



Neutral Citation Number: [2023] EWHC 2568 (KB)

Case No: QB-2021-002286 and ors

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/10/2023

Before :

SENIOR MASTER FONTAINE

Between :

Michael Lott and others	<u>Claimants</u>
- and -	
PSA Automobiles SA (1)	<u>Defendants</u>
Automobiles Peugeot SA (2)	
Automobiles Citroen (3)	
IBC Vehicles Limited (4)	
Peugeot Motor Company plc (5)	
Citroen UK Limited (6)	
Stellantis & You UK Limited (7)	
Stellantis Financial Services UK Limited (8)	
Banque PSA Finance (9)	
Various Authorised Dealers (10)	

Adam Kramer KC and Kate Boakes (instructed by **Leigh Day and PGMBM Law Limited** trading as **Pogust Goodhead**) for the **Claimants**

Leigh-Ann Mulcahy KC, Meghann McTague and James Duffy (instructed by **Kennedys Law LLP**) for the **Defendants**

Hearing date: 22 June 2023

Approved Judgment

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SENIOR MASTER FONTAINE

Senior Master Fontaine:

1. This was the hearing of the Claimants' application dated 3 February 2023 for enforcement of the order of 9 February 2022 and/or to require the Defendants to provide the Claimants with certain specified categories of documents and information under CPR rules 3, 18 and/or 31.12. The application is supported by the first and second witness statements of Benjamin Victor Croft dated 3 February 2023 and 15 June 2023 ("Croft 1" and "Croft 2") and is opposed by the Defendants by the witness statement of Sarah-Jane Nancy Dobson dated 25 May 2023 ("Dobson 1").
2. This group of claims is one of the many multi-party/group claims brought by consumers in this country against vehicle manufacturers and others in respect of vehicle emissions ("the NOx Vehicle Emissions Litigation"). It is anticipated that an application for a group litigation order ("GLO") will be made in due course in this litigation. As at 15 June 2023 claims in this group against the manufacturers of Peugeot and Citroen vehicles and others had been brought by approximately 37,000 Claimants by 20 claim forms. A list of the Claims issued is annexed as Schedule 1 to this judgment. The First, Second, Third and Ninth Defendants are domiciled in France ("the French Defendants"), the remaining Defendants in this jurisdiction ("the UK Defendants"). Claim forms have not yet been served on the French Defendants, and the French Defendants have reserved their position in relation to jurisdiction, but it is accepted that the French Defendants have submitted to the jurisdiction for the purposes of the order made on the 9 February 2022: Dobson 1 §7.

The legal basis for the claim

3. The claims include various causes of action, including deceit and negligent misstatement, breach of statutory duty, breach of contract, and claims under the Consumer Protection from Unfair Trading Regulations 2008 and the Consumer Credit Act 1974.
4. The Claimants say that their core allegation ("the Core Allegation") on which all causes of action will depend, is that:
 - i) The relevant vehicles each contained a "defeat device", defined by Article 3(10) of the Emissions Regulation 2007/715 (the "Emissions Regulation"); and
 - ii) Such defeat devices were prohibited within the meaning of Article 5 (2) of the Emissions Regulation save where:

"the need for the device is justified in terms of protecting the engine against damage or accident and for the safe operation of the vehicle; The device does not function beyond the requirements of engine starting; or the conditions are substantially included in the test procedures for verifying evaporative emissions and average tailpipe emissions."
5. The alleged defeat devices upon which the Claimants rely include "thermal windows", i.e. defeat devices by which the effects of emissions control were reduced or switched off outside certain temperature ranges, which the Defendants accept were

present in their vehicles, but deny that they constituted prohibited defeat devices. The Claimants rely on judgments of the European Court of Justice (“CJEU”), in particular Case No. C-693/18 *Criminal Proceedings against X (CLCV intervening)* and Case No. C-128/20 *GSMB Invest GmbH & Co. KG against Auto Krainer GesmbH*, of which the latter judgment concerned “thermal window” defeat devices. The Claimants say that in both cases the scope and meaning of Articles 3(10) and 5 (2) have been interpreted strictly. It is submitted by the Claimants that the combined effect of these decisions is to severely limit the scope for any vehicle manufacturer who deploys thermal windows in vehicles to argue that their emissions control system did not constitute a defeat device within the meaning of Article 3 (10), and/or that it was justified within the meaning of Article 5 (2).

The relevant background to the Claimants’ application

6. The application arises from an order that I made at the hearing of the Defendants’ application to set aside my order of 28 October 2022, which extended the time for service of the particulars of claim to a date to be directed at the hearing of the proposed GLO application. I declined to set aside that order, but made some further case management directions in the order of 9 February 2022, which included at paragraph 3 an order that:

“By 4pm on 29 April 2022, the Defendants are to provide a substantive response to the Claimants’ letter before action, together with the key documents relevant to the issues in dispute, pursuant to paragraph 6 of the Practice Direction – Pre-Action Conduct and Protocols.”

7. By letter of 28 April 2022, the Defendants sent a letter that purported to be in compliance with paragraph 3 of the order of 9 February 2022, and enclosed 16 documents. The Claimants say that the letter of response did not materially enhance their understanding of the Defendants’ case in response to the letter of claim, which has hampered their ability to provide a useful and informative statement of case; and that the documents provided consisted only of documents that were already in the public domain and to which they had access, or to documents which the Claimants already had and had referred to in their letter before action. It is also said that in any event it is clear from the judgment and the transcript of the hearing, at which disclosure was discussed in some detail, that the information and documents provided were not what was envisaged by the court would be provided by the Defendants: see transcript of judgment: [2023] EWHC 858 (QB).
8. The draft order provided by the Claimants lists the information and categories of documents sought by the application, (set out for ease of reference in Schedule 2 to this judgment) some of which is agreed, albeit on the basis that the Defendants do not consider that they are required either by the order of 9 February 2022, or by CPR rules 3, 18 and/or 31.12, to provide the information or documents sought in the application, but will provide certain categories on a voluntary basis, subject to certain conditions.
9. The Claimants’ specific complaints in relation to the letter of response are as follows:

- i) The letter of response to the Core Allegation was limited to a denial that the PSA vehicles contained “cycle beater” devices, which were able to alter emissions output when the device detected that the vehicle was under test conditions. (The NOx Diesel Emissions group litigation against Volkswagen, which has now settled, concerned “cycle beater” defeat devices).
 - ii) The Defendants stated that the PSA vehicles do not contain “prohibited defeat devices”.
10. On the basis of this information the Claimants understood the Defendants’ case to be an admission of the presence of defeat devices within the meaning of Article 3(10), and an assertion that those defeat devices were not prohibited because they fell within one of the exceptions at Article 5(2). It was noted that this interpretation is consistent with how the PSA Group represented its use of defeat devices in 2016 in response to a questionnaire from the European Parliament’s Committee of Inquiry into Emissions Measurements in the Automotive Sector (the “EMIS Questionnaire”), in which it admitted that:

“PSA uses the derogation allowed in Article 5(2) of [the Emissions Regulation] to protect either the engine in extreme circumstances (for instance EGR cut at high engine cooling temperature to avoid engine damage) or the customer (EGR cut at low ambient air temperature to avoid engine stalling due to poor combustion stability).”
11. The Claimants sought to verify their understanding of the Defendants’ case at §4 of their letter of 7 June 2022. After numerous follow up letters the Defendants’ response, at §§ 22-23 of their letter of 7 October 2022, refused all but one request for documents, and stated as follows:

“...your inferences in the absence of a response by our clients are incorrect... for the avoidance of doubt, particularly given our clients’ change of external legal representatives to this firm, unless an issue has been expressly responded to, no inference should be drawn from an alleged absence of response.”
12. The one request to which some (albeit qualified) positive response was provided was in relation to lists of model variants with a view to identifying whether any vehicles contained defeat devices, where the Defendants stated that they could see the merit in providing certain information, but said that the Claimants’ request was “*overbroad and disproportionate at this stage in the proceedings*” (Croft 1 at §§72-74).
13. Dobson 1, in response to the Claimants’ application, sets out more detailed information at §§101-108 in relation to the Core Allegation, but the Claimants say that this did not assist their understanding of the Defendants’ case any further. In summary Ms Dobson said that:
 - i) There are no prohibited defeat devices in the Defendants’ vehicles, and this issue will be addressed at an individual vehicle level at the appropriate stage in the proceedings, which will involve technical and expert evidence in due course. It will be fully addressed in the defence.

