Case No: QB-2022-002405 and others

Neutral Citation Number: [2023] EWHC 1888 (KB)
THE MERCEDES EMISSION GROUP LITIGATION

IN THE HIGH COURT OF JUSTICE
KINGS BENCH DIVISION

Rolls Building
London, EC1A 1NL

Date 21 July 2023

Before :

THE HONOURABLE MR JUSTICE FRASER

- -

Between :

AURORA CAVALLARI
AND OTHERS

Claimants

-and-

(1) MERCEDES-BENZ GROUP AG
(2) MERCEDES-BENZ AG
(3) MERCEDES-BENZ CARS UK LIMITED
(4) MERCEDES-BENZ FINANCIAL SERVICES UK LIMITED
(5) MERCEDES-BENZ RETAIL GROUP UK LIMITED
(6) 43 AUTHORISED DEALERSHIPS (as listed at Schedule 4 of the Group Litigation Order)

Defendants

- -

Judgment (No.1: disclosure issues)

- -

Tom De La Mare KC, Oliver Campbell KC, Julian Gregory and Gareth Shires (instructed by the Steering Committee - **Pogust Goodhead, Leigh Day, Slater & Gordon UK Limited, Hausfeld & Co LLP and Milberg London LLP**) for the **Claimants**
Helen Davies KC, Malcolm Sheehan KC, Richard Blakeley and Lia Moses (instructed by **Herbert Smith Freehills LLP**) for the **Defendants**
Prashant Popat KC, Brian Kennelly KC and Kathleen Donnelly KC (instructed by **Freshfields Bruckhaus Deringer LLP**) for **Volkswagen AG, Audi AG, Škoda Auto a.s, SEAT S.A., Volkswagen Financial Services (UK) Limited and others** appeared to make submissions on confidentiality

Hearing dates: 18 and 19 July 2023

Mr Justice Fraser:

1. These proceedings are being conducted pursuant to a Group Litigation Order ("GLO") made on 25 May 2023 by Senior Master Fontaine. In that GLO, which was approved by the President of the King's Bench Division ("PKBD"), two Managing Judges were appointed jointly to manage the group litigation. I was one of those, and the other is Cockerill J. The intention in having two Managing Judges is to ensure that there is always at least one available to deal with all the hearings in the litigation, including case management hearings.

2. The GLO itself provides in its detailed terms for the first Case Management Conference ("CMC") to take place on the "first available date" after 11 January 2024. The parties were agreed between themselves that this would be on 5 and 6 March 2024, based on the availability of their respective counsel. I have previously, in other group litigation in which I was the Managing Judge, observed that counsel in such major cases need to work their diary and other commitments around the requirements of the group litigation, rather than vice versa; ***Bates and others v Post Office (Judgment No.1)*** [2017] EWHC (QB). Those observations should be taken as being repeated here, in particular those at [18] to [21] of that judgment. Experience shows that this is the best way to make effective progress in what is – as will be explained– group litigation of significant scale. To be fair to all counsel in this case, other than that explanation of why the first CMC was fixed in March 2024 and not earlier, no submissions have been made to the contrary, nor has it been suggested by any of them that their availability should be a governing factor. This is a welcome change to the approach of other counsel in many other cases.

3. The effect of this approach to fixing dates will most likely be less upon individual counsel in this case than in some others, because each of the parties are represented by a number of counsel, including multiple leading counsel. However, I wish to explain that approach now, because it is what underlies the case management orders that I made at the hearing of 18 and 19 July 2023 in terms of trial dates. I shall return to that subject at the end of this judgment, after explaining the litigation in outline, and dealing with the application for early disclosure in respect of which this judgment contains my detailed reasons for the order I made at the hearing. There was in fact more than one application, but I treat them and refer to them as one.

4. Finally by way of introduction, on the application, as well as comprehensive evidence from the parties, the court also received written submissions from a number of non-parties. These were (using their normal trading or marque names, rather than their fully accurate company names) other car manufacturing companies, namely Volkswagen, Skoda, Seat, Porsche and BMW. Litigation has been commenced already against Volkswagen (which is part of the same group as Skoda and Seat) by a large number of claimants, represented by the same solicitors as the claimants in this group litigation, although no GLO has yet been made in those proceedings. An application for a GLO was issued in that other litigation, but only on 17 July 2023, the evening before this application. No GLO can be made by the court without the express permission of the PKBD, who has not yet (unsurprisingly, given the timescale) even been asked for such permission. Further, it is a matter for the PKBD whether she approves the making of a GLO, and if she does, who is nominated as the Managing Judge. Litigation has not yet been commenced against either Porsche or BMW, although it appears to be expected by everyone that it will be. Volkswagen

also attended the hearing by counsel (three leading counsel, to be exact) and Mr Popat KC made oral submissions seeking to be heard on general case management issues, as well as upon the subject matter of the disclosure application, although no application had been issued to be joined as an Interested Party, nor did Volkswagen seek to be so joined.

