OUTER HOUSE, COURT OF SESSION

[2024] CSOH 68

GP3-23 & GP4-23

OPINION OF LORD SANDISON

In the applications to be a representative party in group proceedings and for permission to bring such proceedings

by

JOSEPH MACKAY

Applicant

against

(FIRST) NISSAN MOTOR CO LTD; (SECOND) NISSAN MOTOR MANUFACTURING (UK) LIMITED; (THIRD) NISSAN MOTOR IBERICA SA; (FOURTH) NISSAN INTERNATIONAL SA; (FIFTH) NISSAN MOTOR (GB) LIMITED; (SIXTH) RENAULT SA; (SEVENTH) RENAULT FLINS; (EIGHTH); RENAULT SAS; (NINTH) RENAULT UK LIMITED; and (TENTH) RCI FINANCIAL SERVICES LIMITED

Defenders

Applicant: Milligan KC; Lefevres
First to Fifth Defenders: Lord Keen of Elie KC, Watts KC; Pinsent Masons LLP
Sixth to Tenth Defenders: Crawford KC, Welsh; Harper Macleod LLP

5 July 2024

Introduction

[1] Joseph Mackay has applied for permission to bring group proceedings in this court concerning the alleged fitting to Nissan and Renault diesel vehicles by their manufacturers of prohibited defeat devices for the control of nitrogen oxide emissions during regulatory

testing. He also applies to be authorised as the representative party on behalf of approximately 8,500 persons claiming to have suffered loss as a result of that alleged behaviour. The first to fifth proposed defenders in those proceedings are various companies in the Nissan group and the sixth to tenth proposed defenders are several companies in the Renault group. Both applications are opposed by each group of companies, and came before me for a hearing.

Relevant statutory provisions and Rules of Court

[2] Part 4 of the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018 *inter alia* 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.
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> (3) A person may be a representative party in group proceedings—
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> (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.
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> (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).

…

21 Group procedure: rules

(1) The Court of Session may make provision by act of sederunt about group procedure.

(2) Without limiting that generality, the power in subsection (1) includes power to make provision for or about—

(a) persons who may be authorised to be a representative party,

(b) action to be taken by a representative party in connection with group proceedings (whether before or after the proceedings are brought),

(c) the means by which a person may—

(i) give consent for the person's claim to be brought in group proceedings,

(ii) give notice that the person does not consent to the person's claim being brought in group proceedings,

…

(e) circumstances in which permission to bring group proceedings may be refused,

…

(h) the making of an additional claim in group proceedings after the proceedings have been brought (including the transfer of a claim made in other civil proceedings),

(i) the exclusion of a claim made in group proceedings from the proceedings (including the transfer of the claim to other civil proceedings),

(j) the replacement of a representative party,

…

(3) Nothing in an act of sederunt under subsection (1) is to derogate from section 20."

[3] Chapter 26A of the Rules of the Court of Session (RCS) provides, *inter alia*:

"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.

(4) Authorisation given under paragraph (1) endures until the group proceedings finish or until permission is withdrawn.

> The permission stage
>
> 26A.11.
>
> …
>
> (5) The circumstances in which permission to bring proceedings to which this Chapter applies may be refused by the Lord Ordinary are as follows—
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> (a) the criteria set out in section 20(6)(a) or (b) (or both (a) and (b)) of the Act have not been met;
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> (b) it has not been demonstrated that there is a *prima facie* case;
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> (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;
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> (d) it has not been demonstrated that the proposed proceedings have any real prospects of success."

Submissions for the applicant

[4] Senior counsel for the applicant drew my attention to *Bridgehouse* v *Bayerische Motoren Werke AG* [2024] CSOH 2, 2024 SLT 116, which was said to emphasise the access to justice considerations which were of utmost importance to, and underlay, group proceedings in Scotland, and to note that the procedure in such proceedings was under the control of the presiding judge so as to enable effective management of the process. Group proceedings had been introduced into Scottish procedure for the specific purpose of enabling claims like those in these applications to be heard conveniently. The court should be wary of specious complaints by prospective defenders about the suitability of a proposed action for the procedure: cf *Bridgehouse* at [16].

[5] In relation to the application for permission to bring group proceedings in terms of section 20(5) of the Civil Litigation (Expenses and Group Proceedings)(Scotland) Act 2018,

the representative party submitted that the terms of RCS 26A.11 had been satisfied and therefore orders were sought in terms of RCS 26A.12(1) along the following lines:

a. That the group proceedings be known as the Nissan/Renault Group NOx Emissions Group Proceedings;

b. That Joseph Mackay be the representative party;

c. That the group and the issues be defined as: "Claims arising from the NOx emissions issue affecting certain Nissan and Renault diesel engines.";

d. That the representative party should serve a finalised summons upon the defenders within 28 days;

e. That the defenders should have the opportunity to lodge defences to the summons within a reasonably short period thereafter;

f. That the group register be lodged within 28 days; that Lefevres, Solicitors, be responsible for curating the group register and notifying the defenders' solicitors on the last day of each calendar month of any alterations to it, showing additions in green text and deletions in red text; with no additional requirement to follow the procedure described in RCS 26A.15, and such notification being deemed to be commencement of proceedings for the purposes of RCS 26A.18 as at the date of intimation to the Defenders' solicitors;

g. That the procedure just described should be sufficient to permit any individual to become a group member or to withdraw consent to be a group member, with no further requirement to serve notices in terms of RCS 26.A.14;

h. That the period of time during which claims may be brought by persons in the group proceedings should end at the allowance of proof, subject always to the right of the court to allow a later claim under RCS 26A.16;