- ii) The Defendants have always been clear that they did not and do not deploy any “cycle beating” devices of any kind.
 - iii) The CJEU judgments on which the Claimants rely are not binding on an English court in these proceedings pursuant to s.6(1) of the European Union (Withdrawal) Act 2018, although the court may have regard to them pursuant to s.6(2) of the 2018 Act.
 - iv) The Claimants’ assumption fails to take into account the complexity of emissions control and the fact that parameter based modulation is essential to ensure the efficacy of the emissions control system in response to different and changing environmental and operating conditions for the efficient and safe operation of the vehicle. Parameter based modulation in the Defendants’ vehicles was and is entirely commonplace and does not mean that the vehicles contained a prohibited defeat device.
 - v) Emissions control systems control multiple types of emissions, including NO_x, CO₂ and particulate emissions. Manufacturers are entitled in good faith to make reasonable engineering judgments about how to handle the trade-offs between different types of emissions, provided the vehicles meet the regulatory requirements. The Defendants’ emissions strategy was developed with a focus on reducing NO_x emissions in urban environments, whilst offering the best NO_x/CO₂ balance under extra- urban conditions over a wide temperature range and without any discontinuity.
 - vi) The Defendants’ emissions control systems factually operate differently from those in the CJEU judgments, which concerned only Euro 5 vehicles, and not Euro 6 vehicles which are the subject of the Claimants’ claims, and in respect of which the technology is different.
14. That witness statement also offered disclosure on a voluntary basis of Request 1 a - d subject to certain conditions. Request 1 e was refused on the basis that this was not a request for information or documents but seeks the Defendants’ substantive defence prior to the Claimants having articulated their case in the form of a generic particulars of claim (“GPOC”).
15. The Defendants’ letter of 9 June 2023, responded to the Claimants’ letter of 1 June 2023, which I summarise as follows:
- i) The Defendants deny that their vehicles contain prohibited defeat devices and state that it is for the Claimants to address in a properly pleaded case the basis on which they allege that any of their clients’ vehicles contained a different device.
 - ii) A recognition of the use of thermal windows in accordance with standard industry practise does not correlate to an admission of the presence of a prohibited defeat device in those vehicles and that thermal windows are not necessarily a type of defeat device which satisfies the definition in Article 3(10) of the Emissions Regulation.

- iii) The Defendants deny that their vehicles contained prohibited defeat devices, which denial encompasses its position in respect of both Articles 3(10) and 5(2) of the Emissions Regulation.
 - iv) The Defendants' subsidiary case, in the event that the court were to determine that there were defeat devices in their vehicles, is that they were justified pursuant to Article 5 (2) of the Emissions Regulation, without making any admissions that there were defeat devices in the relevant vehicles.
 - v) The Defendants were unable to provide the information sought at §1 e of the draft order without the input of both an internal and external expert witness, on a vehicle by vehicle basis, given that there is individual variation in hardware, software and calibration of parameters affecting emissions controls in respect of the range of vehicles which are the subject of the claims.
16. The letter also addressed the request for documents and refused the request for “ ... *documents ... produced, provided or received in the context of the ongoing criminal proceedings in France concerning the potential presence of defeat devices in Peugeot Citroen or DS vehicles*”, on the primary basis that the Defendants would be committing a criminal offence under the French criminal procedure code if they were to disclose the documents on the criminal case file, and relied on Dobson 1 at §§114 - 128 for the other reasons for that refusal.
17. Request 3, which seeks disclosure by list and inspection of certain categories of documents relating to the JMK and GUM recall campaigns, was agreed subject to three conditions namely:
- i) provision of vehicle identification numbers (“VIN”) information in respect of all the vehicles that are the subject of the issued claims; and
 - ii) the use of the Hague Convention (“the Hague Evidence Convention”) for the provision of information and disclosure; and
 - iii) a confidentiality order.

Preliminary Issues

18. There are three preliminary points that I shall deal with before considering the orders sought by the Claimants' application.

Defendants' application to rely on expert evidence of French law

19. At the hearing of the application I heard the Defendants' oral application for permission to rely on the report of an expert on French law, Professor Didier Rebut, dated 25 May 2023. The Defendants sought to rely on Professor Rebut's evidence in relation to French Criminal investigations and the meaning and effect of French Law No. 68-678 amended by Law No 80-538, known as the French Blocking Statute (“the FBS”). I refused permission, but to save time said that I would provide my reasons later. These are as follows:
- i) The report was served too late on the Claimants for them to obtain expert evidence in response, so that if permission was granted, to be fair to the

Claimants I would have had to adjourn the hearing, which I was not prepared to do, given the short notice, and the following circumstances.

- ii) The Defendants first informed the Claimants of their intention to rely upon French law evidence on 17 May 2023, some 3 1/2 months after the Claimants filed their application, and only one month before the listed hearing. The Defendants did not attach a draft report to that letter or provide a detailed explanation of the contents of the draft report, stated that it would be served on 25 May 2023 and that if the Claimants wished to obtain and rely upon a responsive report, it should be served by 15 June 2023 in accordance with the agreed timetable for the Claimants' reply evidence. I regard that conduct as unreasonable.
- iii) In addition, the issue of the effect of the FBS was discussed in some detail at the hearing on 9 February 2022, at which the Defendants stated to the court through Counsel that the reason they had not produced expert evidence of French law in relation to the FBS for the hearing was because it "*was not an application for disclosure*", (Transcript page 8 lines 9-14) which rather suggests that if an application for disclosure was to be made that such evidence would be sought. Counsel for the Claimants also made the point that if the Defendants wished the court to take into account the effect of the FBS they would need evidence of French law (transcript page 38 lines 23-25 and page 41 lines 3-12). Counsel for the Defendants said that his clients would want the opportunity at a further hearing to put in evidence as to the nature of the risk caused by the FBS (transcript page 62 lines 1-7). So the French Defendants have had substantial time to obtain expert evidence on that point, and in any event should have notified the Claimants that they were intending to obtain such evidence as soon as the application had been served.
- iv) The evidence is not necessary for the determination of the application, in my judgment. The meaning and effect of the FBS was, as stated above, discussed in some detail at the hearing on 9 February 2022, and in any event has been discussed in a number of authorities in this jurisdiction. The power and approach of this court to order disclosure from a party that may expose them to criminal sanctions in their own jurisdiction is settled law and is not in dispute. Insofar as any determination of the Claimants' application required consideration of the FBS I considered that it was possible to do so without expert evidence. With all due respect to Professor Rebut, save for the introductory sections on the nature of French criminal proceedings, the references to unreported decisions of French Courts relating to the FBS and recent legislative changes on the application of the FBS, his report largely confirms what was already known to both parties and the court in relation to the FBS.
- v) The only area where the Claimants may have wished to seek expert evidence might have been in relation to the risk of prosecution, and my decision means that such evidence has not been before the court. Nevertheless, I considered that the balance of factors concerning the Defendants' application was most clearly in favour of continuing with the hearing, both in terms of fairness to the Claimants and proportionate use of the court's resources.

