Neutral Citation Number: [2018] EWHC 2006 (QB)

Case No: HQ16X00241

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

THE VW NO_X EMISSIONS GROUP LITIGATION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/07/2018

Before :

SENIOR MASTER FONTAINE

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Between :

(1) MR LESTER VINER **(2) MR BARNEY MCCARTHY** **(3) MRS LOUISE JOHNSON** **(4) MS NORA HAMMOUDA** **(5) MS ALISON POINTIN** **(6) MR DANILO PIGA** **(7) MR ALAN ARCHER** **(8) MR MICHAEL DOOLEY** **(9) MR MARK SLACK**	**Claimants**
- and -	
(1) VOLKSWAGEN GROUP UNITED KINGDOM LIMITED **(2) VOLKSWAGEN AKTIENGESELLSCHAFT** **(3) AUDI AKTIENGESELLSCHAFT** **(4) SKODA AUTO A.S.** **(5) SEAT SA** **(6) VOLKSWAGEN FINANCIAL SERVICES (UK) LIMITED**	**Defendants/ Respondents**

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Mr Benjamin Williams QC (instructed by **Your Lawyers**) for the **Claimants**
Ms Kathleen Donnelly (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Sixth Defendant**

Hearing dates: 13 June 2018

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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SENIOR MASTER FONTAINE

Senior Master Fontaine :

1. This was the hearing of the Claimants' application dated 26 April 2018 for an extension of time for service of the claim form against the First Defendant ("VWUK"). An extension is not required for service on the First to Fifth Defendants as the Claim Form has been served on these Defendants.

2. The application was supported by the statement of Jonathan Whittle dated 26 April 2018 (Whittle 1), responded to by the seventh statement of John Blain dated 8 June 2018 (Blain 7) and replied to by the third witness statement of Jonathan Whittle dated 11 June 2018 (Whittle 3).

3. References to documents in the application bundle are referred to as follows: [Tab/page number].

Background

4. An application for a Group Litigation Order ("GLO") was made on 16 October 2016 by claimants affected by diesel emissions from cars manufactured by the Volkswagen Group and related companies, the circumstances of which have been well publicised. Following the hearing of the GLO application, over three days from 27-29 March 2018, a GLO was made on 21 May 2018, with the consent of the President of the Queen's Bench Division [C4/52]. This claim is one of the claims encompassed by the GLO, but no claim is currently pleaded against VWUK in the Generic Particulars of the Claim ("GPOC") served recently in the group litigation [C5/72]. The GLO provides, as is usual in group litigation, that claims issued in other courts which concern group litigation issues as defined in the GLO will be transferred into the group litigation, and that any future claims issued against the Defendants in the group litigation which involve group litigation issues will be dealt with under the GLO.

5. VWUK is the importer and distributer of Volkswagen vehicles to dealerships in the UK. It is not a supplier of vehicles to consumers (Blain 7, paragraph 12) [B6/17]. VWUK is represented by Freshfields Bruckhaus Deringer ("Freshfields"). The Claimants in this action are represented by one of the three main firms of claimant solicitors in the group litigation, Your Lawyers ("YL"). Those three firms form the Solicitors Steering Committee which liaise with other claimant firms.

Chronology

6. The key dates in relation to this application which appear from the evidence are as follows:

    i) 25 January 2016: claim form issued against VWUK only, claiming damages for "fraudulent misrepresentation, breach of contract and claims under the Consumer Protection Regulation" arising from purchase of "motor vehicles supplied by the Defendants".

    ii) 30 September 2016 and 10 October 2016: extensions of time for service agreed by VWUK.

    iii) 2 November 2016: claim form amended to include five additional Defendants.

iv) 10 November 2016 and 10 January 2017: extensions of time for service agreed by VWUK.

v) 30 January 2017: Adjourned GLO application hearing; this claim managed within the group litigation from this date.

vi) 10 April 2017: extension of time for service agreed by VWUK.

vii) 1 December 2017: order in group litigation application, the effect of paragraph 9 was to grant a further extension to 26 April 2018.

The Legal Test on the Application

7. The application is made under Rule 7.6(2). Both parties are agreed on the law in relation to how that rule should be applied, and the following authorities were referred to:

i) *Hashtroodi -v- Hancock* [2004] EWCA Civ 652, [2004] 1 WLR 3206;

ii) *Collier -v- Williams* [2006] EWCA Civ 20; [2006] 1 WLR 1945;

iii) *Hoddinott -v- Persimon Homes (Wessex) Ltd* [2007] EWCA Civ 120, [2008] 1 WLR 806;

iv) *Malcolm-Green -v- And so to Bed Limited* [2013] EWHC 4016 (IPEC).

Summary of the Claimants' Submissions

8. Because the application is made under CPR 7.6(2) the court has a broader discretion than is the case for applications made after the expiry of the claim form under CPR 7.6(3). Applications under CPR 7.6(2) are determined by the application of the overriding objective and "good reason" is no longer a jurisdictional prerequisite for an extension of time*: Hashtroodi -v- Hancock* at paragraphs 17-19. Whilst, absent a good reason for the extension, an extension may be unlikely, it will be granted if that is appropriate on the particular facts: *Hoddinott -v- Persimon Homes (Wessex)* at paragraphs 53-59. In *Hoddinott* an extension was granted because: -

i) Limitation had not expired and;

ii) The Defendant was not ambushed by a late claim, as it had been provided with a copy of the claim form.