5. I declined to hear Volkswagen, a non-party on the application, save for one exception which related to confidential information. If, when making an order for disclosure, the documents ordered to be disclosed contain the confidential information of a third party, then that third party does have a right to be heard by the court on the arrangements necessary to protect that confidential information. This is well established, and often arises in procurement challenges, intellectual property litigation, and sometimes in commercial contractual disputes.

6. Such confidential information can be that of a rival car manufacturer, such as here, or other confidential information such as that of a rival bidder in a procurement case. In the latter instance there are specific provisions in the relevant Regulations themselves imposing confidentiality, but even these do not prevent disclosure. A useful summary of the approach whereby confidentiality is balanced with the interests of justice is set out by Coulson J (as he then was) in ***Bombardier Transportation Ltd v Merseytravel*** [2017] EWHC 575 (TCC). Confidentiality is not a bar to disclosure as explained in ***Mears v Leeds CC*** [2011] EWHC 40 (TCC) per Ramsey J at [49], and the way that this can be preserved by means of a confidentiality ring is considered, again by Coulson J, in ***Geodesign Barriers Ltd v Environment Agency*** [2015] EWHC 1121 (TCC). It may be, in due course, that some limited element of the trial may have to be heard in private, such as in ***Energy Solutions EU Ltd v Nuclear Decommissioning Authority*** [2016] EWHC 3326 (TCC) but that consideration, if it arises at all, is for some point in the future. The short point is that simply because a document contains the confidential information of another is not a bar to disclosure, early or otherwise.

7. Confidentiality rings are a commonplace solution to issues of this sort and both the Claimants and the Defendants' counsel have been entirely constructive, co-operative and sensible in recognising this, and have gone to some lengths to discuss, agree and finalise detailed arrangements to deal with this. In the event, it was not necessary for either Mr Kennelly KC or Ms Donnelly KC for Volkswagen to address the court on these limited issues, because this was all dealt with by agreement. However, I wish to make it clear that they would have been permitted to do so, had there been any outstanding issues affecting Volkswagen's confidential information (and the same would apply to Porsche and BMW, for that matter).

The Group Litigation

8. The broad outline of the litigation as a whole is as follows, but inevitably these passages that follow are expressed at a very high level. There are now approximately 269,000 claimants on the Group Litigation Register ("GLR"), although I have been told that there is a total of approximately 300,000 to date who have either contacted or instructed the claimants' solicitors, whether all of them are yet on the GLR or not. All of the claimants either owned or leased (or purchased subject to finance, in a number of different ways) Mercedes vehicles that have diesel engines, either as consumers or business users. The First and Second Defendants are manufacturers (they are referred

to in the Generic Particulars of Claim as "Manufacturer Defendants") and the others are subsidiaries, finance companies, distributors or retailers.

9. The essence of the Claimants' case relates to unlawful activity concerning diesel engine emissions. The claims are said to arise from the actions of the Manufacturer Defendants in installing what are called defeat devices ("DDs") in the emissions control unit ("ECU Software") of vehicles that were either purchased or leased by the Claimants. These are all, in this litigation, Mercedes vehicles. The Claimants accept that DDs are in some circumstances permitted, but these DDs are said to be unlawful in that they were prohibited by Article 5(2) of Regulation 2007/715 (the "Emissions Regulation"), and had the effect that the vehicles produced far higher amounts of emissions than were permitted. These emissions are all products of the reaction of nitrogen and oxygen which occurs in internal combustion engines, and are referred to both by the parties to the Group Litigation and generally as NOx. NOx is a shorthand for a combination of oxides of nitrogen of different formulae, and such emissions contribute greatly to air pollution. There is a detailed testing and regulatory regime in place to ensure that car engines produced by manufacturers do not produce excessive NOx emissions. The Claimants' case is that DDs which are prohibited (referred to as "PDDs" in the pleadings) were installed and/or calibrated in Mercedes diesel vehicles, with the Manufacturer Defendants' knowledge that they were unlawful and that such devices could not be justified by the need to protect components of the engine. These PDDs are said not to have protected components at all, or to have operated far beyond the circumstances necessary to do so, and/or were not necessary for component protection. Rather, the Claimants allege, the PDDs were used as a result of and/or connected with the participation by the Manufacturer Defendants in an unlawful technology suppression cartel (which is called "the TS Cartel") with other German car manufacturers, and various related anti-competitive arrangements, essentially to defeat the testing regime, and/or for other commercial reasons such as reducing the use of AdBlue (a lawful emission-suppressant additive to diesel fuel) in normal operation, rather than in test conditions.