Jurisdiction against French Defendants

20. The Defendants submit that the Claimants have not identified the basis on which the court can make orders under CPR 3.1(2) (m), 18 or 31.12 against the French Defendants who have not been served with proceedings and have not accepted the jurisdiction of the English Court. However the Defendants have not expressly challenged the court's jurisdiction to make orders against the French Defendants.
21. The rules do not limit the court's jurisdiction to make orders against defendants outside the jurisdiction who have not been served, subject to the right of such defendants to challenge such orders under CPR Part 11 once proceedings have been served.
22. The French Defendants have, in my judgment, submitted to the jurisdiction of this court in relation to the Claimants' current application for further information and specific disclosure. They have instructed London solicitors and Leading and Junior Counsel to represent them and to oppose the application. Ms Dobson's witness statement states that her firm have conduct of the matter on behalf of "the Defendants", i.e. not limited to the UK Defendants. They also instructed Counsel and solicitors to represent them at the hearing on 9 February 2022, and did not suggest at that hearing that they were not obliged to provide documents under the Protocol for Pre-Action Conduct, but rather explained that they were intending to do so, and were intending to ascertain what documents existed in France so that they could use the Hague Evidence Convention to obtain these.
23. In addition, the Claimants' application for information and documents under rules CPR 3, 18 and/or 31.12 arose directly out of the matters discussed at that hearing, namely the information and documents that the Defendants had failed to provide by way of compliance with the Practice Direction on Pre-action Conduct and Protocols. The Defendants accepted at the hearing in February 2022 that they had failed to comply, and explained to the court what they intended to do to ensure that they could comply. Counsel for the Defendants stated:

"The way that we proposed to try to get ourselves in a position to provide an appropriate response to the core allegations is set out in Mr Geisler's statement. We intend to attend in person, in France with a French speaker and an engineer to try to take as detailed instructions as are possible and to try to ascertain and understand what documentation exists so that we can then use The Hague Convention on taking of evidence in order to obtain those documents in order to provide an appropriate response."

(Transcript page 4 lines 11-17)

And

"What Mr Geisler is not saying is that he is not able to obtain any instructions at all.. But what we are saying is that we do not have sufficient technical information to provide a response to the allegations that are made about defeat devices and about the

extent to which extensions are sought to be relied upon in respect of any.”

(Transcript page 4 line 25 and page 5 lines 1 and 6-10)

24. Counsel went on to submit that because the letter of response was an extremely important document it was important that the Claimants and the court could rely upon it because it will inform the shape the litigation would take. It was said that the difficulty in obtaining the necessary technical information and documents was why it was taking some time to respond to the letter of claim.
25. The expectation of the Claimants from those submissions, and the expectation of the court, was that the letter of response would address the Core Allegation and that key documents would include internal documents from the Defendants in response to the Core Allegation, the Defendants’ solicitors having been able to take instructions as described. I consider that as a result of those submissions it was accepted by the French Defendants that they were submitting to the jurisdiction of this court in relation to internal documents and information sought from the Defendants prior to statements of case being served, subject to their rights to submit that the Claimants were not entitled to such information and/or documents under English law, and to request conditions to protect themselves in terms of the effects of the FBS and where confidentiality was sought.

The Effect of the FBS

26. The FBS, summarised very briefly, prohibits French nationals and certain others from providing documents and information of an economic, commercial, industrial, financial or technical nature to foreign public authorities or for the purposes of establishing evidence for foreign judicial or administrative proceedings. The relevant provision for the purpose of this application is Article 1 bis, an English translation of which reads as follows:

“Without prejudice to international treaties or agreements and laws and regulations in force, it is prohibited for any person to request, search for or communicate, in writing, orally or in any other form, documents or information of an economic, commercial industrial, financial or technical nature for the purposes of establishing evidence in view or foreign judicial or administrative proceedings or in relation thereto”

27. The Defendants have exhibited a letter dated 16 May 2023 from the Service De l’Information Stratégique et de la Sécurité Economiques (“SISSE”) to the General Counsel of the Stellantis Group (“Stellantis”) (ultimate owners of the French Defendants) in response to the notification by Stellantis to SISSE of the requirement to provide technical and commercial documents in the conduct of this litigation. The letter advises that Article 1 bis of the FBS is applicable and prohibits the communication of such information otherwise than through the framework of international treaties or agreements. It is stated that Stellantis should apply via a letter of request in accordance with the Hague Evidence Convention. It also states that under Article 11 of the French Code of Criminal Procedure documents from an investigation may not be disclosed to third parties, even in the context of proceeding

for the exercise of the defence rights, and that the direct transmission of documents from the case file by one of the parties in the context of a class action before a foreign court would constitute a violation of the Code, as well as of Article 1 bis of the FBS.

28. The parties referred the court to a number of English authorities where the effect of the FBS has been considered:
- i) *Secretary of State for Health v Servier Laboratories Ltd; National Grid Electricity Transmission plc v ABB Ltd* [2013] EWCA Civ 1234; [2014] 1 WLR 4383 where the Court of Appeal dismissed an appeal against disclosure orders which the appellants had argued would put them in breach of the FBS and at risk of criminal prosecution in France.
 - ii) *Bank Mellat v HM Treasury* [2019] EWCA Civ 449, at [63] where Gross LJ helpfully summarised the applicable principles.
 - iii) *Qatar Airways v Airbus SAS* 15 July 2022, an approved transcript of an oral judgment of Waksman J. in the TCC, at [58] – [78] where the judge declined Airbus’s request to order disclosure via the Hague Convention because of the likely time that would take, and held that he was not prepared to accept that such delay would have no adverse impact on the trial timetable, and that the uncertainties involved could have been avoided if Airbus had started investigating this alternative route a lot sooner. This was in the context of an expedited trial in a window of May to June 2023, with a timetable described as “tight” and where disclosure was due by 16 September 2022 under directions previously ordered. The judge also concluded that there was no real risk of prosecution of Airbus.
 - iv) *Public Institution for Social Security v Al Wazzan* [2023] EWHC 1065 (Comm), at [156] which held that the person who alleges that there is an actual risk of prosecution bears the burden of proof on this point.
29. In my view there is no real dispute between the parties as to the power and proper approach of this court in relation to determining whether or not to make an order for production of documents against a French Defendant where the FBS is engaged. Gross LJ’s judgment at [63] in *Bank Mellat* best summarises the position:
- “(i) in respect of litigation in this jurisdiction, the court (i.e. the English Court) has jurisdiction to order production and inspection of documents, regardless of the fact that compliance with the order would or might entail a breach of foreign criminal law in the “home” country of the party the subject of the order.
 - (ii) Orders for production and inspection are matters of procedural law, governed by the *lex fori*, here English law. Local rules apply; foreign law cannot be permitted to override this Court’s ability to conduct proceedings here in accordance with English procedures and law.

(iii) whether or not to make such an order is a matter for the discretion of this court. An order will not lightly be made where compliance would entail a party to English litigation breaching its own (i.e. foreign) criminal law, not least with considerations of comity in mind (discussed in Dicey, Morris and Collins...at paras.1-008 and following). This court is not, however, in any sense precluded from doing so.

(iv) when exercising its discretion, this court will take account of the real - in the sense of the actual -risk of prosecution in the foreign state. A balancing exercise must be conducted, on the one hand weighing the actual risk of prosecution in the foreign state and, on the other hand, the importance of the documents of which inspection is ordered to the fair disposal of the English proceedings. The existence of an actual risk of prosecution in a foreign state is not determinative of the balancing exercise but is a factor of which this court would be very mindful.

(v) Should inspection be ordered, this court can fashion the order to reduce or minimise the concerns under the foreign law, for example, by imposing confidentiality restrictions in respect of the documents inspected.

(vi) Where an order for inspection is made by this court in such circumstances, considerations of comity may not unreasonably be expected to influence the foreign state in deciding whether or not to prosecute the foreign national for compliance with the order of this court. Comity cuts both ways.”

30. I shall accordingly apply those principles in dealing with the condition proposed by the French Defendants on their provision of information and/or documents, namely that they be provided only pursuant to a letter of request under the Hague Taking of Evidence Convention.

