Neutral Citation Number: [2021] EWHC 3444

Claim No: QB-2016-000011
(formerly HQ16X03625) & Ors

20 December 2021

THE VW NOx EMISSIONS GROUP LITIGATION
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
BETWEEN : -

ANTHONY JOSEPH CHAMPION CROSSLEY & ORS

Claimants

-and-

(1) VOLKSWAGEN AKTIENGESELLSCHAFT
(2) AUDI AKTIENGESELLSCHAFT
(3) SKODA AUTO a.s.
(4) SEAT S.A.
(5) VOLKSWAGEN GROUP UNITED KINGDOM LIMITED
(6) VOLKSWAGEN FINANCIAL SERVICES (UK) LIMITED
(7) AUTHORISED DEALERSHIPS

Defendants

B e f o r e :
MR JUSTICE WAKSMAN

Tom de la Mare QC, Oliver Campbell QC, Adam Kramer QC, Adam Heppinstall QC, Gareth Shires, Rachel Tandy and Beatrice Graham (instructed by Slater & Gordon UK Limited, Excello Law (2) Limited trading as PGMBM, and Leigh Day Solicitors) for the Claimants

Charles Gibson QC, Prashant Popat QC, Brian Kennelly QC, Kathleen Donnelly, Nicholas Sloboda, Adam Sher, Thomas Evans, James Williams, Jason Pobjoy and Celia Oldham and Ben Norton (instructed by Freshfields Bruckhaus Deringer LLP Solicitors) for the First to Sixth Defendants and
Geraint Webb QC (instructed by Freshfields Bruckhaus Deringer LLP Solicitors) for the Seventh Defendants

APPROVED JUDGMENT

Hearing dates: 6-10 December 2021

INTRODUCTION

1. In this matter, the Claimants consist of about 86,000 owners of VW, Audi, Skoda and SEAT diesel cars. The common feature is that they all use the EA189 engine or a relevant variant of it. Audi, Skoda and SEAT all form part of the VW group and I shall hereafter simply refer to VW. The first four Defendants are the manufacturers of the vehicles ("the VW Manufacturers"). The Sixth Defendant ("VWFS") is VW's financial services company in the UK which provided finance to some of the Claimants in connection with the purchase of their cars. The Seventh Defendant consists of a group of VW Authorised Dealers ("the VW Dealers") which sold the cars to a large number of the Claimants. The Fifth Defendant is not now relevant and no claim has been made against it. Unless the context otherwise requires, I shall refer to the Defendants collectively as "VW".

2. The claims in this action are made pursuant to a Group Litigation Order made on 21 May 2018, and I am the managing judge. The parties have selected a group of 20 Lead Claimants whose claims will be heard at a lengthy trial starting on 24 January 2023 and which will end by no later than 31 July. As described below, there are both Generic and Individual statements of case. I shall refer to the Generic Particulars of Claim, Defence and Reply as "GPOC", "GDEF" and "GREP" and the same Individual statements of case as "IPOC", "IDEF" and "IREP".

3. The foundation for all the claims made against VW is the fact that each of the engines contained what is known as a "defeat device"; when operating in Mode 1, it enabled the engine to emit Nitrogen Oxide and Dioxide ("NOx Emissions") at a level which was below the maximum permissible levels under, among other things, EU Regulation 715/2007 ("the Emissions Regulation"). The defeat device was able to recognise when vehicles were being tested for the purpose of ensuring compliance with the Emissions Regulation which was a precursor to the obtaining of Type Approval, itself necessary before the cars could be manufactured and sold to the public. During the test, the defeat device ran in Mode 1. Otherwise, it ran in Mode 2. In that mode, the NOx emissions exceeded the permissible limits. The defeat device itself consisted of a software function which could and did alter the relevant engine operation so as to reduce NOx emissions, itself known as Exhaust Gas Recirculation ("EGR").

4. I need say no more at this stage about the technical aspects of the case because, by my judgment dated 6 April 2020 following a trial of preliminary issues, I held that the software function did indeed amount to a defeat device. In so finding, I joined a number of other domestic courts in Europe and the Court of Justice of the European Union itself. For further details, the reader is referred to that judgment ("the PI Judgment").

5. Put very broadly, the Claimants make the following claims:

   (1) <u>As against the VW Manufacturers</u>:

      (a) a claim for breach of the statutory duties imposed on them by the Emissions Regulation (the Breach of Statutory Duty Claim);

      (b) a claim in fraudulent misrepresentation (the Deceit Claim);

   (2) <u>As against VWFS and the VW Dealers</u>:

      (a) claims for damages for breach of contract; one aspect of this is the allegation that the cars, when purchased, were not of satisfactory quality (the SQ Claim);

      (b) claims made under the Consumer Protection from Unfair Trading Regulations 2008 (the CPUT claim);

      (c) an unfair relationship claim made against VWFS only, pursuant to section 140A of the Consumer Credit Act 1974.

6. When the existence of the defeat devices in VW cars first became known to the public at large in what became known as "Dieselgate" or "the VW Emissions Scandal", a number of things happened.

First, and almost immediately, VW withdrew from sale, for a period, cars with the affected engines. Second, the regulatory authorities (described in more detail below) in various EU Member States became involved. The third event was that VW provided a "fix" in respect of the defeat device. This was said to be essentially a software change to ensure that on the road, the car would now operate in a single mode and thereby conform to the relevant emissions standards. It was offered free of charge to all relevant owners as a service update and which could be effected in about 30 minutes at a local VW garage. Many, but by no means all, of the owners have had this work done.

7. Following an amendment to the Generic Particulars of Claim (GPOC), the Claimants now contend that the software change effected by the fix, or an element of that change, is itself another defeat device. It is referred to as the Thermal Window Defeat Device. This is a matter for trial and does not feature presently.

THE APPLICATIONS

8. There are two applications before me. The first, dated 22 April 2021 is made by the VW Manufacturers to strike out or summarily dismiss the Deceit Claim which has been set out in both the Generic and Individual Particulars of Claim. This application is made on the basis that the Claimants have not properly pleaded, but in any event cannot make out, what the VW Manufacturers say is one essential element of the tort. I shall refer to that requirement, explained below, as the "Awareness Condition". A subsidiary part of their application relates to the particular cases in deceit brought by five of the Lead Claimants. I refer to this application as "the Deceit Claim Application".

9. The second application, dated 2 July 2021 ("the SQ Application") is made by the Claimants against VWFS and the VW Dealers. It is principally for summary judgment for the 20 Lead Claimants in respect of the allegation that the cars were not of satisfactory quality. A second part of that application is that in any event, certain parts of the Generic Defence should be struck out.

10. It is common ground that neither application, if successful, will dispose of the trial. The two applications were heard by me on 6-10 December 2021. On Friday 3 December, I ruled that the Claimants had sought to expand the scope of the SQ Application materially, and without permission. Save for one modification, I then ruled that the Claimants were confined to the SQ Application as originally formulated. The hearing in the following week took up all of the allotted time. So even if I had permitted the Claimants to expand the scope of the SQ Application, it could not possibly have been heard in the time available. Insofar as the Claimants wish to pursue the other elements of the SQ Application, as now amended, I have directed that this can be done early next year.

11. This is my judgment on these two applications.

SUMMARY JUDGMENT AND STRIKE-OUT PRINCIPLES

12. I do not intend to rehearse in detail all the relevant principles established by the case law as to how the court should approach (a) an application for summary judgment under CPR 24.2 and (b) an application to strike out a claim or defence pursuant to CPR 3.4 (2) (a). I confine myself to the following matters.

13. First, under CPR 24.2, the applicant may obtain summary judgment against the other party if their defence (or claim) has no real prospect of success and there is no other compelling reason for a trial. The burden of showing this rests upon the applicant. "Real" means "not fanciful". The Court should not conduct a mini-trial. However this does not mean that a Court has to accept every assertion made by the respondent to the application, at face value.

14. In deciding the application, the Court should take into account not only the evidence presently before it, but also evidence that is not but could reasonably be expected to be, available at trial. If the application turns on a short point of construction or law and all the relevant evidence is before the Court, then it should grasp the nettle and decide the point; this is for the simple reason that there is nothing to be gained by delaying the inevitable.

15. In this case, and as will be explained below, both sides contend in respect of the applications made against them, that even if the claim or defence has no real prospect of success, there is in any event a compelling reason for a trial of it. In this regard, two important examples of a compelling reason are:

    (1) the fact that the application concerns a developing area of the law; here, it may be desirable that the disputed legal questions should be resolved against the background of the facts as already found at the trial, and not hypothetical facts;

    (2) where summary judgment will not dispose of the whole case; this will be so where there will be a trial anyway, regardless of the outcome of the summary judgment; it is particularly relevant if, at the trial, there will be or is likely to be evidence concerning the same or similar factual matters as those traversed in the application.

16. Both of these examples are highly pertinent here.

17. The applications to strike-out here assert that there are no reasonable grounds for the claim or defence as the case may be. They concentrate on matters pleaded, as opposed to its underlying prospects of success on the facts.

18. For the purpose of both applications, and unless the context otherwise requires, I shall refer to the latest iteration of the relevant statement of case but refer to it simply as, for example, GPOC rather than Re-Amended Particulars of Claim etc.

THE DECEIT CLAIM APPLICATION

Introduction

19. I deal first with the principal part of this application and will then deal with the subsidiary part concerning five Lead Claimants.

Statements of Case

20. Paragraph 63 of GPOC states, under the heading "H. Original Representations by the Manufacturer Defendants", as follows:

> "In causing or permitting the affected Vehicles to be registered and/or put into service and/or sold, with the benefit of COCs in respect of the affected Vehicles (a publicly known practice), in circumstances in which the respective Volkswagen, Audi, Seat and Skoda brands had been signed up to and/or become bound by the New Car Code), (whether (a) directly by the First to Fourth Defendants as "manufacturers" under Regulation 27A(5)(a) of the CPUT Regulations, or (b) indirectly via any companies within the Volkswagen Group acting as their respective UK official importers, distributors, marketeers or as otherwise authorised to act in the name of the First to Fourth Defendants or on their behalf and so amounting to "producers" within the balance of Regulation27A(5)of CPUT, including but not limited to VWUK, and/or by VWUK itself becoming a signatory to the New Car Code on behalf of traders (including the Fifth to Seventh Defendants) within the meaning of regulation 2 of CPUT) and in which they made the statements set out In paragraph 59 above, each manufacturer of the affected Vehicles made the following representations (the Representations):
>
> 63.1. The vehicles complied with all statutory and regulatory requirements imposed by EU and UK law (including the Emissions Regulations, the Testing Regulations and the Euro 5 limits).
>
> 63.2. All requisite testing had been properly and honestly carried out to establish that compliance; and EC Type Approval, and all necessary consents, licenses and registration had been properly and honestly obtained without any misrepresentation to the regulators from whom they were obtained.
>
> 63.3. The vehicles were fit to be lawfully sold, registered and put into service in the UK or any other Member State of the European Union.
>
> 63.4. The vehicles did not incorporate prohibited or illegal components; and did not incorporate devices preventing the proper and accurate testing and recording of their emissions.
>
> 63.5. The vehicles did not require modification in order to meet relevant emissions standards.
>
> 63.6. The Manufacturer Defendants honestly believed 63.1 to 63.5 above to be the case."

21. For present purposes, it is to be assumed that the Original Representations were indeed made.

22. By paragraph 64, it is alleged that the VW Manufacturers made those representations to all potential purchasers and that they knew and intended that such purchasers would be led by the VW Manufacturers' conduct to believe, and would assume, that matters were as stated in paragraph 63.1 to 63.6 recited above.

23. Paragraph 66 alleges that the Original Representations were false. I need not go into the details of falsity because for present purposes, that, too, is assumed. Paragraph 67 alleges that the VW Manufacturers made the Original Representations with the intention of deceiving the purchasers and in the knowledge that the representations were false, or not caring whether they were true or false. Again, that is assumed to be correct for present purposes.

24. Paragraph 68 reads as follows:

> "As intended by the Manufacturer Defendants, purchasers of the affected Vehicles (including the Claimants) were induced to buy or lease them by the Original Representations. But for the Original Representations, and their belief in the truth of them, no Claimant would have purchased or leased an affected Vehicle. Specifically, no Claimant would have done so if he or she had known that:
>
> 68.1. EC Type Approval, and hence legality for supply, sale and operation of the vehicle within the European Union, had been obtained through fraudulent means.
>
> 68.2. The vehicle contained a defeat device (whether or not as defined in the Emissions Regulations) which was intended to cheat, and had cheated, the emissions testing regime, and ensured that the vehicles produced less pollutants when being tested than in road use.
>
> 68.3. The vehicle would require future modification in order to meet relevant emissions standards."

25. The last part of the introductory paragraph has been referred to as the Counterfactual of Truth ("CFOT").

26. By paragraphs 73 (e) and (f) and again at paragraph 78 (b) and (c) of GDEF, the VW Manufacturers denied as a general proposition that the Claimants relied upon the alleged representations, and reserved the right to put each Claimant to proof in any individual case, that the relevant VW Manufacturer had made an actionable representation and that the Claimant had relied upon it.

27. The IPOCs put the Deceit Claim in the same terms as in the GPOC.

28. I interpose here to say that on 22 February 2021, Cockerill J gave judgment in *Leeds City Council and others v Barclays Bank plc* [2021] EWHC 363 (Comm) ("*Leeds*"). This case is far from the only one relied upon by VW in respect of the Deceit Claim Application. However, it was a focus of their arguments on the basis that it is said to confirm, as a matter of law, that as part of proof of reliance, the representee must plead and prove that she was "consciously aware" of the representation in question. In other words, the Awareness Condition. That argument set the scene for further Requests for Information about the Claimants' case in deceit, made by VW.

29. The IDEFs were served on 5 March 2021. To take the one served in the case brought by Mr Bodley, by way of example, paragraph 14 (b) thereof stated:

> "Further, it is noted and averred that the Claimant does not plead that any relevant representations, including any of the Original Representations, were made to him, or otherwise came to his knowledge, prior to entering into the Agreement. That is, the Defendants infer, because they did not do so. Accordingly, it is denied that the Claimant relied on the Original Representations or any representations relevant to the Claimant's allegations."

30. On 8 April 2021 the Claimants served their IREP in each of the individual claim. Paragraph 5.1 of the Reply in the Bodley claim stated as follows:

> "As pleaded in paragraph 9 of the Claimant's particulars of claim, the Original Representations were made to the Claimant before he entered into the contract, he was aware of them, and they were relied upon by him. The circumstances in which the Original Representations were made are already set out in paragraphs 63 and 64 of the GPOC."

31. I interpose once more to note, as stated above, that the Deceit Claim Application was issued on 22 April 2021. It was supported by the 21st witness statement of Mr John Blain, of Freshfields made on

the same date ("JB 21"). On 2 July 2021 the 33rd witness statement of Mr Gareth Pope on behalf of the Claimants was served ("GP 33"). I need here to set out some paragraphs of GP 33 as follows:

> "26… I do not understand the statement Mr Blain makes that "*not a single Claimant pleads active or conscious awareness and understanding of the Original Representations"* (Blain 21 at Paragraph 45). That is demonstrably wrong. Each and every one of them does so, expressly, using the term "aware"… On the Defendants' own terms as to what the alleged failing in the Claimants' case is (awareness is required and must be pleaded) the defendant's application must therefore fail…
>
> 27. The Claimants' pleas are homogenous-or generic-because they are based on general implied representations from very general conduct (putting the Vehicles on the market). It is unsurprising that all the Claimants rely on the same representations and positively assert that they were aware of them.
>
> 28. Without waving privilege in relation to the communications, the Steering Committee has had with its clients, I can confirm that each of the Lead Claimants read their Individual Reply and either signed themselves or confirm that they gave permission for their retained solicitors to sign it on their behalf. Accordingly, their clear instructions are that they were aware of the Original Representations at the time of acquiring their Vehicles. That is their (unqualified) pleaded case…
>
> 35… I can be very clear that if any of the criticisms of the pleadings are upheld, then (subject to further instructions) the other approximately 90,000 claimants will be pleading awareness up front in their IPOCs."

32. On 28 July 2021 and following service of GP 33, VW served a Request for Further Information on the Claimants. This asked the following questions:

> "1. Does each Lead Claimant allege that, at the time each acquired their vehicles, they were actively and consciously aware of and understood each individual pleaded representation? For the avoidance of doubt, the Defendants are asking whether each Lead Claimant alleges they actually turned their mind to, gave conscious thought to and understood each pleaded representation at the time they acquired their vehicles? Active and conscious awareness is to be contrasted with assuming (but without actually consciously considering and understanding) that the matters represented were true…
>
> 3. Mr Pope's 33rd witness statement [at paragraph 35] states that "I can be very clear that… (subject to further instructions) the other approximately 90,000 claimants will be pleading awareness…"
>
> 3.1 Please explain whether, by this, Mr Pope is contending that every Claimant alleges that they had active and conscious awareness and understanding (in the sense described above) of each individual representation pleaded at GPOC [63] when acquiring their vehicles?
>
> 3.2 If "yes", on what basis is Mr Pope "very clear" as to that?"

