OUTER HOUSE, COURT OF SESSION

[2024] CSOH 96

GP2/24
GP3/24

OPINION OF LORD ERICHT

In the applications

to be a representative party in group proceedings

and for permission to bring group proceedings

by

STEVEN BLAIR MILLIGAN

Applicant

against

(FIRST) JAGUAR LAND ROVER AUTOMOTIVE PLC; (SECOND) JAGUAR LAND ROVER LIMITED; (THIRD) CA AUTO FINANCE UK LIMITED; (FOURTH) BLACK HORSE LIMITED; (FIFTH) LEX AUTOLEASE LIMITED

Defenders

Applicant: Smith KC; Drummond Miller LLP
First, Second and Third Defenders: Lord Davidson of Glen Clova KC; CMS Cameron McKenna Nabarro Olswang LLP
Fourth and Fifth Defenders: O'Brien KC; Pinsent Masons LLP

29 October 2024

Introduction

[1] The applicant is a member of a group of around 6,500 persons who wish to bring group proceedings in respect of vehicle nitrogen oxide ("NOx") emissions relating to Jaguar Land Rover vehicles. He has applied to be the representative party, and also for permission

to bring group proceedings. Answers were lodged to each application, and a hearing was held at the same time on both applications.

[2] In this opinion I shall deal first with two matters which were dealt with prior to the hearing on the applications, namely caveats and the substitution of a new applicant. As group proceedings procedure is in its infancy and still being developed, it will be useful to record these matters. I shall then deal with the appointment of a representative party and permission for group proceedings.

Caveats

[3] It is a feature of the Scottish court procedure that a person who is apprehensive that an *ex parte* order may be made against him may lodge a caveat with the court. The purpose of the caveat is to ensure that the person will have an opportunity to oppose the order. When another party seeks an *ex parte* order, the caveat is honoured: the person's solicitors are notified of the motion and are given an opportunity to oppose it and to be represented at any oral hearing on it.

[4] Rule 5.1 of the Rules of the Court of Session provides:

> **"Orders against which caveats may be lodged**
>
> 5.1. … a person may only lodge a caveat against-
> (a) an interim interdict sought in an action before he has lodged defences;
> (b) an interim order sought in an action before the expiry of the period within which he could enter appearance;
> (c) an interim order (other than an order under section 1 of the Administration of Justice (Scotland) Act 1972 (a) (orders for inspection of documents and other property, etc.) sought in a petition before he has lodged answers;
> (d) an order for intimation, service and advertisement of a petition to wind up, or to appoint an administrator to, a company in which he has an interest;
> (e) an order for intimation, service and advertisement of a petition for his

> sequestration; and
> (f) an order permitting the bringing of group proceedings…"

[5] In this case, the first defender had lodged a caveat in the following terms:

> "Should any application be made to the Court for: interim interdict; interim suspension; the appointment of an administrator ad interim; petition for administration; the appointment of a provisional liquidator; petition for liquidation or winding up orders; an order permitting the bringing of group proceedings (within the meaning given in Chapter 26A); or any other interim order against JAGUAR LAND ROVER AUTOMOTIVE PLC it is requested that intimation be made to the undernoted before any order is pronounced."

[6] Similar caveats were lodged by the second and fourth defenders.

[7] An application for permission to bring group proceedings is made by motion (Rule 26A.9(1)). On a motion being enrolled, and before it is served or intimated, it is brought before a Lord Ordinary for an order for intimation and service, advertisement and the lodging of answers (Rule 26A.9(2)). An issue arose in this case as to whether the caveat was triggered by the motion so that the defenders should be notified prior to the motion being placed before the Lord Ordinary. In my opinion the caveat is not so triggered. At that stage the Lord Ordinary is not considering whether to grant the motion and make an order permitting the bringing of group proceedings, but is only dealing with intimation and service, advertisement and the lodging of answers.