9. The Claimants maintain that there was a good reason not to serve the claim form, but rather to seek an extension until the extant GLO issues had been determined. It is accepted that service of the claim form on VWUK was possible, and that there was a deliberate decision not to serve. It is accepted that this may have been a misjudgement, but there is a distinction between that decision made in this case, and those authorities dealing with cases where there had been incompetence, or a disregard for promptness, which had led to the failure to serve within the validity period of the claim form. When YL could not achieve a settlement on the terms sought, they decided to apply for an extension so that there would not be a demise of viable claims against VWUK.

10. It is accepted that the Claimants have not pleaded a case against VWUK, but against the background of the group litigation VWUK is well aware of the issues, namely that it is alleged that the VW Defendants in the group litigation concealed the extent of noxious emissions from diesel vehicles, and the fact that they were in breach of international Regulations. Further there is no issue of limitation arising, and the Defendants have never asserted issues of limitation in any of the claims brought against the VW Defendants. There was also no question of an ambush. This is a very old claim form and most of the extensions granted over a two-year period have been at the behest of VWUK. VWUK has therefore no legitimate expectation that claims would not be brought, it had had a copy of the claim form in excess of two years and had been in receipt of correspondence about it. It was aware that if agreement could not be reached in respect of costs that the claims would be pursued.

11. It is accepted that there was no claim against VWUK in the GPOC, but VWUK was a party to the GLO so that if any claim is brought against VWUK it will fall within the ambit of the GLO. Other Claimants have issued claims within the ambit of the GLO in the County Court. Under the GLO the cut-off date is not until 7 December 2018 so there is every scope for this claim to be included. Thus, this was very different to the *Hashtroodi* case because there is no reasonable expectation of finality in these proceedings by the Defendant.

12. The judgment of Dyson LJ (as he then was) in *Hoddinott* at paragraph 54, identified three reasons why the court may decide to decline to extend time for service, even if the Claimant could immediately issue fresh proceedings where limitation was not an issue. He said that service of the claim form served three purposes: -

    i) to notify the Defendants that the Claimant has embarked on the formal process of litigation and to inform him of the nature of the claim;

    ii) to enable the Defendant to participate in the process and have some say in the way in which the claim is prosecuted;

    iii) to enable the court to control the litigation process.

13. It is submitted that none of those factors applies in this case as a reason to refuse to grant an extension: VWUK has been well aware for over two years that proceedings have been issued; VWUK is able to participate in the process via the group litigation and have a say in the way in which claims are prosecuted as it is a party to the GLO; the court is controlling the litigation process through the group litigation proceedings.

14. It was submitted that although it was recognised that it was possible to serve the claim form before the extension to 26 April 2018, in the particular circumstances of this case, against the background of the GLO application, there are sufficient grounds for the court to exercise its discretion under the over-riding objective in granting the request for an extension.

Summary of the Submissions of VWUK

15. VWUK refers the court to the events in the group litigation and in the correspondence between the parties since the management of this claim within the group litigation on 30 January 2017. This is set out primarily in Blain 7 and is detailed, so I have

summarised the chronology and the events referred to as an Annex to this judgment for ease of reading.

16. VWUK invites the court to make a finding to the effect that there was no good reason for the claim form not to have been served before the expiry date. Mr Whittle's evidence could not be relied upon because it was not consistent with the contemporary evidence of the correspondence between the parties. YL recognised that there was no obstacle to service because it told Freshfields on numerous occasions that it would serve the claim form. It also served the proceedings on all other VW Defendants who were also represented by Freshfields. The letter of service expressly excluded service on VWUK.

17. VWUK invites the court to disregard Mr Whittle 3 because it was not served until 6pm the day before the hearing. In the event that the court chooses to consider it, the following submissions are made. The statement refers to the need for "*dialogue to be entered into with the parties to seek to establish an agreed approach*" as a reason for requiring an extension of time. That could not be a good reason for failure to serve, and in any event, there had been two years in which that dialogue had not occurred, despite Freshfields' repeated requests as to the Claimants' intentions with regards to the claim in relation to the group litigation proceedings.

18. Mr Whittle states at paragraph 35 that as it was not possible to reach an agreement with VWUK, and that the seven days extension offered by Freshfields was insufficient so the Claimants were forced to apply for an extension of time for service. That was not the case because the Claimants would clearly have been able to serve the proceedings within the additional seven days offered, and had previously stated that they would serve by 26 April 2018. It is submitted that Mr Whittle 3 is highly selective about the information provided to the court particularly in relation to paragraphs 35-37.

19. It is submitted that the application to extend time is a device to try to avoid or delay the Claimants' liability for the costs of issuing the claim against VWUK. That approach is at best flawed and at worst an abuse of the court's process. It is submitted that there is no reason for the claims being pursued against VWUK, given the confirmations in correspondence that the Claimants have no claim against VWUK, other than to avoid the costs consequences of discontinuance.

