Neutral Citation Number: [2024] EWHC 1909 (KB)

Appeal Court Ref : KA-2024-000018
Claim No: QB-2021-001817 & Ors

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ON APPEAL FROM:
SENIOR MASTER FONTAINE

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 25 July 2024

Before :

MR JUSTICE CONSTABLE

- -

Between :

ETHAN THOMAS WRAGG & ORS	**Respondents/ Claimants**
- and -	
(1) OPEL AUTOMOBILE GMBH **(2) ADAM OPEL GMBH**	**Appellants/ Defendants**
(3) VAUXHALL MOTORS LIMITED **(4) IBC VEHICLES LIMITED** **(5) STELLANTIS FINANCIAL SERVICES UK LIMITED** **(6) STELLANTIS &YOU UK LIMITED** **(7) VARIOUS OTHERS (ALLEGED AUTHORISED DEALERS)**	

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Leigh-Ann Mulcahy KC & Charlotte Tan & Sophia Hurst (instructed by Cleary Gottlieb Steen & Hamilton LLP) for the Appellants
Daniel Oudkerk KC, Ognjen Miletic & Anna Dannreuther (instructed by Milberg London LLP, Leigh Day LLP, Pogust Goodhead and KP Law Limited) for the Respondents

Hearing date: 18 July 2024

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Thursday 25th July 2024.

Mr Justice Constable:

Introduction

1. This is a judgment consequential upon the successful appeal ('the Appeal') brought by the First and Second Defendants ('the German Defendants') against Senior Master Fontaine's judgment declining to set aside various orders extending time for the service out of claims issued by a large number of Claimants who allege that certain Vauxhall-branded diesel engine vehicles manufactured by the German Defendants and/or supplied by the Defendants contain unlawful defeat devices. The background to the Appeal is found in my earlier judgment at [2024] EWHC 1138 (KB) ('the Judgment').

2. The issue central to this further judgment is the scope of the Order which follows the Judgment. It also deals with the question of costs.

3. Appendix A to the Appellants' Skeleton Argument in the Appeal, and appended as Appendix A to the Judgment, tabulates each of the 31 Claim Forms which were the subject of Senior Master Fontaine's judgment and, in turn, the Appeal. Of these, the original application before Senior Master Fontaine was to set aside orders granting extensions of time for service in 28 of the claims.

4. Notwithstanding the fact that there were, therefore, numerous separate applications for extensions of time, and Extension Orders, underlying the dispute, the Court's approach below and in the Appeal adopted the manner in which the parties advanced their submissions. As such, the Judgment dealt solely with the 10 November 2021 Application, and then with what was called the 'Omnibus' Application. The brief background to the 10 November 2021 Application and to the Omnibus Application is set out at paragraphs 3 and 6 of the Judgment. The reason for this approach, effectively at the initiative of the Claimants, was explained by Senior Master Fontaine in her judgment at paragraph 59:

> "The Omnibus Application was made in respect of all claims and was intended to supersede those previous orders and achieve harmonisation of the extension date for all claims: Oldnall 10 §§6.1-6.2. It is therefore only necessary to consider that application in addition to the application of 11 November 2021."

5. This evidence was, as the Senior Master stated, based upon the evidence given by Mr Oldnall in his Tenth Witness Statement at paragraph 6.1 in which he said:

> "*If the Court makes the Order sought in this omnibus application it would simply supersede these earlier orders in the usual way. This will produce the efficient harmonisation as set out above.*"

6. There was no cross-appeal by the Claimants in respect of that approach when the German Defendants appealed her decision to decline to set the Extension Order(s) arising out of the Omnibus Application aside. True it is that, had Senior Master Fontaine refused the Omnibus Application in the first place, the effect of this would have been to leave prior Extension Orders un-superseded. A number of the Claim Forms were served within time if referenced against the Extension Orders made prior

to the Omnibus Order (Claim Forms: 13, 16, 17, 20, 21, 22, 23, 24, 25 and 26), assuming of course that those Extension Orders were themselves validly obtained. However, no submissions were made either before Senior Master Fontaine or before me, on appeal, suggesting that if the Omnibus Order was set aside, it was necessary to consider separately the validity of these previously ordered extensions.

