Neutral Citation Number: [2022] EWHC 810 (QB)

Case No: QB-2019-002837

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

The VW NOx Emissions Group Litigation

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/04/2022

Before :

SENIOR MASTER FONTAINE

- -

Between :

LYNNE BAKER AND 48 OTHERS	**Claimants**
- and -	
VOLKSWAGEN AKTIENGESELLSCHAFT (1) **AUDI AKTIENGESELLSCHAFT (2)** **SKODA AUTO a.s. (3)** **SEAT S.A. (4)** **VOLKSWAGEN GROUP UNITED KINGDOM LIMITED (5)**	**Defendants**
-and-	
LEIGH DAY	**Interested Party**

Richard Moore (instructed by **E. Rex Makin & Co**) for the **Claimants**
No other groups of Claimants attended or were represented
Kathleen Donnelly and Thomas Evans (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **VW Defendants**
Kate Boakes (instructed by **Leigh Day**) for the **Interested Party**

Hearing dates: 9 March 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SENIOR MASTER FONTAINE

Senior Master Fontaine :

1. This was the hearing of an application dated 4 July 2019 ("the July 2019 application") by the Claimants in this claim, represented by E. Rex Makin & Co ("the ERM Claimants" and "ERM" respectively) for:

    i) A declaration that the ERM Claimants are deemed to be included in the Group Register following service of the Schedules of Information; and/or

    ii) Pursuant to CPR 3.9 relief be granted for late service/omission of the ERM Claimants in the Group Register.

2. The following witness statements were before the court,

    i) For the ERM Claimants: third statement of Matthew Wilson dated 4 July 2019 ("Wilson 3") and fourth statement of Robin Makin dated 2 March 2022 ("Makin 4");

    ii) For the Defendants: thirteenth and twenty fifth statements of John Alexander Blain dated 29 September 2019 and 14 February 2022 ("Blain 13" and "Blain 25");

    iii) For the Interested Party: third statement of Shazia Yamin dated 22 February 2022 ("Yamin 3").

Factual and Procedural Background

3. The following information is taken from the witness statements, court orders and the court file. I set it out in some detail as it puts the July 2019 application in context and is relevant to all the circumstances of the application, which I must consider under CPR 3.9.

4. This claim is part of The VW NOx Emissions Group Litigation established by a Group Litigation Order ("GLO") that I made on 11 May 2018, following approval of the same by the President of the Queen's Bench Division. The ERM Claimants consist of 49 Claimants of a total group of some 91,000 Claimants. The July 2019 application arises out of the automatic striking out of the ERM Claimants' claims on 18 April 2019 pursuant to paragraphs 7 and 8 of the order of Mr Justice Waksman (the Managing Judge of The VW NOx Emissions Group Litigation) dated 10 April 2019 ("the General Applications Order").

5. The "Lead Solicitors" under the GLO are Leigh Day ("LD") and Slater & Gordon. The "Steering Committee" is comprised of those two firms and one other, PGMBM. The "Solicitors Group" is comprised of these three firms and various others, including ERM. The Defendants' solicitors are Freshfields Bruckhaus Deringer ("FBD"). LD are an interested party to the July 2019 application.

6. Paragraphs 20 and 21 of the GLO read as follows:

> "20. A Group Register, on which details of the Claims that are subject to this and subsequent orders in this litigation and that comply with the Standard Minimum Requirements as set out in

> paragraph 32 below are to be entered, shall be set up and managed by the Lead Solicitors in accordance with this GLO. Leigh Day will be responsible for establishing and maintaining the Group Register in respect of all Claimants save for those Claimants represented by Slater and Gordon. Slater and Gordon shall establish and maintain the Group Register in respect of Slater and Gordon Claimants.
>
> 21. The Group Register shall be established by the Lead Solicitors no later than 4pm on 1 July 2018. It is a condition of being entered on the Group Register that each Claimant has complied with the Standard Minimum Requirements set out at paragraph 32 below."

7. Paragraph 24 of the GLO states:

> "The Lead Solicitors shall serve an electronic copy of the Group Register in Word or Excel on the Defendants within 7 days of its establishment."

8. Paragraph 33 of the GLO provides as follows:

> "All of the Claimants who, as of the date of this Order, have issued proceedings to which this GLO applies by virtue of paragraph 1 above and which meet the Standard Minimum requirements for entry on the Group Register, shall serve on the Defendants as soon as reasonably possible and in any event by no later than 4 pm on 31 August 2018, a completed Schedule of Information in the form set out in Schedule 2 hereto, such information to be provided to the best of each Claimant's knowledge and belief and signed with a Statement of Truth."