10. No generic defence has yet been served and indeed one is not due to be served until 30 August 2023. For present purposes all that need be said on behalf of the Defendants is that the existence of such arrangements and their alleged unlawful purpose and/or effect is contested, and the fact that I have not explained that defence in any detail should not be taken as any suggestion that the Claimants' pleaded case contains anything other than, as yet, allegations.

11. 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. As one example only, I was told by Mr de la Mare KC in oral submissions that in some vehicles this was connected to the air-conditioning system, as that would not be operating during the test regime, and that the PDD would therefore (and I emphasise at this stage, purely on the Claimants' case and these are at this stage only assertions) only operate when the vehicle were in normal operation and not subject to testing. 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.

12. At the same time as making the GLO, the Senior Master had to list applications for early disclosure that had been issued by the Claimants. Both the Managing Judges agreed that it was sensible that one of them hear that application, and it was this hearing that took place on 18 and 19 July 2023. I gave the parties the answer to the contested part of that application at the hearing itself and said I would provide more detailed reasons later. These are those reasons.

The application

13. As made clear in the express terms of the GLO itself, the Generic Defence is not due to be served until later in August 2023. However, the Claimants sought early disclosure in their application of 31 March 2023 of documents arising out of, or contained in, two particular discrete areas that are said to impact upon their case. These two particular areas are an investigation leading to a decision by the EC Commission into the TS Cartel ("the Commission decision"); and a similar but not identical scenario involving, and leading to a decision by, the South Korean Fair Trade Commission ("the KFTC Decision").

14. Again in outline only, in July 2017 the well-known German newspaper called *Der Spiegel* published a report entitled "The Cartel: Collusion between Germany's Biggest Carmakers" which reported that Volkswagen was said to have admitted to the European Commission that there had been some sort of arrangement with other manufacturers in which it was involved relating to emission technologies. The newspaper coined the term "the Diesel Scandal". This led to, or was at the same as, questions in the European Parliament by two different MEPs; and later that year in October 2017 the offices of a number of German car manufacturers were raided as part of a joint investigation by the European Commission and the Bundeskartellamt (the German Federal Cartel Office) into potential anti-competitive practices.

15. This ultimately led to the Commission Decision dated 8 July 2021, which was published on 11 November 2021 by the Commission in redacted form. The redactions were applied by the Commission. The First Defendant was an addressee of the decision and was provided with an unredacted version. Significant fines totalling approximately 875 million Euros were imposed, but none upon the defendants in this case. This decision related principally to the TS Cartel. Other cartel, or cartel-type, arrangements are alleged by the Claimants in the litigation. It is unnecessary, for the purposes of this judgment, to consider those latter allegations in any detail.

16. The KFTC Decision is dated 5 April 2023 and arises out of a different investigation by the competition authorities in South Korea. This was published, again in redacted form, on the KFTC website, but again, the First Defendant as addressee has an unredacted version. The Claimants allege that the subject matter of the investigation, and therefore the KFTC Decision itself, goes somewhat wider than that of the Commission. Given only redacted versions of either decision are currently available, it is not particularly worthwhile to debate at this stage the differences between the two decisions in terms of content. The KFTC imposed a fine of 42.3 billion South Korean Won (KRW) and made certain other corrective orders.

17. Essentially, the Claimants seek the same type of documents, or classes of documents, under each of the Commission and KFTC investigations and decisions. These include, but are not limited to, unredacted versions of the two Decisions themselves.