i. That a group member might alternatively withdraw his consent to being bound by the group proceedings by sending a notice in Form 26A.14-B, in terms of RCS 26A.14(2);

j. That, in terms of Rule 26A.12(h)(i), the representative party should advertise the granting of permission by the insertion of an advertisement in the form attached to the interlocutor in The Herald and the Daily Record newspapers within 7 days, and in the next edition of the Journal of the Law Society of Scotland;

k. That no order be made in terms of Rule 26A.12(h)(ii);

l. That parties be allowed a preliminary hearing and should lodge in process in advance of that diet a joint statement of issues and notes of proposals for further procedure together with all correspondence and other documents which set out their material contentions of fact and law, in terms of paragraph 30 of Practice Note 2 of 2020;

m. That the expenses of the application and answers should be expenses in the Nissan Renault NOx Emissions Group Proceedings.

[6] The court, at this stage, was not adjudicating on the issues in dispute; rather, it was considering, in the context of procedure that was intended to be flexible and open, whether the representative party had satisfied the court that there were common issues; that there was a *prima facie* case, and that group proceedings were the best way of determining the issues between the parties. No detailed consideration of the legal or factual issues which might arise was called for, nor was any particular degree of specification necessary at this stage.

[7] The statute and Rules of Court envisaged that the court might refuse permission in four situations: RCS 6A.11(5) and section 20(6) of the 2018 Act. These collectively required the application of a commonality test, a merits assessment, and a superiority test.

[8] The first situation in which the court might refuse to permit group proceedings to be brought was where either of two key requirements of section 20(6)(a) and (b) of the 2018 had not been met, namely, 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" (the commonality test) and that, "the representative party has made all reasonable efforts to identify and notify all potential members of the group about the proceedings". As regards commonality, the group members all presented claims arising from the same, similar or related issues of fact and law, namely, the issue of excessive NOx emissions from their purchased, owned or leased Nissan or Renault vehicles containing Euro 5 or Euro 6 diesel engines, which they alleged contained unlawful defeat devices causing them to sustain loss and damage.

[9] The defenders advanced an argument that it was inappropriate to include both Renault and Nissan in the same group proceedings. That argument had not been accepted by the courts of England and Wales, where both Renault and Nissan were convened in a single group proceeding. Considerations of efficiency favoured that expedient. The representative party understood that Nissan and Renault (together with Mitsubishi) were part of a strategic alliance. In 2002 Renault and Nissan had formed Renault-Nissan BV, a jointly-owned entity in which they owned equal shares, to determine the strategy of the alliance and to coordinate its activities. An Alliance Operating Board had been created on 12 March 2019 to oversee the alliance. The Nissan and Renault defenders remained separate corporate entities and they were separately responsible for obtaining type approval for vehicles they manufactured. In February 2023, the board of Renault Group and Nissan

Motor Co Ltd had formally announced that the alliance would pursue various new initiatives on the basis of enhanced cooperation between member companies. It had also been announced that Renault Group would transfer 28.4% of its Nissan shares into a French trust. As a result of the transfer, Nissan would be able to exercise freely its 15% voting rights in Renault, whereas Renault's freely exercisable voting rights in Nissan had been reduced to 15%. The operation of the strategic alliance had brought about a situation whereby many Nissan models that would form the subject matter of these proceedings would feature engines that were manufactured by Renault and vice versa. The representative party further understood that many Nissan models were installed with engines that were jointly developed and manufactured by Renault and Nissan. There would be a significant number of group members involved in the proceedings who acquired a Renault vehicle from an authorised dealership operated by Nissan and vice-versa. In the context of the extent to which group proceedings were intended to be user-friendly, the defenders had failed to identify any reason as to why it would not be appropriate for both Nissan and Renault to feature in the same proceedings.

[10] On the issue of advertisement, the representative party confirmed that all reasonable steps had been taken to notify all potential group members of the proposed proceedings. The group members were represented by a steering group of agents who had carried out significant amounts of advertising on television and online. It was submitted that the requirements of section 20(6)(a) and (b) of the 2018 Act were satisfied.

[11] As regards the merits of the proposed proceedings, the rules stated that the court might refuse permission where either it had not been demonstrated by the applicant that there was a *prima facie* case, or that the proposed proceedings had any real prospects of success: RCS 26A.11(5)(b) and (d). It was submitted, however, that the court should not

delve deeply into the substantive merits of the proceedings at this stage. All that was required to satisfy the requirement of a *prima facie* case was that the representative party had demonstrated that there was a case to state and a case to answer. As regards "real prospects of success", it was submitted that that had broadly the same meaning as in the context of the test for permission to bring a judicial review, namely that the prospects were real ie, genuine rather than fanciful or speculative. The test was not one of *probabilis causa*: *Wightman* v *Advocate General for Scotland* 2018 SC 388, 2018 SLT 356 at [9]. The purpose of this element of the rules was to filter out obviously unmeritorious claims. Having regard to the details provided in the application, the draft summons and the material lodged in support thereof, the representative party had satisfied the requirement of having a *prima facie* case with a real prospect of success.