9. Under Paragraph 45 of the GLO the cut-off date for entry of a claim on the Group Register was 4pm 7 December 2018. The cut-off date was subsequently extended by agreement of the parties to 15 February 2019. This date was chosen so that all Claimants could be included on the Group Register before the first CMC, due to be heard on the 5 and 6 March 2019 before the Managing Judge. However, the ERM Claimants were not included on the Group Register either by 15 February 2019 or by the date of the first CMC.

10. Mr Wilson of ERM, Ms Yamin of LD and Mr Blain of FBD provide evidence of what occurred following the making of the GLO, at and following the first CMC, which I summarise below.

Following the GLO

11. At the time the GLO was made it was anticipated that there would be in the region of 100,000 Claimants who would need to be added to the Group Register. LD as one of the firms of Lead Solicitors had to collect data for entry onto the Group Register for its own clients, and for clients of 10 Claimant firms, including ERM, a total of some 15,400 Claimants. Due to the volume of data anticipated to be included on the Group Register,

it was agreed between LD, the other Lead Solicitors Slater & Gordon, and FBD, that an Excel format was the preferred approach.

12. Ms Yamin gives evidence that:

> "Given the volume of Claimants, the fact that we were coordinating with 10 different law firms, and the type of data that the Group Register required, the task of collating, managing and maintaining the data required for the Group Register was challenging. Coordinating the data collection and management in respect of a large number of Claimants across 10 different Claimant firms was a very significant task which required careful planning and management. " (Yamin 3 §12)

13. It was acknowledged by the Lead Solicitors and FBD that the data for the Group Register needed to be entered in a consistent manner, otherwise the functionality afforded by presenting the data in an Excel spreadsheet for the Group Register would be compromised. LD and Slater & Gordon held discussions and agreed with FBD the format of the Group Register, an Excel format for the Schedules of Information to be served on the Defendants under Paragraph 33 of the GLO, and an Excel format for each Claimant to provide the Lead Solicitors with the required data for each Claimant for whom they were acting, for entry onto the Group Register. The aim was to ensure that the process of data collection across the Claimant cohort was approached in a standardised manner: Yamin 3 §§15-20).

14. LD produced and agreed with the Defendants a template spreadsheet, for use by all ten firms of Claimant solicitors, which included a series of data entry rules, including drop down selection boxes, allowing for standard responses to the data fields required for the Group Register. LD produced a formal Group Register Guide ("the Group Register Guide") to assist Claimant firms with identifying and preparing the data needed, and detailed instructions on how to complete the template spreadsheet, which was sent to the ten firms of Claimant solicitors with a copy of the template spreadsheet via email on 25 July 2018. The Group Register Guide also explained that Claimant firms could, for a modest monthly fee, avail themselves of an online survey tool called SmartSurvey that could be set up for completion by their clients, which would simplify the process: Yamin 3 §§21-24.

15. LD held a group meeting of Lead Solicitors and the other ten Claimant solicitors after the circulation of the template spreadsheet and the Group Register Guide, to discuss the requirements for populating the Group Register, a meeting which Mr Makin of ERM attended. Ms Yamin's evidence (Yamin 3 §25) is that after explanation of the format in which the data for the Group Register was to be provided, and an enquiry was made by Mr Makin as to whether LD were seeking to impose additional requirements upon the Claimant firms over and above the information required by the GLO. In response LD gave an explanation as to the reason for the Excel format, Ms Yamin states "*Following this clarification, Mr Makin did not object to providing the Template Spreadsheet*." Ms Yamin's evidence is that no objection was made by Mr Makin to the template spreadsheet format until 14 February 2019, the day before the deadline for service of the Group Register. Mr Makin disputes all of that evidence (Makin 4 at §9) and states (at §7) that:

> "There was no agreement beyond compliance with the GL order. There was no agreement for claimant information to be provided to Freshfields and Leigh Day in electronic Excel format. "

16. By a series of emails from October 2018 leading up to the 15 February 2019 deadline for service of the Group Register, LD reminded the ten Claimant solicitor firms of the requirement to provide the data for the Group Register by 1 February 2019 and to use the template spreadsheet to do so. No response was received by ERM in response to any of these reminder emails until the afternoon of 13 February 2019, when ERM sent six emails to LD in respect of six ERM Claimants. These emails each contained information about one Claimant by way of:

    i) A covering letter with information about which claims were brought against which Defendant;

    ii) A sealed copy of the claim form;

    iii) A 3-page pdf of that Claimant's Schedule of Information in the format appended to the GLO, but with one question altered by ERM, despite my having rejected ERM's submissions at the GLO application hearing, that this question should be formulated in this way. Yamin 3 §27-29.