[8] Rule 5.1(f) is very clear in its terms that the order against which a caveat may be lodged is "an order permitting group proceedings." The whole scheme of the rules on group proceedings is that such an order is not made *ex parte*. The application for an order permitting group proceedings is put before a Lord Ordinary who orders the application to be served on the defenders and orders them to lodge answers (Rule 26A.9(2)). On receipt of the answers, the Lord Ordinary can either decide the application on the papers, or order an oral hearing on seven days' notice (Rule 26A.11). In either case, the defenders have had an

opportunity to oppose the granting of the order. As the order permitting group proceedings is not made *ex parte*, there is no need for a defender to be protected from an *ex parte* order by a caveat.

[9] Accordingly, a caveat lodged under Rule 5(1)(f) will not be triggered by a standard application for permission to bring group proceedings under Rule 26A.9. It will only be triggered where the applicant goes beyond that and seeks (for example by way of dispensing with provisions of Rule 26A.9, or by way of an interim order) such permission *ex parte* and with no notice to the defender.

[10] It is however difficult to envisage any circumstances where an applicant might seek such an *ex parte* interim or *ex parte* final order. Such an order would not assist in relation to time bar: time bar is broken at the time the motion is made, not when it is granted. The group register must be served at the time the application is made (Rule 26A.9(3), (4)) and it is the service of the register, not the granting of permission, which is the commencement of proceedings (Rule 26A.18(1)). There is therefore no need, in an urgent time-bar case, for the Lord Ordinary to dispense with the detailed rules as to service and attendance at an oral hearing, in order to grant an urgent *ex parte* interim ((Rule 26A.10(3)(d)) or *ex parte* final order permitting the bringing of group proceedings.

Substitution of applicant

[11] The original applicant was Lisa Rutherford. Her appointment was objected to by the defenders. In response Ms Rutherford sought to amend the applications to be a representative party and for the grant of permission, and the draft summons, by substituting Mr Milligan in her place. I allowed amendment, and awarded the expenses of amendment in favour of the defenders.

[12] In view of that amendment, I did not have to rule on the suitability of Ms Rutherford to be a representative party. Had I been required to make such a ruling, and had the objections averred in the answers been proved, I would have refused to authorise her to be a representative party and would have refused permission to bring group proceedings by her.

[13] The first objection was that she is an employee of a company in the Lloyds Banking Group. The fourth and fifth defenders are companies in the Lloyds Banking Group.

[14] In considering whether or not an applicant is a suitable person to be group representative the Lord Ordinary must consider the matters set out in Rule 26A.7(2) which include:

> "(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;"

[15] Ms Rutherford's position as an employee of a company in the same group as two of the defenders would have made it inappropriate for her to act as group representative. The group representative has a crucial role in group proceedings. It is the group representative who gives instructions to the solicitors conducting the litigation. It is the group representative who must consult the group members on the terms of any proposed settlement before any damages in connection with the proceedings may be distributed (Rule 26A.30). The members of the group repose trust and confidence that in exercising these duties, the representative is acting in their interests and not in the interests of the defender. The representative must not only be independent from the defender, but be seen to be independent from the defender. I would not have been satisfied, in terms of Rule 26A.7(2)(d), that as an employee within the same group of companies as certain defenders she was independent from these defenders. Nor would I have been satisfied, in

terms of Rule 26A.7(2)(e), that her interests as an employee did not conflict with those whom she sought to represent.

[16] The second objection was that Ms Rutherford had granted a protected trust deed. That raises two concerns. A person who does not have the ability to manage their own personal financial affairs in such a way as to avoid bankruptcy is unlikely (absent extenuating circumstances which would have to be fully before the court) to be able to satisfy the court in terms of Rule 26A.7 that she is a suitable person to be a representative party. Further, as she has granted a protected trust deed, she is not entitled to be a member of the group as any claim that she might have had against the defenders would have been assigned to her trustee in bankruptcy. While it is not essential that the group representative is a group member, Ms Rutherford's application was predicated on her being a member of the group. In view of these concerns, I would not have found her to be a suitable person to be a group representative.