33. The answers given to these questions by the Claimants in their Further Information dated 18 August 2021 was as follows:

> "the Lead Claimants have already adequately particularised their plea of reliance on the representations in the…GPOC in their Individual Replies by virtue of their plea that they were "aware of" the representations. Adopting the Defendants dichotomy, this indicates that the Lead Claimants were actively and consciously aware of the representations, in contrast with assuming (but without actually consciously considering and understanding) that the matters represented were true. Hence Mr Pope's 33rd witness statement at paragraph 26 [see above].
>
> The appropriate time for further exploration of the Lead Claimant state of mind is in evidence… awareness …is the same term pleaded by the Lead Claimants; (ii) the ordinary meaning of "awareness" is [t]he quality or state of being aware, consciousness…(iii) awareness of a representation… is clearly distinct from assumption of truth of the matters represented without reference to any representation…
>
> Particulars of the inducement pleaded in the GPOC have not yet been ordered… It is plainly likely that most or all of the non-Lead Claimants will plead awareness given that all of the Lead Claimants (when asked to particularise their reliance) did so."

34. The above statements made on behalf of the Claimants, together with the evidence adduced on the Deceit Claim Application, comprised the state of play at the beginning of the hearing on 6 December.

VW's position at the hearing

35. VW contended the following at the hearing:

(1) Conscious awareness of the relevant representations (here to be implied by conduct - see paragraph 63 of GPOC) is required to sustain a plea of deceit as a matter of law i.e. the Awareness Condition;

(2) Notwithstanding what appeared in the statements of case, the plea of conscious awareness here was insufficient. In particular, it lacked particularity; moreover, the plea was only made in the Reply and not in the Particulars of Claim. That being so, the Deceit Claim should be struck out, without more, since an essential element had not been pleaded;

(3) However, even if the relevant conscious awareness had been pleaded, it was, as a matter of fact, inherently unlikely and implausible that the Lead Claimants (or all Claimants) would actually have turned their minds to the Original Representations at the time of purchase and considered them; accordingly, pleas to this effect were merely fanciful and the Deceit Claim for that reason should be summarily dismissed on the facts.

36. At the end of the first day, I questioned Mr Campbell QC as to why the Claimants had not adduced witness statements from each of the 20 Lead Claimants or at least some of them, setting out the detail of their "conscious awareness" of the Original Representations, so as to put some flesh on the bones, as it were. This would certainly have added clarity and might have been expected, given that the Claimants were facing an application to remove the entirety of the Deceit Claim. Mr Campbell QC had no particular instructions about that. However, he wondered whether such evidence would have satisfied VW in terms of the Deceit Claim Application although, as I pointed out, it was not so much about satisfying VW but assisting the Court.

A further development at the hearing

37. Overnight, Leigh Day, who represent a number of the Individual Claimants, made some enquiries of them. This resulted in the second witness statement of Shazia Yamin dated 7 December 2021 (SY2). It needs to be recited in full:

> "1. I am a Solicitor of the Senior Courts of England & Wales, and a Partner at the firm Leigh Day. I have responsibility for the conduct of the Volkswagen NOx Emissions claim for the clients of this firm. Leigh Day are Lead Solicitors in the claim, together with Slater and Gordon UK Limited.
>
> 2. Of the 20 Lead Claimants, the following 7 are clients of Leigh Day: Mrs Victoria Smith, Mr Maciej Kudanowski, Mr Keith Clarke, Mr Stephen Hodgson, Mr Mark Bodley, Dr Rajinder Dudrah and Mr Lee Cadman (the "Leigh Day Lead Claimants"). On the evening of 6 December 2021, I attempted to contact all 7 of the Leigh Day Lead Claimants via email and telephone and was successful in speaking to the following 5 on the telephone: Victoria Smith, Maciej Kudanowski, Keith Clarke, Stephen Hodgson, Mark Bodley.
>
> 3. Every Leigh Day Lead Claimant I spoke to confirmed that they understood that their pleadings contained a statement that they were aware that representations were made to them at the time of purchasing the vehicles to the effect that the vehicles were lawfully on the road and complied with emissions standards, limits and laws. For convenience I refer throughout the remainder of this statement to that summary of their pleaded case as the "Representation".
>
> 4. Every Leigh Day Lead Claimant that I spoke to confirmed that:
>
> a. at the time of purchase, they had, at the very least, formed an assumption that the Representation was being made to them and that it was/true;
>
> b. at the time of purchase, that they were aware of the Representation; and
>
> c. the Representation was important to them when making their purchasing decision.
>
> 5. Upon speaking with Mrs Victoria Smith, I asked her if she gave thought to the Representation at the time of purchasing the vehicle. Mrs Smith responded: "Yes". In relation to the additional representations she specifically relies upon, she also elaborated as follows: "with regards to emissions [my local dealer] told me Blue Motion was better for the environment. They didn't have [a Blue Motion vehicle] in a dealer near me so I had to travel a further distance to buy it because they didn't have one closer to me. And I knew it would be more expensive. So absolutely I gave express thought to that".

> 6. Upon asking Mr Maciej Kudanowski the same question, he replied: "Yes of course, I gave thought to the fact that I expected the vehicle to be legal." He also said that at the time of purchase he "knew it was a Euro 5 vehicle" and was "happy for it to be" of a Euro 5 standard.
>
> 7. Mr Stephen Hodgson stated that he "expected [the vehicle] was legal to drive" since he would be "driving out of the showroom onto the road".
>
> 8. Mr Keith Clarke stated that he "took for granted" that the vehicle was legal.
>
> 9. Mr Mark Bodley said: "It was important that the vehicle complied with all the relevant regulations - the legal aspect of it was important to me" and that he "made an assumption that because it was marketed it would be legal".

38. Having considered the matter over the short adjournment, Mr Gibson QC took a pragmatic course and sensibly did not object to SY2 being admitted as evidence. In one sense, it would have been hard for VW (and indeed the Court) not to admit it because it was clearly inconsistent with the Claimants' pleaded case (and Mr Pope's evidence which confirmed that case) up to that point. There was no real prejudice to VW because it would not have sought to put in evidence in rebuttal. It would (and did) make submissions about the nature and quality of that evidence, just as it had about the Claimants' Further Information and GP 33.

39. It is indeed impossible to reconcile SY2 with GP 33 and the Further Information. It is plain from the former that at least three of the Individual Claimants spoken to, Mr Hodge, Mr Clarke, and Mr Bodley, were saying no more than they had made an assumption. This is probably true of Mr Kudanowski as well. In the case of Mrs Smith, she did say that she had given thought to "the Representation". As set out in paragraph 3 of SY2 this is a somewhat attenuated and broader representation than those pleaded at paragraph 63 of GPOC.

40. As for paragraph 4 of SY2, I found this difficult to follow in the light of the particular evidence which came after it. Mr Campbell QC acknowledged that the position was not clear and stated that the Claimants would be relying only upon paragraphs 5-9.

41. The upshot of all of this is that the Further Information and GP 33 which confirmed that conscious awareness was part of the Claimants' case are simply unreliable. It could not now be said that the Claimants' case <u>is</u> that there was conscious awareness (as distinct from an assumption or CFOT) on the part of all the Lead Claimants. On the basis of the information contained in SY2, it is overwhelmingly likely that this is not so.

42. Equally, there can be no certainty or even a likelihood that such awareness will be able to be pleaded as and when necessary, in respect of all the other Claimants.

43. What that means is that the contest between the Claimants and VW on the Deceit Claim Application no longer includes whether the Claimants have made a proper plea of conscious awareness. For present purposes one must now assume that they have not, save perhaps in isolated cases like that of Mrs Smith.

44. Rather, the contest is now confined to whether there is indeed the Awareness Condition in order to sustain a claim in deceit in a case like this, as a matter of law, or not. That question includes sub-questions as to whether it is possible, or appropriate, to decide the question anyway at this stage.

45. On that footing, I now turn to the relevant law.

Analysis of the Law

46. I do not intend to discuss each and every case put before me but only those which I regard as key in this area. Moreover, as will be shown below, I have the benefit of the detailed analysis of Cockerill J in *Leeds* where the existence or otherwise of the Awareness Condition was directly in point. I should add that, following the grant of permission to appeal by Cockerill J herself, the Claimants' appeal in that case will be heard by the Court of Appeal on 22 February 2022. However, neither party invited me to await the decision of the Court of Appeal before giving judgment.

47. I shall first summarise the essential position of the parties on the law.

48. VW contends that:

(1) it was clear, well before *Leeds*, that conscious awareness was an essential element of any claim in deceit;

(2) if there was any doubt (which VW says there is not) it was resolved by *Leeds* which held that it was;

(3) I should follow *Leeds*, which is precisely on point, unless it is clearly wrong, and that is a conclusion I cannot reach;

(4) on that footing, the Claimants have no real prospect of succeeding in their Deceit Claim even though every other aspect is assumed to be correct for present purposes;

(5) the law in this area is not "developing"; it is developed; nor can there be any other evidence needed at trial which is not or could not have been brought before the Court now;

(6) even though there is going to be a trial anyway, if the Deceit Claim is unsustainable it should be taken out of the picture now;

(7) accordingly, there is no other compelling reason for a trial.

49. For their part, the Claimants contend as follows:

(1) the law in this respect is far from clear, as the decision in *Leeds* shows, irrespective of its actual result on the facts of the claim before Cockerill J;

(2) there are cases which suggest a contrary view than that taken by Cockerill J and indeed there has been some academic criticism of it;

(3) In any event, this case, and its suitability for summary judgment, is distinguishable from *Leeds*;

(4) given that *Leeds* is going to the Court of Appeal, there should be assumed to be, at least at this stage, a real prospect of demonstrating at trial that conscious awareness is not necessary, certainly not in this case;

(5) there will be evidential crossover at trial in respect of the other claims. This is also a case where the fact that the Deceit Claim Application will not dispose of the trial is an important point against VW. Accordingly, if necessary, the Court should conclude that there is in any event a compelling reason for a trial.

50. I now turn to the case-law.

51. *Smith v Chadwick* (1884) 9 App Cas 187 was a decision of the House of Lords. The claimant alleged that he had been induced to buy shares by a statement contained in the defendants Prospectus which stated that:

> ".. The present value of the turnover or output of the entire works is over £1,000,000 sterling per annum."

52. That statement admitted of two interpretations. It could have meant that the actual turnover for the year exceeded £1 million in which case it was plainly false. Or it could have meant that the works were capable of producing that output, in which case it was true.

53. Prior to trial, the claimant was served with interrogatories asking him to say what his understanding of the words was. Somewhat unhelpfully, he said that he understood the words to mean "that which they obviously convey" and added that he could not express in any other words what he understood to be their meaning. At trial, the claimant was neither examined nor cross-examined about his understanding. He succeeded at first instance and recovered £5,000 damages for fraudulent misrepresentation. The Court of Appeal reversed that judgment and dismissed the action.

54. In the House of Lords, Lord Bramwell upheld the decision of the Court of Appeal, even though he thought that the representation could only mean a reference to actual output and was therefore false. However, he was not satisfied that the statement had been made fraudulently.

55. The lead judgment, with which the Earl of Selborne LC and Lord Watson agreed, was given by Lord Blackburn. He stated at page 195 that whatever the statement meant, the claimant had not sufficiently proved that it did influence him. Later, he said that the claimant must prove damage and if he did not act upon the representations he showed no damage. He went on to refer to the fact that it was not always necessary to call the claimant as a witness to prove that he acted upon the inducement. If it could be proved that the defendant, with a view to inducing a person to enter the contract, had made a statement to the representee which was such as would be likely to induce a person to enter into a contract and it was proved that the claimant did enter into the contract, it was a fair inference of fact that he was induced to do so by the statement.

56. Lord Blackburn thought that the words used here could plausibly have had the sense contended for by the defendant (and indeed Cotton LJ in the Court of Appeal thought they bore that meaning). However, he went on to say that he could not see why the claimant did not give evidence as to whether he understood the words to mean what his case alleged, rather than as the defendant alleged. He thought that the claimant's own counsel did not wish to examine him in case he gave the wrong answer and *vice-versa* for the defendant's counsel wishing not to cross-examine him. But the burden was on the claimant to show that he had been induced by the representation to buy the shares.

57. Here, the point was not that the claimant had not seen the words in question. It was rather that they bore two possible meanings and he had put forward no positive evidence to establish the sense in which he understood them, which was critical to the question of reliance. Accordingly, awareness as such was not the key issue but rather it was his understanding. That said, I take the point made by VW here that it is hard to see how the relevant understanding (whatever it was) did not involve awareness of the words in question.

58. *Edgington v Fitzmaurice* (1885) 29 Ch D 459, was another prospectus case, decided by the Court of Appeal. The key question was whether the claimant could maintain the claim where he was partly influenced by his own mistake but also partly by the defendant's material mis-statement of fact. Again, therefore, awareness of the relevant representation was not itself in issue. At page 481, Cotton LJ stated that:

> "It is not necessary to shew that the misstatement was the sole cause of his acting as he did. If he acted on that misstatement, though he was also influenced by an erroneous supposition, the Defendants will still be liable."

59. Bowen LJ stated at page 483 that:

> "… Such misstatement was material if it was actively present to his mind when he decided to advance his money. The real question is, what was the state of the Plaintiff's mind, and if his mind was disturbed by the misstatement of the defendants, and such disturbance was in part the cause of what he did, the mere fact of his also making a statement himself could make no difference."

60. *DPP v Ray* [1974] AC 370 is a majority decision of the House of Lords in a criminal case. The question was whether there was "deception" for the purposes of committing the offence of obtaining a pecuniary advantage by deception under section 16 of the Theft Act 1968. The facts as found by the magistrates were that the defendant and four friends went to a Chinese restaurant intending to have a meal there and pay for it. After eating the main course they decided not to pay for it but remained until the waiter went out of the room and then they ran from the restaurant. The defendant was convicted.

61. According to Lord MacDermott, the questions that now arose were first, whether the facts justified a finding that the defendant practised a deception and secondly, if he did, was his evasion of the debt obtained by that deception. That second question shows that, as with the civil law of deceit, there has to be a causal connection between the misrepresentation and the result (which in the context of *Ray* was the evasion of a debt which itself amounted to the obtaining of a pecuniary advantage). The key

question was a timing one. This arose because the original intention of the defendant was an honest one and it only changed after the main course. Lord MacDermott said that if one only looked at the position after the main course, one could not find a deception sufficient to prove the offence of obtaining the pecuniary advantage. However, that was not the correct approach. The Court needed to look at the position from the outset. In truth, there had been an implied representation by conduct at the outset which was constituted by the defendant walking in with his friends and sitting down and then ordering a meal. From this could be drawn the representations that they intended to pay for it. While true initially, it was a continuing representation and so eventually became false which made out the offence.

62. At page 385G-386A, Lord Morris said as follows:

> "If someone goes to a restaurant and, having no means whatsoever to pay and no credit arrangement, obtains a meal for which he knows he cannot pay and for which he has no intention of paying he will be guilty of an offence under section 15 of the Theft Act. Such a person would obtain the meal by deception. By his conduct in ordering the meal he would be representing to the restaurant that he had the intention of paying whereas he would not have had any such intention. In the present case when the respondent ordered his meal he impliedly made to the waiter the ordinary representation of the ordinary customer that it was his intention to pay. He induced the waiter to believe that that was his intention. Furthermore, on the facts as found it is clear that all concerned (the waiter, the respondent and his companions) proceeded on the basis that an ordinary customer would pay his bill before leaving. The waiter would not have accepted the order or served the meal had there not been the implied representation."

63. Those observations seem to proceed on the basis that the waiter did not need to do or think very much actively, if anything, to have been induced to believe that the Defendant intended to pay. And the final sentence is a clear invocation of CFOT. *Ray* is of course a very different case than the one before me but it does rather suggest that little if anything was required of the waiter other than that (a) he saw the defendant and his friends and (b) decided to serve them and then CFOT. It is very unlikely that she would have given conscious thoughts to the implied representation and indeed it is not clear what evidence he did give. Rather, any conscious thought would only arise if there was something about a customers demeanour - for example, they were drunk or behaving furtively or oddly - that might then raise a suspicion as to their bona fides. I refer further to *Ray*, when discussing *Leeds* below.

64. One then turns to the well-known decision of Christopher Clarke J (as he then was) in *Raiffeisen v RBS* [2011] Lloyd's Rep 123. At paragraph 80 of his judgment he stated that in order for the Claimant to succeed, it must show:

> "(a) that RBS made representations to it;
> (b) that it understood that those representations were being made;
> (c) that such representations were false;
> (d) that it was induced by those representations … to subscribe… and thus to lend;
> (e) that RBS intended that such representations should induce RZB to enter into the contract…"

65. At paragraph 87, he stated:

> "Lastly, the claimant must show that he in fact understood the statement in the sense (so far as material) which the court ascribes to it… *Smith v Chadwick.*.; and that, having that understanding, he relied on it. This may be of particular significance in the case of implied statements."

66. Finally, at paragraph 187, he stated that:

> "It is not, therefore, necessary for the representee to establish that he would have acted differently if he had known the truth. And it may not be sufficient either. If it were, a claimant who gave no thought to any representation or did not understand it to have been made, might be entitled to recover."

67. In *Cassa di Risparmio v Barclays* [2011] EWHC 484 (Comm), Hamblen J (as he then was) referred to *Raiffeisen* and stated at paragraph 224 that:

> … The claimant must show that he in fact understood the statement in the sense (so far as material) which the court ascribes to it; and that having that understanding, he relied on it."

68. In the event, he found that the relevant representations had not been made at all, or if they had been made, they were not made fraudulently or negligently.

69. Again, in *Brown v InnovatorOne* [2012] EWHC 1321, Hamblen J stated at paragraph 906 of his judgment that:

> "Insofar as the Claimants were alleging implied representations it was incumbent on them to prove that such representations were understood to have been made since otherwise there could be no reliance. In relation to most of the alleged implied representations, there was no such evidence, or no sufficient evidence, of any such understanding…"

70. Yet further, in *UBS v Leipzig* [2014] EWHC 3615, Males J (as he then was) observed at paragraph 666 of his judgment that:

> "… Even if such a representation had been made… There is no evidence (or at any rate none that I accept) that KWL was conscious of any such representation having been made to it, that it relied upon such a representation or that the representation played any part in KWL's decision….There is nothing in Dr Schirmer's evidence, and certainly no evidence which I accept, to suggest that he was ever conscious of the representation which KW claims to have made."