17. Following further correspondence in which LD pointed out that the data had not been provided in the agreed format, and that LD would be unable to include the ERM Claimants on the Group Register unless the data was provided in the agreed format, ERM declined to provide the data in the agreed format. ERM stated in correspondence that because the GLO did not require this information to be in an Excel format they would be sending the information by scanned pdf Schedules of Information. LD notified ERM that the Group Register information must be provided in the Excel format as agreed with FBD in order for LD to be able to add the ERM Claimants to the Group Register. ERM sent a further 40 emails to LD throughout the afternoon of 14 February 2019 with the information for a further 40 Claimants, in the same manner as the six emails sent on 13 February 2019, and two further emails with information about a further two Claimants were sent on 19 February 2019, after the cut-off date: Yamin 3 §§30-38. This was in contrast to every other Claimant firm who were able to supply the data for the Claimants for whom they acted to LD in the agreed Excel format: Yamin 3 §37. (This is disputed in Makin 4 §10, but it was made clear at the hearing that Ms Yamin's evidence on this point was correct).

18. In order to populate the Group Register with the data from each ERM covering letter, claim form and Claimant Schedule of Information, LD would have had to extract each piece of data individually and populate the template Excel spreadsheet with each piece of data for each of the 46 ERM Claimants included in ERM's emails sent on 13 and 14 February 2019: Yamin 3 §§18, 25, 40. Ms Yamin explains that this would have taken considerably longer than the one afternoon that was left before the deadline expired. In any event the information to be provided on the Schedules of Information differed slightly from the data needed to populate the Group Register: e.g., the information required by paragraph 22(d) of the GLO to be included on the Group Register was not included in the Schedules of Information. Accordingly, the ERM Claimants were not included in the Group Register served by LD on 15 February 2019.

19. At the first CMC on 5 and 6 March 2019, the order ("the First CMC Order") made provision for a number of matters, including a trial of two preliminary issues, initial directions for the trial of preliminary issues, directions as to selection of Lead Claims and Lead Claimants ("the Lead Cases"), service of Individual Particulars of Claim, Individual Defences and Individual Replies for each of the Lead Cases, and provision for amendment of any errors or omissions within the Group Register and Schedules of Information. The judge also made a further order - "the General Applications Order" - which provided a streamlined procedure for dealing with various Claimants' applications, made or prospective, for relief from sanction, amendment or substitution of names on claim forms, the Group Register or in the Schedules of Information. This expressly included at Paragraph 1(g) a prospective application by ERM for relief from sanction sent under cover of an email dated 28 February 2019, required because, as a result of the matters referred to above, none of the ERM Claimants were included on the Register by the cut-off date of 15 February 2019. By Paragraph 2 of the General Applications Order the prospective applications listed were required to be issued and served with supporting evidence, by 4pm 15 March 2019. The General Applications Order also provided, at Paragraphs 7 and 8, that where any such application to which consent was given which required a new entry on the Group Register, that such new entry must be made and reflected in the updated Group Register which was to be served on 18 April 2019, and that if there was default in compliance with that, such a claim would be struck out as at the date of the breach without further order.

Events following the first CMC

20. ERM's application referred to above was issued on 14 March 2019 ("the March 2019 application") and sought not only relief from sanction in respect of the ERM Claimants' failure to be included in the Register by the cut-off date of 15 February 2019, but also relief from sanction in respect of the late service of three Schedules of Information, permission to substitute two of the Claimants and permission to discontinue the claim of one Claimant. It also sought "*a declaration that the ERM & Co Claimants complied with the GLO insofar as the provision of necessary information to allow claims to be included in the group litigation and inclusion on the Group Register*." It was made on notice to the Defendants but not to LD. The Defendants consented to the two applications for relief from sanction, and the substitutions, but not the declaration, on the grounds that this was a matter between ERM and LD, nor the permission to discontinue, on the basis that this was not required under the CPR. Accordingly the ERM Claimants were able to benefit from the provisions in the General Applications Order at Paragraph 7 in respect of those parts of the March 2019 application consented to by the Defendants, and did not restore the remaining parts of their application for determination under Paragraph 4 of the General Applications Order. Accordingly the ERM Claimants were given relief from sanction in respect of their failure to join the Group Register by 15 February 2019.

