OUTER HOUSE, COURT OF SESSION

[2024] CSOH 2

GP1-23 & GP2-23

OPINION OF LORD ERICHT

In the Applications

TO BE A REPRESENTATIVE PARTY IN GROUP PROCEEDINGS

and

FOR PERMISSION TO BRING GROUP PROCEEDINGS

by

LEE BRIDGEHOUSE

Applicant

against

(FIRST) BAYERISCHE MOTOREN WERKE AKTIENGESELLSCHAFT

(SECOND) BMW M GMBH GESELLSCHAFT FUR INDIVIDUELLE AUTOMOBILE

(THIRD) BMW (UK) LIMITED

(FOURTH) BMW FINANCIAL SERVICES (GB) LIMITED

(FIFTH) ALPHABET GB LIMITED

Defenders

Applicant: Milligan KC, Black; Pogust Goodhead
Defenders: Lord Davidson of Glen Clova, Boffey; BTO Solicitors LLP

18 January 2024

Introduction

[1] A group of several thousand persons wishes to bring group proceedings in Scotland against various companies in relation to vehicle nitrogen oxide ("NOx") emissions relating to BMW vehicles.

[2] The following orders are sought in the conclusions in the summons:

> "(FIRST) For decree of declarator that the BMW affected vehicles with diesel engines purportedly manufactured to Euro 5 and Euro 6 emissions standards, which are the subject matter of these group proceedings, incorporated prohibited and unlawful defeat devices, the purpose of which was unlawfully to control nitrogen oxide emissions levels during regulatory engine testing, for the purposes of obtaining EC type-approval under EU Directive 2007/46/EC.
>
> (SECOND) For payment by the first, second, third, fourth and fifth defenders severally or jointly and severally to the representative party for the pursuers of such a sum of damages which represents a reasonable assessment of the losses suffered by each individual group member, in order that the sum assessed for each group member may be transferred to the group member named in the Group Register, together with interest thereon at the rate of eight per cent a year (or such other rate having regard to the whole circumstances) from the date each individual group member purchased or leased (as is appropriate) an affected vehicle (or from such other date as the Court may deem fit), until payment.
>
> (THIRD) For the expenses of the group proceedings."

[3] One of the members of the group, the Applicant, has applied to be the representative party. He has also applied for permission to bring group proceedings. Answers were lodged to each application on behalf of the first, third, fourth and fifth defenders. The intention is to revise the summons before service to delete the second party. I fixed a hearing on each application to take place at the same time.

Group procedure in Scotland

The legislative framework

[4] Group proceedings have been available in Scotland since 2020. They were introduced in section 20 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 (the "2018 Act") which provides:

> "20 Group proceedings
>
> (1) There is to be a form of procedure in the Court of Session known as 'group procedure', and proceedings subject to that procedure are to be known as 'group proceedings'.
>
> (2) A person (a 'representative party') may bring group proceedings on behalf of two or more persons (a 'group') each of whom has a separate claim which may be the subject of civil proceedings.
>
> (3) A person may be a representative party in group proceedings—
>
> (a) whether or not the person is a member of the group on whose behalf the proceedings are brought,
>
> (b) only if so authorised by the Court.
>
> (4) There is to be no more than one representative party in group proceedings.
>
> (5) Group proceedings may be brought only with the permission of the Court.
>
> (6) The Court may give permission—
>
> (a) only if it considers that all of the claims made in the proceedings raise issues (whether of fact or law) which are the same as, or similar or related to, each other,
>
> (b) only if it is satisfied that the representative party has made all reasonable efforts to identify and notify all potential members of the group about the proceedings, and
>
> (c) in accordance with provision made in an act of sederunt under section 21(1).

(7) An act of sederunt under section 21(1) may provide for group proceedings to be brought as—

(a) opt-in proceedings,

(b) opt-out proceedings, or

(c) either opt-in proceedings or opt-out proceedings.

(8) In subsection (7)—

(a) 'opt-in proceedings' are group proceedings which are brought with the express consent of each member of the group on whose behalf they are brought,

(b) 'opt-out proceedings' are group proceedings which are brought on behalf of a group, each member of which has a claim which is of a description specified by the Court as being eligible to be brought in the proceedings and—

(i) is domiciled in Scotland and has not given notice that the member does not consent to the claim being brought in the proceedings, or

(ii) is not domiciled in Scotland and has given express consent to the claim being brought in the proceedings.

(9) In group proceedings, the representative party may—

(a) make claims on behalf of the members of the group,

(b) subject to provision made in an act of sederunt under section 21(1), do anything else in relation to those claims that the members would have been able to do had the members made the claims in other civil proceedings.

(10) Section 11 of the Court of Session Act 1988 (jury actions) does not apply to group proceedings."

[5] The Act of Sederunt referred to in that section came into force on 31 July 2020 (*Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Group Proceedings) 2020*). It added a new Chapter 26A headed *Group Procedure* to the Rules of the Court of Session (the "Rules"). The court subsequently issued a Practice Note: *Practice Note 2 of 2020 Group Proceedings under Chapter 26A* (the "Practice Note").

The background to the introduction of Group Procedure in Scotland.

[6] In 1988 the Lord Advocate made a reference to the Scottish Law Commission inviting it to consider the desirability and feasibility of the introduction in Scottish civil court proceedings of arrangements to provide a more effective remedy where a number of persons have the same or similar rights, and how such arrangements might be funded. The Scottish Law Commission undertook a comparative study of class action and similar regimes in other jurisdictions and recommended that there should be introduced a procedure for multi-party actions where a number of persons have the same or similar rights (Scottish Law Commission Discussion Paper no 8 *Multi-Party Actions: Court Proceedings and Funding*, 1994; Report on *Multi-Party Actions*, Scot Law Com No 154, 1996). That recommendation was adopted by the Gill Review (*Report of the Scottish Civil Courts Review* 2009, Chapter 13 para 64).

[7] In relation to the United Kingdom-wide collective proceedings regime available in the Competition Appeal Tribunal, the approach of the courts has been to interpret the legislation purposively and in accordance with the objectives of the regime (*Mastercard* v *Merricks* [2020] UKSC 51 at paras [2], [37], [92] *Commercial and Interregional Card Claims I Ltd and Others* v *Mastercard Inc and Others* [2023] CAT 38 at para [42], *BT Group plc* v *Justin le Patourel* [2022] EWCA Civ 593 at paras [25]-[29]). That approach should also be adopted in relation to the Scottish Group Procedure regime. The objectives of the Scottish Group Procedure regime are set out in the Policy Memorandum for the 2018 Act as follows:

> "The introduction of a group procedure will help to broaden access to justice by allowing multi-litigants the opportunity to bring an action at a lower cost than individual cases. In turn, taking forward a number of related claims as a group procedure can help deliver a more streamlined and cost-effective outcome and reduce court time. An additional and important societal benefit to facilitating

> collective redress is the potential to deter harmful behaviour on the part of businesses and encourage corporate social responsibility. The introduction of a group procedure would help deliver a more streamlined approach to benefit both users and the courts." (para 93)

Features of Group Procedure in Scotland

[8] A system of multi-party actions can be designed in various ways. Different countries have adopted different features. Key features of the design of Scottish Group Procedure include the following.