Application for Enforcement of the Order of 9 February 2023

Discussion

31. The objectives of Pre-Action Conduct and Protocols are stated in the White Book Vol. I at C1-002 to be as follows:

“Before commencing proceedings, the court will expect the parties to have exchanged sufficient information to-

- (a) understand each other's position;
- (b) make decisions about how to proceed;
- (c) try to settle the issues without proceedings;

- (d) consider a form of Alternative Dispute Resolution (ADR) to assist with settlement;
 - (e) support the efficient management of those proceeding; and
 - (f) reduce the costs of resolving the dispute.”
32. There is also a requirement for parties to exercise proportionality in complying with a Pre Action Protocol or the Practice Direction. Paragraph 6 states that the steps to be taken where there is no relevant protocol should include the exchange of letters of claim and response, and the parties disclosing key documents relevant to the issues in dispute.
33. In *Smith v Secretary of State for Energy and Climate Change* [2014] 1 WLR 2283 the Court of Appeal per Underhill LJ stated at [35] that:
- “Protocols do not have the status of rules and there is no obligation as such to comply with them; nor are they drafted with the precision of the rules themselves.”
34. In *Carillion plc (In Liquidation) v KPMG LLP and anor* [2020] EWHC 1416 (Comm) at [37] Jacobs J said:
- “The protocol envisages and indeed requires both parties to provide “key” documents: Whilst there is obviously a certain amount of elasticity within that concept, it would be surprising if in most cases the “key” documents could not fit very comfortably within one lever arch file. Indeed, when eventually Carillion did provide its “key” documents, there were twelve such documents or groups of documents. KPMG said this was “the right order of magnitude”, and I agree.”
35. In *ADD2 Research & Development Ltd v dSpace Digital Signal Processing and ors* [2020] EWHC 912 (Pat) the court, when considering Paragraph 3 of the Protocol, said at [4]:
- “The Practice Direction provides general guidance to parties as to the sort of conduct that is expected where there is no specific pre action protocol for the type of action envisaged (as here). Unsurprisingly, it is not prescriptive. While parties are obliged to have regard to it, and may suffer significant consequences if they do not comply with it, the expectations are drafted in broad terms (“the court would normally; “the steps will usually include”)....”

And at [6] :

“...the protocol does not give parties a right to receive any and all material that they might speculate would be useful.”

36. In this case the court ordered the Defendants to provide a letter of response and key documents following determination of the Defendants' application to set aside an order for an extension of time for service of the Particulars of Claim, in the context of providing some limited case management directions to assist the case to progress. There was no sanction attached to non-compliance, and in any event if the Defendants provided a letter of response, and what they put forward as key documents, this was not a matter that the court could take further in terms of deciding whether the response or the documents were insufficient.
37. I accept the Defendants' submissions that it is not appropriate for the court to make an order for the provision of further information and/or disclosure either as sought by the draft order or at all on this basis. The Defendants did provide a letter of response on 28 April 2022 and a further letter dated 9 June 2023 (although the latter post-dated the Claimants' application) and provided 16 documents. These were provided in belated compliance with the Practice Direction on pre-action conduct.
38. In accordance with those authorities, and consistent with the order of 9 February 2022, I do not consider that the court should be prescriptive as to the specific documents that must be provided in a pre-action protocol letter of response, in the absence of a pre-action disclosure application. I consider that the Defendants have complied with that order.

Application under CPR rules 3, 18 and/or 31.12

39. The Defendants submit that the Claimants have not engaged with the legal requirements for applications on these grounds: see Dobson 1 at §§65-68. Croft 2 states that this will be dealt with in the Claimants' skeleton argument but this has not been done, and was not addressed in oral submissions.
40. The Defendants have emphasised the general rule, namely that the orthodox approach is for a claimant to plead their case on the material that they have, and for further information and disclosure to be provided only after statements of case have been served. It is for a claimant to make out their case, and not for a defendant to provide the material to the claimant to enable them to make their case. The authorities supporting this approach are *Barness v Formation Group plc* [2018] EWHC 1228 (Ch), and, in relation to claims where fraud or dishonesty is alleged, *Bank of Scotland plc v Hoskins* [2021] EWHC 3038 (Ch) and *Sofer v Swissindependent Trustees SA* [2020] EWCA Civ 699. I bear in mind that general approach in my consideration of the application under the rules.

Rule 3

41. Rule 3 sets out the court's case and costs management powers, but only rule 3.1 (m) could be relevant to this application, in my view ("*... the court may...take any other step or make any other order for the purpose of managing the case and furthering the overriding objective,...*"). However, the CPR provides specific rules about both disclosure and provision of further information. In such circumstances it is unlikely that it was envisaged that rule 3.1 (m) could be used to expand the parameters of those rules in any way the court wished, inconsistently with such rules. I do not propose for that reason to make any order under rule 3.

Rule 18

42. Rule 18.1 (1) provides:

“The court may at any time order a party to-

- (a) Clarify any matter which is in dispute in the proceedings; or
- (b) give additional information in relation to any such matter,

whether or not the matter is contained or referred to in a statement of case.”

PD18 para. 1.2 provides that:

“A request should be concise and strictly confined to matters which are reasonably necessary and proportionate to enable the first party to prepare his own case or to understand the case he has to meet.”

43. The Defendants referred to a number of authorities giving guidance in respect of applications under CPR Part 18. In *Al Saud v Gibbs* [2022] 1 WLR 3082 at [35] per Richard Salter KC sitting as a Deputy High Court judge it was held that the following “threshold” conditions must be satisfied to enable the court to make an order, namely:

- i) The information sought must relate to a “*matter which is in dispute in the proceedings*”; and
- ii) “*any request must be strictly confined to matters which are reasonably necessary and proportionate for one or other of the stated purposes in CPR r.18.1(1)*”.

44. At [34] the Deputy Judge quoted Brooke LJ in *King v Telegraph Group Ltd* (Practice Note) [2005] 1 WLR 2282, where “*Brooke LJ laid particular stress on the strictness required by the terms of the Practice Direction*”, to confine this part of any litigation ‘strictly’ to what is necessary and proportionate and to avoid disproportionate expense. At [39] the Deputy Judge stated that:

“...requests and orders under CPR Pt 18 are not an automatic aspect of the progress of litigation under the CPR, and should not therefore be made as a matter of routine”.

45. In *Hall v Sevalco Limited* [1996] PIQR P344 (CA) at p.349, a decision under the RSC relating to interrogatories, where the request does not relate to a pleading, the court stated that:

“It cannot be necessary to interrogate to obtain information or admissions which are or are likely to be contained in pleadings, medical reports, discoverable documents or witness statements unless, exceptionally, a clear litigious purpose will be served by obtaining such information or admissions on affidavit.”

46. In *Barness Morgan J.* set out general principles when a CPR Part 18 application is made before service of particulars of claim:

i) That such an application is most unusual, which did not mean that it was not well founded, but does mean that the court must look at its powers to make the order sought with some care: at [5].

ii) That:

“It is not part of the function of Part 18 to enable claimants to ask questions so as to elicit information which might give them claims against other defendants or, indeed, further separate claims against the defendants that have been sued. The claimant has to say what his claims are. If it wishes to ask questions by way of pre-action disclosure it would have to adduce evidence as to its reasons for thinking that there were in fact activities going on which were unlawful, which they could not easily discover without that information.”: at [9]

Quoting Vos J. (as he then was) in *Trader Publishing Ltd v AutoTrader.com.inc* [2010] EWHC 142 (Ch).

In other words, it is only in relation to a matter in dispute that an order can be made clarifying the matter or giving additional information in relation to the matter (at [10] and [23]).

iii) If the information sought is reasonably necessary and proportionate to enable the claimants to serve particulars of claim, then it could be said that the application comes within paragraph 1.2 of the Practice Direction. But the court is not concerned at an early stage to try and work out what claimants will need in order to present their case at trial or at any intermediate stage in the life of the litigation: at [12].

iv) Where a claim is made in fraud in the tort of deceit against a corporate defendant but the individuals who may have caused a false representation to be made cannot be identified, so there might be some advantage to the claimant in obtaining information about which they are in the dark, that does “*not necessarily mean that the information sought is reasonably necessary and proportionate to enable the claimants to prepare their particulars of claim.*”: at [24].