71. Other recent cases where similar statements have been made include *Leni Gas & Oil v Malta Oil* [2014] EWHC 893 (Males J), *Vald Nielsen Holding v Baldorino* [2019] EWHC 1926 (Jacobs J) and *SK Shipping Europe v Capital VLCC* [2020] EWHC 3448 (Foxton J).

72. I now turn to two LIBOR-related cases on which Cockerill J placed particular emphasis in *Leeds*.

73. The first is a decision of Asplin J (as she then was) in *Property Alliance Group v RBS* [2016] EWHC 3342. The claimant in that case had submitted that it was sufficient that "matters may be implicitly communicated by conduct and sub-consciously understood, even if they were not consciously considered at the time". Asplin J stated as follows, among other things:

> 417. I agree with Mr Handyside [for RBS] that the evidence of Mr Wyse and Mr Russell in cross-examination does not support the contention that they entered into the Swaps in reliance upon the LIBOR Representations. Mr Russell accepted in evidence that at the relevant time he knew nothing of the BBA Definition or the way in which submissions were made by Panel Banks, whether RBS was a panel bank or how LIBOR was calculated and that it had never occurred to him that it was capable of manipulation. He was able to say however, that he had "complete trust and faith that RBS were setting correct and qualified rates . . ." In Mr Wyse's case, he could not recall any of the LIBOR Representations without seeing them and also accepted that it had not crossed his mind that submissions could be manipulated. He added in cross-examination that he knew that LIBOR was an average and that "the High Street banks" were involved in making submissions. He stated, however, that he had assumed that LIBOR was the true and correct rate. […]
>
> 419. It seems to me therefore, that there was no understanding of what are extremely complex and intricate pleaded representations meant and for the most part, the matters which were pleaded did not cross Mr Russell and Mr Wyse's minds. On that basis, in my judgment, they could not have understood the implied representations to have been made and therefore, did not rely upon them. In the circumstances, it is not necessary to consider whether it is appropriate to ask what they would have done if told the alleged truth as against if nothing had been said. It was accepted the form of the implied representations had been "borrowed" from the *Graiseley* case and it seems to me that the pleading was not led by the evidence. At best, it seems to me that both Mr Russell and Mr Wyse assumed that LIBOR, which they understood to be a commercial rate of interest, would be set in a straightforward and proper manner. In my judgment, therefore, they gave no thought to the LIBOR Representations in the form pleaded and did not rely upon them."

74. I should add that in the event, Asplin J did not find that the relevant representations had been made in the first place.

75. The second decision is that of Picken J in *Marme Inversiones v NatWest Markets plc* [2019] EWHC 366 (Comm). This was another LIBOR-related case. As with *PAG*, Picken J held that the relevant representations had not been made. But he went on to consider what the position was if they had been. He made the observation "That there is the awareness requirement is made clear in a number of authorities and textbooks…". He stated the following:

> "286. In the circumstances, I agree… that these authorities support the proposition that a claimant in the position of Marme in the present case should have given some contemporaneous conscious thought to the fact that some representations were being impliedly made, even if the precise formulation of those representations may not correspond with what the Court subsequently decides that those representations comprised. If the

> position were otherwise….The consequence would be that there would be a substantial watering down of the reliance requirement…
>
> 287. … The most that can be said is that Mr Maud assumed this to be the position-indeed, as he put it in his second witness statement, he had no reason to think that the position was other than that. An assumption, however, is insufficient for the reasons which I have given. Accordingly, even in relation to the [representation that] the EURIBOR rate being "true and honest", since Mr Maud did not give conscious thought to the point, he cannot have had the necessary awareness to mean that reliance has been made out in this case. In truth, Mr Maud simply did not turn his mind to the point at the time."

76. One case which was not cited to Cockerill J in *Leeds* and was therefore not considered by her is *Gordon v Selico* (1986) 18 HLR 219. This was a decision of the Court of Appeal upholding the first instance decision of Goulding J. In brief, the landlord had covered up serious defects in the flat which was then sold to the purchaser claimant on a long lease. This included the deliberate concealment of dry rot. Goulding J held that the concealment of the dry rot by the builder (and attributed to the landlord) amounted to a positive representation that there was no dry rot, which was false and fraudulently so. Goulding J also held that there was reliance by the claimant in the CFOT sense i.e. that if he knew of the concealment of the dry rot, he would not have purchased the flat. There was in fact no appeal against the finding that the concealment itself amounted to a false representation. The main point at issue on appeal concerned the claim in deceit and whether Goulding J's attribution of the dishonesty of the builder to the lessor was correct.

77. This case is of significance since the Court of Appeal purported to apply the conventional law of deceit. Yet, while the claimant could readily say that had he known of the dry rot etc. he would not have purchased, it is hard to see how he could have been "consciously aware" of the representation as distinct from making an assumption. As this is a case not dealt with in *Leeds*, I should say a little more about it here. VW says that it is distinguishable on the basis that it was a "concealment" case. I do not think that this is an answer because while the concealment was said to found the relevant representation (that there was no dry rot) the question then was whether there appeared to be an Awareness Condition, or something like it, in relation to the issue of reliance. It seemed not. I should add (though it is hardly determinative) that the editors of *Clark & Lindsell* in footnote 1792 to paragraph 17-35 in the first supplement to the 23rd edition state that *Leeds* is difficult to reconcile with *Gordon*. That said, the editors of *Chitty on Contract* 34th edition, did not take issue with *Leeds*.

78. There is then the case of *Spice Girls Ltd v Aprilia* [2002] EWCA Civ 15. This involved a sponsorship agreement made between the Spice Girls' trading company and Aprilia, a motor scooter company. After the agreement had been made, Geri Halliwell left the band. Aprilia alleged misrepresentation on the basis that there had been implied representations to the effect that, as Arden J (as she then was) held at first instance (and as recited at paragraph 46 of the judgment of the court in the Court of Appeal):

> "(a) the conduct of the Spice Girls in (i) approving and using promotional material depicting all five of them for use until March 1999 and (ii) participating in the commercial shoot on 4 May 1998 gave rise to a continuing representation by conduct that SGL did not know and had no reasonable grounds to believe that any of the Spice Girls had an existing declared intention to leave the group before the end of March 1999;"

79. Arden J went on to find that the representations were false, that they induced the making of the relevant agreement by Aprilia, and that there was no reasonable basis for the making of those representations by SGL.

80. At paragraph 114 of her judgment, Arden J said this:

> "Given that Aprilia had to sign the agreement to get the right to use the commercial shoot (and that there was no other reason for it to sign the agreement except to get the rights thereunder), it seems to me that the court can infer that indirectly it was induced to enter the contract by the representations made to it when it made the shoot. The same would apply to other promotional material which constituted a representation by conduct. I am satisfied that SGL participated in the commercial shoot and provided logos, images and so on of the Spice Girls in order that Aprilia should sign the agreement. I am also satisfied that the representations by conduct were such as to be likely to induce a person to enter into the agreement. An inducement to enter into a contract need not of course be the sole inducement."

81. On appeal, one of the points specifically taken was that Aprilia did not understand the representations in the sense alleged, and was not induced to enter into the agreement. It is important here to refer to paragraphs 66 and 67 of the judgment of the Court of Appeal comprising the Vice-Chancellor (Sir Andrew Morritt), Chadwick LJ and Rix LJ:

> "66. These conclusions were challenged by SGL on the grounds that it had not been established that AWS understood the representations in the sense contended for by AWS (E.A.Grimstead & Son Ltd v McGarrigan Court of Appeal 27th October 1999 unreported), or that SGL intended to induce AWS to sign the Agreement in reliance on representations so understood (Nautamix BV v Jenkins of Retford [1975] FSR 385 a case in fraud). SGL submits that there was no evidence that AWS relied on the representations in that sense; in particular AWS relied on the commercial success of the Spice Girls to keep them together. SGL contends that there was no evidence from any individual in AWS to the effect that AWS would have withdrawn from the negotiations had the representation not been made. It is suggested that AWS was committed too far to justify any implication of withdrawal.
>
> 67. We do not accept these submissions. The representation bears the meaning in which it would be reasonably understood by the representee, that is to say, the natural and ordinary meaning which would be conveyed to a normal person. Akerhielm v De Mare [1959] AC 789. In the circumstances no one at AWS gave any consideration at the time to what representations were to be implied into the statements and conduct of the Spice Girls. But this is not a case in which the representations were ambiguous, so that the problem exemplified in E.A.Grimstead & Son Ltd v McGarrigan does not arise. There is no reason to think that AWS did not understand the representations in the sense alleged. The judge so inferred with regard to approval of promotional material and participation in the commercial shoot. We would do likewise in relation to the other representations to which we have referred."

82. It is also important to note that both at first instance, and on appeal, the Court referred specifically to *Smith v Chadwick*, without considering that it posed an obstacle to the finding of inducement. It is telling that, as recited above, the Court of Appeal stated in paragraph 67 that this was not a case where the statement relied upon was ambiguous.

83. The Judgment of the Court of Appeal continued:

> "69. It remains to consider whether the misrepresentations we have found to have been made did induce AWS to sign the Agreement. SGL contends that no witness for AWS was called to give evidence to that effect. It is true that both Ms Fuzzi and Sr Brovazzo indicated that AWS would not have entered into the Agreement if they had known that Ms Halliwell would leave in September 1998 but that, counsel contended, is not the same as testifying that AWS entered into the contract in reliance on the representation. Moreover, SGL contended, the evidence of Ms Fuzzi appeared to be that AWS was so far committed to the sponsorship deal by 4th May 1998 that it would not have withdrawn even if it had known of Ms Halliwell's intentions.
>
> 70. It is sufficient that the misrepresentation is a material inducement, it does not have to be the only one. In Smith v Chadwick (ibid.) page 196 Lord Blackburn said: "I do not think it is necessary, in order to prove [damage], that the plaintiff should always be called as a witness to swear that he acted upon the inducement. At the time when Pasley v Freeman was decided, and for many years afterwards he could not be so called. I think that if it is proved that the defendants with a view to induce the plaintiff to enter into a contract made a statement to the plaintiff of such a nature as would be likely to induce a person to enter into a contract, it is a fair inference of fact that he was induced to do so by the statement." Lord Blackburn went on to point out that the inference was one of fact not law and that if no evidence is given as to reliance in fact that was ground for not drawing the inference."

84. It is hard, in my judgment, to resist the conclusion that while the points as to awareness and CFOT were specifically taken, this case establishes that at least sometimes, an implied representation, intended by the representor to be relied upon by the representee, which is accompanied at least by CFOT, can be sufficient. I will refer to *Spice Girls* further, below, in my discussion of *Leeds.*

85. To complete the picture, I should make reference to the decision of Colman J in *Geest v Fyffes plc* [1999] 1 All ER 672. In summarising the relevant law, he said this at page 683c-e:

> "(iii) Where there is no express misrepresentation, the first question to ask is whether there has been any implied misrepresentation at all and, as with any other type of contract, the essential issue is whether in all the circumstances relating to the entering into of the contract of guarantee or indemnity, including in particular (a) the nature of the contract between the beneficiary and the principal debtor, (b) the conduct of the beneficiary and (c) express representations made by him to the surety, it has been impliedly represented to the surety that there exists some state of facts different from the truth. In evaluating the effect of the beneficiary's conduct a helpful

> test is whether, having regard to the beneficiary's conduct in such circumstances, a reasonable potential surety would naturally assume that the true state of facts did not exist and that, had it existed, he would in all the circumstances necessarily have been informed of it. (iv) If there has been such a misrepresentation, the next question is whether it induced the person giving the guarantee or indemnity to do so in the sense of its having at least materially influenced his decision, although it may not have been the sole cause of that decision (see Edgington v Fitzmaurice (1885) 29 Ch D 459 at 481, [1881–5] All ER Rep 856 at 860, per Cotton LJ)."

86. Both parties agree that the test for the existence of an implied representation is an objective one, based on what a putative reasonable representee would assume from the conduct in question.

87. I now turn to *Leeds* itself. As with *Spice Girls*, there was a material issue as to the question of inducement and in particular the awareness or otherwise of the relevant implied representation. Here, the claimant local authorities alleged that various implied representations could be spelled out from, as Cockerill J put it at paragraph 53 "a web of dealings, where conduct is the immediate context, but that conduct arises against the background of a web of prior communications written and oral" between the claimants and the defendant bank. In addition, and as with the case before me, the defendant sought summary dismissal of the deceit claim on the basis that even if there were the alleged misrepresentations (assumed for the purpose of the application), the claimants were not aware of them and this was fatal to the claim. In other words there was the Awareness Condition. Cockerill J held that there was the Awareness Condition in the case before her and dismissed the action.

88. Of the two Claimants, Leeds City Council made no plea of conscious awareness of the representations, and disavowed any need to plead and prove it. As for Newham London Borough Council, on analysis, it was found not actually to have asserted that anyone understood that representations had been made at all (see paragraph 162 of the judgment). It was therefore critical to assess whether the Awareness Condition existed or not. Cockerill J's findings as to the law in this regard at paragraphs 144 to 148 of the judgment should be referred to first:

> "144 I would tend to accept the submission that, in terms of building blocks, the third element of a cause of action in misrepresentation, inducement, is all about the causal link between the conduct of the defendant and the conduct of the claimant. I also accept that this question is a question of fact in each case.
>
> 145 In my judgment the authorities including the authorities relied on by the Claimants tend to show that based on the facts of different cases it may (or may not) be necessary to break that building block down into smaller parts (assumption, the counterfactual of truth and so forth) and that in different cases those smaller parts will be thrown into greater relief. That does not mean however that each expression of the workings of that part becomes an essential component of inducement in each case.
>
> 146 That there is some requirement of awareness I am, as I have indicated, persuaded is established by the authorities. Often that requirement will not be in issue; but that does not mean that it is not a requirement; just that in some cases that it is so obvious that the parties do not bother to argue about it. And when that requirement is in issue, in some cases the question will be what the claimant consciously thought, but in other cases it may be better expressed by a focus on active presence.
>
> 147 I am of the opinion that there will however be cases where the element of awareness will come very close to something which might loosely (and without careful analysis) be characterised as assumption and which is most obviously derived from conduct. As I remarked to Mr Beltrami in closing, the dividing line between giving contemporaneous conscious thought to the conduct and contemporaneous conscious thought to the representation may in some cases be thin to non-existent. In some cases what Mr Cox referred to as specific conduct may precisely and inevitably equate to a representation, without any room for ambiguity. That may be the case, for example, in the simplest of representation by conduct cases. Thus, for example, in the case of a bidder at an auction raising a paddle, representing a willingness and ability to pay a certain sum. In such a case a requirement for separate or distinct understanding or thought to the representations would be artificial.
>
> 148 Mr Beltrami's resistance to this approach (which does come close to the formulations both of assumption and subconsciousness which were advanced for the Claimants) is founded on two related things. The first is that this case is not so stark in its facts, such that those facts provide an easy basis for inference of any representation. Further (and this may be only partly a different point) here the nature of the facts is some way distant from the representations which are ultimately spelt out; the conduct does not "speak for itself" in the same way so as to permit of the quasi-automatic understanding which may look like assumption. He is rightly keen that I should not infer a principle out of a situation which is overly simplistic which would then prove inapt in more complex cases. He is of course right about this; but the principle operates in reverse. I should be equally cautious about

> expressing a principle which works well in the complex cases but which is unrealistic in more pedestrian situations."

89. These paragraphs show that a single test for what amounts to the necessary awareness may not be possible. In particular, in some cases (a) the necessary awareness will be very close to an assumption derived from the relevant conduct and (b) the distinction between conscious awareness of the conduct which gives rise to the implied representation, and conscious awareness of the implied representation itself, may hardly exist.

90. One then turns to what Cockerill J said next which in my judgment is very important for the case before me:

> "149 The second thing on which his resistance is founded is the fact that awareness has been found to be required in the cases of *Marme*…, which relate to alleged representations which are effectively identical. This, it seems to me, is key in the present case. Were it not for this I would certainly be tempted to say that the question of what feeds into the equation on understanding depends on the precise facts as to the representation, and the answer may be one which requires conscious thought or some less stringent element of awareness. From there it would be but a short step to acceding to the submissions made as to the unsuitability of determining these issues at the strike out/summary judgment stage.
>
> 150 However I do not operate in a vacuum; far from it. I have two cases where the representations found or assumed to be found were essentially the same as the representations to be assumed in this case; and where the judges involved have said in one form or another that awareness is required. To reiterate: (i) In PAG the context was LIBOR representations said to derive from the making of swaps transactions, the representations were very close to identical to those asserted by Newham and wider than those asserted by Leeds; no representations were found to have been made at first instance, but on the assumption that they were all made, it was held that the absence of any thought being given to the representations (the high point of the evidence being assumption of honesty/straightforward rate setting) was fatal. (ii) In *Marme*, which concerned EURIBOR representations, the court rejected the complex set of representations alleged by the claimant, holding that the only representation that could have been possibly implied was one analogous to the one found in PAG (ie that the defendants were not manipulating and did not intend to manipulate EURIBOR), because no such specific basis from which to sensibly imply such complex representations could be found. Nevertheless, if there had been such representations, reliance would have required some contemporaneous conscious thought being given to them and the evidence that at best the relevant person had assumed that the rate was honest, and did not understand the representations to have been made was not enough.
>
> 151 I do therefore conclude that the Bank is broadly speaking correct in the test which I need to apply in the present case and further that proceeding on the basis of assumption in the present case would be wrong in law."