20. In circumstances where there was no good reason not to serve the claim form, it is submitted that there are no compelling reasons why the court should exercise its discretion under the overriding objective to grant the extension requested. The reasons why the court should not exercise its discretion are summarised in Blain 7 at paragraph 8 as follows:

    i) previous agreed extensions over two years;

    ii) the Claimants failing to articulate the basis of any claim against VWUK in correspondence from 2016 to 2018, despite repeated requests;

    iii) representations to the court and all other parties that the various draft GPOCs served in 2017 and January 2018 (none of which contained any claims against VWUK) contained all causes of action being pursued against all Defendants;

iv) failing to raise at the March 2018 GLO application hearing even the possibility of the VWUK claims being pursued, so that the hearing proceeded on the basis that no claim against VWUK would be pursued;

v) failing to plead any claim against VWUK in the GPOC served on 13 April 2018;

vi) failing to send any correspondence after the GLO hearing about the VWUK claim until 20 April 2018, six days before the date for service;

vii) refusing a seven day extension for service of the Claim Form on the express basis that they would serve proceedings "*within the service deadline*";

viii) failing to serve the application notice until 18 May 2018, over three weeks after issue, contrary to CPR 23.7; and

ix) failing to provide any particulars of the claims apparently being considered, beyond a bare assertion, even by the time of the hearing, nearly eight weeks after the application was made and after the date to which the extension was sought.

21. VWUK refers to the guidance given by Practice Direction 7A at paragraphs 8.1-8.2 which confirms that the evidence in support of an application should include all the circumstances relied on and a full explanation as to why the claim has not been served. It is submitted that those basic requirements have not been fulfilled by Mr Whittle's evidence.

22. In *Hashtroodi* Dyson LJ at paragraphs 18-21 emphasised the need for the court to determine and evaluate the reasons why the claim form was not served in time, and the importance of adhering to time limits unless there is a good reason for departure. He stated that "*the weaker the reason the more likely the court will be to refuse to grant the extension*". At paragraph 35 he held that failure to serve due to the incompetence of the Claimant's legal representatives, whilst not an absolute bar, was a powerful reason for refusing to grant an extension of time. It is noteworthy that in *Hashtroodi* there were no issues as to limitation, so the Defendant would not have been deprived of a limitation defence by an extension but notwithstanding that the court refused to grant an extension, holding at paragraph 36:

> "the absence of any explanation for the failure to serve is, on the facts of this case, decisive."

23. In *Collier -v- Williams* a number of conjoined appeals were heard by the Court of Appeal. Dyson LJ (as he then was) referred to the court's determination and the evaluation of the reason why the claimant did not serve the claim form within the specified period as:

> "the critical enquiry that the court must undertake in these cases". (Paragraph 131)

24. He also stated that even in an application under CPR 7.6(2) "*if, as in the present case, there is no reason to justify the failure to serve the claim form in time, it should normally not be necessary to go further.*" At paragraph 158 he identified the fact that reasons which may justify an extension of time for service of the particulars of claim do not

necessarily justify an extension of time for service of the claim form. He emphasised that waiting for a development in the case was not a good reason for not serving the claim form.

25. In *Hoddinott* in the Court of Appeal, again in the judgment of Dyson LJ, it is stated that:

> "Where there is no good reason for the failure to serve the claim form within the four months period, the court still retains a discretion to grant an extension of time, but is unlikely to do so". (Paragraph 40)

26. With regard to the relevance of limitation, he stated:-

> "Where there is doubt as to whether a claim has become time barred since the date on which the claim form was issued, it is not appropriate to seek to resolve the issue on an application to extend time for service or an application to set an extension of time for service …
>
> Nevertheless, in our view the fact that a claim is clearly not time barred is a relevant consideration to be taken into account in favour of the Claimant when the court decides whether to grant an extension of time. But it is not determinative." (Paragraphs 52-53)
>
> and:
>
> "The fact that the claim form is clearly not yet time barred is a relevant consideration." (Paragraph 55)

27. In relation to the issue of limitation in the case of *Malcolm-Green* HHJ Hacon stated:

> "It seems to me that whether the limitation defence was in relation to large or small proportion of the total infringements alleged is not to the point. The discretion to give the Claimant further time to serve the claim form should not be exercised where there is any loss to the Defendant which cannot be characterised as *de minimis*." (Paragraph 39)

28. The judge also noted that there was a distinguishing feature from *Hoddinott* because a copy of the claim form had not been provided, but only details in correspondence. He stated:-

> "Allegations in correspondence may or may not coincide in nature and scope with what a claimant sets out in his claim form. Only the latter expresses the precise nature of the claim that is being raised in the litigation". (Paragraph 41)

29. In this case the brief allegations in the copy of the claim form provided had never been explained or expanded upon by the Claimants' solicitors in correspondence despite

repeated request by Freshfields for them to do so, as stated in Blain 7. Further, by YL's letter of 24 April 2018 additional causes of action were threatened to be added with no explanation in any pre-action or post-action correspondence. This case can be distinguished from *Hoddinott,* where by the time the claimant's application came before the court full Particulars of Claim had been served by the claimants (paragraph 58 of the judgment). Here, not even draft particulars of claim had been provided in the previous two years since issue, nor have the requests for explanations and for clarity of the allegations been answered. This, combined with the confirmation in correspondence by YL that no claim was pursued against VWUK strongly suggests that there are no real underlying claims against VWUK, which was particularly egregious in the case of allegations of fraud, dishonesty and concealment.