47. Morgan J. added at [29]:

“However, it is an unusual thing to order what is, in effect, disclosure or information under Part 18 before the claimants pleading is served. I also have considerable hesitation about making an order at this stage in the litigation involving allegations of fraud against the defendants where the order would require the defendants to provide information at the outset to help the claimants formulate the case against them. I think the orthodox approach is to require the claimants to plead

their allegations on the material they have, to let those allegations be defended and disclosure be given and for the parties then to take stock and if the matter goes to trial for the issues to be tried.”

48. *Al Saud* at [45] confirmed that the burden of proof is on the party seeking the order under CPR Part 18, both to demonstrate that the threshold conditions are met, and to satisfy the court that, in all the circumstances, the making of such an order would assist in dealing with the case justly in accordance with the overriding objective.

Reasons why the further information is sought

49. The Claimants’ submissions focused on the different categories of documents sought and why it is said they were required by the Claimants. The submissions did not focus on the threshold requirements of Part 18 and whether they were met. Of the information sought only paragraph 1 e is opposed, although information sought in Paragraphs 1 a - d is agreed only subject to conditions, which I will come to.

50. Paragraph 1 e seeks the following information:

“Whether vehicles of this model variant contained a defeat device within the meaning of Article 3(10) of the Emissions Regulation when originally marketed for sale, and if so:

- i. whether the defeat device modulated the operation of the EGR, SCR, or some other part of the emission control system, and by reference to what parameters;
- ii. whether the First to Ninth Defendants allege that the defeat device was justified pursuant to Article 5(2) of the Emissions Regulation and, if so, on what basis.”

51. The reasons why this information is sought is in Croft 1 §§100, 110 -122 and Croft 2 §§47-60, which I summarise as follows:

- i) The information is necessary for the efficient, effective and proportionate management of the claims under the auspices of a GLO, and to enable Claimants properly to target their investigations and to plead their GPOC in a manner which properly reflects the relevant technical commonalities and the differences amongst the affected vehicles which are the subject of these claims.
- ii) The Defendants have confirmed that all their Euro 5 vehicles are equipped with exhaust gas recirculation (“EGR”) technology and all their Euro 6 vehicle with selective catalytic reduction (“SCR”) technology to reduce NOx and associated emissions, but not apparently with lean NOx traps (“LNT”) systems, the other most common technology within a vehicle’s emission control system to reduce emissions.
- iii) A “thermal window” device is a software feature that reduces the effectiveness of a vehicle’s emissions control system at low and/or high temperatures. Regulatory emissions tests are required to take place within a particular “window” of temperatures, and a thermal window device serves to ensure that

when a vehicle is being driven within that “window” its emissions output will be compliant with the relevant regulatory thresholds, whereas when it is being driven outside that thermal window i.e. in temperatures which are either below or above the band of temperatures in which regulatory testing takes place, the vehicle emissions are much higher. It is a crucial factor relevant to the Core Allegation whether the “thermal window” technology is a prohibited device under Article 3(10) of the Emissions Regulation and if so whether it is a defeat device that is permitted under Article 5 (2) of the Emissions Regulation. The Claimants need to know:

- a) what type of “defeat device” is in use within each vehicle and in what circumstances it operates;
 - b) in what way and to what extent it affects the vehicle’s emissions and in what circumstances it operates;
 - c) whether the use of that “defeat device” falls within one of the exceptions to the prohibition on defeat devices in Article 5 (2) of the Emissions Regulation.
- iv) The Defendants having agreed to provide (subject to conditions) the information sought in paragraph 1a-d of the draft order, this will enable the Claimants to understand the Defendants’ position on a model variant by model variant basis, allow the parties to significantly narrow the issues in dispute, and allow the Claimants to focus their resources and investigations. There is a real risk of the Claimants wasting costs in attempting to establish through expert scientific analysis the existence of a defeat device in respect of a category or categories of vehicles which the Defendants do not dispute contain defeat devices.
52. The Defendants’ primary position in relation to the Core Allegation is that they deny that the vehicles contained a defeat device as defined in Article 3(10), and their alternative position is that, if it is found that, contrary to their primary position the vehicles did contain a defeat device, it was not a prohibited defeat device by reason of Article 5(2) as explained in Dobson 1 and in the Defendants’ letter of 9 June 2023.
53. In respect of Request 1 e, the Defendants say that as they have now answered the question at 1 e: “*whether vehicles of this model variant contained a defeat device within the meaning of Article 3(10) of the Emissions Regulation when originally marketed for sale*” in the negative, in Dobson 1 and the Defendants’ letter of 9 June 2023, then the remaining requests at e (i) and e (ii) do not fall to be answered because of the linking words “if so” to the follow up questions (i) and (ii).

Discussion

54. The issue in dispute between the parties in relation to the Core Allegation is whether the thermal windows constitute a defeat device within the meaning of Article 3(10), and if so whether it comes within the exemption provisions of Article 5(2) of the Emissions Regulation. So the first “threshold condition” of Part 18 is satisfied.

55. The Claimants have now received substantially more information about the Defendants' case, following information provided in Dobson 1 §§99-108 and the Defendants' letter of 9 June 2023, although they do not know the detailed technical information to support that case. I summarised Ms Dobson's evidence and the relevant parts of that letter in Paragraphs 12-14 above.
56. It may well assist the Claimants to receive the further information they seek in paragraph 1e of the draft order, but that does not mean that this information is reasonably necessary or proportionate at this stage in the litigation.
57. If this were a unitary action my view might possibly be that it was not, and that either the claimant would request further information after service of a defence, or the parties would exchange expert technical evidence in relation to the Core Allegation following disclosure and inspection. In claims that depend upon expert evidence to support them, it is usual for claimants to have obtained at least some of that evidence in order for the particulars of claim to be drafted, and indeed can be criticised if they do not do so. Leaving aside the fact that I consider the Defendants' approach summarised in Paragraph 40 above to be unnecessarily pedantic and unhelpful, and that in any event they have advanced an alternative case that if the vehicles are found to contain defeat devices within the meaning of Article 3 (10), there are a number of factors why I consider that the Defendants should provide the further information requested in 1 e (i):
- i) The Claimants cannot instruct a technical expert because all the information required to do so is in the possession of the Defendants.
 - ii) In a group action with tens of thousands of Claimants, and several different models of vehicles, the work involved in pleading the GPOC to the level of specificity required without more detailed information about the Defendants' case will inevitably mean substantially more work and costs at a later stage. If the relatively limited information sought in 1 e (i) is provided in relation to the different model variants (which have been agreed to be provided at 1 a - d) it is possible that some claims can be excluded if the technical information provided supports the Defendants' case that "thermal windows" are not a prohibited defeat device.
 - iii) In the Defendants' letter of 7 October 2022 they accepted that there was merit in providing information relating to the different model variants "*to assist with any group action mechanism*".
 - iv) At the hearing on 9 February 2022 the Defendants through Counsel informed the court that they had insufficient technical information to respond to prepare a letter of response but that "*The way that we proposed to try to get ourselves into a position to provide an appropriate response to the core allegations....*" was that their solicitors were intending to travel to France "*with a French speaker and an engineer to their French clients to try and ascertain and understand what documentation exists*" so they could then obtain that documentation, and the information it contained via the Hague Convention route. (Transcript page 4 lines 9-17). No evidence has been provided as to whether this actually occurred, if not why not, and why no attempt was made (if it was not) to obtain the documents via the Hague Convention.

58. After the hearing, but before I had provided a draft judgment to the parties, the Claimants’ solicitors notified me of a decision of Fraser J. in *Cavallari and ors v Mercedes-Benz Group AG and ors* [2023] EWHC 1888 (KB), also a group action relating to alleged defeat devices concerning diesel emissions, but in Mercedes vehicles. That was a specific disclosure application, but similar principles also apply to requests for further information, save that in the Mercedes Emissions Litigation a GLO had been made and a GPOC served. The judge identified the complexity of this particular type of group litigation, and factors relevant to group litigation in general, which may be grounds for distinguishing group claims from some relevant authorities. At [11] the judge said:

“It can therefore be seen that the subject matter of the group litigation has some technical complexities, as well as challenges in terms of scale, analysis of the different causes of action advanced, and calculation or assessment of loss in individual cases. The ECU software itself may not have operated in the same way across all different types of vehicle.