7. In paragraphs 100-103 of the Judgment, in respect of the 10 November 2021 Application, I concluded that, on the basis of the evidence before the Senior Master and upon a proper application of the authorities, it was a clear error to have proceeded on the basis that there was a 'good reason' for not having commenced and progressed the service out at any time between May 2021 and November 2021 and/or finding there were exceptional circumstances, such that the Order arising out of the extension of time application of 10 November 2021 must be set aside. I declined to exercise my discretion afresh to grant the necessary extensions of time, because (a) there was no good reason/exceptional circumstances; and (b) the failure to exercise full and frank disclosure about the limitation defence in the 10 November 2021 application militated strongly against doing so.

8. In paragraphs 107-112 of the Judgment, in respect of the Omnibus Application, I concluded that the Order arising out of the Omnibus Application ought to be set aside because (a) the Judge appeared to have not proceeded on the basis of requiring 'exceptional circumstances'; (b) excessive weight was wrongly placed on the German Defendants' insistence on proceeding through the Foreign Process Section ("FPS") when the Judge had been unable to conclude that this was in fact the reason for the delay of (at least) a number of months coupled with the apparent criticism of that insistence, which could not be justified; and (c) it was wrong to place particular weight on the time spent by the German Defendants in responding pre-service when there was no obligation upon them to respond at all. I also declined to exercise my discretion afresh where there was no good reason for the delays let alone exceptional circumstances justifying such an exercise of discretion.

9. Following the handing down in draft of my Judgment to the parties, the Court received a joint letter from the Claimants seeking clarification. In particular, the Claimants suggested that, with regard to the applications for extensions made after the documents for service were lodged with the FPS (i.e. between June to September 2022), the Senior Master had found there was a good reason for the extensions granted. This point, so described, relates to Claim Forms 26 and 27, but not to any earlier ones. The Claimants noted that at paragraph 104 of my (then draft) Judgment, I had identified that this element of the Judgment had not been appealed. The Claimants therefore sought a clarification as to '*whether the reference to setting aside of the "Omnibus Application" at paragraph 111 of the draft Judgment is intended to instead be a reference to certain Orders made between 16 March 2022 and the lodging of the documents with the FPS for each Claim Form, i.e. for which the Senior Master found no good reasons.*' The Claimants asked for clarification of which of the extension Orders were set aside under the terms of the Judgment. It was suggested that these issues were best dealt with either by way of further written submissions and/or a consequentials hearing to be listed.

10. The German Defendants' position was that the Claimants were seeking to re-open and re-argue points that ought properly to have been raised at the hearing of the appeal if they were to be argued at all.

11. A further communication was received from the Claimants. This stated:

> 'To the extent that any Claim Forms are not impacted by the terms of the Court's Judgment, either due to issues of timing and/or because the substantive content of the Court's Judgment does not apply to their corresponding Extension Orders, it is important for this to be clarified.
>
> To that end, and to assist the Court, all four Claimant firms are currently preparing witness statements which set out information relating to all of the Claim Forms that they have issued. This evidence will set out: (i) each Claim Form issued by the firm; (ii) the date of issue; (iii) dates of related Service Out Applications and consequent Service Out Orders; (iv) dates when documents were submitted to the FPS; and (v) the dates of relevant applicable Extension Applications and consequent Extension Orders.
>
> We are endeavouring to provide this evidence for the Court within 7 days. Such evidence should be uncontroversial, as the dates are all objectively verifiable. Indeed, they are and have been part of the Court record. However, to the extent the German Defendants wish to put in any evidence in response, we consider that it would be reasonable for them to do so within 7 days of receiving the Claimants' evidence.'

12. Although it was envisaged by the Claimants in this email (contrary to the previous suggestion that the matter could be dealt with at a consequentials hearing) that the matter be resolved prior to finalising the Judgment, I amended the draft and handed down a finalised version which now stated, at paragraph 113:

> '*In these circumstances, I allow the appeal in respect of the Extension Applications. In light, however, of the Judge's conclusion about applications for extensions made after the documents for service were lodged with the FPS, to which I have made reference at paragraph 104 above, and further to submissions made by the Claimants and the German Defendants having seen the draft of this Judgment, I will (subject to any agreement reached between the parties) hear further submissions from the parties in order to consider the precise scope of the Order consequential upon this Judgment as it applies to particular extension of time applications.*'

13. I also directed that to the extent that the Claimants wished to serve evidence (as opposed to make submissions based on the evidence before the Court as at the hearing of the Appeal), theymay do so without prejudice to any objection by the German Defendants as to the appropriateness of further evidence at this stage. Similarly, the German Defendants may respond should they wish to without prejudice to any argument about admissibility.