91. It therefore followed that the claims brought by the two councils were dismissed as having no real prospect of success.

92. For my part, I would add the following observations:

(1) Cockerill J clearly thought it important to have the "following wind" of the observations of Asplin J and Picken J in *PAG* and *Marme* respectively, even though on questions of awareness they were *obiter*; but they were at least the same kind of case;

(2) On the question of *Spice Girls* I would respectfully take a different view than that which Cockerill J expressed about it in paragraph 117 of her judgment where she said that the question of awareness was not live. For the reasons already given, it seems to me that it was a live issue and had been a point specifically taken by the defendant. It was not a case of alleged representations which were themselves ambiguous which is why the Court of Appeal expressly distinguished *Smith v Chadwick* on that particular point. If awareness was in issue, then the apparent sufficiency of CFOT was clearly material;

(3) When considering *Ray*, Cockerill J noted in paragraph 112 that there was not a focus on the specific question of the waiter's awareness, and that is true. It is also the case that the core question in terms of reliance was the timing one, referred to above. But Cockerill J also thought that the Awareness Condition was in fact satisfied anyway because the waiter had "actively, albeit almost automatically processed the question whether the customer was good for the money" in conveying the order to the kitchen. See paragraph 113. But if that was

sufficient, a very real question arises as to whether the situation of a customer, who decides to buy a car put on the market by a large and reputable manufacturer and where it is established that there is an implied representation that the car is lawful to drive on the roads and complies with all relevant regulations, is materially different. It could equally be a case of quasi-automatic awareness there, too. Cockerill J, of course, did not have to consider this scenario since it was not before her. So, as far as this case is concerned, I think that one cannot dismiss *Ray* as irrelevant.

93. I would add this, more generally; it has been said (including by VW here) that if a "mere" assumption or CFOT will or might at least in this case suffice, then the distinction between an (exceptional) claim for damages based on non-disclosure (outside contracts of the utmost good faith or those containing fiduciary duties etc) and a conventional claim in deceit, will disappear. I do not agree (at least not at this stage) because there still needs to be established that there is a representation (even if to be implied by conduct) rather than mere silence.

Conclusions on the principal part of the Deceit Claim Application

94. The case before me is very different from *Leeds* (and indeed *PAG* and *Marme*). The conduct, and the representations to be implied therefrom, as pleaded at paragraph 63 of the GPOC (albeit at some length) are both in fact relatively simple. They are not to be spelled out from a complex web of communications. And while in *Leeds* it was to be assumed that the implied representations have been made out, it cannot be denied that the whole context was one where the implied representations might have been difficult to establish and indeed were positively rejected in *PAG* and *Marme*.

95. In my judgment, at the end of the day, and for present purposes, it is the approach to summary judgment taken by Cockerill J that is as important as her analysis of the law. Absent *PAG* and *Marme*, if *Leeds* had to be considered in a vacuum, it seems likely that she would have found that this was an unsuitable case for determining the relevant issue at the summary judgment stage as opposed to at trial. In that sense, this case is being dealt with in a vacuum.

96. One then has to remember that *Leeds* will be heard by the Court of Appeal on 22 February 2022. Cockerill J must have taken the view that there was a real prospect of a successful appeal on the point of law and/or that there was a compelling reason for an appeal because she granted permission.

97. In addition, I do think there are real questions arising from what is to be drawn from the fact that an implied representation from conduct is established which means that the reasonable representee would assume or infer the content of the representation from the conduct observed. It was put to me in argument by the Claimants that it would be odd if a reasonable representee was found to have made that assumption or inference, and yet such an assumption or inference was not sufficient on the part of the actual representee. I appreciate that the former question is an objective one whereas the latter is subjective, depending on the state of mind (or direction of thought) of the actual representee. Nonetheless, I think that there are particular issues raised where implied representations by conduct are alleged and which have yet to be fully worked out. Given also the decisions of the Court of Appeal in *Spice Girls* and *Gordon* and the House of Lords in *Ray,* and notwithstanding *Smith v Chadwick* and the other cases referred to above where the question of awareness was not directly for decision, there is in my view a real prospect of success for the Deceit Claim here. This is in circumstances where a relevant assumption or CFOT must be taken to exist or at any rate is likely to be established or at least there is a real prospect of it being established. Further, I do not consider that the whole issue of the Awareness Condition could seriously be described as a "short point of law" which I should grapple with now. Accordingly, I do not determine that issue at this stage.

98. There are other points, too. First, I understand why VW says that there is an underlying utility in disposing of the Deceit Claim if there were nothing in it, even if there remains a substantial trial. However, the trial here is likely to remain very extensive and involved. It is not as if one would be able by this course to reduce a trial listed for a week or two down to a day or two or at least narrow it substantially. Second, and this is allied to the first point, VW's conduct in relation to the defeat device

and its alleged dishonesty (assumed before me for the purpose of these applications) will still be relevant at trial. Apart from anything else, there is a claim here for exemplary damages. Yet further, the whole issue of reasonable consumer expectations will figure prominently in respect of the contractual, CPUT and unfair relationship claims, or at least it is plausible to think that they will. Indeed, on the Claimants' Satisfactory Quality Application (to which I will refer shortly) VW's own position is that this sort of evidence will be highly important. It is indeed why there is a sense in which the two applications before me are both somewhat double-edged. It is impossible in my view, and at this stage of the process, to draw a clear differentiation between the evidence that will be relevant and admissible on the Deceit Claim on the one hand, and on the Satisfactory Quality and further claims on the other. Yet further, in my judgment, the law in this area cannot be said to be complete or fully developed. This is a classic case where I should on any view avoid determining it ahead of trial and in the absence of all relevant findings of fact. For all of those reasons, even if there were no real prospect of success on the Deceit Claim, these are all compelling reasons for a trial.

99. It therefore follows that the principal part of the Deceit Claim Application must be dismissed.

The subsidiary part of the Deceit Claim Application

Introduction

100. VW contends here that in the case of five particular Lead Claimants, they made claims based on additional representations to those set out in paragraph 63 of GPOC, which are unsustainable either as a matter of pleading or substance. Accordingly, they also seek to strike out or dismiss the relevant parts of such claims on these further grounds.

101. VW made those points in detail at paragraphs 62-91 of JB 21. GP 33 did not address those detailed points at all. However, they were addressed in the Claimants' Skeleton Argument, as they were, again, in VW's Skeleton Argument, and by both parties orally.

102. I consider the points made in relation to each Individual Claimant in turn and then make some general points. Although I am now dealing with individual Claimants, for the sake of convenience, when dealing with the relevant arguments, I shall simply refer to "the Claimants" on the one hand and VW on the other.

103. Further, for the sake of brevity, where I refer below to striking out a claim, it should be taken to refer also to dismissing it summarily.

ICOL

104. The issue here concerns a brochure provided to Mr Heffey, the Director of ICOL Consultants Ltd ("ICOL"), the first of the five Individual Claimants with which I am concerned. This was in respect of a new Audi A4 which he was acquiring from a dealership but obtained on hire terms from VWFS. Prior to purchase, he emailed the dealership about special wheels and "privacy" glass windows at the rear, and with the reply came a Vehicle Specification which at page 6 referred to, among other things, "Emission Class EU 5" and this was set out at paragraph 5 of its IPOC. Paragraph 9 therefore pleaded that it entered into the hire contract in reliance upon the Original Representations (i.e. as pleaded at paragraph 63 of GPOC) and that pleaded at paragraph 5. A CFOT plea was then made.

105. Following points taken in the IDEF, the IREP then stated at paragraph 4 that the words "Emission Class: EU 5" was not only a representation that the vehicle was approved to EU 5 standards but that it also complied with EU 5 standards. Paragraph 93 stated that for the avoidance of doubt, Mr Heffey saw the vehicle specification brochure before entering into the agreement.

106. As a generic point, VW submitted that a plea of conscious awareness was not in fact made here at all. It then went on to say that while it was said that Mr Heffey saw the brochure, it did not specifically say that he read it. As to that, the Claimants respond that this is implicit. VW also says that while the relevant representation was spelled out in the IREP, it was not stated that Mr Heffey understood that part of the vehicle specification in that sense. To this, the Claimants say that this is correct but VW

did not put in issue in what sense it had been understood, as to which VW retorts that it should have been pleaded in the IPOC to begin with.

107. As to all of that, insofar as objection is made about the lack of a plea of conscious awareness, this has been dealt with generally above in my consideration of the main part of the Deceit Claim Application. It does not by itself warrant the striking out of this particular claim.

108. As for the other points, I am not prepared to strike out the relevant element of this claim because parts of the case appeared only in the IREP as opposed to the IPOC that can be cured by amendment. Other objections are really matters of evidence or concern the need for further information. It is worth noting that VW's Request for Further Information dated 5 March 2021 did not raise these particular points. The same goes for the further complaint that it was only in the IREP that ICOL pleaded that the representation drawn from the vehicle specification was made not only on behalf of the dealership which sent it to him, and VWFS, but also on behalf of the Second and Fifth Defendants (the latter being irrelevant). VW takes the point that it is not alleged as against the First Defendant. I see that, but it does not mean that this part of the claim should be struck out. It has just been clarified. There is, after all, the general Deceit Claim based on the implied representation at paragraph 63 of GPOC which is levelled against all the VW Manufacturers.

109. There is no basis for striking out this claim.

Lee Cadman

110. This claim relies on an additional representation drawn from an oral statement made a few months prior to the purchase by a VW dealership, though not the one that Mr Cadman eventually purchased his car from, obtaining finance from VWFS.

111. Paragraph 5 of the IPOC stated that Mr Cadman was informed by an employee of the dealership that the new diesel vehicles produced by VW were much "cleaner" and no more polluting than petrol vehicles and that purchasing a vehicle with a "BlueMotion" package would increase fuel efficiency and reduce pollution further. In making those representations the salesperson was also acting on behalf of VWFS. Paragraph 9 said that this oral representation amounted to an implied representation that the make and model of vehicle was compliant with minimum prescribed emission standards. Paragraph 10 is a plea of CFOT. Following points raised in the IDEF, Mr Cadman alleged in the IREP that the oral representation was made also on behalf of the First and Second Defendants.

112. Similar points as were made in relation to the ICOL claim are made by VW here (i.e. no plea of understanding the representation in the sense pleaded, no plea of conscious awareness and a late plea of attribution). A further point is taken as to how this statement could be attributed to the First, Second and Sixth Defendants anyway. It is to be noted that the specific points taken in VW's IDEF focused on whether the oral representation was actionable and even if it was, whether it was true.

113. For essentially the same reasons as given in respect of the ICOL claim, I am not prepared to strike out the relevant part of Mr Cadman's claim.

Paul Curtis

114. His IPOC alleges at paragraph 6 that "the sales literature pertaining to the SEAT Alhambra… included an implied representation that the SEAT Alhambra met Euro 5 standards." Paragraph 9 pleaded reliance and then CFOT. Paragraph 27.1 said that a claim in deceit was made against the First, Second and Fourth Defendants as set out in section J of the GPOC.

115. Paragraph 9 (a) of VW's IDEF stated that the "sales literature" was not identified in Mr Curtis's Selected Case Schedule and it was not open to him to plead or claim to have relied on it. Paragraph 9(b) noted that Mr Curtis did not claim to have read or have had any knowledge of the selective, generic and unparticularised "sales literature" and it was inferred that he did not.

116. As against those points, in his IREP, it was contended at paragraph 6.3 that Mr Curtis did not rely upon the sales literature as providing a claimant-specific representation but rather as being in support

of the generic allegations in the GPOC. At paragraph 6.4, it was said that he did read and have regard to the sales literature which was a sales brochure produced by the First, Second or Fourth Defendants which indicated that the vehicle met Euro 5 standards.

117. Insofar as Mr Curtis is in fact alleging a separate representation on which he relied, drawn from the sales literature, VW make the same points as they did in relation to the claims by ICOL and Mr Cadman, with the additional point that the sales literature in question was not properly identified. As to the latter, it is a fair point but it was not in fact the subject of the Request for Further Information made by VW on 5 March 2021. This made no reference to the representation at all. That said, there is a question as to whether Mr Curtis is in fact alleging a representation so as to found (part of) the Deceit Claim. This needs to be clarified.

118. Otherwise, my response to VW's points here is the same as for the claims dealt with above. There will need to be an amendment and/or the provision of further information.

Kevin Rowlands

119. His IPOC stated at paragraph 5 that an employee of the Skoda dealer discussed the relevant car with him and stated words to the effect that the vehicle tax on that make and model would be cheaper because it had low emissions. At paragraph 10.2, it was alleged that the oral representation pleaded at paragraph 5 was an implied representation that at the very least, the car was compliant with all emissions standards, and that he entered into the hire contract with VWFS in reliance upon it, with a plea of CFOT at paragraph 10.3.

120. VW makes largely the same points, again, as with the claims already dealt with. But it does specifically point out the lack of any plea as to the understanding of the pleaded sense of the representation, in circumstances where the statement ostensibly was concerned with tax. It is also said that there was no basis for attributing the statement on behalf of the dealership to the Third Defendant.

121. My response is the same as with the claims already dealt with. Such defects as the pleadings contain are not fatal to them but there will need to be an amendment and/or the provision of further information.

Mrs Victoria Smith

122. Paragraph 6 of her IPOC states that there was an express representation by the sales representative at the dealer that a vehicle with BlueMotion would be better for the environment and she would pay less tax as a result. It is then pleaded that this statement also amounted to an implicit representation that such vehicles comply with all statutory and regulatory emissions requirements imposed by EU and UK law, including the Emissions Regulations, that it had been properly and honestly tested to establish such compliance, that it did not incorporate prohibited or illegal components or devices preventing the proper and accurate testing and recording of their emissions, and did not require modification in order to meet relevant emissions standards.

123. Paragraph 9 (c) (iii) of VW's IDEF denied that Mrs Smith relied upon the alleged implied representations on the basis that they could not be implied from the express words and that she had not alleged that at the time she understood the express words to carry the implied meaning.

124. Paragraph 6.4 of the IREP stated in response that for the avoidance of doubt, she did understand the words pleaded at paragraph 6 of her IPOC to have the implied meaning attributed to them. She added at paragraph 5.2 that the relevant employee using the express words had the actual and/or ostensible authority to act as agent for the First Defendant in making them.

125. Apart from points raised before in relation to the other Individual Claimants VW alleges that the plea at paragraph 6.4 of the IREP was fanciful, because it would have required an in-depth insight into the regulatory regime, defeat devices, testing and technical measures, and in any event the words spoken simply did not concern such matters. Here, however, we now have the further instructions taken from

Mrs Smith by Ms Yamin as set out in SY2. On the face of it, what is said at paragraph 5 of SY2 seems to conflict with paragraph 6.4 of the IREP. The Claimants' answer to this point made in their Skeleton Argument (i.e. before service of SY2) was that to say that a vehicle was better for the environment carried the implied representation that the vehicle, was compliant with emissions-related legislation. I see that, but I still think that Mrs Smith's true case is unclear following SY2. It needs to be clarified.

126. As with Mr Rowlands, VW also says that there is no particular basis pleaded for the attribution of the statement pleaded in paragraph 6 of IPOC to the First Defendant. I agree, but again, this can be dealt with by way of further information or an amendment.

Conclusions on the subsidiary part of the Deceit Claim Application

127. For all the reasons given, I do not intend to strike out any part of the claims made by the five Individual Claimants as dealt with above.

128. However, as I have indicated, further steps must be taken by these Claimants in terms of providing Further Information or amending their claims. It seems to me that the most efficient way is probably to amend them. By that route, they can provide the further information and they can also then cure fully the complaint that matters have been pleaded in the IREP which should have gone into the IPOC. This course will also enable the relevant Individual Claimants to articulate precisely what their cases are on deceit where there is some doubt about it, for example, whether a pleaded representation is being relied upon so as to found part of the Deceit Claim or merely as background or for some other purpose.

129. Accordingly, there will need to be an order on this part of the Deceit Claim Application which while refusing the strike-out, provides for the amendments etc.

130. I am bound to say that I consider the way in which the Claimants approached VW's objections in relation to these five claims was unsatisfactory. That is because Mr Pope simply, and expressly, declined to deal with them; see paragraph 36 of GP33. I appreciate that the relevant parts of JB 21 which set out those objections are, to a large extent, taking points about pleadings and so it could be said that they can be adequately addressed in submissions. But that is not a helpful or efficient approach here because it means that at the time when VW was drafting its Skeleton Argument, it had no idea of what the response might be.

THE SQ APPLICATION

Introduction

131. The SQ Application was supported by the 31st witness statement of Mr Pope dated 2 July 2021 ("GP 31"). It said first that there should be summary judgment for all the Claimants on the basis of answering GLO Issue 2 in their favour. This issue is as follows:

> "Whether there was any breach of the implied term of satisfactory quality in contracts relating to affected vehicles between the Claimants and the 6th Defendant (VWFS), 7th Defendant (Inchcape) and any other Authorised Dealership".

132. Accordingly, the Claimants contend that the issue is to be resolved by saying that the affected vehicles were not of satisfactory quality (see paragraphs 6-10 of GP 31).

133. Next, the Claimants seek summary judgment for damages to be assessed in favour of the 20 Lead Claimants, again on the basis that there is a breach of the implied term as to satisfactory quality.