30. With regard to limitation it should be noted that it was not at all clear that this was not an issue and VWUK was not in a position to identify whether or not this is the case. Certainly, with the regard to the claims in the GL litigation against dealer Defendants, Leigh Day, acting for a large cohort of Claimants had said that there were potential time bars in respect of certain claims and that was the reason why claims had to be issued. Further in correspondence the dealer Defendants had consented to addition of claims to existing claim forms only on the basis that the date of claim be treated as the date of the addition. In circumstances where the claims are not pleaded it is not possible to identify whether there was a limitation issue. It is not known whether the Claimants intend to rely on Section 32 of the Limitation Act 1980, but this could not apply to VWUK in any event, because they did not supply vehicles to consumers.

31. The Defendant also relies on issues of conduct in relation to the manner in which the YL have dealt with this matter:

    i) The application for an extension was not served for three weeks, in breach of CPR 23.7 which requires that a copy of an application notice must be served "*as soon as practicable after it is filed*". No explanation has been provided by YL for this, and for ignoring Freshfields' letter of 3 May 2018 following the issue of the application.

    ii) YL's e-mail of 16 May 2018 to the Senior Master in respect of the application was sent privately without being copied to Freshfields. By this date YL had not sent any correspondence at all on the matter since the issue of the application notice and not even sent a copy of the application notice. This was particularly inappropriate in circumstances where YL had requested the application to be determined on paper without a hearing.

    iii) Whittle 3, which was much more detailed than Whittle 1, the witness statement supporting the application, was not served until 6pm the day before the hearing.

    iv) The bundle for the hearing was not provided to Freshfields or to the court until after 10am on the morning of the hearing.

    v) Skeletons were not exchanged a day before, and the Claimants' skeleton argument was only received at 1.15pm for a hearing at 2pm. This was explained because YL were late in briefing counsel, but no reason is given as to why they were so late in doing so.

32. Further it is submitted that the fact that there is group litigation is not an exceptional reason on which to base a decision to grant an extension of time. Rather it was the reverse because there had been so many hearings before the court in January, June and November 2017, and the GLO hearing in March 2018, when this claim could have been mentioned and included in the claims encompassed in the GLO and that opportunity was never taken. Even in the face of the correspondence from Freshfields before the GLO hearing there was no reply and the issue was not dealt with at all by the Claimants at the hearing before the court in March 2018. It is submitted in those circumstances there was never any serious intention to pursue these claims, and that the intention was only to put off the determination of the claims until the end of the GLO in the hope of avoiding the usual costs consequences that would follow on discontinuance.

Limitation

33. The issue of limitation led to some email correspondence from both Counsel to me following the hearing, as Ms Donnelly for VWUK expressed concern that because of the late service of the Claimants' skeleton argument she had not been able to fully inform herself on the submissions previously made on the issue, as it was not mentioned in Mr Whittle's evidence. Mr Williams QC for the Claimants responded that the question of whether a limitation period has expired is well known to be of relevance to applications under CPR 7.6(2). I summarise briefly the written submissions made.

34. Mr Williams QC mentions that in all the authorities referred to at the hearing where permission to extend time for service was refused, limitation had expired. In *Hoddinott* where limitation had not expired, that was identified as a key factor in allowing the extension. He also draws my attention to the fact that neither Freshfields' correspondence nor Mr Blain's evidence makes any mention of any limitation issues or suggests that there are any issues of limitation in this case.

35. Ms Donnelly provides extracts from transcripts from the 8 June 2017 hearing in the group litigation, where Mr Campbell QC, for the Slater and Gordon Claimants (transcript at page 9, lines 10 – 25) and Mr de la Mare QC for the Leigh Day Claimants (transcript at page 18, paragraph 12 to 20) referred to the fact that contractual claims had to be issued for limitation reasons, because the claims were in danger of expiring if no progress was made in the GLO application. Mr Gibson QC for the VW Defendants, including VWUK, made the obvious point that claims can be issued to protect the limitation position, and a stay sought pending further directions after the GL application had been determined (transcript page 59, paragraph 4). Alternatively, the parties can reach an agreement on the issue, as was done between the Slater & Gordon claimants and the VW Defendants in a consent order dated 24 May 2018 in claim no. HQ18X00354.

36. Mr Williams QC refers to the fact that the limitation position is different in relation to the claims in tort, namely for negligent misstatement, based on allegedly false statements in VWUK publicity materials. Section 14A of the Limitation Act 1980 will apply to such claims. The relevant date of knowledge could not be before September 2015, as that was when the US proceedings under the Clean Air Act were reported. It appears that there is one Claimant, the 8th Claimant, whose contractual claim would be time barred, as he purchased his vehicle in 2012, but he would limit his claim to one in tort only if the application succeeds.

37. Ms Donnelly reminds me that her submissions were to the effect that it could not be said at this stage that limitation would not be an issue that would prejudice VWUK. In both *Hoddinott* (at §52) and *Malcolm-Green* (at §39) there is a warning against attempting to resolve the issue of limitation where there is doubt, on an application under CPR 7.6 (2).

Discussion and Conclusions

Whether There was a Good Reason Not to Serve the Claim Form

38. I find that there was no good reason not to serve the claim form within its period of validity. Although this was not expressly conceded, it was accepted that the claim form could have been served within the period of validity and the correspondence makes that entirely clear.