14. The Claimants did, indeed, serve evidence. On 5 June 2024, somewhat later than the 7 days anticipated, the Claimants served 1,763 pages of evidence, including 138 pages of witness evidence from 4 witnesses: the Sixteenth Witness Statement of Mr Oldnall dated 5 June 2024; the Second Witness Statement of Mr Croft dated 5 June 2024; the Fourth Witness Statement of Mr Gallagher dated 5 June 2024 and the First Witness Statement of Mr Nugent Smith dated 5 June 2024. Each of the statements was from a different solicitor, representing a different set of Claimants. The German Defendants have not provided any responsive evidence. They contend that the evidence is inadmissible and irrelevant, and that the Claimants' position amounts to an attempt to

re-litigate both the Part 11 Applications (by putting forward evidence which was not before Senior Master Fontaine) and the Appeal (by putting forward, in addition to the evidence, an argument which was significantly more granular than had been argued before me). They also contend, without prejudice to this, that the Claimants' position remains without substantive merit.

Categorisation of the Underlying Orders and service of Claim Forms being Set Aside

15. It is useful at the outset to categorise the 31 Claim Forms, set out in Appendix A to the Judgment, in order to focus the arguments relating to which (if not all) are within the scope of the Judgment.

16. Category 1: it is agreed that 11 Claim Forms (Claim Forms 1-11 within Appendix A: 'the Initial Claim Forms') definitely fall within the scope of the Judgment.

17. Category 2: it is also agreed that Claim Forms 28-31 within Appendix A were served without reference to or need for extensions of time and are therefore outside the scope of the Judgment.

18. Category 3: the largest disputed category of Claim Forms, and which the Claimants contend fall into a 'grey area', are Claim Forms in respect of which Extension Applications were made after the 10 November 2021 Application but before 9 June 2022, when the first set of documents for the first Claim Form was submitted to the FPS. This relates to Claim Forms 12-25. Of these, the submissions of Mr Oudkerk KC, on behalf of the Claimants, focussed in particular on Claim Forms 24 and 25.

19. Category 4: Claim Forms 26 and 27 were both Claim Forms in respect of which Extension Applications were made after the first set of documents for service were lodged with the FPS. They are, themselves, slightly different from each other in that Claim Form 26 was served subject to an Extension Orders which pre-dated the Omnibus Order, and which had been obtained without having given full and frank disclosure relating to limitation issues. Claim Form 27 was served subject to an Extension Order which post-dated the Omnibus Order.

The Proper Reading of the Judgment

20. The German Defendant argues that the proper reading of the Judgment is that all Extension Orders have been set aside.

21. Extension Orders were defined at paragraph 3 of the Judgment as those arising out of the *ex parte* applications made from 10 November 2021 onwards, specifically by reference to Appendix A.

22. As explained above, the judgment of Senior Master Fontaine and my Judgment proceeded by way of examination limited, in relation to the Extension Orders, to the 10 November 2021 application and the Omnibus Application. There was no suggestion or submission by the Claimants – either before Senior Master Fontaine or on appeal before me - that the effect of setting aside the Omnibus Order, and refusing to exercise the discretion afresh, would – in respect of a number of Claim Forms – not in any event impact their validity because those Claim Forms had nevertheless been 'validly' served within the time permitted by a previous, valid Order. If that had been submitted, no doubt the German Defendants would have sought to deploy submissions focussing on the inadequacy of good reason/exceptional circumstances and the absence of full and

frank disclosure specific to those earlier applications/Orders, which always formed part of the application to set aside. Put another way, there was nothing by which the Claimants sought to distinguish the validity of the Omnibus Application from earlier applications/orders, or any basis upon which the Court was invited, in circumstances where it set the Extension Order arising out of the Omnibus Application aside, nevertheless to uphold the validity of earlier applications/orders, save in respect of the 10 November 2021 Application, which (in contrast to other applications) the Court *was* invited to consider separately.