134. Third, the Claimants say that certain parts of the GDEFs of the VW Manufacturers and of VWFS and the VW Dealers should be struck out; this is because they make assertions which the Claimants say are legally untenable. The relevant targets are paragraphs 60L(a), (b), 60N(e) and 89(a) of the GDEF of the VW Manufacturers and such paragraphs of the GDEF of the VW Dealers and VWFS which say the same thing.

135. The Claimants' submissions which underpin the SQ Application are these:

(1) On a proper understanding of the legislative regime a manufacturer cannot issue a "certificate of conformity" ("COC") that a vehicle conforms with all relevant regulatory acts when it has installed an unlawful defeat device (GP31 paragraph 13), and

(2) It follows that the affected vehicles did not have (at point of sale or otherwise) any or any valid COCs within the meaning of Article 18 of Directive 2007/46/EC of the European Parliament and of the Council ("The Framework Directive"). Thus, the affected vehicles could not have been lawfully used on a road in Great Britain when sold by the VW Dealers and VWFS and without any new and valid COCs being issued, remain unable to be so used (GP31 paragraph 14).

136. The later parts of GP31 set out in more detail why it is said that the COCs were or are now invalid.

137. Paragraphs 28-32 then develop the contention that the absence of any valid COC means that offences are being committed under section 42 of the RTA 1988 ("the 1988 Act") by reason of breaches of Regulation 61A of the Road Vehicles (Construction and Use) Regulations 1986 ("the Construction and Use Regulations"). Drivers would also be exposed to penalties under the Road Traffic (Vehicle Emissions) Fixed Penalty (England) Regulations 2002 ("the Emissions Fixed Penalty Regulations").

138. Paragraphs 33-37 then draw these strands together. In essence, they state that because the COCs were or are invalid, this affects the ability of the cars to be used lawfully on the road and creates a risk that they could not be registered or if registered, de-registration. All of that means that the affected vehicles are not of satisfactory quality.

139. The Claimants' present pleaded case does not quite reflect this because:

(1) While a new section F1 of GPOC sets out in detail why the COCs are invalid (see paragraphs 56C-56Q), this is not actually prayed in aid in the section which alleges unsatisfactory quality at paragraphs 73-77;

(2) The same can be said for the new section F2 on type-approval covered at paragraphs 56R-56X.

140. That said, VW was nonetheless able to and did respond to how the matter was put in GP31, in the 24th witness statement of Mr Blain dated 1 October 2021 (JB 24), which was in turn responded to by the 34th witness statement of Mr Pope dated 22 October 2021 (GP34).

141. Following service of the Claimants' Skeleton Argument in support of the SQ Application and by the time of the hearing before me, the Claimants' position was as follows:

(1) The COCs were and are invalid due to the vehicles' non-compliance with, in particular, the Emissions Regulation (see below) due to the presence of the defeat device (the Invalidity Point);

(2) As a result of that invalidity, a person driving such a vehicle would be doing so unlawfully because they would be committing an offence under s42 (b) of the 1988 Act (the Criminal Offence Point); there is a variant to this argument which I permitted to be run at the hearing. It is that the same result obtains <u>even if</u> the COCs were and are <u>not</u> invalid. That is because, in respect of that offence it is said that it would be committed in any event by reason of the vehicles' non-conformity with the relevant requirements.

(3) As a further consequence of that invalidity, there was a risk that the cars would be "de-registered" by the relevant vehicle licensing authority here; if so, a further offence would be committed if such vehicles were then driven on the roads (the De-Registration Point); it appeared at the hearing that the Claimants were also seeking to maintain (rather as they did on the Criminal Offence Point) that in the alternative, there was the same risk of de-registration even if the COCs were valid; VW dealt with this in argument and so I deal with it in this judgment;

(4) As a result of all of the above, the cars were plainly not of satisfactory quality (the Satisfactory Quality Point);

(5) Critically, according to the Claimants (but denied by VW), once this stage is reached, the fact that none of this had any adverse effect on, for example, the vehicle's value or insurability, or that there had been no prosecution or vehicle recall, could make no difference;

(6) Accordingly, there was no other evidence available now or at trial which could alter the position, so there is no obstacle to giving summary judgment on the issue now.

142. I shall deal with each of these points in turn.

The Invalidity Point

The EU Legislative Background

143. It is necessary first to set out all of the relevant EU legislative provisions. In doing so, I shall, to some extent, be duplicating sections which first appeared in the PI Judgment.

144. The concept of "type-approval" was first introduced by Council Directive 70/156. Any vehicle to be sold in the EU had to have obtained the relevant type-approval issued by a relevant authority in a Member State which approval covered the particular type of vehicle in question i.e. make and model. That Directive was successively amended, in particular in 1976, with the introduction of a single binding EC type-approval system; in other words, a vehicle or particular component would require a type-approval whose pre-conditions were a matter of EU law and not national law. Once a "competent authority" in a particular Member State had granted type-approval for a particular vehicle, then that approval was valid for the whole of the EU. It did not need to be validated separately in every other Member State. A manufacturer could choose which competent authority to approach for approval. Typically (but by no means always), the approval would be sought from the competent authority located in the same Member State as the manufacturer. So, for example, the principal type-approval in issue here for VW vehicles (as distinct from Audi, Skoda and SEAT) was that granted by the German authority, being the KBA. The reason why a type-approval granted by a competent authority in one Member State could be valid for the whole EU was because the requirements for such approval derive from EU instruments and were therefore of the same content wherever they were to be applied.

145. Four core pieces of EU legislation here are as follows:

(1) The Framework Directive;

(2) The Emissions Regulation; and

(3) Commission Regulation 692/2008 dated 18 July 2008 ("the Implementing Regulation");

(4) Commission Regulation 2018/858 ("the Market Surveillance Regulation").

146. I recite the relevant parts below and then will refer to them as necessary.

<u>The Framework Directive</u>

147. According to its title, this was to establish

> "a framework for the approval of motor vehicles and their trailers and of systems components and separate technical units intended for such vehicles."

148. The Recitals included the following:

> "(2) For the purposes of the establishment and operation of the internal market of the Community, it is appropriate to replace the Member States' approval systems with a Community approval procedure based on the principle of total harmonisation.
>
> (3) The technical requirements applicable .. should be harmonised and specified in regulatory acts. Those regulatory acts should primarily seek to ensure a high level of road safety, health protection, environmental protection, energy efficiency and protection against unauthorised use.

(4) … the scope of the present Directive should cover all categories of vehicles, enabling manufacturers to benefit from the advantages of the internal market by means of the Community type-approval…

(14) The main objective of the legislation on the approval of vehicles is to ensure that new vehicles, components and separate technical units put on the market provide a high level of safety and environmental protection. This aim should not be impaired by the fitting of certain parts or equipment after vehicles have been placed on the market or have entered service. Thus, appropriate measures should be taken in order to make sure that parts or equipment which can be fitted to vehicles and which are capable of significantly impairing the functioning of systems that are essential in terms of safety or environmental protection, are subject to a prior control by an approval authority before they are offered for sale. These measures should consist of technical provisions concerning the requirements that those parts or equipment have to comply with.

149. The Articles included the following:

"*Article 1*
Subject matter
This Directive establishes a harmonised framework containing the administrative provisions and general technical requirements for approval of all new vehicles within its scope and of the systems, components and separate technical units intended for those vehicles, with a view to facilitating their registration, sale and entry into service within the Community.. Specific technical requirements concerning the construction and functioning of vehicles shall be laid down in application of this Directive in regulatory acts, the exhaustive list of which is set out in Annex IV

Article 2
Scope
1. This Directive applies to the type-approval of vehicles designed and constructed in one or more stages for use on the road, and of systems, components and separate technical units designed and constructed for such vehicles.

Article 3
Definitions
3. 'type-approval' means the procedure whereby a Member State certifies that a type of vehicle, system, component or separate technical unit satisfies the relevant administrative provisions and technical requirements;

36. 'certificate of conformity' means the document set out in Annex IX, issued by the manufacturer and certifying that a vehicle belonging to the series of the type approved in accordance with this Directive complied with all regulatory acts at the time of its production;

Article 4
Obligations of Member States
1. Member States shall ensure that manufacturers applying for approval comply with their obligations under this Directive.

2. Member States shall approve only such vehicles, systems, components or separate technical units as satisfy the requirements of this Directive.

3. Member States shall register or permit the sale or entry into service only of such vehicles, components and separate technical units as satisfy the requirements of this Directive. They shall not prohibit, restrict or impede the registration, sale, entry into service or circulation on the road of vehicles, components or separate technical units, on grounds related to aspects of their construction and functioning covered by this Directive, if they satisfy the requirements of the latter.

Article 5
1. The manufacturer is responsible to the approval authority for all aspects of the approval process and for ensuring conformity of production, whether or not the manufacturer is directly involved in all stages of the construction of a vehicle, system, component or separate technical unit.

Article 12
Conformity of production arrangements
1. The Member State which grants an EC type-approval shall take the necessary measures in accordance with Annex X to verify, if need be in cooperation with the approval authorities of the other Member States, that adequate arrangements have been made to ensure that production vehicles, systems, components or separate technical units, as the case may be, conform to the approved type.

2. The Member State which has granted an EC type-approval shall take the necessary measures in accordance with Annex X in relation to that approval to verify, if need be in cooperation with the approval authorities of the

other Member States, that the arrangements referred to in paragraph 1 continue to be adequate and that production vehicles, systems, components or separate technical units, as the case may be, continue to conform to the approved type…

3. When a Member State which has granted an EC type-approval establishes that the arrangements referred to in paragraph 1 are not being applied, deviate significantly from the arrangements and control plans agreed, or have ceased to be applied, although production is not discontinued, that Member State shall take the necessary measures, including the withdrawal of the type-approval, to ensure that the conformity of production procedure is followed correctly.

Article 17

Termination of validity

1. An EC type-approval of a vehicle shall cease to be valid in any of the following cases:

(a) new requirements in any regulatory act applicable to the approved vehicle become mandatory for the registration, sale or entry into service of new vehicles, and it is not possible to update the approval accordingly;…

Article 18

Certificate of conformity

1. The manufacturer, in his capacity as the holder of an EC type-approval of a vehicle, shall deliver a certificate of conformity to accompany each vehicle, whether complete, incomplete or completed, that is manufactured in conformity with the approved vehicle type. In the case of an incomplete or completed vehicle, the manufacturer shall complete only those items on side 2 of the certificate of conformity which have been added or changed at the current stage of approval and, if applicable, shall attach to the certificate all certificates of conformity delivered at the previous stage…

4. The certificate of conformity shall be completed in its entirety and shall not contain restrictions as regards the use of the vehicle other than those provided for in a regulatory act. 5. The certificate of conformity as set out in Part I of Annex IX for vehicles approved in accordance with the provisions of Article 20(2) shall display in the title thereof the phrase 'For complete/completed vehicles, type-approved in application of Article 20 (provisional approval).'.

Article 26

Registration, sale and entry into service of vehicles

1. Without prejudice to the provisions of Articles 29 and 30, Member States shall register, and permit the sale or entry into service of, vehicles only if they are accompanied by a valid certificate of conformity issued in accordance with Article 18…

Article 29

Vehicles, systems, components or separate technical units in compliance with this Directive

1. If a Member State finds that new vehicles, systems, components or separate technical units, albeit in compliance with the applicable requirements or properly marked, present a serious risk to road safety, or seriously harm the environment or public health, that Member State may, for a maximum period of six months, refuse to register such vehicles or to permit the sale or entry into service in its territory of such vehicles, components or separate technical units. In such cases, the Member State concerned shall immediately notify the manufacturer, the other Member States and the Commission accordingly, stating the reasons on which its decision is based and, in particular, whether it is the result of:

— shortcomings in the relevant regulatory acts, or

— incorrect application of the relevant requirements.

2. The Commission shall consult the parties concerned as soon as possible and, in particular, the approval authority that granted the type-approval in order to prepare the decision…

4. Where the measures referred to in paragraph 1 are attributed to incorrect application of the relevant requirements, the Commission shall take the appropriate measures to ensure compliance with such requirements.

Article 30

Vehicles, systems, components or separate technical units not in conformity with the approved type

1. If a Member State which has granted an EC type-approval finds that new vehicles, systems, components or separate technical units accompanied by a certificate of conformity or bearing an approval mark do not conform to the type it has approved, it shall take the necessary measures, including, where necessary, the withdrawal of type-approval, to ensure that production vehicles, systems, components or separate technical units, as the case may be, are brought into conformity with the approved type. The approval authority of that Member State shall advise the approval authorities of the other Member States of the measures taken.

2. For the purposes of paragraph 1, deviations from the particulars in the EC type-approval certificate or the information package shall be deemed to constitute failure to conform to the approved type.

3. If a Member State demonstrates that new vehicles, components or separate technical units accompanied by a certificate of conformity or bearing an approval mark do not conform to the approved type, it may ask the Member State which granted the EC type-approval to verify that vehicles, systems, components or separate technical units in production continue to conform to the approved type. On receipt of such a request, the Member State concerned shall take the requisite action as soon as possible and in any case within six months of the date of the request…

6. If the Member State that granted EC type-approval disputes the failure to conform notified to it, the Member States concerned shall endeavour to settle the dispute. The Commission shall be kept informed and, where necessary, shall hold appropriate consultations with a view to reaching a settlement.

Article 32
Recall of vehicles
1. Where a manufacturer who has been granted an EC vehicle type-approval is obliged, in application of the provisions of a regulatory act or of Directive 2001/95/EC, to recall vehicles already sold, registered or put into service because one or more systems, components or separate technical units fitted to the vehicle, whether or not duly approved in accordance with this Directive, presents a serious risk to road safety, public health or environmental protection, he shall immediately inform the approval authority that granted the vehicle approval thereof.

2. The manufacturer shall propose to the approval authority a set of appropriate remedies to neutralise the risk referred to in paragraph 1. The approval authority shall communicate the proposed measures to the authorities of the other Member States without delay. The competent authorities shall ensure that the measures are effectively implemented in their respective territories.

3. If the measures are considered to be insufficient by the authorities concerned or have not been implemented quickly enough, they shall inform the approval authority that granted the EC vehicle type-approval without delay.
The approval authority shall then inform the manufacturer. If the approval authority which granted the EC type-approval is itself not satisfied with the measures of the manufacturer, it shall take all protective measures required, including the withdrawal of the EC vehicle type-approval where the manufacturer does not propose and implement effective corrective measures. In case of withdrawal of the EC vehicle type-approval, the concerned approval authority shall notify the manufacturer, the approval authorities of the other Member States and the Commission by registered letter or equivalent electronic means within 20 working days.

Article 46
Penalties
Member States shall determine the penalties applicable for infringement of the provisions of this Directive, and in particular of the prohibitions contained in or resulting from Article 31, and of the regulatory acts listed in Part I of Annex IV and shall take all necessary measures for their implementation. The penalties determined shall be effective, proportionate and dissuasive. Member States shall notify these provisions to the Commission no later than 29 April 2009 and shall notify any subsequent modifications thereof as soon as possible.

150. I now turn to Annex IX and the details of the COC to be provided by the manufacturer. It begins:

"0. OBJECTIVES The certificate of conformity is a statement delivered by the vehicle manufacturer to the buyer in order to assure him that the vehicle he has acquired complies with the legislation in force in the European Union at the time it was produced. The certificate of conformity also serves the purpose to enable the competent authorities of the Member States to register vehicles without having to require the applicant to supply additional technical documentation.

1. GENERAL DESCRIPTION

1.1. The certificate of conformity shall consist of two parts.

(a) SIDE 1, which consists of a statement of compliance by the manufacturer. The same template is common to all vehicle categories.

(b) SIDE 2, which is a technical description of the main characteristics of the vehicle. The template of side 2 is adapted to each specific vehicle category."

151. The statement of conformity made by the manufacturer at Side 1 says that the particular vehicle conforms in all respects to the type described in the relevant type approval and can be permanently registered in Member States and it is then dated and signed. Side 2 is extensive, running to many pages because it sets out in great detail the particular measurements and dimensions of all aspects of the vehicle. The COC has rightly been referred to as the vehicle's "passport". It cannot be produced by the manufacturer without the type-approval certificate which in turn cannot be obtained without passing the relevant test in all respects. Just as a COC cannot be issued by the manufacturer in the absence of a relevant type-approval, the vehicle cannot be registered in the relevant member state without production of the COC. To that extent, the COC has also been described by VW here as a "bridge" between the grant of type approval by the competent approval authority and registration of the vehicle by the relevant local registration authority.

152. All of this is in the context of the aim of providing harmonised and consistent standards to ensure, among other things, health and environmental protection, whereby relevant tests are to be established by which compliance with such standards can be measured for the purpose of type-approval. As can be seen from the provisions quoted above, subsequent non-compliance with the relevant standards in the case of a particular vehicle or vehicles can result in withdrawal of their type-approval.

153. The COC is not in fact typically supplied as a paper document with the car when delivered to the owner. Instead, it is electronically transmitted to the relevant Member State registration authority which needs to see it before the car can be registered. Car owners are able, however, to request a copy of the COC.

154. As from 29 April 2009, a new Annex IX to the Framework Directive has been inserted by amendment, by Commission Regulation 385/2009. However, there is no material difference between the old and new versions for present purposes.

155. It is worth just summarising some of those provisions. Article 12 imposes an obligation on the approval authority which granted the type-approval (the competent authority) to take necessary measures to certify that the arrangements to ensure that the vehicles conform to the approved type are and remain adequate; if they are not being applied, or deviate from what was agreed about them, the competent authority must take necessary measures, including the withdrawal of type-approval, to ensure that the conformity of production procedure is followed correctly.

156. Article 30 (1) then imposes a separate obligation on the competent authority to take the necessary measures if it finds that new vehicles which have a COC nevertheless do not conform to the type-approval, so as to restore the conformity of the vehicles produced.