.....

It may be therefore that, of the very many different issues currently identified as GLO issues, there will be many answers to different groups of them. This is, perhaps, merely a cumbersome way of explaining that at this early point in the litigation, it is difficult to summarise succinctly the central or core issues.”

The same comments apply to this litigation.

59. In my judgment the second threshold requirement is met in respect of Request 1 e (i), as the information sought is reasonably necessary and proportionate, in the context of a group action of this size and complexity to enable the Claimants to prepare their own case or to understand the case they have to meet. The Defendants must presumably by now have access to their own internal technical expertise to enable them to provide this information, and neither Ms Dobson’s evidence, nor the correspondence from the Defendants has addressed this point adequately. The information is likely to enable the parties to narrow the issues and enable the Claimants to provide a more focused case in the GPOC that will assist both parties. It is in accordance with the overriding objective, in placing the parties on a more equal footing, there being what was described in *Cavallari* at [39] as “*the information asymmetry between the parties*” also in this case. The information can be provided subject to appropriate confidentiality constraints.
60. With regard to Request 1 e (ii), I do not consider that this information is reasonably necessary or proportionate. The first part of the information sought, (“*whether the First to Ninth Defendants allege that that the defeat device was justified pursuant to Article 5(2) of the Emissions Regulation*”) has been answered by Dobson 1 and the letter of 9 June 2023. The second part of that request (“and, if so, on what basis”), in my view is not reasonably necessary or proportionate at this stage in the proceedings because:
- i) It is likely to require much more technical information from the Defendants than is necessary or appropriate or proportionate at this early stage in the

litigation, given the different variations in the various models of vehicles included in the claims; and

- ii) It is information that Ms Dobson describes at §109 as representing “*the Defendants’ substantive defence prior to the Claimants having articulated their case in the form of a GPOC.*” I agree with that submission.
- iii) Ms Dobson’s evidence at §106 that:

“...every calibration in every vehicle produced and/or sold by the Defendants has been disclosed to the appropriate regulatory authority, and every vehicle has been duly type-approved. The use of parameter-based modulation is a matter of which the relevant regulators have been aware throughout the relevant period when granting type approval.”
- iv) It is likely to require much more technical information from the Defendants than is necessary or appropriate or proportionate at this early stage in the litigation, given the different variations in the various models of vehicles included in the claims.
- v) It would be very exceptional to make an order for detailed information requiring substantial technical input before a claim has been pleaded, particularly in claims where there is an allegation of deceit on the part of the Defendants in relation to the question of whether the vehicles in question contained prohibited defeat devices, the issue to which the request is addressed. The request can be revisited if the defence does not deal with the allegation adequately.
- vi) It is information that Ms Dobson describes at §109 as representing “*the Defendants’ substantive defence prior to the Claimants having articulated their case in the form of a GPOC.*” I agree with that submission.
- vii) I also note the fact that other vehicle emissions group claims relying on “thermal windows” defeat devices have not found it necessary to seek technical information of this level of specificity prior to providing a draft or final GPOC.

It is therefore appropriate in my view for this information to be addressed in response to the Claimants’ fully pleaded claim in the Defence, and further information can be sought at that stage if required.

Rule 31.12

- 61. Rule 31.12 gives the court power to make an order for specific disclosure or specific inspection, and although there are no restrictions in the rule as to when such an application may be made, it is generally an order sought after standard disclosure (see CPR 31APD para.5.1).
- 62. The Defendants have summarised the applicable principles in the authorities. Where specific disclosure is sought at such an early stage, before service of a POC, the authorities indicate that guidance should be sought from the law governing

applications for pre-action disclosure: *Balfour Beatty Regional Construction Ltd v Broadway Malyan Ltd* [2022] EWHC 2022 (TCC) at [44]. Other cases have identified the exceptional nature of an application for specific disclosure before a POC has been served: *Gale v Denman Picture House Ltd* at 590; *Hart v Kensington & Chelsea RLBC* [2022] EWHC 1090 (QB) at [23]. Both in *Gale* at 590 and in *Dun & Bradstreet Ltd v Typesetting Facilities Ltd* [1992] FSR 320 at 329-330 it was identified that the exceptional circumstances required for disclosure to be ordered before a claim is pleaded, and in *Bullring Limited Partnership v Laing O'Rourke Midlands Ltd* [2016] EWHC 3092 (TCC) Coulson J. (as he then was) said, at [20], that the party seeking disclosure is obliged to identify "something important or significant" that early disclosure will achieve. Where allegations of fraud are made additional caution will be exercised: *RHM Foods Ltd v Bovril Ltd* [1982] 1 WLR 661(CA) at 668H and 665F. The documents or categories of documents must also be precisely defined: *Fine Care Homes Ltd v NatWest Markets plc* [2020] EWHC 874 (Ch) at [51].

63. Of particular relevance to this application are Fraser J.'s remarks in *Cavallari* at [33], following his summary of authorities to which he had been referred:

"Both of those cases concerned complex and high value case, but neither of them was group litigation. In my judgment, although group litigation is of course governed by the CPR generally and also must take account of the overriding objective in the CPR, there are differences in terms of scale that mean when the general principles to disclosure – and in particular early disclosure - are applied, a different outcome might occur in respect of this subject. This is because in group litigation it is more likely that *if* a particular discrete document is known to exist, and to be directly relevant to the issues (regardless of whether that document is itself admissible as proof of its findings and conclusions, which the KFTC Decision is not, as has been explained above) it would be more usual to order early disclosure of it, than if the litigation were more conventional involving very few parties. In group litigation such as this, I struggle to see that disclosure of some of these documents ought to be delayed merely because pleadings have not closed. I am not for a moment suggesting that early disclosure will more readily be ordered in group litigation; such orders will be relatively rare. But the "something important or significant" in group litigation may more readily be satisfied in group litigation than otherwise."

64. I have found that to be helpful guidance, but with the caveat that the disclosure application before Fraser J. sought only limited categories of documents arising out of decisions by two regulatory authorities, namely of the European Commission and of the South Korean Fair Trade Commission, (although categories relating to the European Commission decision had been agreed before the hearing) a very different situation from this application. The Claimants in *Cavallari* were not seeking internal information or documents from the Defendants in order to assist in pleading their case. A GPOC had been served and a GLO made, with GLO issues identified, so the

timing and circumstances of the application in that case were very different. The disclosure sought in *Cavallari* was not sought to enable the Claimants to plead a GPOC, as here. I note that Fraser J. also said at [36]:

“There is sufficient information in the public domain concerning the diesel emissions landscape for these many hundreds of thousands of claimants to consider, or suspect, they have a claim, and for the Generic Particulars of Claim to be drafted. However, the sooner their legal advisers are aware of the full content of the KFTC Decision the better, as this will help those advisers realise either their case is weaker than they thought, stronger, or perhaps about the same. Such detail can only helpfully advance the group litigation at an early stage.”