39. The reasons why the claim form was not served on VWUK advanced by Mr Whittle in his evidence are, in my judgment, simply not credible. Despite the late service, I have taken into account Whittle 3, although served very late, because I do not consider that its contents prejudice VWUK, and because it also demonstrates that lack of credibility in the evidence relied upon in support of the application. I do not make such a finding lightly against a member of the legal profession, (Mr Whittle is a Chartered Legal Executive and Senior Manager of YL) but Mr Whittle, who has been involved in the group litigation throughout, must know that the reasons given cannot be correct, for all the reasons advanced on behalf of VW.

40. First, in Whittle 1 at Paragraph 14, Mr Whittle says that "*it is appropriate that dialogue is entered into with the parties to seek to establish an agreed approach as to how to such a claim*." (I assume the missing word may be 'progress') and "*To facilitate such dialogue it is necessary that a sufficient extension of time is be [sic] granted to ensure that any such communications can be reached their appropriate conclusion*." The emphasis on time for continuing dialogue does not ring true in circumstances where there had been dialogue about the terms on which discontinuance could be effected for some considerable time, since 15 February 2018, and where Freshfields' offer of a seven day extension had been refused with an assertion that service would be effected "within the service deadline". In any event, the claim form could have been served and an application made for a stay if was thought that further time for discussion might be fruitful.

41. In Whittle 3, at Paragraph 35, Mr Whittle again relies on needing further time "*to consider entering into further dialogue regarding the claim, and to consider the Defendant's stance that any claim against VWUK must be within the GLO*." That is a disingenuous statement in the light of the correspondence sent by Freshfields, throughout the period since the claim had been brought within the GL application, asking what the Claimants' intentions were and seeking particulars of the claims alleged, and where Freshfields had sent numerous letters reminding YL of the need to decide what was intended with regard to the claim before the GL application was determined, and YL failed to engage. The same applies to the suggestion at Paragraph 26 that time was needed to liaise with members of the group litigation steering committee. YL had had ample time to do this during the period when they were being

pressed by Freshfields to engage with them on the intentions with regard to the claim. It also appears to be inconsistent with the statement in Whittle 1 at Paragraph 9 that:

> "*As matters stand, it is the above named Claimants intention to proceed with a claim against VWUK, but that such a claim would not form a part of the GLO*…." (My emphasis)

42. At Paragraph 35 of Whittle 3, Mr Whittle also relies upon "*the Defendant's changed position*", namely its wish to know the Claimants' intentions where no claim had been pleaded in the GPOC, and its unwillingness to grant further extensions. Again, this is disingenuous when considered against the correspondence where Freshfields had asked repeatedly for particulars of the claims, for information regarding the Claimants' intentions as to whether the claims would be proceeded with under the GLO, and in circumstances where YL had stated in evidence and in open correspondence that the Claimants had no cause of action against VWUK. Mr Whittle makes no mention of any of this. He refers at Paragraph 32 of Whittle 3 to the Claimants' "*unwillingness to drop a meritorious claim*" without explaining to the court how such an assertion can be reconciled with the previous assertions that the Claimants had no cause of action against VWUK. He fails to explain, if the claims in this action are meritorious, but where he considers (if this be so) that there are good reasons to stay the claims until the outcome of the group litigation, why an application for a stay was not made within any of the group litigation hearings during 2017 and 2018.

43. Counsel on behalf of the Claimants characterised the failure to serve as a "misjudgement" on the part of the Claimants' solicitor. The position here is indeed different from those cases where the claimant's solicitor unintentionally misses a deadline, or where solicitors are 'waiting for developments', such as in *Collier -v- Williams* and *Hoddinott.* There was a deliberate decision not to serve the claim form, and there was no good reason not to do so.

44. The proper course would have been either to:

i) serve the claim form, and if thought appropriate apply for a stay of proceedings. That would have brought the matter before the court, which could have considered whether the claim should be included within the scope of the GLO, the other Claimants' legal representatives could have considered whether the claim should be pleaded within a GPOC or not, and it might have been possible to identify the other claims against VWUK in the County Courts at the same time.; or

ii) apply to the court under CPR 38.6(1) for a different order than the default position when a notice of discontinuance is served.

45. Either of those steps would have been obvious to a competent litigation practitioner. It was a serious misjudgement to take the course adopted, and no proper explanation has ever been given as to why it was thought appropriate. The line of authorities commencing with *Hashtroodi* are well known to civil practitioners and a deliberate decision not to serve the claim form within the period of validity must, in my judgment, be characterised as incompetent, as it puts at risk the ability to continue the Claimants' claims. This is particularly the case where Freshfields offered a seven day extension to serve and it was refused.

Whether the court should exercise its discretion to grant the extension

46. The court must exercise its discretion under CPR 7.6(2) in accordance with the overriding objective in CPR 1.2(b): *Hashtroodi* at §17-18. In view of the conclusion I have reached that there was no good reason not to serve the claim form within its period of validity, and that the explanation given for the failure is not credible, the Claimants have a substantial hurdle to overcome to persuade the court that the discretion should be exercised in their favour. In *Hashtroodi*, Dyson LJ held, at §35:

> "…where there is no reason to serve other than the incompetence of the claimant's legal representatives. Although this is not an absolute bar, it is a powerful reason for refusing to grant an extension of time."
>
> And at §36;
>
> "The absence of any explanation for the failure to serve is, on the facts of this case, decisive."

47. In *Collier -v- Williams,* at §131 commenting on the guidance in *Hashtroodi*, Dyson LJ said:

> "If, as in the present case, there is no reason to justify the failure to serve the claim form in time, it should not normally be necessary to go further."