(1) One action

[9] Scottish Group Procedure is not a system for managing numerous actions brought by different pursuers each of whom have a claim. There is one action brought by one party, the representative party, on behalf of persons each of whom have a separate claim (section 20(2)). The action is brought by a summons which specifies, in the form of conclusions, the orders sought (Rule 26A.19). Defences are in the form of answers to the summons (Rule 26A.20). The court does not grant a separate decree in respect of each individual person: it grants a decree in respect of the action brought by the representative party. Awards in respect of expenses are made for or against the parties to the action i.e. the representative party and the Defenders: they are not made for or against the individual persons. The litigation is conducted by the firm of solicitors acting in the action. The court deals only with that firm and it is only that firm which enrols motions and deals with the other aspects of conducting the Group Proceedings. There is to be no more than one representative party in Group Proceedings (section 20(3)). Thus when in the initial stages of the VW Group NOx Emissions Group Proceedings four firms of solicitors who were part of the same Steering Group instructed the same counsel but sought to proceed by four separate

but substantially identical summonses, made four separate applications for the appointment of four different representative parties (GP9/20, GP11/20, GP13/20 and GP15/20), and made four separate applications for permission to bring group proceedings (GP10/20, GP12/20, GP14/20, and GP16/20), the court refused all but one of the applications to appoint a representative party and to bring proceedings, ordered that the group registers be combined and ordered that the group proceedings proceed under one summons as *Gillian Cameron* v *Volkswagen* (GP 1-21). It may be that, as a practical matter, behind the scenes there are various firms of solicitors co-operating with each other in managing the workload of dealing with large numbers of individual clients on whose behalf the representative party is making a claim. However that practical consideration does not detract from the procedural requirement that there is only one action and only one firm of solicitors conducting it.

(2) Opt-in only

[10] A regime for multi-party actions can be opt-out or opt-in. In an opt-out regime, the action is brought on behalf of every person who has a claim, whether or not they have agreed to take part, and indeed whether or not they are aware of the action, unless the individual person takes steps to opt out of the action. The solicitors and counsel are not able to take instructions from all the persons in the class on whose behalf a claim is being brought as not all such persons will have been identified. Members of the class who have no direct contact with the solicitors are not in a position to choose their solicitors or counsel, agree the terms and conditions upon which the solicitors will be acting for them (including fees and funding arrangements), or give instructions to the solicitors as to whether or not a settlement should be accepted. Accordingly it is common in opt-out systems for courts to be given powers to intervene to protect the interests of the class members, for example by considering

the suitability of proposed representative parties and proposed legal advisers, considering the legal methodology and litigation plan which the representative parties propose to adopt, controlling the level of legal fees or approving any proposed settlement. It is common for different representative parties and their lawyers to compete for the right to bring the one and only "opt-out" action, in which case there will be what a "carriage dispute". In a "carriage dispute" the court will scrutinise the merits of the rival candidates and decide which one is to be authorised. Such scrutiny often includes analysis of the comparative merits and demerits of litigation plans submitted by each party setting out their methodology and plan for conducting the action.

[11] The situation is different in an opt-in regime. The express consent of each member of the group is required. Each person must make a conscious decision to agree to his claim being included in the action and then take positive steps to agree with the solicitors that he is to be included. If he is not happy with the quality or the suitability of the representative or lawyers, or with the solicitor's terms and conditions or the proposed legal fees or funding arrangements, he need not take part in the action. He can, if he wishes, choose to raise his own individual action or be included in an alternative group action. As he is in direct contact with, and is a client of, solicitors he does not require the same level of protection by the court as is the case in an opt-out regime: he is protected by the solicitor-client relationship and the legal and professional duties owed by solicitors to their clients. So the level of protection afforded by the court to a group member in an opt-in regime is less than that in an opt-out regime.

[12] Scottish Group Procedure is, at present at any rate, an opt-in procedure only. Although section 20(7) contemplates the possibility of opt-out proceedings, Chapter 26A permits only opt-in proceedings. This is in line with the view expressed by the Scottish Civil

Justice Council Working Group *Consultation on Group Proceedings* (2020) that whereas at that time an opt-out regime would be too complex for introduction in Scotland, the introduction of an opt-in procedure would be a comparatively straightforward exercise, which would have the benefit of allowing the court to gain experience the benefit of which could be taken forward when considering an opt-out option in the future (paras 22, 23).

(3) Certification

[13] A common feature in multi-party regimes is a certification requirement.

[14] In Scottish Group Procedure, two matters require certification by the court:

(a) the proposed representative party must be authorised by the court (section 20(3)(b) and Part 2 of Chapter 26A of the Rules), and

(b) group proceedings may be brought only with the court's permission (section 20(5) and Part 3 of Chapter 26A).

[15] Certification takes place at an initial stage prior to the service of the summons. Applications to be a representative party and to bring group proceedings are motions before calling (Rules 26A.5, 26A.9, Practice Note para 11). Each application is given a separate process number. If the motions are granted, the action itself is given its own separate process number and the summons is served and defences lodged.

[16] Experience in other jurisdictions has shown that certification is no mere formality and can be one of the most contentious phases of a multi-party action. Opposition at the certification stage can result in an action failing (or incurring significant delays) before being considered substantively on its merits. As Perell J of the Ontario Superior Court of Justice has warned:

> "The court should be skeptical because the defendant's crocodile tears' argument about the adequacy of the representative plaintiff is made out of a desire to devour the class action and have the certification motion dismissed … defendants are not genuinely interested in ensuring that class members are adequately represented; rather, defendants are genuinely interested in ensuring that there is no class action." (*Sondhi* v *Deloitte Management Service LP* ONSC 271 at para [43])

(4) Subject matter

[17] In Scotland, there are no restrictions on the subject matter of Group Proceedings. So for example, permission has been granted to bring group proceedings in relation to:

(a) diesel emissions: VW Group NOx Emissions Group Proceedings;

(b) historic sex abuse of young boys playing football for Celtic Boys Club: The Celtic PLC Group Proceedings;

(c) unsafe working practices at Kenyan tea plantations causing musculoskeletal injuries: The James Finlay (Kenya) Ltd Group Proceedings (*Thompson Solicitors Scotland* v *James Finlay Kenya Ltd* [2022] CSOH 12, *Hugh Hall Campbell QC* v *James Finlay Kenya Ltd* [2022] CSIH 29, [2022] CSOH 61, [2022] CSOH 94, [2022] CSOH 95, [2023] CSOH 45, [2023] CSIH 39)

Multi-Party actions in England and Wales

[18] The Ministry of Justice in England has taken the view that rather than introducing a generic right of collective action, additional rights of collective action should be considered on a sector by sector basis (Gill Review, Chapter 13, para 45).

