



Neutral Citation Number: [2024] EWHC 190 (KB)

Case No: QB-2022-002405 and others

IN THE HIGH COURT OF JUSTICE
OF ENGLAND AND WALES
KING'S BENCH DIVISION

Royal Courts of Justice
Strand
London
WC2A 2LL

31 January 2024

Before: MRS JUSTICE COCKERILL DBE
Between:

(1) AURORA CAVALLARI and others

Claimants

- and -

(1) MERCEDES-BENZ GROUP AG

(2) MERCEDES-BENZ AG

(3) MERCEDES-BENZ UK LIMITED

**(4) MERCEDES-BENZ FINANCIAL SERVICES
UK LIMITED**

Defendants

**(5) MERCEDES-BENZ RETAIL GROUP UK
LIMITED**

(6) AUTHORISED DEALERSHIPS

**As listed in Schedule 4 to the Group Litigation
Order**

**Daniel Oudkerk KC, Oliver Campbell KC, Tom de la Mare KC, Gareth Shires and
Rachel Tandy (instructed by
the Steering Committee – Pogust Goodhead, Leigh Day, Slater & Gordon UK Limited,
Hausfeld & Co LLP and Milberg London LLP) for the Claimants**
**Malcolm Sheehan KC, James Purnell and Lia Moses (instructed by Herbert Smith
Freehills LLP) for the Defendants**

Hearing date: 19 January 2024

APPROVED JUDGMENT

Mrs Justice Cockerill:

INTRODUCTION

1. This judgment is given in the context of the litigation commonly referred to as “Dieselgate” – that is claims brought by consumers via a range of Group Litigation orders (“GLOs”) claiming that advertised claims by car manufacturers about nitrogen oxide (“NOx”) emissions performance of certain diesel cars were inaccurate, being based on the performance of illegal “defeat devices” in tests done by regulators.
2. The Mercedes GLO is the most advanced of those before the Court, and is acting as the main Lead GLO. Following case management hearings last year before Fraser J (July), Constable J (November) and the PKBD, myself, Constable J and Senior Master Cook (December) I have heard a further CMC covering both Mercedes specific and Pan-NOx issues.
3. One of the matters considered was the Mercedes Claimants’ application dated 5 January 2023 seeking to curtail what it says are excessively broad claims to confidentiality made by the Mercedes Defendants. The Claimants seek an order that certain identified documents which the Defendants have designated as requiring the protection of an existing confidentiality ring dated 13 February 2023 (“the CRO”) be de-designated and accordingly removed from the ring. The application is accordingly referred to as “the De-Designation Application”.
4. In bare summary, the background to the application is as follows. The German type approval authority (the “KBA”) has issued a number of Recall Decisions in relation to certain Mercedes Vehicles. Since the outset of the litigation the Claimants have sought from the Defendants copies of the Recall Decisions, and various information and disclosure relating to those appeals (together, the “Recall Documents”). Their first such request was made in their consolidated letter before action dated 28 January 2021. The disclosure was resisted on the grounds *inter alia* that the material sought was confidential.
5. The Claimants therefore pursued an application for early disclosure in respect of this material as part of their application for a GLO. Ultimately there was agreement to provide some of the material sought, subject to a confidentiality club. That club was agreed to by the Claimants without prejudice to their ability to challenge assertions of confidentiality, and a structure for “de-designation” was incorporated into the CRO.
6. The Defendants indicated that they would disclose a number of categories of document into the CRO. Those were disclosed as being confidential in their entirety. The Defendants were ordered to disclose other documents by the Order of Constable J dated 18 December 2023. Again those were disclosed subject to a blanket assertion of confidentiality. The Claimants took issue with the claims to confidentiality and issued this application.
7. In the draft order attached to the Application, the Claimants seek an order that each of the following categories of document be designated as not confidential pursuant to paragraph 5.5.3 of the CRO.