Application for appointment of Mr Milligan as group representative

[17] In light of the substitution of Mr Milligan, the application to be a representative party was no longer opposed by the fourth and fifth defenders. In these circumstances, I found the applicant liable to the fourth and fifth defenders in respect of the expenses occasioned by the application made by Ms Rutherford to be a representative party.

[18] The application for the appointment of a group representative continued to be opposed by the first to third defenders in respect of Mr Milligan.

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.'

[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 first to third defenders

[19] Senior counsel for the first to third defenders submitted that there was no information before the court to suggest that the applicant had the skills required to competently discharge his function in these complex proceedings. The information set out in the group register was highly unsatisfactory, with duplicate and ill-founded claims and the applicant and his solicitors were bound to take responsibility for that. There was no material before the court to allow it to conclude that the applicant had sufficient competency to litigate, particularly at this level of high factual and legal complexity, and that the material which is before the court (for example the group register) suggested an endemic lack of control, mastery and suitability. He further submitted that it was wholly unclear how the applicant could have the capacity to take appropriately independent decisions in the face of diverging views and interests. He would require to face down the competing interests of six different law firms, the funders and insurers and potentially claimants of groups. No account had been made in the selection of the applicant for a scenario where interests may from time to time diverge from the interests of the group members. No information was before the court on how such decisions were to be made, what decision making powers the applicant had and what decision making powers the group members had ceded. The court should guard against conflict of interests (*Thompsons Solicitors Scotland* v *James Findlay (Kenya) Limited* 2022 SLT 731 at paragraphs 25-27, *Hollick* v *Toronto*

(City) [2001] 3 SCR 158, *Sondhi* v *Deloitte Management Services LP* 2018 ONSC 271 and *Western Canadian Shopping Centres Inc* v *Dutton* [2001] 2 SCR 534, Directive (EU) 2020/1828 25 November 2020 on representative actions.)

[20] He further submitted that the material before the court on the financial standing of the applicant was inadequate. There was no information as to the level of indemnity which had been afforded to the proposed applicant or the working capital of the applicant's funders. The applicant's solicitors and funders were currently engaged in a great number of new group proceedings before the court and there was no information to assess how this pressure upon their funders' resources was to be appropriately managed. The court had not been furnished with sight of the contractual terms and conditions regarding the discharge of the applicant's function. The Lord Ordinary in *Bridgehouse* v *Bayerische Motoren Werke Aktiengesellschaft* 2024 SLT 116 had fallen into error and paragraph 44 of that decision denuded the statutory role of the representative party of its intended effect and allowed a mere catspaw to assume the role subservient to their legal advisors.

[21] Counsel further submitted even if the decision in *Bridgehouse* were correct, the courts approach to the representative party could not be reconciled with the Scots law doctrine of *dominus litis* (*Cairns* v *McGregor* 1931 SC 84 at 86, 89, *McCuaig* v *McCuaig* 1909 SC 355 at page 357).

[22] Counsel further submitted that the court was faced with an ever multiplying number of diesel emissions claims coordinated by PGMBM Scot Limited. That entity benefited from a funding arrangement in the order of £450 million derived from lenders controlled by persons in the United States of America and Ecuador. That funding arrangement should be scrutinised by the courts.

Submissions for the applicant

[23] The applicant submitted that authorisation should be granted for the reasons set out by the court in the *Bridgehouse*.

Analysis and decision

[24] To the extent that the first to third defenders' submissions repeat submissions made in *Bridgehouse*, I reject them for the reasons set out in detail in *Bridgehouse*.

[25] I have considered all of the matters set out in Rule 26A.7(2). The applicant is a member of the group and satisfies the abilities and expertise required in terms of Rule 26A.7(2)(a) (*Bridgehouse* paragraph 44). His interest in the proceedings, and his financial benefit, is the same as any other group member (Rule 26A.7(2)(b), (c)). He is independent from the defenders (Rule 26A.7(2)(d)). He can be expected to act fairly and adequately in the interests of the group as a whole and he will be advised by a firm of solicitors acting in accordance with its legal and professional obligations, (including its professional obligations in respect of success fee agreements) and there is no conflict of interest at this stage, (Rule 26A.7(2)(e)); *Bridgehouse* paragraph 45).