[19] Multi-party actions in England and Wales in respect of diesel emissions in respect of VW and BMW engines have proceeded under the Group Litigation Order procedure (the "English GLO Procedure") in Part 19 of the Civil Procedure Rules 1988 (the "English CPRs") and Practice Direction 19B (the "English Practice Direction"). It is understandable that, as

some of the firms of solicitors which have been instructed in the English diesel emission cases are also acting in the Scottish cases and as Scottish procedure is in its infancy and relatively undeveloped, there has been a tendency to seek to apply the practices adopted in the English cases to the Scottish cases. However English GLO procedure is not a good guide as to how the court will deal with Group Proceedings in Scotland.

[20] English GLO procedure has been developed to overcome the inadequacies of existing English procedures, such as the representative action, to deal with multi-party litigation (English Civil Justice Council *Improving Access to Justice through Collective Actions* 2008 Part 2 para 9). A representative action is a procedure of some antiquity which has no counterpart in Scotland and is unique to England (and other common law countries to which it has been imported) (Scottish Law Commission Discussion Paper para 5.2).

[21] English GLO Procedure operates by managing individual claims. The individual claimants must issue a claim form and pay the issue fee before their claim can be entered in the group register (*White Book* para 19.22.3). A Group Litigation Order makes directions about the establishment of a group register "in which the claims managed under the GLO will be entered" (CPR 19.22(2)(a)) and specifies the GLO issues which will identify "the claims to be managed as a group under the GLO" (CPR 19.22(2)(c)). The individual claims may be transferred to the management court or stayed (English CPR 19.22(3)). A decision on a claim on the group register is binding on the parties to the other claims on the register (English CPR 19.23). The court requires to consider whether it would be more appropriate for the individual claims to be dealt with under another procedure, e.g. by consolidation or as a representative action (English Practice Direction 2.3). Pleading of the individual claims is required: this can be done by Group Particulars of Claim which set out general allegations relating to all claims and a schedule containing entries relating to each individual claim

(English Practice Direction para 14.1). The court can direct that the Group Particulars be verified by a statement of truth (English Practice Direction para 14.2). The specific facts relating to each claimant may be obtained by the use of a questionnaire in place of that schedule (English Practice Direction para 14.3). The content of the questionnaire is approved by the court (English Practice Direction 14.3). It is often convenient for the solicitors acting for the claimants in their individual claims to choose Lead Solicitors to take the lead in litigating the GLO issues (English Practice Direction para 2.2): the court may appoint the solicitor of one or more of the parties to be the Lead Solicitor (English CPR 19.24). The Lead Solicitor's role and relationship with other members of the Solicitors' Group should be carefully defined in writing and is subject to any directions given by the court (English Practice Direction para 2.2). One of the options available to the court is to "provide for one or more claims on the group register to proceed as test claims" (English CPR para 19.24). This can give rise to difficulties if the test claim settles (*The White Book* para 19.26.1).

[22] By contrast, Scottish Group Procedure is a new statutory procedure developed further to the recommendations of the Scottish Law Commission and the Gill Review. It does not derive from the representative action, which has never existed in Scotland. There is only one action, and the individual persons who have a separate claim do not raise separate individual actions. There is only one party pursing that one action: the representative party. There is only one summons. That one summons sets out the orders sought by the representative party on behalf of the group members. There are no individual summonses for the individual persons who have a claim. There is only one firm of solicitors conducting the litigation, and accordingly there is no need to appoint Lead Solicitors nor for the court to concern itself with the relationship between the representative party's solicitors and any

other firms of solicitors cooperating with them behind the scenes. The Group Register is a list of the persons who are group members (Rule 26A.1), not a list of individual claims or actions. As there is only one action, and no separate actions by the group members, there are no separate actions which can be run as test cases.

Collective Proceedings in the United Kingdom

[23] Collective proceedings for damages for anti-competitive conduct may be brought in the Competition Appeal Tribunal ("CAT") on an opt-in or opt-out basis (sec 47B, Competition Act 1998; Part 5, Competition Appeal Tribunal Rules 2015, (the "CAT Rules")). Unlike the courts of Scotland and England and Wales, which have jurisdiction only in their respective countries, the CAT has jurisdiction throughout the United Kingdom and can deal with collective proceedings with both an English and Scottish element (e.g. *Merricks* v *Mastercard Incorporated* [2023] CAT 15).

[24] While decisions of the CAT in relation to certification can be instructive, they must be treated with a degree of caution in Scotland as they proceed on different rules from the Court of Session. Particular caution must observed when considering CAT decisions on certification in opt-out cases, as these involve issues of protection of the interests of unknown class members which are not applicable in an opt-in regime such as exists in Scotland. There is no requirement in Scotland equivalent to the requirement in CAT Rule 78 that, in determining at the certification stage whether the class representative would act fairly and adequately in the interests of class members, the CAT must take into account:

> "78(3)(c) whether the proposed class representative has prepared a plan for the collective proceedings that satisfactorily includes—

(i) a method for bringing the proceedings on behalf of represented persons and for notifying represented persons of the progress of the proceedings; and

(ii) a procedure for governance and consultation which takes into account the size and nature of the class; and

(iii) any estimate of and details of arrangements as to costs, fees or disbursements which the Tribunal orders that the proposed class representative shall provide."

The application to be a representative party

Legislation and rules

[25] Section 20(3) of the 2018 Act provides:

"A person may be a representative party in group proceedings—

(a) whether or not the person is a member of the group on whose behalf the proceedings are brought,

(b) only if so authorised by the Court."

[26] Rule 26A.7(1) provides:

"Determination of an application by a person to be a representative party

26A.7.—(1) An applicant may be authorised under section 20(3)(b) of the Act to be a representative party in group proceedings only where the applicant has satisfied the Lord Ordinary that the applicant is a suitable person who can act in that capacity should such authorisation be given.

(2) The matters which are to be considered by the Lord Ordinary when deciding whether or not an applicant is a suitable person under paragraph (1) include—

(a) the special abilities and relevant expertise of the applicant;

(b) the applicant's own interest in the proceedings;

(c) whether there would be any potential benefit to the applicant, financial or otherwise, should the application be authorised;

(d) confirmation that the applicant is independent from the defender;

(e) demonstration that the applicant would act fairly and adequately in the interests of the group members as a whole, and that the applicant's own interests do not conflict with those of the group whom the applicant seeks to represent; and

(f) the demonstration of sufficient competence by the applicant to litigate the claims properly, including financial resources to meet any expenses awards (the details of funding arrangements do not require to be disclosed).

(3) The Lord Ordinary may refuse an application made by an applicant seeking authorisation to be given under section 20(3)(b) of the Act where the applicant has not satisfied the Lord Ordinary that the applicant is a suitable person, in terms of paragraphs (1) and (2), to act in that capacity."

[27] Rule 26A.8 provides:

"**Replacement of a representative party**

26A.8.—(1) A representative party may apply to the court, … seeking the permission of the court to authorise, in place of that party, another person as the representative party, who may or may not be a group member.