23. The Judgment was specifically concerned with the Senior Master's consideration of the evidence as to the reasons why the extensions were sought: were there 'good reasons' or 'exceptional circumstances'? The Senior Master's approach had been summarised in her judgment at [58], as referred to in my Judgment at [80] and following. Her summary reflected the fact that the submissions before her did not seek to distinguish in any meaningful way between particular Claim Forms or particular applications for extensions of time within Appendix A.

24. Similarly, no argument was advanced with any specificity before me on the Appeal on the basis that the Court should consider specific Claim Forms as having relevantly different factual backgrounds, whether by reference to the evidence or otherwise, for the purposes of taking different approaches to each. The only relevant demarcation was between the 10 November 2021 Application and the Omnibus Application, specifically in circumstances where the Court approached the issue, at the invitation of the Claimants, on the basis that the latter had superseded the previous Orders.

25. Ms Mulcahy KC, for the German Defendants, is therefore correct that the approach of the Senior Master and indeed my approach in the Judgment was the natural consequence of the manner in which the Part 11 Applications have been dealt with by the Claimants, the German Defendants, and the Court throughout. Mr Oudkerk, who did not argue the matter before the Senior Master or on the Appeal, accepted that specific submissions at an individual and granular level were not advanced due to the manner in which the parties and the Court had approached the issues but contended that this was the reality of the requirements of proportionality and time. He argued that, in order to do justice, it was necessary now to revisit matters through a more granular lens. The analogy advanced was as though the Judgment dealt only with issues of principle, akin to a preliminary issue determination, and it was now time to apply those principles to the facts underlying each Claim Form. I do not accept this. If the Claimants had wished for the Court to put its mind to the specifics of different Claim Forms, the time to do it was when the matter was being argued. They could easily have made such bespoke submissions efficiently, in precisely the same way as they have – only now – sought to do in Appendix 2 to Mr Oudkerk's Skeleton Argument. The reality is that the Claimants either positively chose, or potentially failed, to present their arguments in this way (to the extent that the underlying evidence then before the Court would have permitted them to do so). Save in the most exceptional of circumstances, it is generally too late after the arguments have closed and the Judgment has been handed down (whether in draft or as perfected) to change tack. I consider that the arguments advanced before me presently are an illegitimate attempt to re-cast the arguments previously made; it is a second bite of the cherry. If, in light of the way in which the arguments were advanced before me, I have fallen into error (which I do not consider I have done) by failing to consider an argument or evidence properly before me, that is a matter upon which permission for appeal would need to be granted and the matter, if permission is granted, can be considered by others.

26. The Orders from those two applications having been set aside and not re-granted, the natural consequence from the way in which the case was argued is that all the Extension Orders should be set aside, which therefore affects all Claim Forms within Appendix A save for those agreed to be outside the scope of the Judgment.

27. That is enough to dispose of the matter. Nevertheless, I deal with the other matters raised by the Claimants because I consider the arguments to be equally unmeritorious.

The Admissibility of Evidence

28. The evidence the Claimants now seek to rely upon to advance their Claim Form-specific case goes significantly beyond that for which permission was sought following the handing down of the draft judgment, which had been described as evidence going to (i) each Claim Form issued by the firm; (ii) the date of issue; (iii) dates of related Service Out Applications and consequent Service Out Orders; (iv) dates when documents were submitted to the FPS; and (v) the dates of relevant applicable Extension Applications and consequent Extension Orders. The Claimants said in terms that the evidence would be objectively verifiable matters which were part of the court record. Whilst my direction did not in terms limit the evidence to the Claimants' own description of what they intended to submit, it is obvious that I was giving permission for the Claimants to do that which they said it were going to do, and not more. Even this permission was without prejudice to the admissibility of this, limited, evidence.

29. It is also plain that the evidence served goes significantly beyond that which was before Senior Master Fontaine on the original applications and/or on the application to set aside.