Discussion

18. Although the Claimants maintain that they have been seeking an unredacted version of the Commission Decision since 2021, and Mercedes had declined to provide it, all aspects of the early disclosure application in respect of the Commission Decision were agreed by the parties and it was not necessary for the court to consider the subject matter of the application in any detail, or at all. The Defendants agreed to provide early disclosure of the Decision and certain other documents from the Commission file. The only outstanding matter relating to it were potential issues regarding the fine detail of the confidentiality ring which the parties considered (and ultimately agreed) and which the court was content to approve. Therefore, it was not necessary either for Volkswagen to make oral submissions on such fine details, although both Mr Kennelly KC and Ms Donnelly KC considerately attended both days of the hearing of the application out of caution.

19. The KFTC decision, and documents associated with it, remained controversial. The categories sought by the Claimants were as follows:

(a) the full, confidential, unredacted KFTC Decision;

(b) pre-existing documents listed on what is called "the KFTC file" in the Defendants' possession;

(c) the index to the KFTC file;

(d) requests for information ("RFIs") made by the KFTC to the First Defendant; and

(e) responses to such RFIs.

20. Identifying the grounds of opposition by Mercedes in summary only, and with apologies to the sophistication and care with which submissions in opposition were articulated by Ms Davies KC for the Defendants, which are lost by way of that summarisation process, Mercedes contended as follows. The court was reminded that this was an application for early, rather than standard, disclosure, and the different considerations that apply in such a situation. The KFTC Decision is, unlike the Commission Decision (which has binding status in this jurisdiction), inadmissible, a point which Mercedes relied upon as justifying its opposition to early disclosure of it. This inadmissibility reflects the long-standing rule in ***Hollington v Hewthorn*** [1943] KB 587. The rule was explained by Christopher Clarke LJ in ***Rogers v Hoyle*** [2014] EWCA Civ 257 at [39]-[40], and is a rule which seeks to preserve the fairness of the proceedings. Basically it comes to this. Just because the KFTC made certain findings in its Decision as a result of its investigation, the Claimants cannot rely upon those findings in this litigation. The situation regarding the Commission Decision is different and somewhat more complicated, due to Brexit, the move from the Framework Directive to the Framework Regulation on the Regulation Date of 1 September 2020, the Brexit Implementation Date of 31 December 2020 and then 31 December 2022, when a slightly modified version of the Framework Regulation

continued to apply in the UK pursuant to section 3(1) of the EU Withdrawal Act 2018. However, none of those complications arise regarding the KFTC Decision.

21. But this does mean that the Claimants will therefore still have to prove the matters in respect of which the KFTC Decision makes findings. It is also said by Mercedes that the amount of disclosure sought is disproportionate, and that many of the documents on the KFTC file will also be provided in the disclosure being given from the Commission file, because they are duplicated by documents that also appear on the Commission file. Reliance is also placed upon the degree to which the Claimants have already pleaded their case in considerable detail in the Generic Particulars of Claim to demonstrate that the test for early disclosure, to which I will now turn, is not made out. Essentially the Defendants' position is one of "perhaps, but not yet" in terms of providing those documents to the Claimants by way of disclosure. Finally, in respect of the document at [19](c), the index, Mercedes maintain that no such document in fact exists. The court is told that there is no index or contents tabulation to the documents on the KFTC file.

22. I shall deal with that last point first. I find it verging on extraordinary that there can be no index or contents of a file that contains thousands of pages of documents. I explored this a little with Ms Davies, who rather agreed with me that given no such index or tabulation of contents appears to exist, one would have to be created in any event for efficient conduct of the matter going forwards. Regardless of her pragmatism on this subject, so far as that particular document (or category of document, depending upon whether a category can contain only a single document) is concerned, I am satisfied that efficient case-management of this group litigation requires that the Defendants create such a document. Strictly speaking, ordering creation of an index is not granting early disclosure of it, because one cannot order disclosure of something that does not exist. However, I am satisfied that in group litigation my case management powers are such that I can order creation of such a document, even if that were vehemently opposed (which here, it is not). For present purposes, I am content that an order is required that this be done, without that order *also* requiring a witness statement from a suitable officer of the First Defendant explaining how it can be that none currently exists, rather than a simple bald statement that none exists.

23. Turning to the principle of early disclosure, the correct place to start is consideration of the principles generally. I accept Ms Davies' primary point that it is well-established that the scope of any disclosure ordered by the court (whether early disclosure or otherwise) must be reasonable and proportionate at the point in time at which it is ordered. This is also part of the overriding objective under CPR Part 1.1. Indeed, the overriding objective governs all that the court does by way of case management. It is particularly important, in my judgment, that it is borne centrally in mind in group litigation.