(2) A group member may apply to the court, … seeking the permission to authorise the replacement of the representative party with another person, who may or may not be a group member …

(9) Subject to paragraph (10), the Lord Ordinary may grant an application made under paragraph (2) only where it appears to the Lord Ordinary that the representative party is not able to represent the interests of the group members adequately.

(10) No application made under paragraph (1) or (2) may be granted unless the Lord Ordinary is satisfied that—

(a) the person who is to replace the representative party is a suitable person who can act in that capacity should such authorisation be given, having regard to the matters mentioned in rule 26A.7(2); and

(b) the best interests of the group members are met."

[28] Rule 26A.30 provides:

> "Settlement of proceedings
>
> 26A.30. The representative party must consult with the group members on the terms of any proposed settlement before any damages in connection with the proceedings may be distributed."

Submissions for the Applicant

[29] Counsel submitted that the Applicant should be authorised as the representative party.

[30] The basic requirements of a representative party were to prosecute the claim vigorously and effectively, and the main considerations were the quality of the legal representatives, the availability of financial backing and no conflict of interest (*Western Canadian Shopping Centres* v *Dutton* 2001 SCR 534 at 555, *Sondhi* v *Deloitte Management Services LP* paras 40-46).

[31] The bar for appointment of a representative party was low: a high bar would be an impediment to access to justice. The Applicant had an experienced legal team. Given the size and experience of the legal team, there was no need for the additional expense of an advisory council, as suggested by the Defenders. Other group members were safeguarded by the ability to challenge and replace the representative party (Rule 26A.8(2)), and the requirement that settlement must be achieved only after consultation with other group members (Rule 26A.30). The Applicant need not disclose details of funding (Rule 26A.7(2)(f)) and all that was required was an explanation of the pursuer's financial resources to meet any award of expense. The funder, Quantum Claims Specialists Limited ("Quantum Claims") would be responsible for bearing any adverse award of expenses. A representative party should not be prevented from appointment because of a requirement to

demonstrate sufficient funding: even an impecunious litigant is entitled to advance a stateable case (*McTear's Executrix* v *Imperial Tobacco Ltd* 1996 SC 514).

[32] In the event that the Applicant was not suitable for appointment as representative party, a retired sheriff would be proposed for appointment instead.

Submissions for the Defenders

[33] Counsel for the Defenders submitted that the Applicant had failed to discharge the onus to show that the Applicant was a suitable person to act as representative party. The issues raised in the proceedings were highly complex and likely to involve complex factual engineering matters. The proceedings involve several thousand individual group members, at least six law firms and funders and insurers. The monetary interests of solicitors/funders/insurers may not be fully aligned with those of group members, particularly in respect of settlement. There can be disputes regarding the direction of a case (Hodges and Stadler *Resolving Mass Disputes* 2013 p13). The court should guard against conflicts of interest (*Thompsons Solicitors Scotland* v *James Finlay (Kenya) Ltd* at para 25-7). The issue of selection of a representative party had exercised the Canadian Supreme Court (*Hollick* v *Toronto (City)* [2001] 3 SCR158, *Western Canadian Shopping Centres Inc* v *Dutton).* The European Union Directive *(EU 2020/1828* 25 November 2020) on representative actions for the collective interests of consumers prescribed that only qualified representatives may represent mass-harm claimants. The information presently before the court on the interests and capacities of group member is limited and there were likely to be complexities and demarcation into sub-groups, with potential for conflicts of interest. There was no material before the court to allow it to conclude that the Applicant had sufficient competence to litigate particularly at this level of high factual and legal complexity, and take independent

decisions in the face of diverging views and interests. The material before the court on the financial standing of the Applicant was inadequate.

[34] Counsel further submitted that the court had not been furnished with sight of the contractual terms and conditions regarding the discharge of the Applicant's functions. The equivalent terms in the English BMW proceedings suggested that the authority of the representative party might be illusory.

[35] Counsel further submitted that any representative party ought to act with the benefit of an advisory council which included engineering expertise. The utility of an advisory council was not limited to technical engineering matters but would also operate as a board of reference for the representative party, providing balance and independence. The utility of an advisory council was well established in the CAT (*Michael O'Higgins FX Class Representative Limited and Anor* v *Barclays Bank plc and Others* [2022] CAT 16, paragraphs 250-258; 299-341; and 343-346 and *Commercial and Interregional Card Claims I Ltd and Others* v *Mastercard Inc and Others* [2023] CAT 38, para 249). Not every group proceeding may merit an advisory council, but in this case a council would be of value to the representative party and the court.

Analysis and Decision

Authorisation as Representative Party

[36] The test for authorisation of the Applicant to be a representative party is that the court must be satisfied he is a suitable person who can act in that capacity should such authorisation be given (Rule 26A.7.(1)), having considered the non-exclusive list of matters set out in Rule 26A.7.(2).

[37] There is no requirement in Scotland for the court to assess the competence of the lawyers acting for the proposed representative party. In rejecting any such requirement, the Scottish Law Commission stated:

> "Further, under our recommended opt in procedure the representative pursuer appears on his own behalf and on behalf of those members of the class who have voluntarily and expressly associated themselves with the group by signifying that they consent to be bound by the judgment. Those who have opted in may be assumed to have satisfied themselves of the fairness and competence of the representative pursuer's legal advisers." (Report para 4.38)

[38] The dispute between the parties centred on the issues of the suitability of Mr Bridgehouse to be representative party, and the funding of the group proceedings.

[39] Mr Bridgehouse is a member of the group. Far from that being a disqualification from being the representative party or some sort of disadvantage in applying, it is expressly envisaged by the primary legislation that the representative party can be a member of the group (sec 20(3) (a) of the 2018 Act).

[40] The legislation also allows persons who are not a member of the group to act as representative parties. That allows for an ideological pursuer such as a consumer body to be a representative party provided it has standing to bring proceedings (Gill Review Chapter 13 para 69). It also allows for other pursuers who have neither an ideological interest nor a claim against the defenders. An example of such a pursuer would be an independent lawyer. The representative party may not be the same firm of solicitors as is conducting the group proceedings. That is because of the potential conflict of financial interest, and the blurring of the distinction between a party and its advisors: the representative party would be issuing instructions to itself as the representative party's solicitors (*Thompsons Solicitors Scotland* v *James Findlay (Kenya) Ltd* para [26]). The James Findlay (Kenya) Ltd Group proceedings now have a distinguished retired King's Counsel as representative party.

[41] In the event that Mr Bridgehouse's application is refused, an application will be made for Grant McCulloch to be representative party instead. Mr McCulloch is a retired Sheriff who had a distinguished prior career as a solicitor and is a former President of the Law Society of Scotland. He would be working as representative party *pro bono*.