21. On 16 April 2019, ERM wrote to FBD enclosing an Amended Claim Form and Schedule of Claimants and stated in the letter "*Messrs Leigh Day are the solicitors responsible for the Group Register. The ERM & Co Claimants should be included in the updated version to be served by 18 April 2019*.". This letter was not copied to LD. ERM took no steps to join the Group Register by the extended cut-off date of 18 April 2019 provided for in the General Applications Order. Amendments were made to the Group Register in relation to other Claimants who had obtained relief from sanction

and an amended version was served on the Defendants on 12 April 2019. That did not include any of the ERM Claimants. Consequently the ERM Claimants' claims were automatically struck out under the provisions of paragraph 18 of the General Applications Order.

22. It is not in dispute that the ERM Claimants did not ask LD to add them nor did they inform LD that they had obtained relief from sanction in relation to the previous failure to join the Group Register. Counsel for the ERM Claimants suggested that this would have been brought to LD's notice when they were copied into an email from the clerk to the Managing Judge on 10 April 2019, as the reference to ERM disputing the costs order made on the relief from sanctions application would have indicated that such application had been successful. LD's evidence is that they learned of this for the first time on 19 June 2019 when ERM wrote to them enclosing a copy of the March 2019 application and informing LD for the first time that the ERM Claimants had obtained relief from sanction. The letter also stated: "*despite having ample time to enter the ERM & Co Claimants' details on the Group Register we understand Leigh Day have not done so*". The letter went on to say:

> "It now seems, as we are told by the Defendants, your firm has refused to include the 48 ERM & Co Claimants' details in the Group Register only because the details contained in the schedule of information were not provided in an Excel spreadsheet. Your firm's refusal to 'maintain' the Group Register to include the ERM & Co Claimants' details may need us to issue an application notice to seek a declaration that the ERM & Co Claimants have complied with the requirements of the GLO and are entitled to be entered onto the Group Register."

23. The letter concluded by asking for details of LD's professional indemnity insurers. On the same day ERM wrote to FBD in similar terms and stated that it "…*put [the Defendants] on notice that an application notice may need to be issued to seek a declaration that the ERM & Co Claimants have complied with the requirements of the GLO and are entitled to be entered onto the Group Register*."

24. LD learnt on the same date that ERM's March 2019 application had contained misleading information which implied to the court that LD had not raised any issue as to the format in which the ERM Claimants' data had been provided until 14 March 2019, despite the communications between LD and ERM up to and including 14 February 2019; that the ERM Claimants had sought the Defendants' agreement to the declaration sought in the application without notice to LD and that allegations were made, again without notice to LD, that LD had refused and/or failed to fulfil their obligations to maintain the Group Register: Yamin 3 §43.

<u>The circumstances of the issue of and listing of the July 2019 application</u>

25. On 10 May 2019 the Defendants wrote to ERM identifying the absence of the ERM Claimants on the Group Register and stating that therefore their claims had been automatically struck out. It was not until 19 June 2019 that ERM began to correspond with the Defendants and LD in relation to the struck out claims and claimed that LD had been at fault for not including the ERM Claimants on the Group Register. There followed some correspondence with FBD during which the ERM Claimants sought

unsuccessfully to argue that their failure to join the Group Register could be rectified under the terms of the First CMC Order: Blain 13 §§85-93. By letter of 28 June 2019 LD rejected the assertion that LD were at fault for not including the ERM Claimants on the Group Register and notified ERM that they would have to make a further application for relief from sanction. The July 2019 application was made on 4 July 2019 and unsealed copies of the application were served on FBD and LD on 5 July 2019. At the same time the ERM Claimants provided their Group Register data in the agreed Excel template form.

26. The July 2019 application was issued in the Liverpool District Registry instead of the Central Office of the High Court in London, where the group litigation was being case managed. It was transferred by the Liverpool District Registry to the High Court in London on the 8 August 2019. It had to be scanned in to the electronic court file and was then referred to the Managing Judge on 15 August 2019, who indicated that he was content for me to deal with the application, which was then referred to me on 23 September 2019. The electronic court file shows that I directed that the application should be listed for 2 hours, and my clerk sent to ERM a template of a private room appointment form which had to be completed by all parties to the application with available dates and each parties' time estimates. The electronic court file shows no other activity on the court file following that entry until 2 February 2022.