157. Article 30 (3) enables an approval authority in any Member State which demonstrates non-conformity with the type-approval, to request the competent authority to verify that there is conformity. The competent authority must take the requested action within six months of the request.

158. Article 30 (4) then obliges an approval authority to request the competent authority to take the necessary action to bring the vehicles back into conformity where (among other things) the non-conformity is attributable exclusively to the non-conformity of a system, component or separate technical unit. The competent authority must then take the requested action within six months. If a failure to conform is established, then the necessary measures must be taken.

159. So the taking of necessary measures to restore conformity, even if sought by an approval authority which is not the competent authority, is the ultimate responsibility of the competent authority.

160. Article 29 provides a "safeguarding" procedure whereby an approval authority in any Member State, whether the competent authority or not, can refuse registration or the sale of vehicles locally, as it were, where it finds that there is a serious risk to road safety or of serious harm, and can do so for up to 6 months. The approval authority in question must then notify all other Member States and the Commission, giving its reasons. It must say whether the risk that has emerged is due to shortcomings

in the underlying legislation or an incorrect application of the relevant requirements. In the latter case, the Commission must take appropriate measures to restore compliance.

161. This, then, is the framework for the more detailed legislation set out in the Emissions Regulation, the Implementing Regulation and, more recently, the Marketing and Surveillance Regulation.

The Emissions Regulation

162. I then turn to the relevant provisions of the Emissions Regulation which deals with:

> "type-approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information".

163. The Articles provide, among other things, as follows:

> *"Article 1*
> **Subject matter**
> 1. This Regulation establishes common technical requirements for the type-approval of motor vehicles (vehicles) and replacement parts, such as replacement pollution control devices, with regard to their emissions.
>
> *Article 4*
> **Manufacturers' obligations**
> 1. Manufacturers shall demonstrate that all new vehicles sold, registered or put into service in the Community are type approved in accordance with this Regulation and its implementing measures. Manufacturers shall also demonstrate that all new replacement pollution control devices requiring type-approval which are sold or put into service in the Community are type approved in accordance with this Regulation and its implementing measures. These obligations include meeting the emission limits set out in Annex I and the implementing measures referred to in Article 5.
>
> *Article 5*
> **Requirements and tests**
> 2. The use of defeat devices that reduce the effectiveness of emission control systems shall be prohibited…
>
> 3. The specific procedures, tests and requirements for type-approval set out in this paragraph, as well as requirements for the implementation of paragraph 2, which are designed to amend non-essential elements of this Regulation, by supplementing it, shall be adopted in accordance with the regulatory procedure with scrutiny referred to in Article 15(3). This shall include establishing the requirements relating to:
>
> (a) tailpipe emissions, including test cycles, low ambient temperature emissions, emissions at idling speed, smoke opacity and correct functioning and regeneration of after-treatment systems;
> (c) OBD systems and in-use performance of pollution control devices;
> (d) durability of pollution control devices, replacement pollution control devices, in-service conformity, conformity of production and roadworthiness;…
> (h) test equipment;
>
> *Article 10*
> **Type-approval**
> 1. With effect from 2 July 2007, if a manufacturer so requests, the national authorities may not, on grounds relating to emissions or fuel consumption of vehicles, refuse to grant EC type approval or national type approval for a new type of vehicle, or prohibit the registration, sale or entry into service of a new vehicle, where the vehicle concerned complies with this Regulation and its implementing measures..
>
> 2. With effect from 1 September 2009…the national authorities shall refuse, on grounds relating to emissions or fuel consumption, to grant EC type approval or national type approval for new types of vehicle which do not comply with this Regulation and its implementing measures..
>
> 3. With effect from 1 January 2011…national authorities shall, in the case of new vehicles which do not comply with this Regulation and its implementing measures…consider certificates of conformity to be no longer valid for the purposes of Article 7(1) of Directive 70/156/EEC [for which read Article 21 of the Framework Directive] and shall, on grounds relating to emissions or fuel consumption, prohibit the registration, sale or entry into service of such vehicles…
>
> *Article 13*
> **Penalties**

1. Member States shall lay down the provisions on penalties applicable for infringement by manufacturers of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive. Member States shall notify those provisions to the Commission by 2 January 2009 and shall notify it without delay of any subsequent amendment affecting them.
2. The types of infringements which are subject to a penalty shall include:
(a) making false declarations during the approval procedures or procedures leading to a recall;
(b) falsifying test results for type-approval or in-service conformity;
(c) withholding data or technical specifications which could lead to recall or withdrawal of type-approval;
(d) use of defeat devices;
and
(e) refusal to provide access to information.

Article 17
Repeal
1. The following Directives shall be repealed with effect from 2 January 2013:
— Directive 70/220/EEC…
3. References made to the repealed Directives shall be construed as being made to this Regulation."

164. The broad effect of Article 10 is that if the vehicle complies with the relevant requirements of the Regulation and its implementation measures, then the competent authority must grant the relevant type-approval. Conversely, if there is no compliance they must not. Given the centrality of the test procedure to deciding whether the vehicle has complied, this means that essentially, if the test is passed then the vehicle must be type-approved. The logic of that is obviously that if there is a harmonised and consistent procedure for ascertaining compliance, competent authorities cannot be permitted to either qualify or disqualify vehicles according to other criteria.

165. There is no need here to refer to the Implementing Regulation (692/2008). However, I do need to refer to Regulation 2018/858 ("the Market Surveillance Regulation").

The Market Surveillance Regulation

166. Recital 30 states as follows:

"The obligations of national authorities concerning market surveillance provided in this Regulation are more specific than those laid down in Regulation (EC) No 765/2008. This is the result of the need to take account of the special characteristics of the framework for type-approval and the need to complement that framework with an effective market surveillance mechanism ensuring the robust verification of compliance of the automotive products covered by this Regulation. In order to ensure the functioning of the framework, it is essential that market surveillance authorities verify compliance of the automotive products irrespective of whether their type approval was granted before or after the date of application of this Regulation."

167. There are a number of relevant Articles:

"*Article 31*
Conformity of production arrangements
1. An approval authority that has granted an EU type-approval shall take the necessary measures in accordance with Annex IV to verify, if necessary in cooperation with the approval authorities of the other Member States, that the manufacturer produces the vehicles, systems, components or separate technical units in conformity with the approved type.

2. An approval authority that has granted a whole-vehicle type-approval shall verify a statistically relevant number of samples of vehicles and certificates of conformity on their compliance with Articles 36 and 37 and shall verify that the data in those certificates of conformity are correct.

3. An approval authority that has granted an EU type-approval shall take the necessary measures to verify, if necessary in cooperation with the approval authorities of the other Member States, that the arrangements referred to in paragraphs 1 and 2 of this Article continue to be adequate so that vehicles, systems, components or separate technical units in production continue to conform to the approved type and that certificates of conformity continue to comply with Articles 36 and 37.

Article 51

National evaluation regarding vehicles, systems, components and separate technical units suspected of presenting a serious risk or non-compliance
Where, based on their own market surveillance activities, or based on information provided by an approval authority or a manufacturer or based on complaints, the market surveillance authorities of one Member State have sufficient reasons to believe that a vehicle, system, component or separate technical unit presents a serious risk to the health or safety of persons or to other aspects of the protection of public interests covered by this Regulation or does not comply with the requirements laid down in this Regulation, they shall evaluate the vehicle, system, component or separate technical unit concerned with respect to the relevant requirements laid down in this Regulation. The relevant economic operators and the relevant approval authorities shall cooperate fully with the market surveillance authorities, which shall include forwarding the results of all relevant checks or tests performed in accordance with Article 31.

Article 88
Repeal of Directive 2007/46/EC [ie the Framework Directive]
Directive 2007/46/EC is repealed with effect from 1 September 2020.

References to Directive 2007/46/EC shall be construed as references to this Regulation and shall be read in accordance with the correlation table set out in point 3 of Annex XI to this Regulation."

168. It can be seen from Articles 31 and 51 that while this Regulation introduces further activities at a Member State level, the primacy of the competent authority remains in terms of taking necessary measures. Article 88 is of relevance to the Criminal Offence Point.

169. Both the Emissions Regulation and the Market Surveillance Regulation are retained EU law and therefore continue to have direct effect. The Framework Directive still applies to all COCs issued before 1 September 2020.

Interpretation of EU Legislation

170. Before analysing the Invalidity Point it is necessary to rehearse some relevant principles of the interpretation of EU legislation. I see no reason to alter the principles which I set out in the PI Judgment, and so they are repeated below, to the extent necessary.

171. First, there is ample support for the proposition that in general, the exercise of interpreting EU legislation is more obviously purposive than a similar exercise in the UK. See also paragraphs 12.34 and 12.35 of *"Understanding Legislation: A Practical Guide to Statutory Interpretation"* by Lowe and Potter ("L&P") which sets out the contextual approach. So when there is a dispute over interpretation, that which will allow the provision to achieve its purpose will be preferred to one which does not. That said, if the legislative intent is clear from the words, the court should not rewrite it by reference to its purpose. See paragraph 12.43 and 12.44 of L&P.

172. Second, recourse can be (and often is) had to the Recitals of the relevant instrument because they explain what its purpose is and why it came to be there. But again, they must not be used to derogate from a provision, or to be interpreted in a way which is clearly contrary to its wording. See L&P at paragraphs 12.46 and 12.47.

173. Third, other parts of the measure containing the provision in question can be looked at to identify its true meaning, context and purpose; see paragraph 668 of *"Judicial Control in the EU: Procedures and Principles"* by Lasok and Millett (1st Edition, 2004) ("L&M").

174. Fourth, provisions should be interpreted to ensure that they are given full effect ("effet utile") and so they should be interpreted broadly, so as to ensure the smooth functioning of the scheme of which they form part; however, this cannot be used to produce a result inconsistent with the aim of the provision. See L&M at paragraph 695.

175. Fifth, the interpretation preferred may be based on the fact that the alternative interpretation would render another provision in the same measure redundant or ineffectual. What can be inferred from the absence of an express statement in the relevant provision is, however, limited, according to L&M at paragraph 697:

> "An interpretation deduced from the absence of an express statement in a legal provision is acceptable only in the last resort, when no other interpretation appears to be adequate or compatible with the text of the provision, its context and its objectives."

176. Finally, and in relation to all of this, it goes without saying that how all of these particular principles play out (over and above the relevance of the immediate context and purpose of the relevant provision as well as its language) will depend very much on the facts of any particular case.

Analysis

177. Much reliance was placed by the Claimants on the language of Article 26 (1), perhaps unsurprisingly since it is the only relevant provision in that directive which makes a specific reference to a "valid" COC. Its predecessor was Article 7 (1) of Council Directive 70/156 which itself provided:

> "Member States may not refuse to register or prohibited the sale, entry into service or use of any new vehicle on grounds relating to its construction or functioning, where that vehicle is accompanied by a certificate of conformity."

178. The short point made by the Claimants is that if the vehicle in question had a defeat device rendering it non-compliant with the operative requirements, the COC which certified compliance cannot be valid at the same time. The Claimants say that the VW Manufacturers who both made the cars and certified them as compliant cannot have done both acts. As a matter of fact, I disagree, because they did, insofar as the COC is taken as a certificate of compliance with the underlying requirements. What the Claimants are really saying is that if the COC is provided in those circumstances, it is invalid, for the purposes, at least, of Article 26 (1). This is so, contend the Claimants, even though no relevant type-approval appears ever to have been withdrawn in respect of the affected vehicles since the emissions scandal broke.

179. The Claimants go on to submit (at paragraph 109 of their Skeleton Argument) that "it cannot be right" that this Court should find both that defeat devices were installed (which it already has, in the PI Judgment), and yet the VW Manufacturers properly certified compliance. That supposed paradox does not necessarily follow. It all depends on what is meant by an "improper" COC.

180. Article 3 (36) states that the COC is the document set out in Annex IX. It goes on to say that it certifies that the vehicle belonging to the relevant series in the type-approval "complied with all regulatory acts at the time of its production." Article 18 then sets out a number of what might be described as general formal requirements with which the COC must comply. It makes no reference to its mandatory contents. These are set out in the template provided at Annex IX. If one goes to Side 1, the actual signed and dated assurance provided by the manufacturer is clearly as to conformity to type-approval and nothing more. It is perfectly true that Side 2 then gives a technical description of all aspects of the vehicle's construction and performance with appropriate measurements, dimensions, units and so on. No doubt the provision of such information has all sorts of uses (including by the registration and possibly tax authorities) but these are not "attested" to by the manufacturer. The information is simply provided. Taken by themselves, Sides 1 and 2 do not certify compliance to all of the relevant requirements or indeed the accuracy of the information provided.

181. It is correct that Objective 0, at the start of Annex IX, states first that the COC is a statement directed to the buyer in order to assure her that the vehicle complies with EU legislation. However, as an objective, it could be said that this is indeed achieved by stating conformity with the type-approval which itself can only be granted for the vehicle in question when the relevant requirements are demonstrated to have been met by testing and so on. So the objective is itself fulfilled and the relevant statement made, through the manufacturer's certificate that the vehicle complies with its type-approval. One could read Article 3 (36) in the same way.

182. The second objective stated is to enable registration to be effected without having to require the applicant to supply additional technical documents, other obviously, than the information provided.

183. The Claimants, for their part, say that the function and content of the COC is to deliver an assurance to the buyer from the manufacturer both of compliance with the type-approval and all relevant legislative requirements. VW says that its function is limited to assuring only the former.

184. It is not necessary to reach a final view as to whether the COC should be read as VW contends or as the Claimants contend. That is because the real question is what the status of the COC is if in fact there is non-conformity. This is not affected by how one interprets what it is certifying.

185. It does not follow, in my judgment, that because the COC is inaccurate (since part of the manufacturer's certification is wrong because of the presence of the defeat device) it is necessarily invalid in the sense of being void which is what the Claimants contend for. The first version of the De-Registration Point depends on it being shown that the COC is void and of no effect so that it must follow that the vehicle, if new at the time, could not be registered and if already registered might perhaps be "de-registered".

186. There is nothing in the Framework Directive which provides that an inaccurate COC is thereby invalid or void. In my judgment, if that had been the intention, it would have said so.

187. There are numerous other reasons why the Invalidity Point is wrong. First, if it was correct, it is indeed remarkable that it seems that no approval or other relevant authority in the EU has ever contended for the non-registration or de-registration of the affected vehicles on that basis, that the COC was void. This is against a backdrop where the type-approvals themselves have never been withdrawn.

188. In this regard, Mr Blain exhibited to JB24 a number of letters from lawyers in Germany, Spain, France, Italy and the Czech Republic. Undoubtedly, parts of them contained opinion evidence on the Invalidity Point and relevant procedures in their own jurisdictions; to that extent there was no permission for such evidence and I should not have regard to it. However, the letters from those in Spain, France, and Italy also stated expressly that as a matter of fact, they were not aware of any action taken in their jurisdictions by the approval or other authorities on the basis that the COCs were rendered invalid due to non-conformity. The same answer would seem to be implied in the responses from Germany and the Czech Republic, it is just that they did not address this factual question directly. While such evidence is hardly conclusive, it does add support to the notion that no action to declare as invalid, or revoke the validity of COCs had in fact occurred. Certainly, the Claimants cannot point to any such action.

189. Second, in my judgment, the expression "valid" as used in Article 26 (1) is not about substantive validity (in the sense of valid by reference to the underlying requirements) but rather is a matter of form. The prescribed form is set out in Annex IX and the general requirements are contained in Article 18 so it would be easy for any registration authority to see if the COC had complied with its required form or not. Obviously, if the COC was incomplete or not in the correct form then there is no reason why the registration authority should be obliged to register the vehicle. That sense of validity ties in with the COC being "issued in accordance with Article 18" as Article 26 (1) goes on to provide. On that basis, it would at least be a straightforward exercise for the registration authority to check and see if the COC was "valid".

190. It is perfectly true that Article 10 (3) of the Emissions Regulation provides that:

> "With effect from 1 January 2011,… National authorities shall, in the case of new vehicles which do not comply with this Regulation and its implementing measures…consider certificates of conformity to be no longer valid for the purposes of Article 7 (1) of Directive 70/156… and shall, on grounds relating to emissions and fuel consumption, prohibit the registration, sale or entry into service of such vehicles.…"

191. The reference to Article 7 (1) of the earlier Directive is there because at the time when the Emissions Regulation was made, that Directive was still in force, albeit that the Framework Directive was issued not long afterwards. It is to be noted that Article 7 (1) refers simply to a "certificate of conformity" rather than a "valid" one. The reference in Article 10 (3) of the Emissions Regulation now must be to Article 26 (1) of the Framework Directive. It is true that what Article 10 (3) seems to contemplate is

the rendering of the COC invalid for the purpose of registration because otherwise the registration authority would be bound to register. It then positively prohibits registration. The whole of Article 10 is concerned with the timing of the introduction of new emissions limits and it is all about "temporal validity" as Mr de la Mare QC put it. He did not seek to rely on this provision as somehow supporting the Invalidity Point; but even if he did, it does not support that argument. What it does, however, is provide an example where, if it was intended to alter the status of a COC, the legislation would say so, as it did here.

192. Furthermore, if the Claimants' interpretation was correct it would mean that any approval authority (not just the competent authority) and here in particular the DVLA, would be unable to register a vehicle (and not merely have a discretion not to) if it took the view that there was a non-conformity of any kind, not merely one concerned with emissions or other serious matter. This would have the potential for chaotic consequences across the whole of the harmonised EU type-approval regime. Nor would there be any mechanism for resolving disputes or ensuring consistency.