30. Perhaps recognising this, Mr Oudkerk effectively made the vast majority of his oral submissions without reference to this evidence, and thus sought to downplay the importance of its admissibility. Nevertheless, it is plain that the fresh evidence is cross-referenced extensively in Mr Oudkerk's Appendix 2 which sets out the '*reasons for pre-FPS application*'. In this context, and quite realistically, Mr Oudkerk did not demur from the proposition that (for example in relation to the need for amendments to Claim Forms which is now being advanced as a reason for needing an extension of time) neither Senior Master Fontaine, initially, nor I on appeal, need take into account matters as 'good reasons' or 'exceptional circumstances' which were not explicitly identified as such in the evidence and submissions at the relevant time, whether or not the underlying fact (e.g. the fact that claimants were being added to the claim forms prior to service) was capable of being discerned from the Court record.

31. Pursuant to CPR 52.21(2)(b), unless the Court orders otherwise, an appeal court will not receive evidence which was not before the lower court.

32. If the Claimants had, in the context of the Appeal, sought to adduce this further explanatory evidence prior to the hearing in April, they would have had to persuade the Court that (in broad terms) there were 'special grounds' upon which to adduce the fresh evidence. What may constitute 'special grounds' remains guided by Ladd v Marshall [1954] 1 WLR 1489. In circumstances where this is obviously evidence which could and should have been obtained and deployed before Senior Master Fontaine had the Claimants thought it appropriate to do so, I would not have exercised my discretion to allow this fresh evidence in. This remains the case. Indeed: the position is even more acute where the evidence is sought to be adduced after argument and the handing down of the Judgment.

33. There is no proper basis to adduce the fresh evidence at this stage. The voluminous witness evidence served by the Claimants is therefore inadmissible.

Category 3 Claim Forms

34. This category relates to 14 Claim Forms (12-25) issued (i) at some point in the 8-9 month period identified by Senior Master Fontaine between a letter from Cleary Gottlieb Steen & Hamilton LLP (Cleary Gottlieb) dated 15 October 2021 and the making of the first request for service to the FPS in June 2022; and (ii) in respect of which a first Extension Order was sought prior to the submission of documents to the FPS in June 2022. This is not a category of Claim Forms about which any uncertainty or difficulty was previously said to arise (and in respect of which I permitted submissions to be made) in the correspondence which followed the handing down of the draft Judgment. It was effectively a new argument taken in the (inadmissible) witness evidence.

35. It is now said that there is, in respect of this category, an uncertainty because (1) Senior Master Fontaine had held that she was unable to conclude that there was a '*good reason for delay'* in effecting service of Claim Forms during the *entirety* of the period described above; and (2) at [99] of the Judgment I made the general observation that "*If, for example, the Claimants had applied to serve out promptly, either following issue of the Claim Form or (at the very latest) sometime in August, the very heavy administrative process of dealing with the FPS in the context of document-heavy claims may very well have been good reasons to justify an extension of time and would have been relevant to the length of additional time needed.*" It is therefore argued that there may be some of the Claim Forms, depending on their date of issue, where the reason for delay was a 'good reason'.

36. However, there is no uncertainty. Senior Master Fontaine concluded that, in relation to the preparation of documents for service of the 31 claims following the end of the correspondence from Cleary Gottlieb on this issue in mid-October 2021, '*there is no real evidence as to when that preparation commenced and how long it took*'. Senior Master Fontaine, therefore, simply made no factual finding on the existence of a good reason in respect of any of these Claim Forms, less still a relevant 'exceptional circumstance' which was the true test to apply, given the limitation issues. It was for the Claimants to provide the necessary evidence and submissions to enable the Senior Master to make the factual finding which could underpin an entitlement to an extension of time. The Senior Master made no such factual finding, and the Appeal properly proceeded from this basis. The further evidence sought to be adduced now is, as I have concluded, inadmissible to that end.