48. And in *Hoddinott,* at §40, Dyson LJ referred to "the general principle" that:

> "…where there is no good reason for the failure to serve the claim form within the four months' period, the court still retains a discretion to grant an extension of time, but is unlikely to do so."

49. The grounds in favour of granting the extension are as follows:

i) The claim is included in the group litigation and can be managed by the court within that litigation without interfering with the progress of the group litigation.

ii) There are other extant claims in the County Court against VWUK and other future claims likely to be brought so that there is no prejudice to VWUK in permitting these claims to be dealt with under the GLO.

iii) The cut-off date in the group litigation is not until 7 December 2018, so the claim can still be included in the group litigation.

iv) There is no question of an ambush as VWUK have known of the existence of this claim since it was issued in January 2016, and are, in general terms, aware of the nature of the allegations made.

v) It is most likely that limitation is not an issue in relation to claims in tort, and limitation may not be an issue in relation to some or most contractual claims. (See Paragraph 54 below for further discussion on this issue).

50. The circumstances which indicate that discretion should not be exercised in favour of granting the extension are as follows: -

    i) There is no claim against VWUK in the GPOC.

    ii) YL's refusal to provide any details in correspondence of the claims alleged against VWUK despite repeated requests. Indeed, it was only in leading counsel's skeleton argument for the purposes of this application, and in oral submissions at the hearing, that it was indicated that the grounds for the claims in the claim form and the proposed intended additional claims related to the fact that VWUK was the publisher of publicity materials, including websites, concerning vehicles within this jurisdiction, where it is alleged that VWUK made representations to customers about emissions from VW vehicles which were false.

    iii) Allegations are made of fraud and dishonesty without being identified in a pleaded case or in correspondence.

    iv) The failure of YL to bring this matter to the attention of the court at any of the hearings before the GLO application or at the GLO application hearing, despite repeated reminders of the need to do so by Freshfields, who did bring this to the attention of the court as indicated by counsel.

    v) The likelihood that there will be no material disadvantage to the Claimants, save for costs consequences, if an extension is refused, given the repeated confirmation that there was no intention to pursue claims against VWUK, and a willingness to discontinue the claims provided there was no liability for costs.

51. It is apparent from the authorities mentioned, particularly *Hoddinott* at §58 and *Malcolm-Green* at §38, that the Claimants must point to exceptional circumstances which merit the exercise of the discretion in their favour. The Claimants rely primarily on the existence of the group litigation proceedings. However that reliance is at odds with the assertion in Whittle 1 at Paragraph 9 that: "*such a claim would not form a part of the GLO"* (see Paragraph 41 above), and the suggestion in correspondence that an application would be made for a stay of the proceedings until the group litigation had concluded. Where the Claimants have had over a year, and opportunities at four listed hearings, to bring this claim to the attention of the court, and failed to do so despite Freshfields' repeated exhortations to YL, when applying the overriding objective the group litigation does not, in my judgment, constitute exceptional circumstances on which the Claimants can rely to justify granting the extension sought.

52. In those circumstances, I consider that all the circumstances and the weight of the factors against granting the extension, lead me to the conclusion that in applying the overriding objective it is appropriate to refuse to grant the extension requested.

53. I place particular weight on the following factors:

    i) The failure to bring this claim to the attention of the court during the group litigation proceedings, when there was every opportunity to do so, and no explanation given for that failure. It is also entirely unclear whether this issue was brought to the attention of the other solicitors on the steering committee in

whose names the GPOC was issued, so that consideration could be given to including such claims in the GPOC. It is also unclear what the position will be in relation to other claims against VWUK and whether they be dealt with separately or under the umbrella of the GLO. This should have been a matter which the court was able to deal with at the hearing in March 2018. It may have been that the court would have decided it would be appropriate to stay the claims pending the determination of the claims against the remaining Defendants, but that was a matter to be considered in the context of the GLO application and not separately. No explanation has been provided for this failure by YL.

ii) The failure to engage with Freshfields, or, presumably, other claimant solicitors in the group litigation: see Whittle 3 Paragraph at 36 where it is indicated there has not been liaison with members of the steering committee, [B7/39.9], and also the lack of any claims against VWUK in the GPOC) on the appropriate course to take in the group litigation in respect of claims against VWUK.

iii) The failure to provide any details in correspondence, or even adequately at the hearing of this application, of the claims against VWUK. This is of course particularly of concern when allegations of fraud and dishonesty are made. Indeed, it was only in leading counsel's skeleton argument for the purposes of this application that it was indicated that the grounds for the claims in the claim form and the proposed intended additional claims related to the fact that VWUK was the publisher of publicity materials, including websites, concerning vehicles within this jurisdiction where it is alleged that VWUK made representations to customers about emissions from VW vehicles which were false. Although VWUK, and Freshfields, were of course fully familiar with the claims made against other Defendants, as VWUK did not sell to consumers it was difficult to identify without explanation what claims would be made. The fact that no claims were made against VWUK in the GPOC called out for an explanation.

iv) The acceptance in correspondence that there were no claims that would be continued against VWUK, supported by the willingness to enter into a consent order discontinuing the claims, throws doubt on the later assertions that the claims are 'viable'. In any event, even if there are viable claims, but good commercial grounds for not pursuing them in the context of the claims made against all other Defendants in the group litigation, the Claimants have had ample opportunity to explain that to VWUK and to the court and have not done so.