[42] The appointment of a retired lawyer as representative party should not become the norm in Scottish Group Procedure. A policy objective of the 2018 Act is to help to broaden access to justice, and to that end the Act permits the appointment of a group member as the representative party. Insistence on appointment of an independent person rather than a group member could unduly restrict the number of group proceedings brought in Scotland and restrict, rather than broaden, access to justice. There is a finite number of distinguished former practitioners who are prepared to devote their retirement to pursuing litigation on a *pro bono* basis. If the independent representative party is to be paid, then that will be an additional cost to the group members, which works against the policy objective of broadening access to justice by allowing litigants the opportunity to bring an action at a lower cost and delivering a cost-effective outcome.

[43] An applicant has to demonstrate that they would act fairly and adequately in the interests of the group members as a whole, and has sufficient competence to litigate the claims properly (Rules 26A.7.(2)(e) and (f)), and consideration has to be given to the special abilities and relevant expertise of the applicant (Rule 26A.7.2(a)).

[44] Mr Bridgehouse does not claim any ability or experience, other than his own experience with his own vehicle. To that extent, he is in the same position as any client in ordinary individual litigation, including complex ordinary litigation: he is dependent on the advice of his legal advisers. His lack of wider experience of managing litigation does not disqualify him from bringing his own individual claim in a separate action, and does not

disqualify him from bringing a claim in group proceedings. Nor does it disqualify him from being a representative party. A representative party has a specific duty to consult with the group members on any settlement (Rule 26A.30). In addition, he must vigorously and capably prosecute the interests of the class (*Western Canadian Shopping Centres* v *Dutton* para 41). Beyond that, the representative party is in a similar position to any litigant, in that he takes advice from and gives instructions to his lawyers. Because the representative party will have the advice of counsel, the court should not expect too much or be too demanding in evaluating whether a person can properly serve as a representative party (*Sondhi* v *Deloitte Management Services LP* at para [42]). An unduly restrictive approach to the appointment of a group member as group representative could discourage the bringing of group proceedings in Scotland, and would run counter to the policy objective of broadening access to justice. I am satisfied on the basis of the material before me that Mr Bridgehouse is an appropriate person to be representative party. There is nothing to suggest that Mr Bridgehouse would not competently, vigorously and capably prosecute the interests of the group members, or that he would fail to consult on any settlement.

[45] The Defenders raise the spectre of Mr Bridgehouse being unable to take independent decisions in the face of conflicts of interests with the solicitors, the funders or differing sub-groups of group members. At present, any such conflicts are speculative and theoretical as the interests of the solicitors, funders and group members are all aligned towards seeking the orders in the conclusions in the summons. If any settlement is offered by the defenders in the future, Mr Bridgehouse will be in no different position from any litigant in an ordinary case where funding has been provided. His solicitors will be under legal and professional obligations to give appropriate advice on the settlement offer which is in the interests of their client rather than the personal interest of the solicitors. The ability to

continue to fund an action if a settlement offer is refused is always a practical consideration in deciding on whether to accept or reject the offer, and that applies whether the funding is coming from the litigant's own personal resources or coming from a funder. There is no reason to doubt that Mr Bridgehouse, properly advised by his solicitors, will be capable of consulting the group members on any settlement offer and giving appropriate instructions. At present, no sub-groups of group members have been identified which have interests which conflict with those of Mr Bridgehouse. If any sub-groups emerge as the case proceeds, then the management of any conflicts of interests between different sub-groups, and between any sub-group and Mr Bridgehouse, can be considered and discussed at Case Management Hearings. If the group members are dissatisfied with the way in which Mr Bridgehouse discharges his duties as representative party they can have him replaced under Rule 26.A.8.

[46] The requirement to demonstrate competence to litigate the claims properly includes having the financial resources to meet any expenses awards. The details of funding arrangements do not require to be disclosed (Rule 26A.7.(2)(f)).

[47] The Applicant and group members are being funded by Quantum Claims. Quantum Claims is a Scottish funder with many years of experience in funding Scottish litigation. Different considerations apply in funding Scottish litigation from funding litigation in England. For example, an "After The Event" insurance policy is not acceptable as security for adverse expenses (*Centenary 6 Ltd* v *Caven* [2018] CSIH 27). Quantum Claims has given an undertaking to the court that it will indemnify the Applicant and group members in respect of expenses awards made against them in the course of these group proceedings. The latest available statutory accounts for Quantum Claims show net assets of over £8 million. In the light of the indemnity, and the underlying strength of Quantum Claims'

balance sheet, I am satisfied that the Applicant has sufficient financial resources to meet any expenses awards. If the financial position of the Applicant or Quantum Claims changes during the course of the litigation, then it will of course be open to the Defenders to seek caution for expenses.

[48] The Applicant is independent from the Defenders (Rule 26A.7.(2)). He has an interest as a member of the group and as such would benefit from the group proceedings, (Rule 26A.7(2)(b) and (c)), but this does not make him unsuitable to act as representative party.

[49] In all the circumstances of the case, and having considered the matters set out in Rule 26A.7.(2), I am satisfied that the Applicant is a suitable person to be representative party and authorise him as representative party.

Advisory Council

[50] The Defenders' position was that any representative party for these proceedings ought to act with the benefit of an advisory council, as is done in the CAT in UK collective proceedings.

[51] It is open to a representative party in Scottish Group Proceedings to establish an Advisory Council if the representative party takes the view that it would be necessary or desirable to have one.

[52] In this case, the representative party does not wish to establish an Advisory Council.

[53] The issue for this court is whether it should impose an Advisory Council against the wishes of the proposed representative party. Such an imposition could be achieved, for example, by the court refusing to authorise the representative party unless there was an Advisory Council.

[54] Imposition of an Advisory Council is a matter for the court and not for the Defenders. In litigation generally, the lawyers for a pursuer and the defender have an interest in protecting and acting in the interests of their own clients. That interest does not extend to protecting, and acting in the interests of, the clients on the other side. It is not up to a defender's lawyers to give advice to a pursuer as to how the pursuer should manage the litigation or how the pursuer should protect himself from the pursuer's own solicitors. Nor is it for the court to bring the litigation to an end if the pursuer does not take the advice of his opponent's lawyers.

[55] Counsel for the Defenders urged me to adopt the practice of the CAT.

[56] It is not the practice of the CAT to impose an Advisory Council. The establishment of an advisory council is not a requirement for certification (*Boyle and Vermeer* v *Govia Thameslink Railway Ltd* [2022] CAT 35 para 16).

[57] When the CAT does give consideration to the desirability of having an advisory council, it does so in the context of a different exercise from that being conducted by this court. When the CAT considers the desirability of having an advisory council it does so in the exercise of its obligation under CAT Rule 78(3)(c) to take into account the proposed class representative's proposed litigation plan. There is no requirement for this court to conduct such an exercise. There is no requirement under the Scottish Group Procedure Rules to take into account a litigation plan. If such a requirement had been thought by the Scottish Civil Justice Committee to be appropriate in Scottish Group Procedure, wording similar to CAT Rule 78(3)(c) could have been provided in the Scottish Group Procedure Rules.