[12] The defenders invited the court to conduct a detailed examination of the underlying merits of the claims. For example, issue was taken by them regarding an apparent lack of specification regarding complex matters such as the nature and extent of defeat devices, the interplay between defeat devices and Euro 5 and Euro 6 emissions standards, and controlled testing conditions, amongst other matters. They also complained about a lack of specification regarding individual claims. It was entirely premature and quite misconceived in terms of the rules for the defenders to expect, as they appeared to suggest, that these matters should or could be canvassed in full now. The full nature of the dispute, and questions of the type raised by the defenders, could only be assessed once a finalised summons was served, defences were lodged, and evidence had been exchanged, all of which could only take place once permission to bring group proceedings had been granted. Should the court find otherwise, it would be difficult to conceive how group proceedings could ever get off the ground, faced with a requirement upon prospective group members to

frontload the preparation of their cases without knowing whether permission to bring proceedings would ultimately be granted. The defenders would be entitled to take issue with matters of specification at the appropriate juncture, but that juncture could not on any view be now. Since their position was that no prohibited defeat devices had been fitted to their vehicles, they could easily state that as an ostensibly clear answer to the claims being made. The only place in which the degree of specification demanded about individual claims could be provided, at this early stage, would be within the group register. To include that sort of detail there would, however, be entirely contrary to the decision in *Bridgehouse* at [78], where it was held (under reference to Form 26A.15) that the group register ought simply to contain a list of the group members who consented to being members of the group. Again, any particular difficulty which might emerge in relation to details of individual claims could be returned to at a later stage.

[13] The defenders also sought to suggest that the representative party had failed to demonstrate a *prima facie* case on account of the fact that there appeared to be some duplication of claims between these proposed proceedings and those in extant proceedings in England and Wales. Steps were being taken to identify all duplicate claims within the group register and any duplicated entries would be removed.

[14] The court might also refuse permission where it had not been demonstrated that it would be more efficient for the administration of justice for the claims to be brought as group proceedings than by way of separate individual proceedings, in terms of RCS 26A.11(5)(c). This was essentially a superiority test as to whether group procedure was more suitable for the proposed claims. It was self-evident that group procedure was more suitable here, given the number of prospective group members and the common issues already identified. Permission for such proceedings should be granted.

[15] Although the case law regarding group proceedings in Scotland was in its relative infancy, it was clear that the bar in order to be appointed as a representative party was and should be low. It would be an impediment in the access to justice if it were otherwise, and the procedure would become unworkable. The sole issue taken by the defenders regarding the appointment of the applicant as the representative party related to a purported lack of specification on the issue of funding and indemnity.

[16] In determining whether or not the applicant was a suitable person to be appointed as the representative party, RCS 26A.7(2)(f) required the court to consider whether he could demonstrate sufficient competence to litigate the claims properly, including in relation to the financial resources available to him to meet any expenses awards. The rule expressly acknowledged that the applicant need not disclose the detail of any funding arrangement. It was to be noted that the considerations mentioned in the Rule were not exhaustive and did not set out minimum requirements for permission to be granted, merely matters to be taken into consideration. There was some tension between the requirement that the court consider the applicant's ability to meet adverse expenses awards on the one hand, and not requiring him to disclose the detail of his funding arrangements on the other. However, it was submitted that all that was required was for the nature of his financial resources to meet any award of expenses to be explained ie, whether he was self-funding or receiving third party assistance. Where, as here, the applicant relied on funding from a third party, the detail of the funding arrangement did not require to be disclosed. Quantum Claims Compensation Specialists Limited had undertaken to provide funding to the representative party and group members for the conduct of the litigation. That was the source of funds to which the applicant would look if the need arose. Quantum Claims would be responsible for bearing any adverse award of expenses incurred by the representative party on behalf of the group

members. It was a litigation funder which had been operating in Scotland for around 35 years. It had been responsible for funding many litigations, both on behalf of individuals and multi-party actions. It had vast experience of funding multi-party claims in Scotland, including vaginal mesh and Volkswagen litigations, and the Kenyan tea pickers case. It had never failed to meet any award of expenses in its history. Its latest statutory accounts showed assets of over £8 million. The provision of funding by Quantum Claims was apt to demonstrate that the applicant had sufficient financial resources to meet any adverse expenses awards. That had been accepted in the *Bridgehouse* litigation. It would be a surprising result if, having satisfied the court that there was a stateable case, a representative party could be prevented from appointment because of a requirement to demonstrate sufficient funding. That was most apparent if one contrasted the position with the court's approach to the issue of requiring a pursuer to find caution, the general principle being that even an impecunious litigant was entitled to advance a stateable case other than in exceptional circumstances: *McTear's Executrix* v *Imperial Tobacco Ltd* 1996 SC 514, 1997 SLT 530. In any case, to require further information about the detail of the funding arrangements would expressly go against Rule 26A.7(2)(f). It would involve disclosing the detail of funding arrangements which were commercially sensitive and confidential. The information provided was sufficient to demonstrate the applicant's competence to litigate the claims properly. The funding issue was heavily outweighed by the factors favouring the appointment of the applicant as the representative party: *Bridgehouse* at [44]. The court had to choose whether to appoint him or not; there was no third option.

[17] The applicant had demonstrated that he fulfilled the limited criteria to be appointed as the representative party. He had provided sufficient information to satisfy the limited

requirements of RCS 26A.7(2)(f) in relation to funding. The court should appoint him to be the representative party.