- i) Six recall decisions of the KBA which were provided for inspection on 27 February 2023 (the “Recall Decisions”);
 - ii) Nine corrections and amendments to Recall Decisions which were provided for inspection on 27 February 2023 (the “Recall Amendments”);
 - iii) 13 letters from the First and/or Second Defendant to the KBA challenging Recall Decisions provided for inspection on 27 February 2023 (the “KBA Appeal Letters”);
 - iv) Four decisions of the KBA in response to the KBA Appeal Letters provided for inspection on 27 February 2023 (the “KBA Appeal Decisions”);
 - v) Four letters to the German Administrative Court challenging KBA Appeal Decisions provided for inspection on 27 February 2023 (the “Admin Court Appeal Letters”);
 - vi) 22 decisions of the KBA approving a mandatory software update in the Defendants’ vehicles provided for inspection on 18 October 2023 (the “Mandatory Update Decisions”);
 - vii) 54 decisions of the KBA approving a voluntary software update in the Defendants’ vehicles provided for inspection on 18 October 2023 (the “Voluntary Update Decisions”);
 - viii) 440 decisions of the KBA granting type approval in respect of the Defendants’ vehicles provided for inspection on 20 October 2023 (the “Type Approval Decisions”);
 - ix) 495 Annexes and enclosures to Voluntary Update Decisions and Type Approval Decisions provided for inspection on 21 December 2023 (the “Annexes and Enclosures”).
8. Following a review, the Defendants indicated before the hearing that they would not pursue a confidential designation for about half of the documents in issue. That left the following documents in dispute: (i) sevenx Recall Decisions, (ii) four KBA Appeal Decisions, and (iii) 495 Annexes and Enclosures (the “Disputed Documents”).
9. The provisions of the CRO as regards the designation of a document or information as confidential are as follows:

“5.1 A Party providing a document/information in connection with the Proceedings may designate that the document/information is: (i) Confidential Information; or (ii) not confidential.

5.2. Designation of a document/information as Confidential Information must be made in writing to the Party or Parties receiving the document/information. When making the designation, each document containing information in respect of which confidential treatment is sought should be marked up as follows: (i) the information itself must be highlighted in yellow or some other prominent colour (that does not obscure the information underneath

it); and (ii) each page of the document must include the header “CONTAINS CONFIDENTIAL INFORMATION”.”

10. The De-designation Application is made pursuant to paragraph 5.5 of the CRO which reads as follows:

“5.5 A Party receiving documents/information in the Proceedings may request that the disclosing Party or Parties amend the designation of a document/information that it has or they have provided (including amendment to a designation of not confidential) as follows:

5.5.1. The requesting Party shall provide a written request to the disclosing Party or Parties (copied to the other Parties) specifying the following:

- (a) the relevant document/information concerned;
- (b) the designation the requesting Party believes is appropriate; and
- (c) why it is reasonable and necessary for the designation of the document/information to be amended.

5.5.2. A disclosing Party must respond within 10 working days of having received the written request referred to in paragraph 5.5.1 confirming whether they consent or object to the proposed amendment, such consent not to be unreasonably withheld.

5.5.3. Should the consent referred to in paragraph 5.5.2 not be obtained from each disclosing Party, the requesting Party may apply to the Court for an order that the document/information should be designated as either: (i) Confidential Information; or (ii) not confidential (as the requesting Party deems appropriate), provided that prior written notice is given of that application to the other Parties.”

NOTICE

- 11. The Defendants’ position was that the notice requirements under paragraph 5.5.3 of the CRO have not been met and that the application should be dismissed; although that argument was not strongly pressed orally.
- 12. As noted above, paragraph 5.5.2 of the CRO permitted the Defendants ten working days to respond to the written request made pursuant to paragraph 5.5.1. The De-designation Request (which the Defendants accept meets the requirements of paragraph 5.5.1) was made on 20 December 2023 and the De-designation Application was made only 8 working days later on 5 January 2024.
- 13. The Defendants contended that it was not appropriate for the Claimants to seek to blame the Court’s timetable (in particular the requirement for applications to be determined at this second Progress CMC to be issued by 5 January 2024) for the very limited notice that they gave, given that:

- i) The Claimants had been aware of that timetable since the July CMO (paragraph 6(a) of which fixed the relevant date);
 - ii) All of the documents that are the subject of De-designation Application and which were in the Claimants' possession at the time of the De-designation Request had been in their possession for some time (some since 27 February 2023);
 - iii) While it is right that the Claimants received a substantial number of the documents that are the subject of the De-designation Application the day after the De-designation Request (i.e. on 21 December 2023), they clearly did not require sight of those documents in order to decide to make a request under paragraph 5.5.1 and, absent agreement, an application to the court under paragraph 5.5.3 in respect of them.
14. It was therefore submitted that the Claimants could and should have made the De-designation Request much earlier than they did and the proper course was for the Defendants to confirm the de-designation of the documents they accept should not be treated as confidential, but for the application to be otherwise dismissed. To do otherwise, it was submitted, would be to undercut the agreed requirements of paragraph 5.5.3 of the CRO, and to encourage premature applications for de-designation.
 15. There are good points here, and were it not for the wider considerations of the litigation I might well have been minded to give them more weight. As I made clear at the start of the CMC hearing, it is imperative that the parties work better together and also work with more of an eye to the requirements of the timetable, which will be demanding for all involved.
 16. However, in this case there has been a degree of uncertainty as regards the forwards progress of the case in 2023, not least in the light of the applications by other litigants for Pan-NOx directions. That has been to some extent resolved by the hearings of Michaelmas 2023. That uncertainty and the constraints of the timetable as regards the January hearing make the position as regards a technically premature application more understandable in this instance.
 17. Further the Defendants have not been prejudiced by the short notice. The notice was only slightly short. By the time of the hearing the Defendants had had an opportunity to review and to consider de-designation for longer than the period provided for in the CRO. They had indeed provided an answer following review. On that basis and demonstrating the lack of prejudice, the points were fully argued out.
 18. Still further there is a significant interest in moving this litigation on as efficiently as possible, and this dispute has a much wider relevance across the Pan-NOx litigation.
 19. In those circumstances and against the background of the tight timetable set for this litigation, I am not minded to penalise the Claimants on this occasion for a premature application. However, for the future the timeousness of applications must be kept under careful review and there should be no reliance on this charitable approach being repeated.

THE LAW

20. I will commence with a fairly thorough review of the relevant law. This is essential for two reasons. The first is that the approach of the Defendants thus far indicates that these points might not be entirely in the mind of those who were responsible for the original approach to designation and a briefing or refresher is thus desirable.
21. The second is that other Pan-NOx defendants will have to deal with similar documents. It may therefore short circuit disputes in those cases if those involved have a “ready reckoner”.
22. The starting point as a matter of law is the principle of open justice. It is, as the Court of Appeal recently remarked in *J.C. Bamford Excavators Ltd v Manitou UK Ltd* [2023] EWCA Civ 840 at [71] a fundamental principle of English Law. The reasoning of the House of Lords in *Scott v Scott* [1913] AC 417 remains as sound today as it was then; as does the quote from Jeremy Bentham which they cite:

“Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial.”
23. Open justice is also, as noted in *Dring v Cape Intermediate Holdings Ltd* [2019] UKSC 38, [2020] AC 629 (per Lady Hale at [43]), vital to enable the public to understand how the justice system works, to understand the issues in cases and how, based on those issues, decisions are reached by the courts.
24. It follows from this that each party should generally have unrestricted access to the other’s disclosure (see for example Hamblen J in *Libyan Investment Authority v Société Générale SA* [2015] EWHC 550 (QB) (“*LIA*”) at [20]). All parties have the benefit of the protection offered by the collateral undertaking at r 31.22 CPR regarding the use of documents disclosed in the course of proceedings. In the vast majority of cases and for the vast majority of documents, the undertaking will be sufficient protection.
25. Confidentiality orders offering enhanced protection beyond the collateral undertaking are therefore “*the exception rather than the rule*” (per Christopher Clarke J in *Porton Capital Technology Funds v 3M UK Holdings Ltd* [2010] EWHC 114 (Comm) at [43]).
26. A confidentiality ring involves a departure from the open justice principle which must be justified. As Hamblen J made clear in *LIA* at [21] “*It is for the person seeking the imposition of a confidentiality club to justify any departure from the norm*” (see also *Porton Capital* at [43]). Any restriction should “*go no further than is necessary*” for the protection of the right in question (*LIA* at [21]-[22]). As Roth J explained in *Infederation Limited v Google LLC & ors* [2020] EWHC 657 (Ch) at [42]: “*...the important points to emerge from the authorities are that: (i) such arrangements are exceptional; (ii) they must be limited to the narrowest extent possible; and (iii) they require careful scrutiny by the court to ensure that there is no resulting unfairness.*”
27. With that scrutiny in mind, the burden lies on those seeking to displace the application of the open justice principle to produce clear and cogent evidence to explain why that departure is justified: the “real risk” of the right of inspection being used for a collateral purpose. It must be shown that “*by nothing short of the exclusion of the public can justice be done*” (*Scott v Scott* [1913] AC 417, per Viscount Haldane at page 438, and