[26] In respect of Rule 26A.7(1)(f), the funding position in this case is the same as in *Bridgehouse* (paragraph 47). Quantum Claims has given an undertaking to the court that it will indemnify the applicant and group members in respect of awards of expenses made against him in the course of the group proceedings. In light of the undertaking, and the underlying strength of Quantum Claims balance sheet, I am satisfied that the applicant has sufficient financial resources to meet any expenses award. The defenders raise concerns that Quantum Claims has overextended itself in respect that it is funding a number of diesel emission cases. That is not of concern to the court at this stage. As explained in *Bridgehouse*,

(paragraph 47), if the financial position of the applicant or Quantum Claims changes during the course of litigation, then it will be open to the defenders to seek caution for expenses.

[27] The first to third defenders raise the issue of *dominus litis*. In Scots law, expenses may be awarded against a person who is not a party to the action if that person has an interest in the subject matter of the action and controls and directs the litigation. As the Lord Justice Clerk (Alness) said in *Cairns* v *McGregor* 1931 SC 84, at p 89 (emphasis added):

> "The *locus classicus*, however, on the topic of *dominus litis* is, I think, the opinion of Lord Rutherfurd in *Mathieson v. Thomson* where his Lordship says:
>
> > 'There may be some difficulty in defining exactly what is a *dominus litis*; but I confess that I very much agree with what has been laid down by your Lordship, and with the definition quoted from the civil law by Lord Ivory, that he is a party who has an interest in the subject-matter of the suit, and, through that interest, a proper control over the proceedings in the action. Now it will not make a person liable in the expenses of an action that he instigated the suit, or told a man that he had a good cause of action, and that he would be a fool if he did not prosecute it, or though he promoted it by more substantial assistance. It will not make him liable in the expenses of the suit that, while he does both of these things, he shall have some ultimate consequent benefit in the issue of that suit. But when you go a step further, and find a party with a direct interest in the subject-matter of the litigation, and, through that interest, master of the litigation itself, having the control and direction of the suit, with power to retard it, or push it on, or put an end to it altogether, then you have a proper character of *dominus litis;* **and, though another name may be substituted, the party behind is answerable for the expenses'**
>
> The interest of the alleged *dominus litis* in the subject-matter of the suit, in the sense of that passage, must be so direct and dominant as to yield control of the suit."

[28] If there is a *dominus litis*, then the expenses of an action can be recovered from the *dominus litis*. So, if, for example, due to changes in circumstances neither the applicant nor Quantum Claims has in the end of the day the financial resources to meet an award of expenses, then it may be that if there is indeed a *dominus litis*, then expenses may be recoverable from that *dominus litis* instead. It is premature to address the question of *dominus litis* at this stage. What I have to consider at this stage is whether the applicant has

the financial resources to meet any expenses awards (Rule 26A.7(1)(f)). I am satisfied on the basis of the undertaking granted by Quantum Claims that the applicant has the financial resources to meet any expenses awards. That being the case, it is not necessary for me to go on to consider possible additional, alternative sources for the payment of an award of expenses such as a *dominus litis*.

[29] The financial position of PGMBM Scot Limited is of no relevance to the current group proceedings. PGMBM Scot Limited is a firm of Scottish solicitors which is neither conducting the current litigation nor funding it. The litigation is being conducted by Drummond Miller and funded by Quantum Claims. In any event, Rule 26A.7 (1)(f) specifically states that the details of funding arrangements do not require to be disclosed.

Application 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.'"

[30] The defenders opposed permission on each of the subsections of Rule 26A.11(5). The fourth and fifth defenders did not make any separate submission on permission to bring group proceedings, but aligned themselves with the submissions of the first to third defenders.