193. In fact, of course, the Framework Directive provides what is meant to happen if either the competent authority or any other approval authority considers that there has been a non-compliance with the underlying requirements. See Articles 12 and 30 which provide a detailed procedure, as described above, to deal with just this eventuality. Ultimately, if the manufacturer does not resolve the issue, the relevant vehicle can be recalled or the type-approval be withdrawn. Not only is the Invalidity Point inconsistent with the careful regime set out in the Framework Directive - if correct, there would be no need for Articles 12 and 30 at all. In this instance, the principle of interpretation which is to avoid redundant provisions legitimately comes into play. I also agree with VW that the Claimants' putative scheme would render or at least risk rendering the Framework Directive's express scheme ineffective.

194. Yet further, the Claimants' putative scheme would effectively displace the relevant competent authority as the ultimate decision-maker on these matters in terms of the measures to be taken.

195. In this regard, it is worth referring to the decision of the CJEU dated 4 October 2018 in the case of *Commission v Germany*, C-668/16. Here, the Commission claimed as against Germany that its competent authority i.e. the KBA had failed to act in respect of a number of Mercedes cars (Daimler is referred to because this is the name of the ultimate Mercedes holding company) whose air-conditioning systems were no longer compliant with the relevant requirements as imposed by the Air Conditioning Systems Directive 2006/40. This led, among other things, to 800,000 non-compliant vehicles being sold on the German market notwithstanding the fact that the KBA had been informed of the defect. The Commission said that the KBA should have exercised its powers to re-establish conformity by withdrawing type-approval or in the recall and repair of the vehicles concerned.

196. In fact, the KBA did not take such measures for a very long time. This was because Mercedes had informed it that the deviation from conformity was because there was cogent and reliable evidence that without the deviation (which was in connection with the particular air conditioning refrigerant) there would be a serious risk to harm, health and safety. In such circumstances, while Articles 12 and 30 required the KBA to take the necessary measures to re-establish conformity, it was entitled to wait until it had carried out its own assessment. However, what happened was that after a significant period and on 25 September 2014, the Commission sent a reasoned opinion to the KBA and called upon it to take the necessary measures within two months. In fact, the KBA had already found at the end of the first test period, in October 2013, that there were no serious risks caused by the use of the new refrigerant. Indeed, in December 2015, Mercedes had set out its own proposed remedial measures. However, it was only on 23 March 2017 that Mercedes was ordered to bring into conformity by conversion, the relevant vehicles.

197. The Court held that Germany was in breach of its obligations under Articles 12 and 30. It said that if, at the end of the assessment period, it appeared to the KBA that the alleged serious risk had not been established, then it should have acted immediately to restore compliance and thereby comply with its obligations under Articles 12 and 30. It also said this:

> "74. Since the approval procedure established by the Framework Directive… is based on the principle of total harmonisation, the margin of discretion conferred on Member States by Articles 12 and 30… Cannot permit them to evaluate themselves whether it is necessary to achieve that objective.
>
> 75. … To permit the Member States themselves to evaluate the necessity to achieve that objective of conformity would deprive the harmonised system of approval defined by the combined provisions of the Framework Directive and the regulatory acts of any effectiveness."

198. This decision emphasises that even in relation to the body which is empowered ultimately to take the necessary action, its discretion is fairly limited and it cannot as it were, simply take the law into its own hands by choosing not to exercise its obligations or to delay their exercise. In those circumstances it is hard to see how the Court said that the KBA had a "wide discretion", as suggested by the Claimants. This case shows the emphasis which is placed on the proper working of the harmonised scheme. Finally, there is nothing in this case to suggest that where there was a significant breach, it rendered the COC automatically invalid. The whole thrust of the decision was about seeking to ensure that the competent authority took the necessary steps under Articles 12 and 30. The point was that until that happened, new cars could continue to be sold and registered, as indeed they were, which is why the Commission complained.

199. It is also worth referring to the submissions of the Commission in the so-called *Gera References* in four cases referred to the CJEU, all of which have now been withdrawn, presumably because they settled.

200. One of the issues raised by the referring court was the impact or otherwise on a vehicle's COC when it contained a defeat device and where it could then be said that the vehicle was in conformity with the type approval or the underlying legislation. The Commission opined that where there was a defeat device this meant that the vehicle did not in fact conform to the type-approval. It went on to say as follows:

> "51. In the Commission's opinion however, an infringement of Article 18… due to an incorrect certificate of conformity will not make the relevant statement "invalid".
>
> 52. This is because a certificate of conformity, as described above, does not constitute a regulatory act that is valid (or not), but constitutes a mere statement by the manufacturer as a holder of the type-approval vis-à-vis the buyer of the vehicle that is accompanied by the certificate of conformity.
>
> 53. This fact remains unaffected by Article 26 of this Directive…
>
> 55. The reference to a "valid" certificate of conformity in Article 26 of Directive 2007/46 is rather more relevant in connection with the transitional provisions of the regulatory acts that are separate to this Directive and stated in its Annex IV: Regulatory acts in which the requirements for type-approval are stated normally contain a transitional provision that stipulates from what date the requirement applies to the approval for new types and from what date the requirement applies to the registration, sale or entry into service of new vehicles (see, for example, Article 10 of Regulation 715/2007). The significance of the second date is normally stated as being that from this date onwards, certificates of conformity that only refer to the conformity of the vehicle or the conformity of the approved type with regulatory acts prior to the validity of the new type approval requirements are no longer "valid".
>
> 56. As a result it is to be concluded that a vehicle whose certificate of conformity meets formal standards (allocation to approved type and issuance by the correct manufacturer), can continue to be registered, sold and brought into service based on this inaccurate, but "valid" [certificate] for the purposes of Article 26 of Directive 2007/46."

201. Of course, these views are not binding but as they derive from the Commission they are deserving of some attention. Moreover, they reflect the logic of what has already been said.

202. The Claimants argue that the (later) opinion of AG Rantos, delivered on 23 September 2021, in the joined cases of *GSMB v Auto Krainer* C-128/20, *IR v VW AG* C-134/20 and *DS v Porsche KG and VW AG*, takes a different view. I do not agree. He was not in that case dealing directly with the Invalidity Point as such but rather the broader question of satisfactory quality. Nonetheless, at paragraph 144, he stated that in the event of nonconformity the COC would be "inaccurate". He

referred again in paragraph 147 to the "absence of an accurate" COC which meant that the vehicle did not comply with the seller's description. But he did not say it was invalid. I should add that the decision of the CJEU in these cases is expected in January or February 2022 but neither side suggested that I should defer judgment until after it had been handed down.

203. In my judgment, the Invalidity Point is in truth a short one and it is clearly unfounded. There is no basis for saying that non-conformity (because of the presence of the defeat device) renders the COC invalid in the sense contended for by the Claimants. Accordingly, insofar as their application for summary judgment depends on the success of the Invalidity Point as a building block, it must fail.

The Criminal Offence Point

Introduction

204. The Claimants contend that by reason of the presence of the defeat device in the affected vehicles, three different offences have been committed or are likely to have been committed. They are:

(1) An offence under section 42 of the 1988 Act (Section 42);

(2) An offence under Regulation 2 of the Emissions Fixed Penalty Regulations, leading to a fixed penalty ("Regulation 2");

(3) An offence committed because the vehicle is no longer registered.

205. I deal here with the first two offences, and deal with the last under the De-Registration Point below.

Section 42

206. Section 42 is entitled "Breach of other construction and use requirements". It provides as follows:

> "a person who-
>
> (a) contravenes or fails to comply with any construction or use requirement other than one within section 41A(a) or 41B(1)(a) [or 41D] of this Act, or
>
> (b) users on a road a motor vehicle or trailer which does not comply with such a requirement, or causes or permits a motor vehicle or trailer to be so used,
>
> is guilty of an offence."

207. It is common ground that the construction and use requirements to which section 42 can apply include the Construction and Use Regulations. It is also common ground that, in order to understand how there may be a section 42 offence in this context, the key provisions of those Regulations are as follows:

> "6.— **Compliance with Community Directives and ECE Regulations**
>
> (1) For the purpose of any regulation which requires or permits a vehicle to comply with the requirements of a Community Directive or an ECE Regulation, a vehicle shall be deemed so to have complied at the date of its first use only if –
>
> (a) one of the certificates referred to in paragraph (2) has been issued in relation to it; or
>
> (b) the marking referred to in paragraph (3) has been applied; […]
>
> (c) it was, before it was used on a road, subject to a relevant type approval requirement as specified in paragraph (4) [;or] …
>
> (2) The certificates mentioned in paragraph (1) are –
>
> (a) a type approval certificate issued by the Secretary of State under regulation 5 of the Type Approval Regulations or of the Type Approval for Agricultural Vehicles Regulations;
>
> (b) a certificate of conformity issued by the manufacturer of the vehicle under regulation 6 of either of those Regulations;
>
> or (c) a certificate issued under a provision of the law of any member state of the [European Union] which corresponds to the said regulations 5 or 6,

being in each case a certificate issued by reason of the vehicle's conforming to the requirements of the Community Directive in question…

61A.— **Emission of smoke, vapour, gases, oily substances etc—further requirements for certain motor vehicles first used on or after 1st January 2001**

(1) This regulation shall apply to motor vehicles first used on or after 1st January 2001.

(2) Subject to paragraphs(5) to (7) and Schedule 7XA, a motor vehicle in any category shall comply with such design, construction and equipment requirements and such limit values as may be specified for a motor vehicle of that category and weight by any Community Directive specified in item 1 or 2 of the Table and from such date as is specified by that Community Directive.

(3) Subject to paragraphs (4) to (7) and Schedule 7XA, no person shall use, or cause or permit to be used, on a road a motor vehicle if the motor vehicle does not comply with such limit values as may apply to it by virtue of any Community Directive specified in item 1 or 2 of the Table, and from such date as is specified by that Community Directive, unless the following conditions are satisfied with respect to it –

(a) the failure to meet the limit values does not result from an alteration to the propulsion unit or exhaust system of the motor vehicle;

(b) neither would those limit values be met nor the emissions of gaseous and particulate pollutants and smoke and evaporative emissions be materially reduced if maintenance work of a kind which would fall within the scope of a normal periodic service of the vehicle were carried out on the motor vehicle; and

(c) the failure to meet those limit values does not result from any device designed to control the emission of gaseous and particulate pollutants and smoke and evaporative emissions which is fitted to the motor vehicle being other than in good and efficient working order…"[" R61A"]

208. The Claimants' case on section 42 has had an unhappy procedural history, to say the least. Originally, it was pleaded in paragraph 77.2 of GPOC that the affected vehicles did not meet the regulatory requirements to be lawfully registered, kept and used in the UK. When the last iteration of the GPOC was being proposed in draft, Freshfields, on behalf of VW, made some Requests for Further Information. One concerned the new plea at paragraph 56M(g) which referred to the text of section 42 and R61A. By its letter dated 13 October 2020, Freshfields asked if it was the Claimants' positive case that each Claimant is or has been guilty of an offence under section 42. By its letter of reply dated 23 October 2020, Slater and Gordon stated that it was not the Claimants' case that each of them was or had been guilty of such an offence. They went on to say that the COCs were "ostensibly valid" and the vehicles had in fact been registered on the basis of those COCs which registration had not been withdrawn. The Claimants could not be guilty of offences while the COCs remained accepted as valid by the Secretary of State. It then referred to paragraph 56O to the effect that as the registration of the affected vehicles was invalid, there was a significant risk that it would be withdrawn, and that it would become unlawful to use or keep such as vehicles. In other words, the De-Registration Point which concerns a different criminal offence.

209. Indeed, when the latest amendment was ultimately made, paragraph 77.2 removed the words "kept and used". Further, in the Bodley IPOC, no allegation of a section 42 offence was made.

210. However, paragraph 29 of GP 31 stated that "Accordingly, without the deeming effect of valid Certificates of Conformity, an offence is committed under section 42 [the reference to 41 is an obvious mistake] Road Traffic Act 1988, as well as drivers being exposed to penalties under Road Traffic (Vehicle Emissions) Fixed Penalty (England) Regulations 2002." So the commission of a section 42 offence was being relied on after all.

211. On that footing, Mr Webb QC, for VW, submitted to me that there was a complete absence of any plea of unlawfulness based on section 42 albeit that paragraph 56M still pleaded non-compliance with R61A. I agree, and this view of the GPOC was fortified by the admission of Mr de la Mare QC at the end of the hearing that the Claimants' pleadings were inadequate in this respect. Nonetheless, and without prejudice to that procedural point, Mr Webb QC went on to address the substance of the matter and I shall deal with the substance as well. In the event, in the light of my conclusion, VW is not prejudiced by the way in which this point was taken.

212. In order to understand the Claimants' contentions here, it is necessary to look at the detail of the relevant parts of the Construction and Use Regulations set out above. It is common ground that a COC or type-approval certificate has the effect that the vehicle is deemed to comply with the underlying requirements. It is also common ground (because of R3(3)(a)) that "first use" in the case of a vehicle which has been registered is the date on which it was registered. There is, however, an issue about the meaning of the deemed compliance "at the date of its first use only ". I deal with this issue below.

213. As for R61A, in terms of the Construction and Use Regulations themselves, the meaning of these provisions is not in doubt. R61A(2) stipulates that a vehicle must comply with such design, construction and equipment requirements and such limit values as may apply to it by virtue of any Directive in the Table. There is a separate dispute as to whether the Emissions Regulation is to be treated within the Table, but I will deal with that point later. For present purposes, it should be assumed that it is.

214. R61A(3) is worded in a somewhat cumbersome fashion. However, both parties agree that the effect is that it prohibits use on the road of an affected vehicle if its failure to meet emissions values arose because (a) it had been modified or (b) it was not routinely serviced or (c) the emissions control device in the vehicle was not working properly (I interpolate to add that if it was not working properly this would normally have shown as a fault by a warning light hence the driver would be alerted to it). In other words, these sub-paragraphs show that a person would only be in breach of R61A(3) if they were at fault. So there would be no breach simply because a person was driving it and a design defect or feature was the reason for the excess emissions value. If one stays with R61A(2) and (3), therefore, there cannot be an offence under section 42 (the Construction and Use Regulations not themselves creating an offence here) because R61A(2) is directed to manufacturers, while R61A(3) is directed to users who are at fault in the sense referred to above.

215. However, the Claimants contended at the hearing in a way which was not apparent from GP 31 or their Skeleton Argument that the correct position was this:

(1) Section 42(b) penalises the use on a road of a vehicle which does not comply with the Construction and Use Regulations;

(2) A vehicle which is in breach of R61A(2) is in breach of those Regulations;

(3) Therefore, a person using such a vehicle commits an offence under section 42(b).

216. If this interpretation is right it would in practice mean that the offence was or was almost one of strict liability since the user would not be "at fault" and may not even be aware of the defect which has caused the breach of R61A (2). As against that, it is said that there are many road traffic offences which are strict liability so there is nothing unusual in that. I am sure that there are but it would seem very odd to penalise the user for the defaults of the manufacturer. Moreover, on this footing, there was no need for R61A(3) at all since all users, not just those at fault, could be prosecuted under section 42(b) via R61A(2). I have to say that this makes very little sense to me. I am sure that the better contention is that made by Mr Webb QC which is as follows: Section 42 (b) must be read in the context of what R61A (2) and (3) were seeking to achieve. This was the requirement on manufacturers to produce conforming vehicles and the requirement on (and ability of) users to drive affected vehicles without being at fault. In which case, Section 42 (a) aligns with R61A(2) and section 42 (b) aligns with R61A (3) and there is no "crossover", as it were. In other words, the prohibited use under section 42 (b) only arises where there has been fault within the meaning of R61A (3).

217. I have not been taken to any authorities on this particular point and it appears that there has never been a prosecution in this context.

218. I would add that it seems to me that the "defence" under R6 is likely to be relevant in circumstances where (as I have found) this COC is valid and in any event there is a type-approval certificate. The Claimants contend that this is only of limited use because compliance is only deemed at the date of

first use and not after. Thus, immediately after that date (or indeed time) the deeming provision disappears. Again, I do not agree because that seems to make no sense. The words surely mean "as at" the date of first use. The deeming provision should therefore be regarded as applying afterwards as well - or at least this interpretation is strongly arguable. Of course, if there was no relevant certificate, then no advantage can be taken of R6.

219. For all those reasons, I consider it very far from clear that the mere fact that a vehicle contains a defeat device renders a person who drives it to be criminally liable under section 42. If it did, then that must apply to every Claimant who has not yet had "the fix" and yet Slater and Gordon stated positively in the letter referred to above that the Claimants were not so alleging.

220. I suspect that there may well be more guidance or materials on the question of the operation of section 42 in conjunction with R6 and R61A than I have been provided with. That is no doubt to some extent because of the fact that as eventually argued, the Claimants' contention came late.

221. Either way, I am not going to make a final determination of this point (unlike the Invalidity Point). It suffices to say that VW clearly has a real prospect of showing at trial that there was no such offence committed or likely to be committed because of the presence of a defeat device.

222. There is a further point taken by VW in respect of Section 42. This was to the effect that for the purposes of R61A, the relevant requirement is the Emissions Regulation. However, this does not feature in Item 1 or 2 of the Table, nor, of course, is it a Directive. The Table did refer to Council Directive 70/220 which dealt with emissions, but it was this Directive which was repealed by Article 17 of the Emissions Regulation. While the Table has been amended twice, in 2001 and 2006, there is no amendment to replace the reference to the Directive with the Emissions Regulation.