per Earl Loreburn at page 446). The question is not one of convenience, but of necessity (*Al Rawi v Security Service* [2011] UKSC 34; [2011] 3 WLR 388 at [11]).

28. The claim to confidentiality therefore needs to be focused with precision by reference to the precise contents of documents: it can often be suitably protected by the use of redaction and/or gisting as tools by which as much of a document or its relevant contents is put into open (see e.g. *London Regional Transport v Mayor of London* [2001] EWCA Civ 1491; [2003] EMLR 4 at [50]).
29. In short, a party who resists disclosure of documents otherwise falling within its disclosure obligations on the basis that the documents contain trade secrets is under a duty to consider, in relation to each piece of information within those documents, whether and to what extent that information is truly confidential. Confidential information may be excised or redacted, but there must be “*as full a degree of disclosure as will be consistent with adequate protection of the secret*” (per Aldous J in *Roussel UCLAF v ICI Ltd* [1990] RPC 45 at [49]). The court will not readily accept that the entire contents of a given document or a whole class of documents are confidential such that no part of it can be inspected by the other party.
30. The terms of any confidentiality order, if appropriate, will be decided in each case “*having regard to the particular circumstances of the case, bearing in mind that, if a case for disclosure is made out, the applicant should have as full a degree of appropriate disclosure as will be consistent with adequate protection of any trade secret of the respondent*” (per Buckley LJ in *Warner-Lambert Co v Glaxo Laboratories Ltd* [1975] RPC 354 at [358]).
31. The considerations relevant to the imposition and terms of a confidentiality club were summarised by Hamblen J in *LIA* at [34] (see also per Floyd LJ in *Oneplus Technology v Mitsubishi* [2020] EWCA Civ 1562 at [39]):

“The imposition of a confidentiality club and, if so, its terms, generally involves a balancing exercise. Factors relevant to the exercise of the court's discretion are likely to include:

- (1) The court's assessment of the degree and severity of the identified risk and the threat posed by the inclusion or exclusion of particular individuals within the confidentiality club — see, for example, *InterDigital Technology Corporation v Nokia* [2008] EWHC 969 at [18] and [19].
- (2) The inherent desirability of including at least one duly appointed representative of each party within a confidentiality club — see, for example, *Warner-Lambert v Glaxo Laboratories* [1975] RPC 354 at [359] to [361].
- (3) The importance of the confidential information to the issues in the case — see *Roussel UCLAF v ICI* at [54] and *IPCom GmbH v HTC Europe* [2013] EWHC 52 (Pat) at [20].

(4) The nature of the confidential information and whether it needs to be considered by people with access to technical or expert knowledge — see *IPCom GmbH v HTC Europe* at [18].

(5) Practical considerations, such as the degree of disruption that will be caused if only part of a legal team is entitled to review, discuss and act upon the confidential information — see *Roussel UCLAF v ICI* at [54] and *InterDigital Technology Corporation v Nokia* at [7].”