37. The admitted high point of Mr Oudkerk's case in relation to this category focusses on Claim Forms 24 (Willis) and 25 (Aarre). These are relevant to the Second Defendant only, as the First Defendant was successfully served within the original 6-month period. The Service Out Order and the first Extension Order sought in respect of these Claim Forms was by way of an application dated 29 April 2022. It was submitted that the reason for requiring the Extension Order was contained in Mr Oldnall's Eighth Witness statement. This described the reason (summarising evidence from his previous 2 statements) as "*(i) delays at the Foreign Process Section ("FPS") in processing foreign service applications; combined with (ii) the estimate for effecting service under The Hague Service; (iii) the German Defendants' unwillingness to accept service by*

registered post, despite previously indicating in correspondence via its solicitors Cleary Gottlieb Steen & Hamilton LLP ("Cleary") that they were willing to consider such alternative service; and (iv) the time it took for Cleary to confirm the position in response to numerous requests that they do so from our firm."

38. As to (i) and (ii), paragraph 16 of the same statement described the (then) issues with the FPS as being a three-to-four-week backlog at the FPS to process foreign service applications; and, thereafter, the estimate for effecting service in Germany was estimated to be around three months. There was at the time of the first application, therefore, an expected period of at most 4 months to effect service, including all then-known delays at the FPS, within a 6-month window for service. In the hypothetical position where I had been required to consider this substantively, I would have acceded to a submission from the German Defendants that this would not have amounted to the necessary 'exceptional circumstances' justifying an extension. Thereafter, the Claimants took the best part of three months to submit documents to the FPS (which happened on the 21 July 2022). There was no admissible evidence justifying this further delay before the Court during the initial application or the Appeal – the explanation (relating to translations) is found in the inadmissible evidence just served. Even if it had been, the need for translations was known about from the date of issue. Whilst later delays caused by the FPS might well, of themselves, have amounted to a good reason for an extension of time, the same position as that concluded by Senior Master Fontaine on the Omnibus Application would have pertained to the earlier application: it was not possible to conclude that a good reason – let alone exceptional circumstances – had been evidenced for the entirety of the overall delays which necessitated the later extension of time application.

39. Moreover, in respect of each of the applications preceding the Omnibus application, (i.e. including Claim Forms 12-25) the Claimants had failed to comply with the obligation of full and frank disclosure. This non-disclosure was material because, as I concluded in terms in the Judgment at [103], it affected the very test which the Court was required to apply. It was therefore a significantly more serious transgression of the duty of full and frank disclosure than that which occurred in the context of the serving out application. Had it been necessary to do so, I would have determined that the appropriate sanction in the case of a serious transgression of this nature would have been to set the extension order(s) arising from the applications aside and not to re-grant the orders.

40. In the circumstances, each of the Claim Forms in this category (12-25) are within the scope of the Judgment.

Category 4 Claim Forms

41. This relates to two Claim Forms, 26 and 27 (Mercury and Burns respectively).

42. The Claimants rely upon Senior Master Fontaine's conclusion that, '*with regard to the period when applications for extensions were made after the documents for service had been lodged with the FPS it is entirely apparent from the very detailed information provided in Oldnall 10…that there was a good reason for the extensions granted*'. On the basis of my general observations at paragraphs [99] and [104] it is said that, effectively without more, the Judgment cannot apply to any applications for extensions of time made after 9 June 2022 – which is the date that the first documents (in relation to *other* Claim Forms) were lodged with the FPS.

43. I consider that this mischaracterises both the judgment of Senior Master Fontaine and the Judgment. The Senior Master was plainly not finding that merely because an application had been made after 9 June 2022, there automatically existed a good reason to grant the extension of time. Had she done so, that would be an error of principle. As made clear at paragraph [99] of the Judgment, it is only in circumstances where the *actual* reason for the delay being caused or to be caused to the service out of a claim form is the delay being encountered in the FPS that there may be a 'good reason', or possibly even 'exceptional circumstance' justifying an extension of time. The fact that an application in respect of Claim Form A has been made after a date upon which documents relating to Claim Form B have been submitted to the FPS cannot possibly be, without more, a reason for an extension of time in respect of the service of Claim Form A.