[58] The reason why such an exercise is not undertaken by the court in Scottish Group Procedure is immediately apparent when one recalls that Scottish Group Proceedings are opt-in proceedings. Opt-in proceedings are brought with the express consent of each

member of the group (sec 20(8)(a) of the 2018 Act). In the CAT on the other hand there can be opt-out actions where the members of the group are unknown and require the protection of the Tribunal. That protection includes scrutiny by the CAT of the proposed class representative's litigation plan, which in turn includes consideration of whether the proposed litigation plan allows for an Advisory Council. Thus when deciding a carriage dispute which will decide between two competing potential class representatives, only one of whom will be authorised to be the one class representative, the CAT will compare the merits and demerits of their respective litigation plans including their respective proposals in respect of an Advisory Council (eg *Michael O'Higgins FX Class Representative Limited* v *Barclays Bank plc* at paras [253] and [330]).

[59] In considering whether the court should impose an Advisory Council in Scottish Group Procedure it is also necessary to bear in mind the policy objective of broadening access to justice by allowing litigants the opportunity to bring an action at a lower cost and delivering a cost-effective outcome. The costs associated with the establishment of an Advisory Council can be substantial. For example the cost for an advisory council for Mr O'Higgins in *Michael O'Higgins FX Class Representative Limited* v *Barclays Bank plc* was estimated as being £132,000 (para [323]). The imposition by the court of the additional expense of establishing an Advisory Council is contrary to that policy objective.

[60] Counsel for the Defenders put particular emphasis on the inclusion of engineering expertise in the Advisory Council. As is the case for any pursuer in litigation involving complex technical matters, the representative party will have the benefit of expert advice from expert witnesses. It is up to the representative party's experts and solicitors to explore any technical issues and give explanations and advice to the representative party. There is no need for the court to impose a second tier of expert advisers, in the form of members of

an Advisory Council, to further consider and advise on the work of the representative party's experts.

[61] For these reasons, I shall not impose the establishment of an Advisory Council in this case.

Application for permission to bring group proceedings

The legislation and rules

[62] Section 20 of the 2018 Act provides:

> "(5) Group proceedings may be brought only with the permission of the Court.
>
> (6) The Court may give permission—
>
> (a) only if it considers that all of the claims made in the proceedings raise issues (whether of fact or law) which are the same as, or similar or related to, each other,
>
> (b) only if it is satisfied that the representative party has made all reasonable efforts to identify and notify all potential members of the group about the proceedings, and
>
> (c) in accordance with provision made in an act of sederunt [i.e. the Court of Session Rules]."

[63] Rule 26A.11 provides:

> "(4) At a hearing …, the Lord Ordinary may—
>
> (a) grant the application (including the giving of permission subject to conditions or only on particular grounds); or
>
> (b) refuse the application.
>
> (5) The circumstances in which permission to bring proceedings to which this Chapter applies may be refused by the Lord Ordinary are as follows—
>
> (a) the criteria set out in section 20(6)(a) or (b) (or both (a) and (b)) of the Act have not been met;
>
> (b) it has not been demonstrated that there is a *prima facie* case;

(c) it has not been demonstrated that it is a more efficient administration of justice for the claims to be brought as group proceedings rather than by separate individual proceedings;

(d) it has not been demonstrated that the proposed proceedings have any real prospects of success."

Decision on application to bring group proceedings

[64] The Defenders did not oppose the granting of permission to bring group proceedings. They were firmly of the belief that it was more efficient for the administration of justice for this matter to be litigated by group procedure as opposed to individual claims. Having considered the Applicant's averments and the supporting documentation lodged by him, including the evidence of the efforts made to advertise to potential members of the group, I am satisfied that the requirements of section 20(6) and Rule 26A.11(5) have been met and grant permission to bring the proceedings.

Orders under Rule 26A.12(1)

The Rule

[65] Rule 26A.12 provides:

"Matters to be decided when permission granted

26A.12.—(1) Where the Lord Ordinary gives permission for group proceedings to be brought the Lord Ordinary is to make an order which—

(a) states the name and designation of the representative party;

(b) defines the group and the issues (whether of fact or law) which are the same as, or similar or related to, each other raised by the claims;

(c) requires the lodging, by the representative party, of a group register;

(d) specifies the procedure which must be followed for a person to be a group member;

(e) specifies the period of time in which claims may be brought by persons in the group proceedings;

(f) specifies that group members may withdraw their consent to being bound by the group proceedings;

(g) specifies the procedure which must be followed by a group member to withdraw their claim from the group proceedings; and

(h) requires such advertisement of the permission to bring group proceedings to take place—

(i) within 7 days of the date of the order; and

(ii) thereafter, within the period during which persons may opt-in to the proceedings, as the Lord Ordinary thinks fit."

Orders

[66] I shall make orders under Rule 26A.12 as follows.

Rule 26A.12(1)(a) name and designation of the representative party

[67] Lee Bridgehouse shall be the representative party.

Rule 26A.12(1)(b) definition of the group and the issues

[68] What is required here is a succinct statement of the issues in general terms. That has been the practice of the court in relation to the VW Group NOx Emissions Group Proceedings, Celtic PLC Group Proceedings and the James Finlay (Kenya) Ltd Group Proceedings. That short statement is then placed in the list of group proceedings on the Court of Session website.

[69] It is not necessary at this stage to set out the issues in detail. All that is necessary is to set out issues which "are the same as, or similar to, or related to, each other."(sec 20(6)(a) of the 2018 Act and Rule 26A.12(1)(b)). At this stage in group proceedings the parties'

pleadings are relatively undeveloped. It is only after permission is granted that the summons is served, defences lodged and the full details of the dispute emerge. It would be premature at this stage to be too prescriptive as to what the issues in contention may turn out to be. Identification of the detailed issues arising, and how these should be resolved, are matters to be addressed by the court in case managing the group proceedings once defences are lodged. At the current stage the court does not have sufficient information to define these issues in detail.

[70] I would observe in passing that the English practice of ascertainment of common issues is of no relevance in Scotland. The phrase "common issues" derives from English procedure (e.g. CPR 19.21) and the word "common" does not appear in the section 20 of the 2018 Act nor in Chapter 26A of the Rules. The English Practice Note provides for the division of issues into common issues and individual issues, and allows for the procedure in each category being different (English Practice Note para 15). The ascertainment of common issues is necessary in English procedure as each claimant has an individual claim, and a judgment in one person's claim on common issues (but not individual issues) is binding on the parties to all the other claims in the group register (English CPR 19.23). There is no such necessity in Scotland as there is only one action, which is brought on behalf of all the group members and is binding on all of them.

[71] I define the group and the issues as "claims arising from BMW vehicles with diesel engines governed by either Euro 5 or Euro 6 emissions standards."

Rule 26A.12(1)(c) lodging by the representative party, of Group Register

[72] I shall order the Group Register be lodged within 28 days.