32. The court may order that confidential information be disclosed in its entirety to the other party subject to suitable undertakings as to confidentiality if required by the “*nature of the proceeding and the nature of the allegation*” (see e.g. *Atari Inc v Philips Electronics and Associated Industries Ltd* [1988] FSR 416, where Whitford J ordered confidential computer source code to be disclosed without limitation to the lawyers and internal expert of the party being sued for copyright infringement).
33. It must be kept in mind that although the parties may agree an “external eyes only” confidentiality ring, “[a]n arrangement under which an officer or employee of the receiving party gains no access at all to documents of importance at trial will be exceptionally rare, if indeed it can happen at all”, “restricting disclosure to external eyes only at any stage is exceptional”, and the “onus remains on the disclosing party throughout to justify [external eyes only] designation for the documents so designated” (per Floyd LJ in *Oneplus Technology (Shenzhen) Co Ltd v Mitsubishi Electric Corp* [2020] EWCA Civ 1562; [2021] FSR 13 at [39]).
34. One then proceeds to confidentiality itself. The question of whether, as a matter of English law, information is covered by a duty of confidentiality depends “*not only on the nature of the information and the significance of the information for the [disclosing party], but also on the circumstances of the [receiving party]’s acquisition of the information*”: see *Phipps on Confidentiality* (4th ed.) at paragraph 3-016.
35. In this case, and others like it, the focus is likely to be on the first element – and indeed it is clear that what is primarily in play here is business confidentiality or “trade secrets”.
36. In *Thomas Marshall Ltd v Guinle* [1979] Ch. 227, Sir Robert Megarry VC summarised the necessary quality of confidence (as well as the practical difficulties in identifying it in the commercial context) as follows (at page 248B to G). That summary was expressed as a tentative one, but has been often adopted since:

“It is far from easy to state in general terms what is confidential information or a trade secret. ...

four elements may be discerned which may be of some assistance in identifying confidential information or trade secrets which the court will protect. I speak of such information or secrets only in an industrial or trade setting. First, I think that the information must be information the release of which the owner believes would be injurious to him or of advantage to his rivals or others. Second, I think the owner must believe that the information is confidential or secret, i.e., that it is not already in the public domain. It may be that some or all of his rivals already have the information: but as long as

the owner believes it to be confidential I think he is entitled to try and protect it. Third, I think that the owner's belief under the two previous heads must be reasonable. Fourth, I think that the information must be judged in the light of the usage and practices of the particular industry or trade concerned. It may be that information which does not satisfy all these requirements may be entitled to protection as confidential information or trade secrets: but I think that any information which does satisfy them must be of a type which is entitled to protection.”

37. Although in *McGill v The Sports and Entertainment Media Group Ltd* [2014] EWHC 3000 (QB) at [148], HHJ Waksman QC (as he then was) suggested that “[o]ne way to describe the quality of confidence is to say it is information which is not generally available to others and which the possessor does not wish to be generally available ...” it is clear that the “subjective view of the owner [regarding confidentiality] cannot be decisive” (See Carnwath J’s comment in *Lancashire Fires Ltd v S.A. Lyons & Co Ltd* [1996] FSR 629 at [656]).
38. The editors of *Phipps* summarise the test in the following terms (at paragraph 4-005):
- “There must be some value to the party claiming confidentiality (not necessarily commercial) in the information being treated as confidential:
- (a) The information must be such that a reasonable person in the position of the parties would regard it as confidential; and
 - (b) Reasonableness, usage and practices in the relevant sector (for example, industrial or professional) are to be taken into account.”
39. Confidentiality is not set in stone for all eternity, however. The quality which gives rise to the confidentiality may be lost. One means whereby this may occur is where information “has entered what is usually called the public domain (which means no more than that the information in question is so generally accessible that, in all the circumstances, it cannot be regarded as confidential)” (*Attorney-General v Guardian Newspapers (No 2)* (“*Spycatcher*”) [1990] 1 AC 109 p. 282). However, a duty of confidentiality can apply despite some loss of secrecy e.g. if the information has only been disclosed to certain parties (*Spycatcher* at page 260, per Lord Keith).
40. Similarly, while no claim of confidentiality can be maintained in respect of information which can be readily obtained by inspecting an article which is publicly accessible, “relative confidentiality” can be claimed in respect of such information if it can only be obtained by a process of reverse engineering which takes time, effort and skill (per Arnold LJ in *JCB* at [44]). In relative confidentiality cases, what is protected is the value (in terms of money and time cost avoided) of the shortcut achieved by use of the confidential information. However, the success of such a claim will depend on precisely what is said to be confidential, whether that shortcut has any continued or current utility, and whether that specific information can readily be ascertained by inspecting the article in question: per Arnold J in *Force India Formula One Team Ltd v I Malaysia Racing Team Sdn Bhd* [2012] EWHC 616 (Ch) at [222].