223. The Claimants' essential riposte is two-fold. First, Article 17 (3) states that "Reference made to the repealed Directives should be construed as being made to this Regulation." Second, even if Article 17 (3) does not apply, it must be implicit within the Table or R61A itself that the Emissions Regulation, should be regarded as a relevant requirement, otherwise there is a very large lacuna in the Construction and Use Regulations.

224. As to those points, VW says that Article 17 (3) deals with references to the repealed Directives found in other EU legislation, not to references within Member States' domestic legislation. Second, there is no basis for implication, however desirable, when the Secretary of State could have made the relevant amendment but has not done so, in the context of a very detailed scheme. Moreover, there is in fact a specific reference to the Emissions Regulation in R61C of the Construction and Use Regulations, albeit in a different context.

225. Argument on this point took some time with detailed excursions into the EU and domestic legislation.

226. In the light of my prior conclusions about the proper construction and ambit of Section 42, it is not necessary for me to deal with this further argument. But I should say that had it been, I would have considered that VW's points were well arguable so as to have a real prospect of success. In any event this is not an issue which is suitable for summary determination.

Regulation 2 of the Emissions Fixed Penalty Regulations

227. This provides that an emissions offence means:

> "using on a road a motor vehicle which does not comply with a requirement of regulation 61 or 61A of the 1986 Regulations."

228. The Emissions Fixed Penalty Regulations enable local authorities to test vehicles for emissions levels and if appropriate, issue fixed penalty notices.

229. The short answer to the invocation of Regulation 2 is the answer given to the invocation of section 42. If there is no offence under that provision, then there can be none under Regulation 2 because it also depends on R61A. It must, equally, be interpreted so that the prohibited use only arises where the driver is at fault, or at least there is a real prospect that this is the correct interpretation.

Conclusion

230. Insofar as the Claimants' application for summary judgment requires the commission or likely commission of offences under Section 42 or Regulation 2, it must fail. Indeed it must fail irrespective of the outcome of the final Satisfactory Quality Point since the commission of a criminal offence is an essential building block so far as this summary judgment application is concerned. On that basis it becomes critical to the success of the summary judgment application (even before one gets to the Satisfactory Quality Point) that there is at least an offence or likely offence committed on the basis that an unregistered vehicle is driven on the road. I turn to that matter now.

The De-Registration Point

231. As I have already indicated, this point is taken (now) whether or not the Invalidity Point succeeds. It is therefore not dependent on that point. Since it is not in doubt that a criminal offence would be committed by driving a vehicle on the road without registration, the real issue is whether there is a risk of de-registration; or more accurately, that there is no real prospect of showing that there is little or no such risk. Although other scenarios have been postulated, for example, the non-registration of cars not yet registered, or an ability to register cars in another jurisdiction, those possibilities are not really relevant for the purposes of the offence. In any event, all the Claimants' cars will have been registered at the outset. So the issue is indeed de-registration.

232. There has never been any deregistration of affected vehicles here (or, it would appear, anywhere else), just as there has never been a withdrawal of type approval or declaration of invalidity in relation to the COCs.

233. If there was de-registration it would presumably have to come from the registration authority here i.e. the DVLA or perhaps the VCA as the approval authority.

234. Mr de la Mare QC was at pains to point out that any power on the part of a domestic authority to de-register was exceptional and if exercised, it would have to be done in relation to the affected vehicles here in a manner consistent with the actions of the KBA as the competent authority (or VCA in the case of Skoda). In this context, because of my finding on the Invalidity Point, the postulated scenario is where the relevant authority knows that the vehicle does not conform because of the (unfixed) defeat device albeit there remains a valid COC.

235. As with the Invalidity Point, Mr de la Mare QC recognises that there is nothing in the Framework Directive that specifically provides for non-registration or de-registration by a domestic authority in these circumstances. The reason for having it is put, somewhat forensically, that there must be such a power because otherwise what is the domestic authority to do when it knows (as here) that the type-approval has been obtained by fraud and the COC is untrue? But that rather begs the question as to why such action is in fact necessary and by whom and in what circumstances the problem should be addressed. In my view, we are back to the operation of the harmonised system. All the arguments about why automatic invalidity of the COC would disrupt that scheme, as made above, would apply here, too.

236. It is important to remember that the KBA addressed the issue in its Decision of 15 October 2015 by requiring the defeat device to be removed and setting out a detailed programme for the implementation of the "fix". If that Decision was not followed, then there was the threat of partial or total withdrawal of the type-approval. Pending implementation of the fix, registered vehicles were allowed to stay on the road and for example not be recalled.

237. However, the exercise of a discretion to de-register in the way contended for by the Claimants completely undermines the measures put in place by the KBA as the competent authority. I can see no rational basis for such an outcome and yet again, it goes against the harmonised scheme. In addition, such a discretion to de-register is not, in my view, necessary in order to deal with the problem of the defeat devices. Mr de la Mare QC says that it may just be a question of time before there is de-registration because the relevant authority might or could be dissatisfied about the lack of

progress on the part of VW. Or in theory such a situation could arise. However, there has been no threat of de-registration and in any event the question is now simply the take-up of the fix, which appears to have happened for most, but by no means all of the affected vehicles here. I appreciate that the Claimants say that even if the original fix gave comfort to the authorities, that fix is itself a defeat device. However, that is a separate issue and for another day.

238. Mr de la Mare QC asks the forensic question: "what if the relevant authority is told that a particular vehicle's COC is forged or there are other forged documents? Is it powerless to act?" I do not think that such questions assist here. The context is where there is type-approval granted and the COC is put forward, without regard to the fact that there is non-conformity because of the defeat device. The issue is not the undoubted seriousness of using such defeat devices, rather it is how that problem is dealt with so far as the relevant authorities are concerned. It remains the case that no authority appears to have thought of de-registration as a response.

239. However, the Claimants also rely upon a letter from the KBA to VW about a VW Caddy model which is said to support their case. The letter is dated 30 October 2015 (though with handwriting of 11 November 2015, perhaps indicating when it was received or read). It is in reply to a letter from VW dated 26 October 2015 and following on from the underlying Decision. VW asked about Caddy models which had already been produced but were not yet registered and whether they should be put into circulation. The KBA said that there was a "barrier to registration" of those vehicles. It said so because the defeat device had not yet been removed from them and therefore they did not conform to the amended type-approval. The letter went on to say that the KBA was not responsible for the execution of the registration procedure by the local body which had "sole responsibility for registration on a case-by-case basis."

240. The Claimants say that this shows that the competent authority itself recognises the power to de-register, or at least not to register.

241. I confess that I find this letter difficult to follow. While the KBA did state that there was a "barrier to registration" it did not go on to say that registration etc. were prohibited. It might well have been able to do that or effectively get VW to agree to such a course at least against the background of a threat of withdrawal of type approval (as with the Decision). And indeed, for the most part, VW did not sell or register new vehicles without the fix. On the other hand, it is a different thing to see how it could be said that the local registration authorities could perhaps have a different assessment of the legal situation which could affect registration since, as a matter of EU law, they were bound to register by Article 12 of the Framework Directive. We do not know what action, if any, the local registration authority in Germany actually took thereafter.

242. It must also be remembered that when there was continuing registration and sale of the Mercedes vehicles which were the subject of the *Commission v Germany* case, action was taken not by any registration authority, but rather by the Commission in circumstances where it was found that the KBA should have acted but did not.

243. Furthermore, in the present context, I am concerned with the position of the local registration authority here. If any "local" discretion was to depend on the relevant legal position of that authority, then this is not set out in any detail. In truth, of course, as it seems to me, it is a question of EU law.

244. If there was any de-registration direction to emanate from the KBA then, of course, that would be a different situation because it would apply to Member States and could be seen as part of the KBA's array of necessary measures. This possibility was referred to in VW's document setting out answers for enquiries dated 3 February 2016. In answer to a question about the consequences if an owner did not have the car "retrofitted" (i.e. have the fix done) VW said:

> "… In Germany, a product recall monitored by the KBA… can be pursued with a threat of decommissioning and even subsequent mandatory deregistration of the affected vehicle."

245. The Claimants pray this answer in aid but I do not see why since it is all about the various measures which the KBA as the competent authority might take. That says nothing about the risk of de-registration on the part of a domestic authority, or what power it would have to do this.

246. In all those circumstances, I cannot possibly find conclusively that (a) there is, as a matter of either (Framework Directive-compliant) English or EU law, a discretion to de-register on the part of an authority here and (b) there is a real risk of that materialising.

247. In my judgment, there is a real prospect of VW defending at trial an argument based on the risk of de-registration. That means that they have the same prospect of showing that there is no or no likelihood of any offence being committed by owners of the cars on the basis that they are not registered.

248. Since this finding disposes of the third of the three criminal offences relied upon by the Claimants, it now follows that the application for summary judgment must necessarily fail. That being so, it is not strictly necessary to go on and consider the Satisfactory Quality Point. Nonetheless, I do so, albeit briefly since it was argued extensively before me.

The Satisfactory Quality Point

Introduction

249. As originally put, the Satisfactory Quality Application was on the basis of (a) the invalidity of the COCs and (b) the resulting commission of an offence under section 42. As shown above, the arguments which I permitted go somewhat further but there is still the need for an offence plainly to have been committed one way or another. I have rejected that contention.

250. The only utility in making some observations about the third stage i.e. Satisfactory Quality is if one is to assume (contrary to my conclusions above), that an offence was committed. This is a somewhat artificial basis to assess satisfactory quality and even then is perhaps less useful than in cases where for example after a trial, a final finding is made on issue A, but in case that were wrong, a finding is made on issue B. The context here is more fluid since (save on the question of automatic invalidity of the COC) the only finding I have made is that these matters must all go to trial.

251. Next, it must be remembered that the arguments made before me only concern one of the Claimants' alleged routes to demonstrating an absence of satisfactory quality. For example, a different argument proceeds on the basis that it is axiomatic that the mere presence of the defeat device renders the car in breach of the term as to satisfactory quality. Other arguments focus on the nature and effect of the fix, and so on.

252. With all of that said, I think I can make the following observations set out below. I do so in a limited fashion, since I will be the trial judge.

253. The relevant implied term as to satisfactory quality (at least for the vast majority of the Claimants and all of the Individual Claimants seeking summary judgment for damages to be assessed) is to be found in s10 (2) of the Supply of Goods (Implied Terms) Act 1973 in relation to hire purchase contracts and s14 (2) of the Sale of Goods Act 1979 for contract of sale, both of which such Acts have, of course, been heavily amended. The content of the term is the same in both, namely:

> "…(2) Where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of satisfactory quality.
>
> (2A) For the purposes of this Act, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances.
>
> (2B) For the purposes of this Act, the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods—
>
> (a) fitness for all the purposes for which goods of the kind in question are commonly supplied,
> (b) appearance and finish,
> (c) freedom from minor defects,
> (d) safety, and

(e) durability.

(2D) If the buyer deals as consumer…the relevant circumstances mentioned in subsection (2A) above include any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling."

254. Key points made by VWFS and the VW Dealers, even if there was the defeat device and at least a possibility of the commission of criminal offences are that:

(1) There was and is in fact no risk of any prosecution;

(2) The "defect" occasioned by the defeat device has been, or still can be "cured" by the fix;

(3) Even without the fix and certainly with it, the presence of the defeat device has had no or no real impact on the value of the car, its insurability and drivability, performance etc.;

(4) In the light of just those matters, the objective test which requires the reasonable purchaser to regard the car as being of satisfactory quality is met, or at least, for present purposes, there is a real prospect that it would be met.

255. VW also says that it will (if permitted) adduce expert evidence to include customer survey evidence on the actual expectations of customers in relation to the affected cars. I put this to one side at the moment as no application to adduce such evidence has been made, the Claimants are likely to oppose it, and I should not prejudge the matter.

256. The Claimants' answer to the matters set out at paragraph 254 above is, in effect, that as a matter of law they must be taken to be irrelevant, or put another way, the case for unsatisfactory quality on the basis of the criminal offences is so strong that there is no real prospect of these other factors tipping the balance the other way. Yet further, it is said that invoking these factors may be some sort of illegitimate balancing exercise.

257. The Claimants also contend that the court cannot, as a matter of principle, consider matters which have been discovered subsequent to the date of delivery of the car which is when its quality must be assessed. In that regard, they take issue with VW's reliance upon the majority decision of the House of Lords in *Kendall v Lillico* [1969] 2 AC 3. This case involved the purchase of compounded meal which was intended as feed for partridge and pheasant chicks. It was not appreciated at the time that the meal contained a groundnut extract which was known to be toxic because it had been infected before it was processed. Yet later, it was discovered that in fact the meal could be fed to some animals safely. The majority held that this later knowledge could and should be taken into account with the effect that the meal was found not to be of merchantable quality. VW say, by analogy, that in this case, first, the fact that the existence of the defeat devices was not known to the Claimants when they bought their cars cannot be held against them. It is a latent defect which the reasonable purchaser must be assumed to know at the time of purchase and is therefore relevant. However, VW go on to say that the fact that the defect can be mitigated, indeed removed, by the fix must also be taken into account.

258. For their part, the Claimants do not accept this argument. For one thing, they say that *Kendall v Lillico* is no longer a relevant authority because the present test for satisfactory quality is different from that for merchantable quality. It is correct that in, for example, Goode's *Commercial Law (6th Edition)*, it is suggested that the case is of historic interest only. The Claimants say that in any event it is wrong. This is because while the toxic nature of the groundnut extract was known at the time of purchase (it was simply not appreciated that it was in the meal) there was and could have been no knowledge at the time that the toxicity was not as severe as was originally thought. On that basis, the Claimants say that any reliance by VW on this case is misplaced. That said, it is worth pointing out that at paragraph 11-92 of *Commercial Law* it is said that:

> "… There is little doubt that if after-acquired knowledge that a characteristic is defective is to be admitted, it would be wrong to exclude later knowledge qualifying what had been discovered in relation to the defect. On this aspect, the logic of the majority view [in *Kendall v Lillico*] is unanswerable."

259. In this case, it was known at the time of purchase of the cars (albeit not by the particular purchasers) not only that they had the defeat device but also that it could in effect be easily switched off. Thus VW argues that to take account of the latter even in the context of the new test of satisfactory quality, is not illegitimate.

260. I am not going to delve into this debate in any detail. But it seems to me that there is at least a real argument to be had on this point which should be aired at trial.

261. Another authority relied upon VW is *Bramhill v Edwards* [2004] EWCA Civ 403. Here, the Court of Appeal had to consider the satisfactory quality or otherwise of a motorhome which was 2 inches wider than permitted by Regulation 8 of the Construction and Use Regulations so that the use of such a motorhome was a criminal offence. The trial judge found that it was well-known to the motorhome world at the time that these particular motorhomes (imported from the US) were too wide but also, either then or slightly later, that the UK authorities turned a blind eye to this illegality. So there was no real risk of prosecution. The trial judge found a breach of the implied term nonetheless. The Court of Appeal considered that these two pieces of knowledge would have been known to the reasonable buyer such that the motorhome should be regarded as of satisfactory quality. VW says that this case assists it in the argument that if there is no real risk of a prosecution under section 42 here and no real risk of de-registration, this must be taken into account.

262. For their part, the Claimants retort that VW cannot rely on *Bramhill* because the facts about there being no risk of prosecution were known at the time of purchase. On the other hand, in this case, it cannot be said that the lack of any risk of prosecution was already established at the time of sale. As against that, VW submits that the Court of Appeal, in upholding the trial judge's separate conclusion that there was no breach of the implied term so far as insurability was concerned, proceeds on the basis of his factual findings whereby all of the evidence about the insurability related to periods after the purchase in June 1999. The Court of Appeal was therefore not imposing any strict rules about after-acquired knowledge; rather it overturned the trial judge's finding of no satisfactory quality on the basis that it was perverse and against the weight of the evidence as he had found it to be. In other words, the issue of satisfactory quality is highly fact-sensitive.

263. Again, at this stage, VW would appear to have at least a real argument that cannot be dismissed at this stage.

264. There were many other arguments between the parties before me in relation to numerous other authorities. I do not intend to rehearse them because it should by now be clear that the Claimants' Satisfactory Quality Point is not the stuff of which summary judgment decisions are made. I cannot (I stress at this stage) see that there is any authority which, as a matter of law, delivers a fatal blow to VW's defence of this particular allegation. Nor can I see that it is plain that the other matters invoked by VW are obviously of no import, for example drivability, performance, value (which I should add are disputed on the facts by the Claimants). There is likely to be a welter of factual evidence on these points at trial, along with other evidence, concerning consumer expectation for the purposes of the CPUT claim, other evidence about public statements, and so on. I am, of course, not making any rulings at this stage. But I am quite satisfied that VW has a real prospect of rebutting this iteration of the claim about satisfactory quality and even if they did not, there is a compelling reason for trial. As with the Deceit Claim there are substantial points of law which cannot appropriately be dealt with summarily, there will be evidence on other claims which overlaps with the evidence on this one, and a lengthy trial is going to take place in any event.

265. It follows from what I have said above that it is not necessary for me to deal with a fallback argument raised by VW in relation to the claims for summary judgment made by specific Individual Claimants based on exclusion clauses and consumer status, as set out in Annex 3 to VW's Skeleton Argument on Satisfactory Quality.

Conclusions on the Satisfactory Quality Application

266. For all those reasons, the summary judgment element of the Satisfactory Quality Application (set out in paragraphs 1 and 2 of the draft order) must fail.

267. It also follows from my findings above that the paragraphs of the GDEF of the VW Manufacturers referred to in paragraph 3 of the draft order, and the paragraphs of the GDEF of the VW Dealers referred to in paragraph 4 of the draft order, should not be struck out.

268. I am very grateful to all Counsel for their very helpful oral and written submissions on both applications.