24. The Defendants submit that there is a need to apply the principles with particular care in competition law cases, which it is said can lead to "notoriously burdensome disclosure requests". The Defendants had submitted, as part of their evidence, the response of the Commission itself, which very helpfully reminded the court in a letter dated 22 June 2023 of the correct approach by the court to issues of disclosure, and the principles that the Commission said ought to be applied to the disclosure application in so far as it related to the Commission Decision. For example, the

Commission stated that it "has difficulties to see how a document discovery order going beyond documents related to the infringement as found by the Commission in its final Decision could be deemed necessary and proportionate" and also stated in the same letter that "particular attention should be paid to preventing 'fishing expeditions', i.e. non-specific or overly broad searches for information that is unlikely to be of relevance for the parties to the proceedings".

25. Reminders to the High Court by the European Commission of the importance of considering relevance (always a useful approach to disclosure) and avoidance of fishing expeditions (again, always helpful) are not specifically necessary in this (or one would hope, any) case, but the First Defendant was obliged to notify the Commission, given the nature of the disclosure sought included an unredacted copy of the Commission Decision. I approach this contested application to disclosure bearing in mind both the provisions of the Civil Procedure Rules and the terms of the Directive because of the provisions of the Competition Act 1998.

26. As to whether to order the contested early disclosure, the guiding principles are set out in paragraphs 1.4 to 1.7 of PD 31C:

"1.4. The application must include a description of the evidence that is sought that is as precise and narrow as possible on the basis of the reasoned justification.

1.5. The court may only permit disclosure or inspection that is proportionate.

1.6. In order to determine proportionality, the court must in particular consider

(a) the extent to which the claim or defence is supported by available facts and evidence justifying the request to disclose evidence;

(b) the scope and cost of disclosure, especially for any third parties concerned, including preventing non-specific searches for information which is unlikely to be of relevance for the parties in the procedure;

(c) whether the evidence the disclosure of which is sought contains confidential information, especially concerning any third parties, and what arrangements are in place for protecting such confidential information."

27. As regards <u>early</u> specific disclosure, the position under CPR 31.12 was summarised by Coulson J (as he then was) in ***Bullring Ltd v Laing O'Rourke Midlands*** [2016] EWHC 3092 (TCC). The party seeking disclosure is obliged to identify "something important or significant" that early disclosure will achieve.

28. As Coulson J stated at [20]:

"It does not seem to me that, in reality, the parties are very far apart in terms of their formulation of the test that I should apply. Mr. Hargreaves formulates it in this way:

'Taking into account the overriding objective and the respective consequences of making or not making the order, whether, in all the circumstances of the case, the applicant has demonstrated that there is a proper basis for early disclosure as opposed to disclosure after close of pleadings.'

I think that is apposite, although I would say that, for a proper basis to be identified, there does need to be something important or significant which can be achieved by ordering early disclosure".

29. The Defendants submit that the proportionality of what is being suggested (and when) must be assessed alongside the 'important or significant something' that is to be achieved. As Birss J (as he then was) observed in ***Vodafone Ltd v Infineon AG*** [2017] EWHC 1383 (Ch) at [31], more is not always better. He stated that "it is relevant to ask how much more would it be and how much better would it make the result".

30. In competition cases, the Defendants also drew my attention to the following passage of Competition Litigation: UK Practice and Procedure (OUP. 2nd ed.) at §9.10, in which the position is stated to be as follows:

"There are circumstances in which it is permissible to obtain early disclosure after the commencement of proceedings but before close of pleadings. The court always has the power so to order, but such orders are rare. For an early disclosure application to be successful, specific documents relevant to the action must be targeted, and the applicant must be able to show that it is not in a position to plead its case without access to those documents. There is, however, a general right to inspect documents mentioned in pleadings and evidence under CPR rule 31.14."