27. ERM failed to serve sealed copies of the July 2019 application on the Defendants or LD, who had to obtain a sealed copy by writing to the Court in February 2022. ERM began to correspond with the Defendants on 1 October 2019 about listing the application. The Defendants asked for the application to be listed at the PTR for the preliminary issues trial on 11 November 2019, but ERM objected on the grounds that it was inconvenient and proposed 26 or 27 November 2019, dates which were unsuitable for the other parties as they were just prior to the two-week preliminary issues trial which was to commence on 2 December 2019. The Defendants suggested in their letter of 8 November 2019 that ERM obtain alternative dates from the court and proposed directions for further evidence, the filing of a bundle and skeleton arguments, but ERM failed to reply. The Defendants did not hear anything further from ERM until 20 January 2022. It appears from the Court file that no steps were taken during that period by ERM to obtain a listing of their application. No explanation was provided by ERM to the Defendants for the delay.

28. The circumstances in which the July 2019 application came to be listed were that I had been asked to list a number of applications by both claimants and defendants in other Emissions litigation (not yet the subject of a GLO), and when searching the court files to ensure that all applications in a number of different claims were included in the applications to be listed, I noticed that there was an application by the ERM Claimants dated 4 July 2019 where it appeared that no order had been made. I accordingly checked the position with the parties by email and was advised that the July 2019 application had not been dealt with and did need to be listed. Although it was submitted by counsel on behalf of the ERM Claimants that ERM had emailed my clerk in December 2021, that is not in the evidence and there is no record of that email on the court file, and in any event that would still have been some 2 ½ years after the date the application had been issued. It is also inconsistent with the letter from ERM to FBD dated 20 January 2022, when they stated: "*We understand from the court that Senior Master Fontaine wishes to list our Clients' application, together with a number of other outstanding*

applications, on 9 February 2022 for an in-person hearing…." which indicates that it was my email to various emissions litigation parties' solicitors that had prompted the listing, as in fact occurred. I note that it was not made clear in that letter that the other applications were in claims which were not part of The VW NOx Emissions Group Litigation, and been made very recently. ERM's letter implies that the July 2019 application was just one of a number of applications in the same multi-party litigation that were outstanding.

Discussion

The application for a declaration that the ERM Claimants are deemed to be included in the Group Register following service of the Schedules of Information

29. I have no hesitation in dismissing this application. It appears from the evidence that ERM may have confused the requirement in Paragraph 33 of the GLO to serve Schedules of Information on the Defendants, with the requirements in Paragraph 22 of the GLO as to the data required for each Claimant for the practical exercise of populating the Group Register. It is correct that the GLO does not prescribe a specific manner of providing that data to the Lead Solicitors, as that had not yet been discussed and agreed with FBD. Ms Yamin gives evidence (Yamin 3 at §§15-20) about those discussions, first about the format of the Schedules of Information, which were followed by discussions about the format of the Group Register and the format in which data to be entered for each Claimant on the Group Register was to be provided: see Paragraphs 11-14 above. Accordingly LD produced and agreed with the Defendants a template spreadsheet, for use by all Claimant solicitors, which included a series of data entry rules, including drop down selection boxes, allowing for standard responses to the data fields required for the Group Register. Clearly a considerable amount of thought and work went into all of that. Ms Yamin reasonably states that: "*In the absence of agreed Excel template formats, the task of any meaningful analysis of the data contained in the Group Register and SOIs would have been virtually impossible*." Yamin 3 at §§17-18. In any event, the GLO specifically provides (at Paragraph 24) that the Group Register could be in either Word or Excel format, so it would be logical for the data required to populate the Group Register to be in the same format as the Group Register.

30. ERM may not have agreed with this approach, (and Makin 4 at §7 expressly states that ERM did not agree), but LD were Lead Solicitors for their clients and other Claimants, and they were not required to obtain agreement from all of the other Claimant firms, provided they fulfilled their obligations with regard to establishing and maintaining the Group Register as required by the GLO in a sensible and proportionate manner. I accept the evidence of Ms Yamin and Mr Blain, and Counsel's submissions on behalf of LD and the Defendants that LD did so.

31. There is no explanation from ERM as to why they behaved in the way that they did. Neither Wilson 3 nor Makin 4 states the reasons for ERM's objections to the Excel format, nor whether, and if so, when and how, any objections were communicated to LD. It appears from the evidence that they were not so communicated until 14 February 2019, the day before the deadline for service of the Group Register. ERM clearly were able to provide the data in Excel format using the template spreadsheet, as they eventually did so on 5 July 2019, some two and a half months after the ERM claims had been struck out pursuant to the General Applications Order. ERM were given two

opportunities to provide the required data in the Excel format by the deadlines of, first 15 February 2019 and secondly, 18 April 2019 and the evidence demonstrates that they failed to do so because of their own intransigence and lack of cooperation.