Request 2 – Investigation and Testing Documents

65. The documents in this category are all documents “*which have been produced, provided or received in the context of the ongoing criminal proceedings in France concerning the potential presence of prohibited defeat devices in Peugeot, Citroen or DS vehicles*”.
66. The Claimants say that these documents “*will provide a helpful roadmap to some of the core issues in the case, saving all parties in this litigation time and costs.*” They refer to the well established way of short-cutting disclosure and saving costs, by using work already done and findings made in criminal or regulatory investigations “*whilst also providing readily available documents that can be disclosed early because they are already assembled.*”
67. Croft 1 addresses why these categories of documents are sought at §§126 – 136. The documents relate to investigations carried out by the French Directorate General for Competition Policy, Consumer Affairs and Fraud Control (“DGCCRF”) in 2016 and 2017, and criminal investigations by judges of the public health division of the Paris Tribunal de Grand Instance in 2019 into the First and/or Second Defendant/the PSA Group. This was confirmed by a statement from Stellantis in June 2021. The Claimants have not had sight of any of the documents in those investigations but say it is reasonable to assume that documents are highly likely to contain information of central relevance to the claims and will form part of the Defendants’ standard disclosure obligations in due course. It is said that the investigation and testing documents produced in these investigations will significantly assist the Claimants in understanding the nature of the Defendants’ case, which will enable them to plead their claims with an appropriate degree of specificity. Mr Croft refers to “*The asymmetry of information between the parties regarding the relevant factual and technical issues that lie at the heart of the claims*”.
68. The Defendants oppose the request for reasons identified in Dobson 1 at §§110-129, which I summarise below:
 - i) The Defendants’ primary objections are that:
 - a) It is inappropriate to seek disclosure of documents in an ongoing criminal case from a defendant which is the subject of criminal

investigations;

- b) The French Criminal Procedure Code provides that the procedure during an ongoing criminal investigation and inquiry is secret;
 - c) It is a criminal offence in France to disclose the contents of a criminal file;
 - d) A disclosure exercise is likely to involve issues of privilege;
 - e) Only the French Defendants (who have not been served, nor submitted to the jurisdiction), are in possession of these documents.
- ii) The range of documents sought is very broad, and wider than those sought in the letter before action, and appears to relate to the entirety of the criminal case file over a period of 7 years.
 - iii) It is not clear how the documents would be relevant to the present claims, and it appears that the Claimants want the French documents as a means of shortcutting their own analysis and for the purposes of bolstering claims issued prematurely.
 - iv) There are no precisely defined documents, and it amounts to a request that would require a full disclosure exercise.
69. There are a number of difficulties with this request. First, although in this jurisdiction it is not unusual in a civil claim to obtain documents in relevant criminal proceedings, e.g. where there has been a prosecution for dangerous driving or sexual assault against the defendant in a civil claim. But documents from the criminal proceedings are not usually disclosable until after a conviction has been obtained, and the civil claim may be stayed pending the outcome of the criminal proceedings. Here there are only investigations, which may or may not lead to proceedings and to conviction. Such documents would not be ordered where the criminal investigation was taking place in this jurisdiction, and Ms Dobson's evidence, which is not challenged, is that French law prohibits such disclosure. In addition, many documents are very likely to be protected by privilege.
70. The Claimants do not know what documents are included in this category, and have attempted to second guess what these might be, but there is no list of specific documents known to exist, and the authorities make it clear that an applicant for disclosure at an early stage, particularly before claimants have provided a pleaded case, must identify specific documents. The Claimants have made the point that the Defendants have not engaged with the fact that documents within the criminal investigations will be likely to include the Defendants' own internal documents provided to the investigators, as well as those created for the purpose of the investigations. That may be likely to be a good point in relation to standard disclosure, but an application for specific disclosure, particularly one made before service of statements of case, which is more akin to an application for pre-action disclosure, must, in my view, specify the documents or categories of documents with some degree of precision.

71. The fact that there are no pleadings makes it virtually impossible to assess whether the documents sought, or which, if any of them, would be likely to be included in standard disclosure, is a requirement for a pre-action disclosure application, which is relevant to specific disclosure applications brought before statements of case have been served (see Paragraph 62 above).
72. The Defendants have exhibited a letter from the Service De l'Information Strategique et de la Securite Economiques (SISSE) to the General Counsel of Stellantis dated 16 May 2023, in response to the notification by Stellantis to SISSE of the requirement to provide technical and commercial documents in the conduct of this litigation. The letter advises that under Article 11 of the French Code of Criminal Procedure, documents from an investigation may not be disclosed to third parties, even in the context of proceedings for the exercise of defence rights, and that the direct transmission of documents from the case file by one of the parties in the context of a class action before a foreign court would constitute a violation of the Code, as well as of Article 1 bis of the FBS.
73. For all those reasons, I have concluded that there are no grounds on which I could properly order disclosure in this category at this stage in the proceedings. Whether such documents would be disclosable in due course as part of standard disclosure will be a matter for another day. There are no exceptional circumstances that would justify an order for this disclosure; it is entirely speculative as to whether it would assist the Claimants in pleading their GPOC, and it is in my view a fishing expedition to identify whether there is anything that will assist the Claimants to identify whether or not they have a claim.

Request 3 – Recall Documents and Information

74. This request seeks categories of documents relating to the JMK and GUM recall campaigns. (Although the Claimants' description of the Request includes "*information*", only documents are mentioned in the draft order and evidence in support, and I therefore assume "*information*" refers to the information contained within the documents). Croft 1 at §§137- 144 explains that disclosure of these documents has been sought since the date of the letter before action, and in January 2023 technical information was sought concerning the recalls that had taken place, and confirmation as to whether any voluntary recalls had taken place other than the JMK (manufacturer code applicable to certain Peugeot models) or GUM (manufacturer code applicable to certain Citroen models) recall campaigns. The evidence in Croft 1 is that the Defendants have largely failed to provide the information sought, but have provided two specimens of recall letters sent to Peugeot and Citroen vehicle owners, the wording of which strongly suggested that the JMK and GUM recall campaigns related to the presence and operation of prohibited defeat devices in Peugeot and Citroen vehicles. Thus it is said that the circumstances, extent and reasons for those recalls would be of significant relevance to the issues in the claims, to the pleading of the Claimants' case, to the formulation of the GLO issues and identification of test claims. It is also important to understand the implication that any recalibration (mentioned in the specimen letters) might have on the operation of the vehicles' emissions control systems. The documents would also facilitate the identification of the relevant categories of model variant and assist in providing a proper structure to the management of the claims and the efficient resolution of the disputes within the framework of a GLO.

75. Dobson 1 at §§130-150 refers in some detail to the correspondence from June 2021 to January 2023 between the parties on the issue of information and documents relating to recall campaigns. Her evidence is, in brief summary, that the voluntary recalls were part of normal continuous improvement updates, and does not indicate any non-compliance with regulations, and that the recall campaigns had no link with any defeat devices or emissions manipulation. Her evidence is further that the JMK and GUM recall campaigns relate only to a very small proportion (c.2%) of the Leigh Day Claimant cohort, so the documents were not considered to be “key” documents. The Defendants have now agreed to provide certain documents, as follows:
- i) Internal test results records conducted by the French Defendants, subject to conditions;
 - ii) Correspondence between the UK Defendants and the Vehicle Safety Branch of the DVSA (the UK regulator), relating to recalls of vehicles in the UK, subject to a confidentiality order, but not correspondence with regulators other than the UK regulator;
 - iii) Copy instructions provided to the UK dealership network regarding the implementation of the recalls, subject to a confidentiality order; and
 - iv) Records of follow-up testing carried out by the French Defendants after the recalls, subject to conditions.
76. Croft 2 at §§64-65 emphasises that the wording in the limited description on the specimen letters suggests that the recall does relate to a defeat device:
- “Your Peugeot Citroen vehicle is required to have a download of a new engine management software as an incorrect calibration within the software could result in emissions of NOx which do not comply with regulatory limits...”
77. Further, that the Defendants’ explanation for the recalls at Dobson 1 §149 is not inconsistent with an update aimed at amending the parameters of the thermal window. Mr Croft also explains that even on the basis of 2% of the Leigh Day Claimants within the claims, these would account for a substantial number of popular models, namely approximately 20 to 25% of the cohort.
78. As the Defendants have now agreed to these categories of disclosure, the only issue for determination relates to the conditions which the Defendants say they require for such voluntary or court ordered disclosure, as follows:
- i) Requests 3(b) and (c) are limited to (respectively) the correspondence between the UK Defendants and the UK regulator (the Vehicle Safety Branch of the Driver Vehicle and Standards Agency), and the instructions provided by the UK Defendants to the UK dealership network, which the Defendants say are the relevant documents;
 - ii) The documents and information agreed to be provided by the French Defendants are provided via the Hague Convention; and

- iii) A confidentiality order is agreed or directed by the court, and disclosure made subject to a confidentiality ring.