Submissions for the first to fifth defenders

[18] Senior counsel for the first to fifth defenders submitted that the application for permission to raise group proceedings should be refused, or at least refused *in hoc statu*. Firstly, the requirement to establish that all the claims made in the proceedings raised the same, similar or related factual issues was not met. The proposed group was said to comprise pursuers who had "purchased, owned or leased" a Nissan or Renault vehicle containing a Euro 5 or Euro 6 diesel engine. A pursuer who had leased a Nissan vehicle was self-evidently in an entirely different position to a pursuer who had purchased a Renault vehicle. No explanation was offered as to why the two manufacturers against whom group proceedings were sought to be commenced should be combined in a single action. A number of problems arose with that approach. There was a long-standing alliance arrangement between Nissan and Renault, but the two businesses were and always had been separate entities with their own separate research and development functions and arm's length supply arrangements. Even where an engine type or family was common to both Nissan and Renault vehicles, there was scope for multiple variables relating to, *inter alia*, emissions control systems, software, and approaches to calibration and configuration, all of which varied considerably between the two manufacturers. The proposed group proceedings would inevitably involve disclosure of highly commercially sensitive documents from numerous jurisdictions. They would require specialist translation of technical documentation and complex witness evidence. They would involve the potential disclosure of confidential documentation between two defenders who were direct

competitors. The position was further complicated by the inclusion of the tenth defender, who was in turn in an entirely different position to either manufacturer. The decision for the court in this regard was not between the group as it was presently proposed to constitute it and 8,000 individual actions; rather, it was between the present group and other potential groups sharing greater community of interest.

[19] Secondly, there was no *prima facie* case in terms of RCS 26A.11(5)(b). The application was so fundamentally lacking in specification as to fail to demonstrate a *prima facie* case. It did not even attempt to make any relevant averments of loss. Further, many of the claims appeared to have prescribed.

[20] Thirdly, it was not a more efficient administration of justice for the claims to be brought as group proceedings in terms of RCS 26A.11(5)(c). The nature and extent of the loss allegedly suffered by, for example, the lessee of a Nissan vehicle as opposed to the owner of a Renault vehicle would be materially different and would require the leading of different evidence from different witnesses. Establishing such a loss would require the leading of complex technical evidence which would be of little or no assistance in relation to large numbers of pursuers in the group who owned or leased completely different vehicles. The quantification of their loss would not, as stated in the application, follow a "common methodology". The basis for that suggestion, or the nature of the supposedly common methodology, was totally unclear. It was, indeed, difficult to see how lessors of vehicles had suffered any loss at all. The proposed group proceedings would require to analyse numerous engine configurations in various Nissan and Renault engines, across multiple models made by two different manufacturers. Different configurations in hardware and software further complicated the position. The cases could not efficiently be dealt with together.

[21] Fourthly, it had not been demonstrated that the proposed proceedings had any real prospects of success in terms of RCS 26A.11(5)(d), for the same reasons put forward in relation to the absence of a *prima facie* case.

[22] Fifthly, the purported group register was not fit for purpose. It contained members who already had claims ongoing in England and Wales. Approximately 1,360 vehicle identification numbers ("VIN") for Nissan vehicles included on the Scottish group register were duplicated, either internally to that register or when compared with the English and Welsh group register. There were claims which involved vehicles not fitted with either a Euro 5 or a Euro 6 engine. In at least one case the vehicle in question was not a Nissan or Renault vehicle at all. In any event, the group register did not provide adequate specification to allow the first to fifth defenders to understand and investigate the nature or basis of the claims which were sought to be brought separately against each of them.

[23] Sixthly, the application contained allegations of fraudulent misrepresentation. No attempt had been made to specify the detail of these allegations or the basis upon which it was felt they could responsibly be made. Allegations of fraudulent representation required a high level of specificity. It was necessary to set out, in detail, the specific acts or representations complained of, the occasions on which they were made, and how the representations were causative of the relevant party entering into the transaction in question: *Royal Bank of Scotland* v *Holmes* 1999 SLT 563 at 569-570. The application fell far short of these requirements. Both applications should be refused.

[24] In relation to Mr Mackay's application to be a representative party, it was submitted that it was not clear upon what basis it was said that he could act fairly and in the best interests of other members of the group whose claims shared no common features with his own. There was scope for a situation in which his interests might differ from those of other

members of the group. It was said that he had the benefit of an arrangement with Quantum Claims, but no further detail was provided to explain the basis upon which he might be able to indemnify all of the defenders in the proposed group proceedings in respect of awards of expenses which, on any view, could be extremely large. Cost estimates for procedure in England and Wales ran to tens of millions of pounds. In particular, no suggestion had been made that he had the benefit of "After The Event" insurance, or any other form of litigation funding which might give greater comfort than that disclosed. Quantum Claims were already funding actions against other vehicle manufacturers in addition to numerous other cases, including other group litigations. The extent of its potential liabilities for all of these claims was likely to exceed its assets. Both applications should be refused.

Submissions for the sixth to tenth defenders

[25] Senior counsel for the sixth to tenth defenders submitted that the applications should be refused. In relation to the application for permission to bring the proposed group proceedings, the court should not be satisfied that the representative party had made all reasonable efforts to identify and notify all potential members of the group about these proposed proceedings, as was required by section 20(6)(b) of the 2018 Act. In that regard, the applicant had not provided anything to the court beyond assertion. These were not trivial matters and deserved to be approached formally so to avoid conflicting and parallel applications and litigation in the court.

[26] The applicant was unable to satisfy the court that there was a *prima facie* case because of a failure on his part properly to specify the proposed case. A number of significant issues arose. There appeared to be duplication not only within the Scottish group register itself, but also across parallel proceedings being brought in Scotland and England and Wales,

which had not been adequately addressed and therefore raised serious questions of duplicate claims being made, as well as questions of jurisdiction, and of case and cost management. Given the lack of any information about the proposed group members on the register beyond their personal details, it was impossible to know if and when each of them was said to have purchased, leased or otherwise acquired relevant vehicles in Scotland and, if so, for how long each had retained that vehicle. The problem was particularly acute in respect of the proposed group members who were domiciled outside Scotland. A number of those members were listed without an address or were shown with addresses outside Scotland. The number of proposed group members who were domiciled in Scotland but who purchased, leased or otherwise acquired relevant vehicles in England or Wales was unknown and could not be ascertained from the information provided. Without such information, it was impossible for the court to assess whether it had jurisdiction to determine the claims. None of the defenders was domiciled in Scotland, so those details were essential in order to assess whether there was a *prima facie* case.