44. Looking at each of these two Claim Forms on their merits, in light of the evidence which was before Senior Master Fontaine and me on the Appeal, I conclude that both Claim Forms should fall within the scope of the Judgment. As to Mercury, the prior application was one made without full and frank disclosure as to an important factor which changed the very nature of the test the Court was to apply, and the conclusion I have reached at [39] pertains equally. Moreover, there was no evidence before the Senior Master (or me) to explain the particular delays with regard to this particular Claim Form in circumstances where, on the face of it, there were lengthy delays between issuance of the Claim Form and the application for service out or an extension of time, and in seeking to and in submitting documents to the FPS. None of these delays were caused by the FPS itself. As to Burns, the evidence before the Senior Master was the same as that in respect of the Omnibus Application and the same outcome should apply. Moreover, even if looked at individually, there was an unjustifiable delay of some 4 months before taking the first step of seeking service out or extension orders.

45. In the circumstances, each of the Claim Forms in this category (26-27) are also within the scope of the Judgment.

Conclusion

46. Thus:

(1) Service of Claim Forms 1 to 23 and 26 to 27 must be set aside entirely (as Claim Forms which were served outside the period of original validity and had to rely on Extension Orders which have now been set aside);
(2) Service of Claim Forms 24 and 25 must be set aside in relation to D2 but not set aside in relation to D1 (given that those two Claim Forms were served on D1 (but not D2) within the original period of their validity).
(3) Service of Claim Forms 28 to 31 shall not be set aside (given that these claim forms were served on both German Defendants within the original period of their validity).

Costs of the Appeal

47. Ms Mulcahy contends that the Appeal has been allowed and that the German Defendants are the successful party, such that costs should follow the event. They seek 90% of their costs reflecting the outcome that service of 27 out of the 31 Claim Forms will need to be set aside (in relation to two claim forms in relation to one German Defendant but not the other) as a result of the setting aside of the Extension Orders. It is said that these costs should be assessed, if not agreed, on the standard basis save for

the costs of this consequentials hearing (and all costs incurred by reason of the service of the Claimants' new evidence) which should be assessed on the indemnity basis.

48. By contrast, Mr Oudkerk contends that the Court should take an issues-based approach, as the Senior Master did below. It is contended that the Claimants won entirely on the Service Out Orders appeal based on full and frank disclosure (Issue 1), and that the German Defendants had a partial success in relation to the Extension of Time Orders appeal (Issue 2), suggesting that they lost the full and frank disclosure element of this appeal. It is said that Issue 1 took up the majority of the time (at least 70%). Mr Oudkerk argued that even assuming, in the German Defendants' favour and for the purposes of argument, that Issue 1 only took up 50% of the time and costs, it would follow that the Claimants would be entitled to 50% of their costs and the Defendants would be entitled to 50% of their assessed costs (prior to a reduction to reflect partial success) and that the net costs position would be neutral.

49. It is plain in my view that the German Defendants have won the Appeal. Whilst it is right that one limb on which the Appeal was advanced failed, it is wrong to suggest that the significant time spent dealing with the law relating to full and frank disclosure formed no part of the successful element of the German Defendants' Appeal: see [103]. That paragraph could only take the matter shortly because of the legal analysis undertaken initially in the context of the Service Out Application.

50. Doing justice between the parties and in the exercise of my discretion, I consider that the German Defendants ought to have its costs of the Appeal, but (without taking a strict 'issue by issue' approach) a reduction by 30% to 70% be made to reflect the fact that the success was not complete. This reduction should not apply to the costs of the preparation for the consequentials hearing, as to which the German Defendants should recover 100%. All costs are to be assessed on a standard basis, if not agreed. Whilst the attempt to put in late evidence was misguided and ultimately failed (such that the Claimants will pay their own and the German Defendants' costs of dealing with it), it is not conduct sufficient to warrant the application of indemnity costs.

Costs of the Part 11 Application

51. In terms of the costs of the Part 11 Applications, Senior Master Fontaine's order dated 25 January 2024 provided for:

    (i) *The Claimants to pay the German Defendants 40% of their costs of the application on the indemnity basis*. These were the costs attributable to the limitation non-disclosure and this was part of the costs sanction, as was the previous interim payment on account of those costs. Both parties accept that this should stand following the Judgment in circumstances where the existence of a costs sanction formed part of my reasoning as to why the appeal relating to the Service Out Orders was unsuccessful.

    (ii) *The German Defendants to pay 20% of the Claimants' costs*. This was by reason of losing on the alternative forum issue. The German Defendants seek a modification of this, as explained below.