[73] The Defenders propose that the Group Register be expanded so that it requires the following information:

> "a. full name of the Pursuer Group Member (already present on the Group List Register);
>
> b. full address and post code of Pursuer Group Member (already present on the Group List Register);
>
> c. date of birth (already present in Group List Register);
>
> d. the instructing firm (already present in Group List Register);
>
> e. the capacity in which the Pursuer Group Member claims (owner, former owner, lessee or former lessee);
>
> f. the date of acquisition of the Pursuer's Group Member's relevant ownership or lease interest in the vehicle(s);
>
> g. the capacity in which the Pursuer Group Member acquired the vehicle(s), whether as a consumer or in a business capacity;
>
> h. the country and town in which the relevant interest in the vehicle was acquired (for example, Scotland – Edinburgh);
>
> i. the model and engine of the vehicle(s) in respect of which the Pursuer Group Member claims;
>
> j. The Vehicle Identification Number ("VIN") of each vehicle in respect of which the Pursuer Group Member claims (something already offered by the Claimants' solicitors in the draft GLO proposed in respect of English proceedings);
>
> k. the date upon which the Pursuer's Group Member's Claim was entered on the Group Register (something already offered by the Claimants' solicitors in draft GLO proposed in respect of English proceedings); and
>
> l. the date of removal of the Pursuer's Group Member's Claim from the Group Register (something already offered by the Claimants' solicitors in the draft GLO proposed in respect of English proceedings);
>
> m. the causes of action on which the Group Member relies;
>
> n. the defender(s) against which the Group Member claims; and

o. the model of the vehicle or vehicles in respect of which a claim is made, including either (i) the model information contained in the relevant vehicle's V5C form, or, if the V5C form is unavailable to the relevant Group Member, then (ii) all available information from the following list:

- The segment/model series number (for example, the "3" in "320d")
- The two numbers following the segment/model series number (for example, the "20" in "320d")
- The letter which designates the vehicle's drive technology (for example, the "d" in "320d")
- The letter which designates an SAV, SAC or roadster (for example the "X" in "X3") or an "M Performance" vehicle, if applicable.
- Any additional model-distinguishing information, such as "xDrive" or "sDrive".

[74] The Defenders also propose that each person wishing to be named in the Group Register should be required to agree to provide such information within 21 days.

[75] In Scotland the Group Register has two functions.

[76] Firstly, to record the persons who form the group. As the Practice Note says:

> "The Group Register is the means by which those persons who form the group is recorded. Membership of the group may change, by the addition of new members into the group and the withdrawal of members from the group, during the course of the proceedings. The group register, a key component central to the procedure, is considered by the court at every hearing." (para (9))

[77] Secondly, to establish the date of commencement of proceedings by each individual group member for the purposes of prescription and limitation. Rule 26A.18 provides:

> "26A.18.—(1) The service upon a defender of a group register … amounts to the commencement of the proceedings in respect of those persons who are group members, and are recorded as such on the group register that is served.
>
> (2) The lodging with the court of a group register, in revised form ... .amounts to the commencement of the proceedings in respect of any new group member who has, following the lodging and service of the group register … joined the group."

[78] It is not the function of the Group Register to go beyond these functions and contain detailed information or pleading about the individual circumstances of group members and their individual claims. Nor is it appropriate to make inclusion of a person in the Register conditional on that person agreeing to provide that information. The Group Register is simply a list of the group members. That is put beyond doubt by Rule 26A.15(1) which provides that a group register is to be in Form 26A.15. Form 26A.15 is a simple form which specifies the Group Register as being a list of the persons who consent to be members of the group. The Applicant or Representative party is required to state on the Form:

> "I, hereby, provide the court with a list of all those persons who, as of [insert the date of lodging this group register with the court and service upon the defender], expressly consent to be members of the group on whose behalf group proceedings [are to be] [have been] brought."

[79] There is no provision under the Rules for the inclusion in the Group Register of the kind of detail which the Defenders suggest should be included in it, nor for the exclusion from the Group Register of persons who fail to agree to provide that information. I shall make no order for the inclusion in the Group Register of the information sought by the Defenders, nor for the exclusion from the Group Register of persons who do not agree provide that information. If, for administrative convenience, a representative party wishes to add further information to the Group Register beyond that which is required by the Rules, then they are free to do so but will not, at this stage at any rate, be ordered to do so. I return below to the separate question of what information about the claims of the individual group members should be provided by the representative party to the Defenders other than by inclusion in the Group Register.

Rule 26A.12 (1)(d)(f) and (g) procedures for persons being added to or withdrawing from the group

[80] Senior Counsel for the Applicant indicated that the mechanics for persons giving notice that they wish to be added or removed from the Group Register as set out in Rule 26A.14 and 15 had proved to be cumbersome in practice and invited me to dispense with these and adopt different mechanics as had been done in the James Finlay (Kenya) Ltd Group Proceedings. There was no opposition to this. I shall grant orders in the same terms as in the James Finlay (Kenya) Ltd Group Proceedings, ie

(a) dispensing with the requirements of Rule 26A.14 and Rule 26A.14(1) insofar as a person giving their consent to bring group proceedings requires to give notice to the Representative party by completing and signing a Form 26A.14A;

(b) dispensing with the requirements of Rule 26A.14 and Rule 26A.14(2) insofar as a person withdrawing their consent to bring group proceedings requires to give notice to the representative party by completing and signing a Form 26A.14B;

(c) directing that sufficient compliance with the requirements of Rules 26A.14, 26A.14(1) and 26A.14(2) shall be met by the highlighting in green of new group members and the highlighting in red of withdrawing group members in the Group Register previously lodged by the representative party;

(d) directing that where group members are added to, or removed from, the Group Register and highlighted in the revised Group Register in the manner specified above, and the revised Group Register is lodged with the General

Department and intimated to the Defenders every 28 days there shall be deemed compliance with Rule 26A.15(3).

(e) dispensing with the requirements of Rule 26A.15 and Rule 26A.15(5) such that (i) where there are changes to the group of persons, (ii) the changes are highlighted in the revised group register, and (iii) the changes are intimated to the Defenders and are lodged with the General Department every 28 days, then there shall be deemed compliance with Rule 26A.15(5) without the requirement to notify all group members of the changes to the membership of the group of persons."

Rule 26A.12(e) period of time in which claims may be brought by persons in the group proceedings

[81] The period of time after the grant of permission in which claims may be brought must be long enough to allow potential new group members an opportunity to respond to the advertisement referred to below, but short enough not to delay progress in resolving the substantive issues in the case. As suggested by the Defenders, I shall set the period at nine months. This will of course be subject to the right of the court to allow a later claim under rule 26A.16.

Rule 26A.12(1)(h) advertisement

[82] Although there has been extensive advertisement of potential group proceedings prior to the lodging of this application in order to attract potential claimants, formal advertisement at this stage performs the different function of giving notification that the application for group proceedings has been granted. Advertising at this stage alerts any

potential claimants that the proceedings are underway in the Court of Session. This will be of interest to any other firms of solicitors who may be contemplating either individual or group proceedings (which is why there is to be advertisement in the Journal of the Law Society of Scotland), and to any individuals who may wish to join this action before the nine month deadline.