32. It was the responsibility of all Claimant solicitors to cooperate with the Lead Solicitors to enable them to comply with their obligations under the GLO. By refusing to cooperate, for no good reason, or indeed any reason enunciated other than they were not obliged to provide their clients' data in Excel form under the GLO, ERM breached the obligation in CPR 1.3 to assist the court to further the overriding objective. It is especially important in group litigation for parties to behave in a responsible and cooperative manner so that the litigation can progress in an orderly and proportionate way. This is one of the largest groups of claimants in any litigation there has been in this jurisdiction, to my knowledge, and it is necessary for all parties to behave in such a way as to enable the court to progress the litigation justly and efficiently.

33. The ERM Claimants have not participated in the group litigation since the determination of the March 2019 application. It would be contrary to the overriding objective to deem that they had been included in the Group Register from 18 April 2019, for all the reasons above and the reasons given in my determination of the application for relief from sanctions, below.

The application for relief from sanction

The legal principles applicable to the July 2019 application

34. CPR 3.9 provides as follows:

> "(1) on an application for relief from any sanction imposed for a failure to comply with any rule, practice direction or court order, the court will consider all the circumstances of the case, so as to enable it to deal justly with the application, including the need –
>
> (a) for litigation to be conducted efficiently and at a proportionate cost; and
>
> (b) to enforce compliance with rules, practice directions and orders.
>
> (2) An application must be supported by evidence."

35. The Court of Appeal gave guidance as to the application of CPR 3.9 in *Denton v TH White Ltd* [2014] EWCA Civ 906 [2014] 1 WLR 3296. It directed that an application for relief from sanction should be addressed in three stages. The first stage is to identify and assess the seriousness and significance of the breach. The second stage is to consider why the default occurred. The third stage is to evaluate all the circumstances of the case, so as to enable the court to deal justly with the application, including CPR 3.9 (1) (a) and (b).

The seriousness and significance of the breach

36. I was referred to *British Gas Trading Ltd v Oak Cash and Carry Ltd* [2016] 1 WLR 4530 at [34] – [44]. The court held that in assessing the seriousness or significance of

the breach of an unless order it was also necessary to look at the underlying breach. It was not possible to look at an unless order in isolation. However, the very fact that a party has failed to comply with an unless order undoubtedly indicates that the breach is serious and significant.

37. The earlier Court of Appeal decision in *Mitchell v News Group Newspapers Ltd* [2014] 1 WLR 795 gave some examples of what amounts to a good reason, and stated (at [43]) that "…*good reasons are likely to arise from circumstances outside the control of the party in default*…"

38. If not otherwise obvious, it is apparent from a number of group litigation decisions that failure to join a group register prior to a cut-off date is clearly a serious and significant breach of a court order*: PIP Breast Implant Litigation* [2014] EWHC 1641 (QB) per Thirlwell J. (as she then was) at [17]. [22], [25] and [30]; *Kimathi & ors v The Foreign & Commonwealth Office* [2017] EWHC 939 (QB) per Stewart J. at 49(b)] and [51] (citing Thirlwell J, in PIP *Breast Implant Litigation* with approval). In his judgment dated 6 March 2019 in this litigation ([2019] EWHC 698 (QB)), Waksman J. emphasised the importance of cut-off dates (at [4]) and held that the failure by a number of Claimants to serve their claims before the cut-off date was a significant breach (at [7]). It is hardly likely that a second breach of an extended cut-off date would not equally, if not more so, be a serious and significant breach. The failure to comply with an unless order also indicates that the breach of the order is serious and significant. The second failure was even more serious because by the time the July 2019 application was listed for a hearing, the preliminary issues trial had been heard and judgment handed down, and there had been a determination in respect of the selection of lead claimants/cases. I refer to Waksman J.'s judgment of 6 March (referred to above) at [6] where he refers to a Claimant's Schedule of Information as being the "*critical document which is required for the purposes of selection*" required "*with a firm deadline of 12 April 2019*". As the ERM Claimants were not included in the Group Register by that date or the cut-off date of 18 April 2019, they could not be included in the pool of Claimants from whom selection of lead cases could be made.

Whether there was a good reason for the breach

39. Wilson 3 puts the blame for the failure for the ERM Claimants to join the Group Register squarely on LD's insistence that the data for populating the Group Register be provided in the Excel template format, and relies on the fact that there is no order in the GLO requiring the data to be provided in that format. It is said at paragraph 39 that:

> "The reason for the non-compliance was that the ERM &Co Claimants legitimately took the view that they had complied with the provisions of the GLO."