Rule 26A.11(5)(a): the issues were not the same as, or similar or related to each other

[31] Section 20(6)(a) of the 2018 Act provides that the court may only give permission where it is satisfied that all of the claims in the proceedings raise issues (whether of fact or law) which are the same as, or similar or related to, each other. Counsel for the defendants submitted that as there was a very large number of different makes, models and versions of cars produced over a long period of time, and differences of the claimants acquisition of these cars as to whether they were purchased, leased, hire purchased, purchased new or purchased second hand, the statutory requirement was not satisfied.

[32] In this case the central issue, as set out in the first declarator sought in the summons, is whether:

> "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"

It makes no difference if this issue arises over various models and purchase methods. Indeed, the whole point of group proceedings is to allow claims such as this to be brought together rather than thousands of individual claims having to be made. In my opinion the statutory test under section 20(6)(a) is satisfied.

Rule 26A.11(5)(b): Lack of a* prima facie *case

[33] Rule 26A.11(5)(b) provides that the Lord Ordinary may refuse permission to bring proceedings if it has not been demonstrated that there is a *prima facie* case.

[34] Counsel for the defenders made various criticisms of the drafting of the summons, including that the pleadings were not of the necessary specificity required for fraud (*Marine & Offshore (Scotland) Limited* v *Hill* 2018 SLT 239 at paragraph 16).

[35] At this stage in the proceedings, the court does not require the pleadings to be fully developed. All that is required is a *prima facie* case. Once permission is granted, the summons is then served and answers lodged and parties can be given a period of adjustment in which to finalise their pleadings. If by the end of that period of adjustment the pleadings are inadequate, whether in respect of specificity of fraud or for other reasons, the defenders may seek to have the summons dismissed, or parts of it excluded. I am satisfied that the draft summons in this case sets out a *prima facie* case. Whether that *prima*

facie case is robust enough to survive debate after both parties have fully pled their cases is not a matter for this stage of proceedings.

Rule 26A.11(5)(c): The efficient administration of justice

[36] The defenders submitted that it was not in the efficient administration of justice to grant permission for group proceedings to proceed where the proposed group register reveals the duplicate nature of many of the claims being brought: had the claims been raised individually, it is more likely than not that the duplication and proliferation of repeat claims would not have happened. In my opinion, it is in the efficient administration of justice for claims involving large numbers of claimants to proceed by group proceedings rather than individual cases. In the current case, if I accept the defendants' argument, some 6,500 individual claims will be brought instead of this one. If there are duplications or other errors in the group register, the remedy for that is for the applicant to correct the group register, rather than to prevent the group proceedings proceeding at all.

Rule 26A.11(5)(d) real prospects of success

[37] The grant of permission is at an early stage in the proceedings, and the test of real prospects of success is not a high one.

[38] The defendants submitted that if the applicant had a sound evidential basis for its averments, it ought to have been produced by now. The court would have to consider (1) the unclear nature of the loss suffered by any group member; (2) the effect of section 5(A(4)) of the European Union (Withdrawal) Act 2018 on the applicant's reliance on EU case law, and (3) prescription.

[39] In my opinion all of these matters fall to be dealt with once the summons has been served and answers lodged. To require evidence to be lodged at the permission stage and to require legal argument on these issues, would be to turn this preliminary certification stage into a full hearing on the substance of the case. All that is required at this stage is that the averments demonstrate a real prospect of success. The test 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: there requires to be a prospect which is less than probable success, but which is real and has substance (*Wightman* v *Advocate General* 2018 SC 388 at paragraph 9, *Mackay* v *Nissan Motor Co Ltd* [2024] CSOH 68 at paragraph 46). I am satisfied that the test has been met in this case.

Conclusion

Orders

[40] In GP2/24 I shall authorise the applicant to be the representative party. In GP3/24 I shall grant permission for the applicant to bring group proceedings, order that the group proceedings be known as the "Jaguar Land Rover NOx Emissions Group Proceedings", define the group and the issues as "Claims arising from NOx emissions issues affecting Jaguar Land Rover diesel engines manufactured to euro 5 or euro 6 emissions standards" and make various orders as to further procedure.