[83] I shall order the representative party to advertise the granting of permission by the insertion of an advertisement in following terms in The Herald and the Daily Record newspapers and the Journal of the Law Society of Scotland:

> "Notice is hereby given that on, [insert date] , the Court of Session made an order granting permission for group proceedings to be brought by Lee Bridgehouse as representative party on behalf of members of the group against [insert names and addresses of defenders].
>
> The group proceedings relate to claims arising from BMW vehicles with diesel engines governed by either Euro 5 or Euro 6 emissions standards.
>
> Individuals and businesses who have not previously made a claim in the group proceedings but wish to do so should contact Pogust Goodhead, the solicitors acting for the representative party, at the contact details noted below."

[84] I shall extend the 7 day period of notice referred to in Rule 26A.12(1)(h)(i) so that the reclaiming days (ie days within which my interlocutors can be appealed) expire before the deadline for advertisement. The advertisement is to be published within 28 days in the Herald and Daily Record, and in the next edition thereafter of the Journal of the Law Society of Scotland.

[85] I make no order in terms of Rule 26A.12(1)(h)(ii).

Orders under Rule 26A.12(2)

[86] Rule 26A.12(2) provides that the Lord Ordinary, when giving permission for group proceedings to be brought, may make any such order as he thinks fit.

[87] In an Appendix to their answers to the Application for Permission to Bring Group Proceedings the Defenders set out a Schedule of Information to be provided by each group member. The Schedule consisted of 35 questions. These questions require the provision of very detailed information, down to the level of for example the vehicle's mileage and details of the service and maintenance of the vehicle. The Schedule requires each Group Member to sign their Schedule and state that they believe that the facts stated in their Schedule are true.

[88] There is a balance to be struck between the need of a defender to have information about the group members' claims and the expeditious and efficient determination by the court of Group Proceedings. The court will not allow the progress of the litigation to be delayed, and substantial expense incurred, by extensive investigation into the detailed factual circumstances of each group member at the outset of proceedings. The court is determining the summons, not the individual claims, and the focus will be on the targeted provision of information which is required to determine the summons.

[89] The court expects parties to cooperate in the provision of information. It may well be that the representative party already has some of the information which is sought by the Defenders in the Schedule of Information and was sought by the Defenders to be included in the Group Register. If so, then that information should be shared voluntarily with the Defenders as soon as possible. The representative party should also check that the Group Register does not contain duplicate claims. The question of what information about the individual claimants should be provided, and when, will be revisited at the preliminary hearing.

[90] What the court will not do is to order the completion of a detailed Information Schedule and statement of truth by the individual claimants along the lines of the English GLO procedure of particulars of claim or questionnaires verified by a statement of truth. In view of the differences between English GLO procedure and Scottish Group Procedure referred to above, it is not appropriate to import procedures based on the English CPRs.

Further procedure

[91] The applications for appointment as representative party and for group proceedings having been granted, the next stage is for the summons to be served, and a preliminary hearing to be held within 14 days from when defences are lodged (Rule 26A.21).

[92] In this case agents for the Defenders have agreed to accept service. They are to be commended for having done so. The court expects parties to cooperate on the procedural steps of group proceedings so that the proceedings proceed efficiently and expeditiously and are not delayed by technicalities. In group proceedings cases where defenders are outwith Scotland the court does not expect the defenders to insist on formal service outside this jurisdiction, with all the delay that entails, rather than allowing service to be accepted by their Scottish agents.

[93] In accordance with the timetable suggested by the parties, I shall order the representative party to serve the summons on Defenders within 14 days, the Defenders to lodge defences within 12 weeks of service, and a preliminary hearing to be held on a day to be fixed within 14 days of defences being lodged. A Joint Statement of Issues and Notes of Proposals for Further Procedure should be lodged not later than 4pm two days before the preliminary hearing. At the same time parties should lodge the documents specified in para

30 of the Practice Note, namely all correspondence and other documents which set out their material contentions of fact and law.

Observations on further procedure

[94] At this stage I would take the opportunity to make some observations about the approach I intend to adopt in the management of these group proceedings, unless at the preliminary hearing or any case management hearing parties persuade me that a different approach would be more suitable.

[95] The approach of the court will be to identify the issues which require to be determined by the court and resolve these issues. There are various methods in which the issues might be resolved. For example, the court might grant a declarator set out in the summons, or uphold pleas in law in the defences to the summons. The parties might identify a question and the court would answer that question. In the VW Group NOx Emissions Group Proceedings the court fixed a debate on a series of issues identified by parties in their Notes of Proposals for Further Procedure. In the event, the debate did not proceed as the case settled.

[96] It will not be appropriate to identify test cases involving individual claimants. That is because Scottish Group Procedure consists of one summons being brought on behalf of all persons who are making a claim. The individual persons do not bring individual cases so there are no individual cases which can be run as test cases.

[97] Future procedure in the current case will be a matter for discussion at the Preliminary and Case Management Hearings.

[98] As is set out in the Practice Note:

> "Parties are expected to arrive at the preliminary hearing with clear, fully formed, views about how the issues which are the subject of the proceedings can be litigated in the most efficient way, and address the court on this. The aim is for the proceedings to be determined as efficiently as possible. It is considered that if the parties can arrive at a preliminary hearing with an agreed view of the best way to approach the litigation ... then that will be for the benefit of all." (para 28)

[99] The Joint Statement of Issues should set out the issues which require to be determined by the court. The issues should be agreed by the parties. In the event that parties cannot reach agreement on any particular issue the statement should set out parties' respective positions.

[100] The Notes of Proposals for Further Procedure should set out, in relation to each issue, an agreed proposal as to how the court should determine that issue. That could be one of the methods referred to above or another method. If agreement cannot be reached the parties should set out their separate proposals to determine the issue.

[101] The Notes of Proposals should also set out, in relation to each issue, what information is required from the other party in order to determine that issue. That information may include the answers to some of the questions in the Schedule of Information or which the Defenders sought to have included in the Group Register, but it is expected that some issues will be capable of resolution with none or only some of these answers. That can be taken into account in prioritising the order in which the court will determine the issues, so that for example issues which require a lengthy period of investigation could be determined after other issues.

[102] The Notes of Proposals for Further Procedure should also address the matters which require to be dealt with at the preliminary hearing under Rule 26A.21.

[103] The Notes of Proposals for Further Procedure should also address the position in respect of expert reports. Given the relatively long period allowed for the lodging of answers, the court is hopeful that by the time of the preliminary hearing parties will have their expert reports, at least in draft form. If not, the Notes of Proposals should state what reports are being instructed and when they are expected to be received.

Orders

[104] As the application to be a representative party and the application to bring group proceedings have different process numbers I shall issue a separate interlocutor in each.

[105] In GP 1-23, I shall authorise the Applicant to be the representative party.

[106] In GP 2-23, I shall grant permission for the Applicant to bring group proceedings, order that group proceedings be known as the "BMW Group NOx Emissions Group Proceedings" and make the various orders under Rule 26A.12 and as to further procedure and other orders, all as referred to above.

[107] In both applications I shall reserve all questions of expenses in the meantime.