[27] The applicant sought permission to bring claims against two separate vehicle manufacturers, without identifying the specific make or model of any relevant vehicle or specific engine type contained within it. It was clear that not all of the proposed group members owned vehicles from both Nissan and Renault. Furthermore, given the differences in the various models and engine types, it was highly likely that the proposed group members would need to be sub-divided in order properly to assess their claims. That was impossible at present because the applicant made no attempt to identify either the nature of a group member's relationship to a particular vehicle, or what was said to constitute a defeat device. The proposed claims related to a large number of different models and different diesel engine types, each containing their own permutations. For instance, from the

information available, the Renault defenders had identified over 350 different model variants. In the K9K Renault diesel engine family alone, there were over 170 different engine variants. The different engine types illustrated the problem with the generic pleading of the allegations, given the variances and permutations in the design, operation, and calibration of engines across the range of Renault vehicles. The current lack of any detail in the draft pleadings made it all but impossible for the Renault defenders to provide a meaningful response. Furthermore, the identification and instruction of an expert was not possible without further specification of the claim.

[28] Article 18 in the proposed summons made averments regarding "the group member pursuers who financed the purchase of or leased their vehicles with the financial assistance of the tenth defenders …" but without making any averment that there were any such pursuers and, if so, how many and which ones. Similarly vague phrases were used at Articles 19 and 20. The pleas-in-law in the proposed summons set out an omnibus case in fraud, negligence and breach of statutory duty indiscriminately against each defender. The argument set forth by the applicant was entirely general (and generic) in nature. It made no reference to any particular proposed pursuers, to any particular vehicles, or to any particular device. The argument was presented at such a high level as to render it academic and irrelevant. The proposed pleadings were so lacking in specification that they failed even to demonstrate a *prima facie* case.

[29] The applicant did not set out any case as to why the purportedly unlawful defeat devices said to have been used were unlawful in relation to the relevant EU law. Whilst it was not accepted that Renault vehicles contained a defeat device, the use of a device was not unlawful if it fell within the criteria set out in Article 5 of the Emissions Regulation (ie Regulation (EC) 715/2007). It was for the applicant to demonstrate that there was a *prima*

facie case that particular devices said to have been used by particular defenders amounted to defeat devices for the purposes of Article 3(10) of the Regulation, and did not fall within the Article 5 criteria for particular and specified reasons. No such pleadings were offered by the applicant and therefore no notice was given of his position in that regard. Even if any of the group members owned a relevant Renault vehicle at any relevant time, the applicant had in this respect, too, not demonstrated a *prima facie* case.

[30] The applicant made no attempt to quantify the proposed claims and seemed to suggest that the court should do so for him. Absent any pleadings as to quantum, the applicant had, once again, not demonstrated a *prima facie* case.

[31] In any event, by any reckoning, a significant number of the claims sought to be included in the register were prescribed. The application to appoint a representative party for the purposes of these proceedings was first served on or around 19 June 2023. That application included a first draft of the group register. In accordance with RCS 26A.18(1), that was when these proceedings were deemed to have commenced for the individuals included in that iteration of the group register. A significant number of the individuals included in the schedule were said to have a "keeper start date" more than 5 years prior to that date. Any obligation which might have existed to make reparation to those individuals would, on the applicant's own position, have been extinguished as a result of the obligation subsisting for a period of 5 years without any relevant claim having been made, in accordance with sections 6 and 11 of the Prescription and Limitation (Scotland) Act 1973. Furthermore, nine of the entries were said to have a "keeper start date" more than 20 years prior to the commencement date, engaging section 7 of the 1973 Act. There was, therefore, no *prima facie* case in relation to any of those entries on the group register.

[32] It was not possible for this court to be assured that group proceedings would represent a more efficient administration of justice on the basis of the information that had been provided with this application. If anything, the lack of information from the applicant suggested that an efficient administration of justice would not be rendered in a group proceeding. The administration of justice was not made more efficient by permitting the applicant to present claims against the defenders without providing the most basic of information to enable them to know whether the group members ever owned a relevant vehicle. Were each of the proposed group members to bring their own proceedings, they would need to plead and prove their averments, including the details of the vehicle said to give rise to the claim, the manner in which the vehicle had been purchased or leased, and the period during which it was said to have been owned or leased. The applicant's case, as currently pleaded, posed a serious risk that the group proceeding would be used in a manner that permitted potentially irrelevant claims to go unnoticed, which was detrimental to each defender's right to assess and verify each of the claims brought against it. That was not a demonstration of the efficient administration of justice.