40. Mr Wilson does not attempt to provide any explanation why, knowing that the extended cut-off date of 18 April 2019 under the General Applications Order for entry on the Group Register was looming, ERM took no action to provide the required data to LD before that extended cut-off date.

41. Neither Mr Makin nor Mr Wilson, even if they were working under the misapprehension that the Schedules of Information to be served on the Defendants, and the provision of data to LD in order to populate the Group Register amounted to the

same thing, address why they took such an intransigent approach to the issue, and how they anticipated that LD would be able to manage the practical task of extracting data from the Schedules of Information and populating each separate template form with that data in a manageable way and over a reasonable timescale for some 15,400 Claimants. They have not said that there was any difficulty in their being able to provide the data in the Excel spreadsheet format, and it appears that there was not as they eventually provided it on 5 July 2019. Ms Yamin's evidence (as summarised above) is that LD provided support and assistance to any Claimant firms who had any difficulty in completing the template spreadsheets (Yamin 3 §23) and that all of the other nine Claimant firms were able to provide their clients' data in that form (Yamin 3 §25).

42. Makin 4 at §§11-16 appears to suggest that ERM were not prepared to complete the template spreadsheet with their clients' data because they regarded this as "…*generic work to be undertaken by lead solicitors, who will (if the claims are successful) claim the costs of compiling such as generic/common costs from the Defendants*." This in my view is clearly wrong, as both LD and the Defendants submitted. The work of each Claimant firm in obtaining the data from their own clients, and completing the template spreadsheet to be submitted to the Lead Solicitors, is individual claimant work. It is only the work of the Lead Solicitors in entering that data onto the Group Register that is included in common costs. Such an approach also fails to address how LD could possibly enter manually the data for 15,400 Claimants provided piecemeal in three separate pdf documents for each Claimant. In any event, that is hardly a good reason for failing to ensure, for the second time, that the ERM Claimants were included on the Group Register. Arguments about classification of costs could have taken place after the Group Register was served.

43. With regard to the failure to take any steps to list the July 2019 application since its issue on 4 July 2019, Mr Makin states at paragraph 29:

> "ERM & Co has no knowledge of the listing arrangements following the sending of the application dated 4 July 2019 to the Court."

And at paragraph 32 and 33 provides the following information:

> "32. Covid-19 had an obvious effect on the progress of all cases before the court; many in-person hearings were either postponed or listed as virtual hearings (albeit with considerable delays).
>
> 33. Mr Philip Engelman, who had represented the ERM & Co Claimants has not been able to continue to be instructed. He suffered from ill-health and was not able to continue with attended court work and ceased to practice from his Chambers at Cloisters."

44. This is an entirely inadequate explanation for the failure to take any steps to list the July 2019 application for over two and a half years. In July 2019 there was no Covid 19 pandemic. The first lockdown Regulations were introduced in this country on 23 March 2020. In this court hearings then continued remotely, first by Skype and then by Microsoft Teams. None of the hearings listed before me during any of the period since that date were adjourned for reasons of the Covid pandemic, unless one or other or both

of the parties themselves requested it and the court agreed. The failure to issue the application in the Central Office of the High Court is unexplained. If that had been done in July 2019 the application would have been listed and heard by October 2019, well ahead of the beginning of the Covid pandemic. If at any time ERM had contacted the court to ask for the matter to be listed they would have been advised to file a Masters' appointment form providing the parties' available dates and time estimates so that a hearing could be listed. In fact, the court record shows that my clerk requested ERM to provide such an appointment form in September 2019 after the July 2019 application was received from the Liverpool District Registry. No other information is recorded on the court file until 2 February 2022 shortly after I discovered the application, corresponded with the parties and arranged for the application to be listed only a month later.

45. The fact that Counsel of choice had retired from practice does not explain why alternative counsel could not be instructed over a two and a half year period.

46. I have concluded that there was no good reason for the breach. The reason for the breach was ERM's failure to comply with its obligations to the court and to act reasonably and proportionately in the group litigation. It had the means to enable the ERM Claimants to be included on the Group Register just as much as the other Claimant firms, and the circumstances leading to the breach were entirely within its control.

All the circumstances

47. The two circumstances specifically mentioned in CPR 3.9 are:

    i) the need for litigation to be conducted efficiently and at proportionate cost; and

    ii) the need to enforce compliance with rules, practice directions and court orders.