    (iii) *No order for costs in respect of the remaining costs of the application.* This related to the costs of the Extension Applications and deprivation of these costs (despite the Claimants' success below) was another part of the sanction for non-disclosure. The German Defendants seek the same percentage (90%) of the 40%

attributed to the Extension Applications to be paid by the Claimants, to be the subject of detailed assessment (if not agreed). However, in addition, Ms Mulcahy submits that where the German Defendants now receive the Extension Application costs following the Appeal in any event, the part of the sanction previously reflected in this 'no order' limb has effectively been lifted, and suggests that it is reimposed by amending (ii) so that the Claimants pay the German Defendants' costs of that 20% portion (instead of the other way around). I disagree. Unlike the position that Senior Master Fontaine was dealing with, in the Judgment the failure to give full and frank disclosure forms a substantive part of the reasoning by which the German Defendants succeeded in persuading me not to exercise the discretion to allow the order to be renewed. That is a powerful sanction in its own right and no further costs sanction to replace the 'no order' limb is required to do justice between the parties or to further mark the disapproval of the Court in the face of the breach of the duty.

Costs of the Proceedings on lapsed Claim Forms

52. The German Defendants seek all their costs, to be assessed if not agreed, with respect to lapsed Claim Forms. The Claimants submit that an order based upon Millburn-Snell v Evans [2011] EWCA Civ 577 is appropriate. They propose the following:

(1) if within two months of receipt of the sealed consequentials order the Claimants issue a like Claim Form against the German Defendants, all steps that were taken in their old claims shall be deemed to be steps taken in the new claim and the costs of such steps shall similarly be deemed to be incurred in the new claim; but

(2) if no new claims are issued within that period, then the Claimants will be ordered to pay the German Defendants the individual costs of the proceedings relating to the lapsed Claim Forms only with liability of any common costs to be determined in accordance with §40 of the GLO.

53. Ms Mulcahy resisted this Order, pointing out that the facts of Millburn-Snell were quite different. Both parties referred me to paragraph 35 of Millburn-Snell, in which Rimer LJ said:

> "*I regard the fair order to make as to the costs of the claim (other than that in respect of the application costs, which will remain undisturbed) is that the claimants should pay all the defendant's costs of the claim so far as they have been wasted. I put it like that because during the argument we discussed with counsel our provisional thoughts that it would be unsatisfactory simply to order the claimants to pay all the defendant's costs of the claim. That is because it is not just possible, but probable, that now that one of the claimants has obtained a grant, a properly constituted claim will be brought against the defendant. If so, such claim could, when issued, and subject to appropriate directions being given, be ready for trial almost straight away. That is because all the steps taken in the old claim could, were we so to direct, be treated as steps in the new claim; and the costs of those steps have already been incurred.*'

54. Although the underlying facts are entirely different, the logic of the position where a claim is to be set aside but where it is readily probable that a replacement will be issued is, in my judgment, inescapable. The German Defendants are undoubtedly entitled to the costs that have been *wasted* as a result of the procedural failure to have served the proceedings in accordance with a validly obtained extension of time. If, however, the

German Defendants have incurred a cost which – once re-served – will not then have to be incurred again, that is not a wasted cost. It is a cost the liability for which should fall to be determined as part of the replacement litigation. If Ms Mulcahy is right that no such costs exist, and that all costs incurred have been wasted, then the effect of the Millburn-Snell order will, in practice, be the same as the costs recoverable pursuant to the Order that she seeks. Whether and what costs have been wasted is a question of fact upon an assessment; it is not something which I can determine summarily or as a matter of principle.

55. That said, I do not consider that the specific wording of the Order sought by the Claimants as set out above properly reflects an order by which they should pay all the German Defendant's costs of the claim so far as they have been wasted. The Order should make clear that the Claimants are to pay the German Defendants' costs of the lapsed proceedings relating to the lapsed Claim Forms save insofar as, in circumstances where new, like claims are issued within 2 months, the Claimants are only to pay the costs wasted by the lapsed Claim Forms/re-issuing of new, like Claim Forms.

Interim Payment

56. A payment on account should be provided for in the ordinary way: I shall determine that sum if not agreed.

57. I leave the parties to draw up the appropriate Order.