[33] The test for real prospects of success was identical in wording to the test for permission to bring an application to the supervisory jurisdiction of this court. In *Wightman*, the First Division had stated:

> "The words 'real prospect of success' mean what they say. … They were designed to set a higher hurdle than that which was described in *EY* [v *Secretary of State for the Home Department* [2011] CSIH 3; 2011 SC 388; 2011 SLT 508] as 'low'. The new test is certainly intended to sift out unmeritorious cases, but it is not to be interpreted as creating an insurmountable barrier which would prevent what might appear to be a weak case from being fully argued in due course. Of course the test must eliminate the fanciful, but it is dropping the bar too low to say that every ground of review which is not fanciful passes the test. It is not enough that the petition is not 'manifestly devoid of merit', since that, in essence, reflects the 'manifestly without substance' test adopted in *EY*. The applicant has to demonstrate a real prospect, which is undoubtedly less than probable success, but the prospect must be real; it

> must have substance. Arguability or statability, which might be seen as interchangeable terms, is not enough (Scottish Civil Courts Review (2009), Ch 12, para 53). The substance, or the lack of it, is something which the court has to determine as a preliminary issue; not after a full consideration of elaborate pleadings. It is important therefore that those seeking permission are able to plead their cases accurately and, crucially, succinctly both in relation to the facts and the propositions in law."

[34] In the circumstances of this application, the applicant had not demonstrated by way of accurate and succinct pleading that there was any substance to the proposed proceedings. If the court and the defenders were unable to ascertain from the application – even at this late stage – whether the court had jurisdiction, whether there were any relevant proposed pursuers who owned relevant vehicles at a relevant time, what was alleged to be unlawful about the vehicles, or what losses were said to have been caused, the proposed claims did not have a real prospect of success. Indeed, absent those details, the claims had no prospect of success.

[35] For those reasons, the court had not been provided with sufficient pleading or sufficient foundation to allow it to be satisfied of the matters set out in RCS 26A.11(5). The applicant had placed before the court nothing more than a replica of standardised pleadings which contained nothing relevant to the Renault defenders or to the vehicles produced by them. Whilst it was appreciated that group proceedings were intended to streamline matters for the court where a large number of individual claims could be heard and determined together, the defenders were nonetheless entitled to know what it was that they were alleged to have done, how it was said that those actions were unlawful, who was affected by those actions, and what losses those people were said to have been caused as a result. Fair notice of the most basic elements of the claims was not an unreasonable request.

[36] The unfairness of the current approach was exacerbated when one had regard to the fact that the defenders had sought the desiderated information from the applicant's legal

teams on a number of occasions and across what was now a considerable period of time. These were not matters which were being sprung on the applicant or his legal teams without notice. They had had every opportunity to provide the requisite information to the defenders and to the court, and it had to be assumed that a conscious decision had been taken not to do so. The applicant and his legal teams should therefore bear the consequences of that choice, and permission should be refused.

[37] In relation to Mr Mackay's application to be a representative party, senior counsel adopted the argument advanced for the first to fifth defenders, and added that, although RCS 26A.7(2)(f) was clear that details of any funding arrangements need not be disclosed, that did not mean that no information was to be provided. Quantum Claims was also funding several related actions in the Scottish courts, as well as other litigations. The applicant had given no indication of any cap imposed on the level of funding available, nor had it been explained how the funder intended, in light of the funds apparently available according to its accounts, to satisfy the court that it had the available financial resources to fund this litigation, including any adverse awards of expenses. That consideration had to have regard to the other calls on those same funds. The proposed group proceedings were likely to be complex both legally and factually.

Decision

[38] The background to group proceedings in Scotland is described in detail in *Bridgehouse* at [4]–[17]. It is clear that considerations of access to justice and its efficient administration are fundamental to the proper operation of the scheme which has been introduced. However, though those considerations may inform the interpretation of the relevant statutory provisions and Rules of Court, the criteria there set out must be faithfully

noted and applied by the court in determining applications such as those presently before it. I do not consider it appropriate to approach the position of any party with any degree of scepticism; what is called for is an objective and principled assessment of the material put before the court by reference to the criteria set out in the legislation.

[39] In relation to the question of whether permission to bring the proposed group proceedings should be granted or refused, it will be recalled that, in terms of RCS 26A.11, the court may refuse to grant such permission:

> (a) If it considers that all of the claims made in the proceedings do not raise issues (whether of fact or law) which are the same as, or similar or related to, each other;
>
> (b) If it is not satisfied that the representative party has made all reasonable efforts to identify and notify all potential members of the group about the proceedings;
>
> (c) If it has not been demonstrated that there is a *prima facie* case;
>
> (d) If 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; or
>
> (e) If it has not been demonstrated that the proposed proceedings have any real prospects of success.

Dealing with those issues in turn:

Are the issues in the proposed proceedings (whether of fact or law) the same as, or similar or related to, each other?

[40] In *Campbell* v *James Findlay (Kenya) Limited* [2022] CSIH 29, 2022 SLT 751 it was submitted that the proposed group proceedings in that case failed this test because the members of the group (Kenyan tea pickers claiming to have suffered musculoskeletal injury as a result of the working practices required by their employer) had had different roles and had suffered different varieties of injury. The court at [5] held that there were what it called generic issues of fact and law which could be resolved for all the group, even though there would have to be left over, for sub-group or possibly individual determination, particular issues – in that case, especially causation.

[41] Although that case is by no means on all fours with the present one, in particular because of the presence here of two distinct groups of proposed defender, certain parallels may be drawn. Each member of the proposed pursuer group is claiming that a defeat device was fitted in a vehicle in which he had a financial interest of some kind, and that he suffered loss thereby. It seems likely, on that basis, that it will be possible to identify and resolve issues of fact and law which will be of relatively general application to all group members, even though specific issues, such as quantification of losses or prescription, may require to be determined at sub-group or individual level. The statutory test does not require the issues for resolution in group proceedings to be identical in the case of every member of the group, merely similar or related to each other.