Conditions sought by the Defendants on orders for further information and disclosure

Limitations on recall information and documents

79. I consider that, at this early stage in the proceedings, and where the French Defendants have not yet been served, it is appropriate to limit the documents as outlined in Paragraph 78(i) above.

Use of the Hague Convention for documents and information sought from the French Defendants

80. The Claimants oppose the imposition of such restriction, on the basis that there is no attempt to explain why the provision of the documents and information would be likely to lead to prosecution of the French Defendants under the FBS. It is submitted that the only reason why the documents need to be provided via The Hague Convention is if the court considers that the FBS is engaged, and that there is a real risk of prosecution under the FBS such that disclosure should not be provided by the ordinary route.
81. In so far as I will order disclosure and inspection of documents from the French Defendants pursuant to this application, I shall not require this to be done via the Hague Evidence Convention route, balancing the following factors:
 - i) I have no real means of assessing how real is the risk of prosecution if the documents so ordered were provided directly by the French Defendants to the Claimants, even if protected by a confidentiality order or confidentiality ring. That might have been provided by expert evidence of French law, but I have given reasons why that was not permitted at this stage. However, I do take into account both the letter from SISSE which explains the French authority's position, and the interests of international comity, which support the use of the Hague Convention route.
 - ii) The French Defendants were well aware of the difficulties caused by the FBS at the hearing on 9 February 2022, and assured the court that once their legal representatives and an engineer had been able to take instructions in France from their clients they would seek the relevant documents via the Hague Convention themselves, but that has not been done, and no explanation provided. If it had been done by the French Defendants solicitors within a reasonable time after that hearing the relevant information and documents would have been available some time ago. It was also not explained why the FBS would prohibit the French Defendants from providing information and documents to their own clients other than through the Hague Convention. It is not a reasonable approach for the French Defendants to come back to court some 17 months after that hearing and now insist that the Claimants make a Hague Convention request, without any explanation for the change of stance, and the substantial delay.

- iii) The prejudice to the Claimants that will inevitably be caused to provision of information and documents by reason of that delay if these have to be provided via the Hague Convention, that is likely to impact their ability to provide a fully pleaded draft GPOC and/or GLO issues which in turn may cause delay to the hearing of the GLO application.
 - iv) I take account of the fact that this is group litigation where there is, as in *Cavallari*, “*an asymmetry of information*” between the parties, and the relevant technical information is held by the Defendants, primarily by the French Defendants.
82. Balancing those factors, I consider that if the French Defendants had serious concerns about the provision of documents and/or information other than via the Hague Convention they would either have followed up on their assurances to the court on 9 February 2022, or would have notified the Claimants that their position had changed and that they required the Claimants to apply for an order for a letter of request for the documents sought, because of the potential effects of the FBS. Instead the French Defendants took a position contrary to their assurances to the court, and simply produced documents in the public domain in their response to the letter of claim. They were, as I have found, entitled to do so without incurring any sanction by the court, but they have not explained to the Claimants or to the court why they did so in contradiction of the position taken at the hearing on 9 February 2022.

Documents and information of a technical nature (save where they are public documents) be subject to confidentiality

83. I note that Gross LJ in *Bank Mellat* at [63 (v)] suggested that the use of confidentiality restrictions can minimise the concerns under foreign law, and that may also assist in ensuring that the French central authority will agree to the Hague Convention requests. Where sensitive commercial or technical information is sought, as here, that is a proportionate way to deal with that concern: for comparison see *Bugsby Property LLC v LGIM Commercial Lending Ltd* [2021] EWHC 1054 (Comm) at [77] – [80]. I consider that the evidence from SISSE is sufficient to provide evidence of a risk where technical and commercial evidence is concerned, as well as the obvious commercial sensitivity of some of the material. See also Fraser J.’s comments in *Cavallari* at [6] – [7], where he describes confidentiality rings as “*a commonplace solution to issues of this sort*”, and where he commends the parties for being able to deal with it by agreement.
84. The Claimants have now agreed, in principle, to a confidentiality order and/or confidentiality ring, but note that the Defendants will have to identify which documents and information contain confidential information and why it is regarded as confidential before such a confidentiality order or confidentiality ring can be made/established. Subject to that I consider that the Defendants’ draft order, subject to some amendment, is sufficient to deal with this.

The Defendants’ Part 18 application against the Pogust Goodhead Claimants

85. This has now been compromised, subject to costs, on which I have not yet heard submissions, but may be capable of agreement.

SCHEDULE 1
LIST OF ISSUED CLAIMS THE SUBJECT OF THE APPLICATION

No.	Claim Form	Issue Date	Issuing Firm
1	QB-2021-02286	11/06/2021	Leigh Day
2	QB-2021-002523	29/06/2021	Leigh Day
3	QB-2021-003138	13/08/2021	Leigh Day
4	QB-2021-003500	15/09/2021	Leigh Day
5	QB-2021-003518	16/09/2021	Leigh Day
6	QB-2021-004038	29/10/2021	Leigh Day
7	QB-2021-004617	16/12/2021	Leigh Day
8	QB-2022-000628	24/02/2022	Leigh Day
9A	QB-2022-001267	14/04/2022	Leigh Day
9B	QB-2022-001284	20/04/2022	Leigh Day

10	KB-2022-003152	23/09/2022	Leigh Day
11	KB-2022-003276	30/09/2022	Leigh Day
12	KB-2023-000727	31/01/2023	Leigh Day
13	KB-2023-002498	01/06/2023	Leigh Day
14	QB-2021-004245	17/11/2021	Pogust Goodhead
15	QB-2022-001300	21/04/2022	Pogust Goodhead
16	QB-2022-001739	31/05/2022	Pogust Goodhead
17	QB-2022-002401	28/07/2022	Pogust Goodhead
18	KB-2022-004566	28/11/2022	Pogust Goodhead
19	KB-2023-000734	08/02/2023	Pogust Goodhead

SCHEDULE 2

INFORMATION AND DISCLOSURE SOUGHT BY THE CLAIMANTS

Request 1

1. A full list of all Euro 5 and Euro 6 Peugeot, Citroen and DS model variants sold in the UK since 1 September 2009, together with the following information for each:
 - a. the engine code, family and size;
 - b. the emissions certificate number;
 - c. the applicable Euro emissions standard;
 - d. the brand and model of the ECU;
 - e. whether vehicles of this model variant contained a defeat device within the meaning of Article 3(10) of the Emissions Regulation when originally marketed for sale, and if so:
 - iii. whether the defeat device modulated the operation of the EGR, SCR, or some other part of the emission control system, and by reference to what parameters;
 - iv. whether the First to Ninth Defendants allege that the defeat device was justified pursuant to Article 5(2) of the Emissions Regulation and, if so, on what basis.

Request 2

2. Disclosure by list and inspection in respect of the following categories of documents which have been produced, provided or received in the context of the ongoing criminal proceedings in France concerning the potential presence of prohibited defeat devices in Peugeot, Citroen or DS vehicles:
 - a. indictments or other formal charging documents including the original provided by the DGCCRF and any other evidence provided to the prosecutor's office.
 - b. case summaries;
 - c. reports or notifications of investigators' or prosecutors' interim findings;
 - d. transcripts or summaries of hearings at which evidence is given or examined as part of the judicial investigation;
 - e. witness statements or transcripts of witness testimony provided to the judges during hearings;
 - f. any orders relating to evidence or documents etc. to be seized from the investigated person(s);
 - g. test results and any expert reports and analyses commissioned by the judges; and
 - h. correspondence, including requests for information and submissions, between the First to Ninth Defendants and the DGCCRF and/or French prosecutors (including, in particular, correspondence regarding the presence, nature, effects and/or purported legal justification for any defeat devices present in any Peugeot, Citroen or DS vehicles).

Request 3

3. Categories of documents relating to the JMK and GUM recall campaigns:
 - a. Internal test results or reports which contributed to, or were the result of, the recalls;
 - b. correspondence with regulators regarding the recalls;
 - c. instructions to dealerships regarding the implementation of the recalls; and
 - d. follow-up test results or reports in respect of vehicles which were the subject of the recalls