Limitation

54. The issue of limitation, although clearly an important factor in the court's decisions on many applications under CPR 7.6(2), has not been of particular relevance here. I do not have sufficient information, in the absence of a pleaded case, and where there is some dispute between the parties on the issue, to reach a concluded view. However, I have considered whether, as seems most likely, if there are not, other than perhaps *de minimis*, issues of limitation, this would be a factor that would 'tip the balance' in favour of granting the extension, as in *Hoddinott*. Assuming therefore in the Claimants' favour that there are no limitation defences available to VWUK in this claim, that is not

a factor that would persuade me, applying the overriding objective, to grant an extension. The factors in favour of refusing to grant relief are, in my judgment, overwhelming in this case.

Conduct

55. YL's conduct in correspondence with Freshfields and in relation to aspects of the application has been inconsistent, non-engaging and generally unhelpful. But I accept the submissions of the Claimants' leading counsel that matters of conduct in relation to the application itself are not factors that I should take into account, and have not taken into account, in the exercise of discretion in the application, but rather factors which relate to my determination on costs. In so far as I criticise the credibility of Mr Whittle's evidence, I do so in the context of my conclusion that it fails to make out the basis for a good reason for a failure to serve, rather than as forming any part of the exercise of my discretion.

Costs

56. The usual order would be that VWUK would be entitled to their costs of the application, and the costs of the claim. Since the draft judgment was provided to the parties and the opportunity provided to the parties to make further submissions in relation to the basis of assessment, those costs have been agreed.

ANNEX

Chronology of events referred to in evidence served in the GLO application and correspondence between the parties, relied on by VWUK

i) 26 January 2017: YL served the first witness statement of Mr Johal of YL in the group litigation opposing the making of a GLO. This exhibited updated draft consolidated GPOC, which did not include any claims against VWUK. At paragraph 24 of the statement it is said: "*At this time, claims are not pursued by the YLC [YL claimants] against Skoda, Seat and VWUK*". (Blain 7 para. 32) [B6/22];

ii) 12 January 2018: Seventh witness statement of Mr Johal of YL in the group litigation, referring to the draft GPOC, and stating: "*the Defendants have the benefit of comprehensive draft Generic Particulars of Claim encompassing all causes of action which will be brought against them.*" (Blain 7, para. 7) [B6/15]. No cause of action against VWUK in draft GPOC;

iii) 15 February 2018: Freshfields invite YL to discontinue the claim against VWUK on the grounds that there was no cause of action pursued against VWUK in the draft GPOC (Blain 7 para. 45) [B7/25]. Mr Blain in his third witness statement dated 5 February 2018 served for the purposes of the GLO hearing in March 2018 referred to this and stated:

> "*Accordingly, if the Your Lawyers Claim Form HQ16X00241 is not discontinued as against VWUK, it should be struck out as against VWUK with an appropriate order as to costs*"; (Blain 7 para, 46) [B/7/25];

iv) 2 March 2018: YL responded by letter without prejudice save as to costs ("WPSAC") (later waived) stating:

> "*We can confirm that no cause of action is currently pursued against VWUK*";

v) There then followed proposals about the way to proceed, proposing, instead of a notice of discontinuance, a consent order confirming that no cause of action would be pursued against VWUK, upon agreement from VWUK that it would not seek to pursue any costs against the Claimants (Blain 7 para. 47) [B7/26];

vi) 9 March 2018: Freshfields responded, also on a WPSAC basis (later waived) stating:

> "*There never was any proper basis for the claim issued against VWUK. It is clear that your clients have been unable properly to identify or plead a claim against VWUK, and accordingly the issue of a claim form itself is an abuse of process: Nomura -v-Granada 2017 EWHC 642*;"

The request for the proceedings to be discontinued was reiterated, and a request made for an open letter to be sent confirming YL's intentions in relation to the

proceedings against VWUK. There was no reply from YL before the March 2018 GLO hearings either on open or a WPSAC basis; (Blain 7 paras. 48-49) [B7/95];

vii) 20 March 2018: VW Defendants' skeleton argument in the GLO proceedings at paragraph 10 identified the present claim against VWUK as one of the reasons why VWUK should remain a respondent to the GLO proceedings. The issue was also referred to in the VW Defendants' skeleton argument on costs of the same date stating:

> "*The question therefore arises as to the costs of that issued claim between VWUK and YL group. Nothing in the Draft Order is intended to encompass this discrete issue*";

viii) 13 April 2018 Slater & Gordon (SG) solicitors for one cohort of Claimants, and one of the two firms of lead solicitors in the group litigation, e-mailed Freshfields, attaching a copy of the GPOC filed on behalf of the three main groups of Claimants in the GLO litigation, including the YL group. Consistent with the previously served draft GPOCs, on the basis of which the court and the parties have proceeded, VWUK was not identified as a Defendant, and no cause of action was articulated against it; (Blain 7 paras. 55-56) [B7/28];

ix) 20 April 2018: YL letter to Freshfields on a WPSAC basis (later waived) stating that they would agree to discontinue the claim against VWUK only on terms that there be no Order as to costs. The letter ended with the following:

> "*As we are due to serve the claim form next week we would ask that you confirm your position to us by no later than 4pm on 23 April 2018, failing which we shall serve*";