[42] The most obvious way in which issues of fact might prove not to be similar or related to each other in the proposed proceedings arises from the proposed convening of two separate sets of defenders, with a current lack of clarity as to the degree to which relevant

activities were carried out in common or at least in co-operation. Section 21(2)(i) of the 2018 Act allowed an Act of Sederunt made in furtherance of its terms to make provision for the exclusion of a claim made in established group proceedings from those proceedings, including by way of transfer of the claim to other civil proceedings, but it is not obvious to me that that opportunity was taken up in chapter 26A, unless (which I doubt) it falls to be implied into the very wide case management powers contained therein. Had such a power existed, then it might have been easier to allow the proceedings as presently drafted to go ahead, knowing that any divergence of issues which might emerge as matters proceeded could, if necessary, result in the separation into other proceedings of any particular group which no longer appeared to have enough in common with another. However, absent such a power, a decision has to be made now, on the basis of the material currently available. I was provided with a press release dated 6 February 2023 from the "Renault-Nissan-Mitsubishi Alliance" in which it was stated that the alliance was a partnership with a unique model which leverages the leadership strengths of each member company, uniting their skills, talents and technologies to streamline idea sharing, fast-track innovation, improve cost-efficiency and add value, together with a report of a hearing by the European Parliament's Committee of Inquiry into Emission Measurements in the Automotive Sector dated 13 July 2016 suggesting that the hardware (but not software) of certain engine types is common to Renault and Nissan in Europe. I consider that that material provides a proper basis to conclude that there is sufficient communality amongst the members of the proposed group to warrant the factual and legal issues to be ventilated in the proposed proceedings being deemed to be, at least, "related" to each other. I accordingly determine that the application cannot be refused on that ground.

Has the representative party has made all reasonable efforts to identify and notify all potential members of the group about the proceedings?

[43] The application states, and senior counsel for the applicant repeated, that significant steps have been taken to identify and notify all potential members of the group about the proceedings and that a significant amount of advertising on UK television and online by various means has been carried out. I did not understand that to be disputed by the defenders, and in the absence of specific criticism of the nature or efficacy of the steps said to have been taken I am satisfied that this question calls for an affirmative answer.

Has a* prima facie *case been demonstrated?

[44] As Lord Diplock observed in *American Cyanamid Co* v *Ethicon Ltd* [1975] AC 396 at 407F-G, [1975] 2 WLR 316 at 320B, "'*Prima facie* case' may in some contexts be an elusive concept". The experience of the intervening years have demonstrated the veracity of that statement. The terms of RCS 26A.11 suggest that it cannot in this context involve an assessment of whether the proposed proceedings have any real prospects of success, since that is expressly a separate matter for consideration. The defenders made a number of points about the deficiencies of the proposed summons, largely focusing on a lack of essential specification, but also raising issues of jurisdiction and prescription, and the accuracy of the group register. Had these points been made at the stage of a debate on the relevancy and specification of the pursuers' pleadings, it would have been impossible to deny their force. However, at this stage in the process, the existence of a *prima facie* case in this particular context requires no more than the appearance of a serious question or questions to be tried. It does not call for the application of tests of relevancy or specification which would (and will) apply once the pleadings are finally settled. I consider that the

application does, in that sense, disclose a *prima facie* case. That case (at least in its current mode of expression) is beset with apparent difficulties which will require to be addressed, if need be by very robust case management, if and when matters proceed, but in the meantime I see nothing that cannot be so addressed, and conclude that enough has been said to demonstrate a *prima facie* case in the requisite sense.

Has it 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?

[45] It is obvious that, in a case involving over eight thousand potential claimants, the prospect of individual proceedings borders on the unthinkable, and would run entirely contrary to the policy aim of the 2018 Act to widen and improve access to justice. It was submitted by the defenders that different homogenous groups should be constituted, instead of one potentially heterogenous group containing everyone with any sort of claim against either Renault or Nissan. While there is force in that suggestion for the reasons already canvassed, the question I am required to ask at this point is not whether different groups would be preferable to that presently put forward, but simply whether the administration of justice would be more efficient if the claims which have been advanced were determined by way of group proceedings rather than by way of individual litigations. The answer to that question must be a positive one.

Has it been demonstrated that the proposed proceedings have any real prospects of success?

[46] It was submitted that the words "real prospects of success" ought to be construed in the same way as a very similar phrase was construed in *Wightman*, in other words, as requiring the demonstration of real and substantial such prospects, albeit less than probable

success, and not creating an insurmountable barrier which would prevent what might appear to be a weak case from being fully argued in due course. Although the phrase was used in a somewhat different context in *Wightman*, raising rather different issues, I accept that submission, and consider that the application passes that test. The grounds of action have been articulated to the level required at this stage and, despite their many weaknesses of expression as matters stand, nothing insuperable appears to attend their prosecution. It cannot be said that they will probably succeed in whole or in part, but they may well do, and that suffices for present purposes.

[47] There accordingly being no ground upon which I may refuse permission for the proposed group proceedings to be brought, I shall grant such permission.

Application to be the representative party

[48] In order to be authorised to act as a representative party, the applicant requires to satisfy the court that he is a suitable person who can act in that capacity should authorisation be given. Without prejudice to that generality, the court requires to consider (amongst any other matters which may be relevant to the applicant's suitability) the matters set out in RCS 26A.7(2). I set these out and comment on them in the context of the present case as follows:

(a) The special abilities and relevant expertise of the applicant.

It was not claimed on behalf of Mr Mackay that he enjoys any special ability or relevant expertise; he is simply one of the members of the proposed group who is willing to act as a representative party and appears to the solicitors who would be conducting the proposed proceedings to be unaffected by any obvious inability to do so. There is, accordingly, no positive contribution to be made to the decision as to

whether he should be authorised to be a representative party by reference to this consideration.