31. I do not agree that the passage in the textbook accurately summarises the position. It is not the case that "the applicant must be able to show that it is not in a position to plead its case without access to those documents" (my emphasis) as though that is a mandatory requirement. If a party cannot plead its case without the early disclosure sought, then obviously that would be a powerful factor in ordering early disclosure. But it should not be elevated to a compulsory requirement. However, I entirely accept that the two first instance decisions I have referred to at [27] and [29] above correctly identify the approach to be taken, and merit particular attention. Both judges were highly experienced at the time of those cases, and indeed both were elevated to the Court of Appeal some time ago, and their decisions hold great weight. The first case, ***Bullring***, concerned a detailed request made by defendants in respect to complex, and some might say classic, litigation in the Technology and Construction Court relating to the construction of the Selfridges building in the Bullring Birmingham, the centrepiece of the city centre regeneration project in 2003. Following termination of a standstill agreement by the defendants, their application for early disclosure by the claimants of a number of categories of documents succeeded, as these were directly relevant to date of knowledge by the claimants and therefore potential limitation defences available

32. The second case, ***Vodafone***, concerned cartels operated by a number of defendants in respect of smart card chips sold by those defendants to Vodafone for use in its mobile devices, sold on to consumers. Both claimant and defendants sought early disclosure of different types of document from the other. The judge carefully analysed the arguments advanced by each, and the issues to which each category of document went, including those that went to potential loss (if any) by Vodafone, purchase data by the claimant, sales data by the defendants, market share, and the documents covered very numerous transactions across many Member States of the EU.

Disclosure was ordered in both directions, but of a narrower scope than that initially sought by the parties.

33. 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.

34. This is for two main reasons. Firstly, early disclosure of a document such as the unredacted KFTC Decision itself may, and in this case probably will, assist the parties in refining the issues between them in the group litigation generally. This assistance to the parties will also help to inform the court as to the direction of the group litigation in terms of what issues can usefully be resolved, when, and in which order. Case management is important in most, if not all, complex cases, but in group litigation it is even more important, given the nature, scale and duration of such cases. The redactions that have been applied to the KFTC Decision that is available have been applied by the authorities in Korea. They include (for example) the names of some of the officers of the First Defendant, such as the Chief Executive, matters which are undoubtedly public knowledge in any event. The issues currently under consideration on this application now here is not whether the unredacted KFTC Decision should be disclosed in the usual way, but whether it ought to be disclosed into a carefully designed and court controlled confidentiality ring. That is another factor which in my judgment is in favour of early disclosure.

35. The second reason is that co-operation by the parties, required in any event of all parties under CPR Part 1, is even more important in group litigation. It is hardly co-operative for a party with a directly relevant document, which I find the KFTC to be, to take the position that in principle it is disclosable, but to resist that on the basis of "not yet".

36. Early disclosure in this case also assists in correcting what Mr de la Mare correctly describes as the information asymmetry between the parties. 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.

37. I consider that consideration of the same factors also result in the same outcome for documents actually expressly referred to in the KFTC Decision too. Some of those are, for example, meeting minutes; some are mentioned in tables within the Decision, but the tables themselves have had their entire contents redacted and the tables are therefore blank; and some (or perhaps all) are given Exhibit numbers. I consider that early disclosure is justified for all and any documents referred to in the KFTC Decision so that the decision can be properly read and understood in context.

38. However, I accept Ms Davies' submission that the other categories of documents sought by the Claimants from the KFTC file are too wide and not sufficiently narrowly focused for early disclosure. I do, however, note that where I am told that there is no index or contents table available (or even in existence) it is somewhat difficult for the Claimants more narrowly to focus any request for disclosure in any event. Saying "there is no index" yet at the same time saying "and your request is too wide" are potentially contradictory positions. Therefore, given I am ordering that such a document is created as I have explained at [22] above, this will assist the Claimants in considering more focused requests in the future. It will also enable the Defendants to identify both to the Claimants and the court which documents in the KFTC file have already been disclosed because of their existence within the Commission Decision file, early disclosure of which has been agreed.

39. The application for early disclosure is therefore granted to the extent that I have explained.

40. I have also made other case management decisions, including setting down trials for 2024 and 2025, without specifying the issues which will be resolved at those trials. Trial dates are to be fixed in October 2024, February 2025 and October 2025. It not possible now to list or identify the issues that will be dealt with at each or any of those trials. This is because the generic Defence has not yet been served, and I have adopted this approach to preserve maximum flexibility for the Managing Judge going forward. This litigation is very much in the foothills, and the GLO was only made two months ago. The co-operation demonstrated by counsel for the parties at the two day hearing before me is commendable, and I can only express the hope that this continues. Taking excessively partisan positions on interlocutory matters vastly increases the costs each side has to bear during the litigation, which the losing side (whoever that might be) ultimately having to pay those costs, and such an approach also leads to further court resources being required to resolve interlocutory matters. Co-operation is undoubtedly the way forward, and is the most efficient way to achieve cost-effective ultimate resolution of the central issues by the court at the trial or trials to come.