48. Other circumstances include whether the application for relief from sanction was made promptly: *British Gas Trading Ltd* at [52]-[61]; *Diriye v Bojaj* [2021] 1 WLR 1277 at [65].

49. Clearly the conduct of ERM is not conducive to the requirements of either of the circumstances mentioned in CPR 3.9. The application itself was not made promptly; it took some 2 ½ months for ERM to issue the application and their failure to take any steps to list the application over 2 ½ years would be sufficient on its own not to grant relief from sanction: see *British Gas* at [61], where the lack of promptness was described by Jackson LJ as "*the critical factor*" in relation to a delay of just over a month, and *Diriye* at [65].

50. Mr Makin states in his evidence (Makin 4 at §§ 24-28) that there is no prejudice to the Defendants for the ERM Claimants to be included in the Group Register. That is only one of the factors for consideration at the third stage of the test, but in any event it is not, in my view, correct. It is contrary to the efficient progress of group litigation for one group of Claimants to effectively remove themselves from the group for a period of now almost three years (since April 2019), and for that Claimant group to take advantage of a preliminary issue trial determined in the Claimants' favour, with no risk of an adverse finding incurred because they were not on the Group Register, and to benefit from the selection process for lead cases without making themselves available

for selection. Waksman J. regarded the fact that the Lead Claimant selection process had not yet been completed in March 2019 as a decisive factor in his decision to grant relief from sanction to those Claimants whose applications were not made by consent: see his judgment [2019] EWHC 686 (QB) at [6] and [13].

51. The other relevant circumstances in this case are as follows:

i) the fact that this was a second breach by the ERM Claimants of the requirement to provide data in a manner that would enable them to be included on the Group Register;

ii) the complete lack of cooperation by ERM with the Lead Solicitors to enable them to fulfil their obligations to establish, manage and maintain the Group Register; it is obvious that Claimant solicitors need to co-operate with each other and with the Lead Solicitors in group litigation, and this is particularly the case, as here, where claimant numbers are in tens of thousands;

iii) the wholly unjustified attempt to blame LD for their own failings, which I regard as reprehensible, and I make it clear that I am satisfied that LD fulfilled all its obligations as Lead Solicitors to establish and maintain the Group Register and did so in an appropriate and efficient manner;

iv) Mr Wilson's failure to address in his witness statement the numerous occasions when the agreed format had been communicated to the Claimant firms since 25 July 2018, and why no objection had been taken by ERM either at the meeting with all Claimant firms or at any time, nor why the ERM Claimant data was provided (in the wrong format) so late, 13 days after the deadline set by LD, and when it would have been obvious that LD would not have been able to carry out the work required to include the ERM Claimants in the Group Register before the cut-off date; I accept that is information that relates entirely to the March 2019 application, for which relief from sanction was granted by consent, but it is relevant to all the circumstances, and is also a ground relied upon by the ERM Claimants in the July 2019 application;

v) the fact that the group litigation has progressed significantly since March 2019; Mr Blain gives evidence as to what has occurred during that period: there has been a trial of preliminary issues, there has been a selection of lead claimants, there have been two strike out/summary judgment applications brought by both Claimants and Defendants, and the ERM Claimants would benefit from the decisions in their favour without having participated in the costs risks of such trial and applications; there will be a 6 month trial commencing in January 2023 after a case management period of some 4 years;

vi) the suggestion made in submissions by Counsel for the Defendants that ERM may have taken a tactical decision not to progress the July 2019 application pending the outcome of the preliminary issue trial, which was not addressed by Counsel for the ERM Claimants in his reply submissions, so it remains a possibility that a considered decision may have been taken not to proceed with the July 2019 application, particularly where the evidence addressing the delay is simply not credible as a good reason for such delay;

vii) the conduct of ERM in this litigation, which has been dilatory, inefficient uncooperative, disregarding of court orders and inconsistent with their obligations to their clients and to the court.

52. Taking all those matters into consideration, it would not be just to grant the ERM Claimants relief from sanction. I can do no better than quote Thirlwell J. (as she then was) in the *PIP Breast Implant Litigation* at [30] when she said:

> "…the applications are hopeless. To grant them would undermine the discipline of this litigation. The cut-off date would be rendered meaningless. Such prejudice as there may prove to the applicants may be laid at the door of their solicitors."

53. I therefore dismiss the application.

54. It would follow under the general rule in CPR 44.2 (2) (a) that the ERM Claimants are liable to pay the costs of the Defendants and of LD of and occasioned by the application. There is no opposition to the application of the general rule by the ERM Claimants and the amounts of costs payable to the Defendants and LD have now been agreed.