(b) The applicant's own interest in the proceedings.

It was not suggested that Mr Mackay had any interest in the proceedings save the financial claim which flows from his membership of the proposed group.

(**c)** ***Whether there would be any potential benefit to the applicant, financial or otherwise, should the application be authorised.***

What has been said in relation to the previous consideration applies equally here.

(d) Confirmation that the applicant is independent from the defender.

There was no suggestion that Mr Mackay is anything other than wholly independent of the defenders.

(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.

It is to be noted that, unlike the previous sub-paragraphs of the Rule, this head requires the court to consider whether it has been demonstrated that the applicant would act in the manner described and that his interests do not conflict with those of others in the proposed group. That suggests that a burden of some sort, albeit perhaps not a very heavy one, rests on the applicant in these regards. No positive attempt was made to demonstrate (as opposed to assert) that Mr Mackay would act

fairly and adequately in the interests of the group members as a whole, though nothing was said against him in those respects either. If, as I read this aspect of the Rule, I have to consider what has been demonstrated in this regard, the only possible answer is nothing.

In relation to a demonstration of the absence of conflict of interest, it was suggested that such a conflict might emerge as and when the varying interests of the members of the group (eg as between those claiming against Nissan and those claiming against Renault, or as between owners and lessors) had become clear. Mr Mackay was a Nissan owner and his interests may, therefore, not entirely coincide with those of every other member of the group. However, as matters stand I consider the possibility of positive conflict to be more theoretical than real, and in the event that any conflict does emerge, RCS 26A.8 provides the means of replacing him as the representative party. I am prepared to proceed on the basis that it has been demonstrated that there presently exists no conflict of interest.

(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).

Again, this sub-paragraph appears to require the court to consider whether the applicant has demonstrated that he has sufficient competence to litigate the claims properly. Leaving aside for the moment the question of financial resources, all that was said of Mr Mackay in this regard was that he appeared to the solicitors who would be conducting the proceedings to be a level-headed individual who would listen carefully to legal advice and make a sensible decision as and when called upon

to do so. While that may well be true, no attempt was made to demonstrate that he was someone used to receiving legal advice, asking relevant questions, considering and acting upon it. I would expect, in a group of more than eight thousand people, that someone fitting that description could relatively easily be found. Mr Mackay was, it seems, asked to volunteer as the representative party by the solicitors in question, without reference to the views of the potential group members in whole or in part. A possible concern as matters stand is that he might simply accept the advice given to him somewhat uncritically, and possibly may become a mere cipher for the solicitors in question. Since it is inappropriate for solicitors conducting the proceedings themselves to be the representative party (*Thompsons Solicitors Scotland* v *James Findlay (Kenya) Ltd* [2022] CSOH 12, 2022 SLT 731) that would be a situation best avoided. However, it would be wrong to assume that such a thing might happen, and none of the defenders urged that consideration upon me.

Turning to financial resources, Quantum Claims Compensation Specialists Limited has agreed to provide funding for the proposed proceedings and to bear expenses awarded against the representative party. The latest accounts for that company (for the financial period to 30 April 2023) disclose cash in hand at that date to be a little over £3.9 million, and net assets of £8.9 million. The accounts are unaudited and I was informed that no more recent figures (as, for instance, brought out in management accounts since April 2023) were available for the court's consideration. It was not disputed that the company had given similar undertakings in other group proceedings and had other potential liabilities. However, I am satisfied that the undertaking given is, at least as matters stand, sufficient to demonstrate that adequate financial resources are likely to be available to meet any expenses awards

which may be made in the foreseeable future course of the group proceedings. If that situation should change, as by the state of the company's finances deteriorating materially, then the availability of caution may be addressed at an appropriate point.

[49] No other matters which fell to be considered in assessing whether Mr Mackay is a suitable person were raised before me, and none suggests itself. In summary, then, on the positive side, Mr Mackay has a legitimate personal interest in the proposed proceedings to the extent of his own claim, but no further; is independent of the defenders; has no present conflict of interest with other group members; and can call upon adequate financial resources to act as a representative party. On the other hand, he claims no special abilities or relevant expertise, and has not demonstrated that that he would act fairly and adequately in the interests of group members, or that he is sufficiently competent to conduct the litigation, although, equally, nothing suggests otherwise.

[50] Taking all of these matters into consideration, I conclude – by a relatively small margin – that Mr Mackay is a suitable person to be authorised to act as a representative party in the proposed proceedings. I expect that a more obviously suitable person could have been found, particularly one who could be shown to have experience in considering and acting upon legal advice and who would, therefore, be someone in respect of whom aspects of factors (e) and (f) might have been more easily and fully demonstrated. Future applications of this kind ought to bear such matters in mind more directly than appears to have been typical so far. However, it is evident that a relatively benign view (I put it no higher than that) falls to be taken of the question of suitability to be a representative party if the group proceedings facility is to work as designed in the improvement of access to justice. A fairly wide range of individuals may, on that view, be suitable to be a representative party, and I consider that Mr Mackay falls within that range.

Conclusion

[51] For the reasons stated, in application GP3-23, I shall authorise Mr Mackay to be the representative party. In application GP4-23, I shall grant permission for Mr Mackay as that representative party to bring group proceedings to be known as "Renault Nissan NOx Emissions Group Proceedings" and put the case out for a hearing to settle the further orders required to enable those proceedings to continue in accordance with the provisions of Chapter 26A.