly not be of assistance to either the parties or the court.

68. The Defendants submit that the sale or part exchange price or insurance payment will have been a precise not an approximate figure and will be information reasonably available to the Claimants.

69. This relates to the same principles as addressed in Question 18, and the same reasoning applies. The answers should not be qualified as proposed by the Claimants.

Question 33(b)

70. Q33(b) asks for a yes or no answer to the question "Additional fuel and/or AdBlue consumption and/or running and maintenance costs following a software update". The Claimants seek to precede the question with the following reservation: "*Subject to disclosure and expert testing of vehicles, the Claimant pursues a claim for*".

71. The Claimants' reservation is explained in their letter of 11th January 2023 to the Defendants. Whilst initially unwilling to include this question, the Claimants sought a compromise position by adding the reservation set out above. As explained in that letter, "*some Claimants will not know whether the vehicle has received an update*" and "*many Claimants will not know whether an update has resulted in increased fuel and/or AdBlue consumption*."

72. The Defendants oppose the insertion of the additional words, submitting that they are both confusing and unnecessary. It is submitted that any reservations in respect of this head of loss should be provided in the Generic Particulars of Claim, and following the service of generic statements of case, if disclosure or expert evidence leads the Steering Committee to consider that claims under this head of loss are not sustainable, then any Claimants who initially advanced such claims can abandon them.

73. I accept the submissions of the Defendants in relation to the proposed additional words, subject to one amendment to the proposed answers. The meaning of the proposed words will be unclear and potentially confusing to the majority of lay Claimants, and will be likely to generate queries to the Lead Solicitors. Such reservations can be made in the Generic Particulars of Claim as submitted by the Defendants. Claimants who do not know whether a software update has been applied are given the option to say so in answer to Q14, but this would not necessarily provide the answer to Q33(b). I consider that a further option of "Not known" should be included. There will be likely to be sufficient numbers of Claimants who are able to answer yes or no to provide sufficient information at this stage.