The letter indicated that the only reason the claim form would be served would be to try to delay the costs on discontinuance being determined, by having the claims against VWUK stayed until after the conclusion of the other claims; (Blain 7 para.57) [B7/29];

x) 23 April 2018: Freshfields' open letter to YL largely repeating the matters previously set out in the letter of 9 March 2018, stating why the claim against VWUK should be discontinued and identifying VWUK's entitlement to costs and reserving VWUK's position respective in indemnity costs arising from the allegation of fraud; (Blain 7 para.59) [B7/29];

xi) 23 April 2018: Freshfields' open letter to YL opposing the suggestion that the claim form should be served and then the claim stayed generally, on the basis that, it having been accepted by YL that the Claimants had no claim to advance against VWUK, and/or they would not pursue any such claim, YL was seeking a stay merely to avoid the usual costs consequences on discontinuance of a claim, namely that the claimant pays the defendant's costs of the action under CPR 38.6. The letter alleged that this amounted to an intent to abuse the court's process, and that if an application for a stay was to be made it would be resisted. The letter also addressed the failure to raise the issue of this claim before the

court at or before the hearing of 27-29 March 2018; (Blain 7 paras. 60-61) [B7/30];

xii) 24 April 2018: YL response to Freshfields WPSAC (later waived) stating:

> *"…our clients had previously considered that it was not necessary to pursue claims against VWUK when they had meritorious claims against one or more of the Defendants within the GLO. Your client's stance on costs, however, forces our clients to pursue claims against VWUK (which will inevitably be successful) in order to avoid any liability of costs arising from discontinuance*."

That letter for the first time identified two further causes of action against VWUK namely negligent misrepresentation and breach of collateral warranty. Those additional causes of action were not referred to in the pre-action correspondence and were not identified on the claim form. No amended or draft amended claim form has been served nor any particulars of the proposed causes of action provided. The letter stated that unless there was agreement to discontinuance with each party bearing their own costs: "*…we shall proceed to serve both the Claim Form and Additional Particulars of Claim in relation to the claims against VWUK*". An agreement was sought by 12pm on 25 April 2018; (Blain 7 paras. 62-66) [B7/31 -32];

xiii) 25 April 2018: Freshfields (WPSAC but seeking to engage YL on an open basis) proposed a seven-day extension for the service of the claim form to remove the urgency of the issue and sought confirmation from YL that the joint lead solicitors in the group litigation were appraised of the VWUK claims, and identified that the Senior Master should be aware of the matters which potentially affected the GLO; (Blain 7 paras. 67-68) [B7/32]. On the same date YL replied by e-mail rejecting the extension offered and stating: "…*we shall proceed and serve proceedings within the service deadline as previously intimated. in our letter of the 24th April 2018*"; (Blain 7 paras. 69-70) [B7/32];

xiv) 26 April 2018: YL WPSAC letter (later waived) requested a twenty-one-day extension for the purposes of "*engaging in further dialogue*". Freshfields responded that VWUK's position in relation to costs on discontinuance would not change, but reiterating their agreement to a seven-day extension of service of the claim form. At 4.15pm on the same date YL e-mailed Freshfields attaching by way of service a copy of the claim form and response pack, but stating "*service of these documents is effected on the Second to Sixth Defendants inclusive … please note that service is not being effected on the First Defendant, Volkswagen Group United Kingdom Ltd at this time. A copy of our application for an extension of time for service against that Defendant will be provided forthwith*"; (Blain 7 paras.73 -74) [B7/33-34];

xv) 3 May 2018: Freshfields not having received a copy of an application for an extension of time wrote to YL requesting a copy of any application by return and notification of whether a hearing had been listed. There was no reply from YL; (Blain 7 paras. 75 -76) [B7/34];

xvi) 18 May 2018: Freshfields again wrote to YL repeating their request for a copy of the application notice and information as to whether a hearing had been listed (Blain 7 para.77 [B7/34]. YL sent Freshfields a letter enclosing a copy of the application notice, a witness statement and draft Order issued on 26 April 2018, and a copy of a lengthy email sent by YL to the Senior Master on 16 May 2018, not copied to Freshfields. The letter of 18 May 2018 also stated:

> *"(i) Only these nine Claimants out of the circa 60,000 Claimants who have indicated are likely to participate in the GLO are considering bringing claims as against VWUK;*
>
> *(ii) Any claims brought by these nine Claimants against VWUK would invoke the transfer provisions of the GLO meaning that an Order would be required by the managing judge; and*
>
> *(iii) these claims ought to be stayed pending the outcome of the GLO as they are not brought against the Defendant to the GLO but inevitably involved consideration of the generic issues*"; (Blain 7 paras. 78-83) [B7/34-35];

xvii) 23 May 2018: Freshfields wrote to the Senior Master in respect of the Claimants' application, and to YL on a WPSAC basis requesting that they agree to waive privilege over the WPSAC correspondence on the basis that the Senior Master would need to see this correspondence to determine the application (Blain 7 paras. 84-85) [B7/36];

xviii) 24 May 2018: Senior Master's Listing Clerk notified the parties by e-mail that I had not yet seen the application but having read the letter of 23 May 2018, directed that the application should be listed for a hearing. (Blain 7 para. 86) [B7/36];

xix) 1 June 2018: YL agreed to waive privilege over the WPSAC correspondence. (Blain 7 para. 90) [B7/37].