41. In addition, material which is commercially sensitive to the extent that it is confidential may cease to be confidential because the value of the information is lost by passage of time and progress. *Phipps* (at paragraph 4-041) indicates that:

“Trade secrets, too, may lose their confidentiality by other means than by entering the public domain. In *Thomas Marshall Ltd v Guinle*, Sir Robert Megarry VC suggested, inter alia, that, for information to constitute a trade secret, the party claiming confidentiality must reasonably believe that the release of the information would be injurious to him or of advantage to his rivals or others. A trade secret may cease to have that quality, for example, through changes in the confider’s business or through technological advances rendering the trade secret obsolescent.”

42. There is, at least in the EU context, a five-year rule of thumb which reflects this approach (*Phipps* at paragraph 4-042):

“However, the English courts have not gone so far as to adopt the rule of thumb employed in competition proceedings before the European Commission (in which applicants for leniency may be entitled to confidentiality).

In *Evonik Degussa GmbH v European Commission*, the European Court of Justice suggested that: ‘information which was secret or confidential, but which is over five years old must as a rule, on account of the passage of time, be considered historical and therefore as having lost its secret or confidential nature unless, exceptionally, the party relying on that nature shows that, despite its age, that information still constitutes essential elements of its commercial position or that of interested third parties.’”

43. There are other ways in which confidence may be lost. A duty to keep material confidential can be waived by the party to whom it is owed (e.g. waiver of legal professional privilege). Where correspondence with a regulator attracts privilege this, too, can be waived. One example of such a waiver is where the party claiming privilege (and, by extension, confidence) relies upon the result of proceedings before the regulator (see e.g., *Property Alliance Group Ltd v Royal Bank of Scotland plc* [2015] EWHC 1557 (Ch) at [114]).
44. Otherwise valid claims to confidentiality can be displaced on account of the public interest in the information entering the public domain on the basis that it reveals serious wrongdoing. This is sometimes called “the Iniquity Exception”. The basis of the exception is that there is “no confidence as to the disclosure of iniquity” or that there is “no property in [iniquitous] transactions”: see *Gartside v Outram* (1856) 26 LJ Ch 113.
45. The editors of *Phipps* summarise the principles applicable to public interest aspects which underpin the iniquity exception as follows (at §5-165, adopted by me in *Saab v Dangate Consulting Ltd* [2019] EWHC 1558 (Comm); [2019] Lloyd’s Rep. FC 542 at [133]):

“Although each case has to be examined on its own facts, the following general principles are suggested:

- (1) Respect for confidentiality is itself a matter of public interest.
- (2) To justify disclosure of otherwise confidential information on the grounds of public interest, it is not enough that the information is a matter of public interest. Its importance must be such that the duty otherwise owed to respect its confidentiality should be overridden.
- (3) In broad summary either the disclosure must relate to serious misconduct (actual or contemplated) or it must otherwise be important for safeguarding the public welfare in matters of health and safety, or of comparable public importance, that the information should be known by those to whom it is disclosed or proposed to be disclosed.
 - (i) Even if the information meets that test, it does not necessarily follow that it would be proper for the defendant to disclose it.
 - (ii) The court must consider the relationship between the parties and the risks of harm which may be caused (or avoided) by permitting or prohibiting disclosure, both in the particular case and more generally. For example, if the law inhibits a doctor from disclosing information about a patient which may affect another person, it may lead to risk of avoidable injury or death; but if it permits a doctor to do so, it may impair a patient’s willingness to confide in the doctor and receive treatment.
- (4) Ultimately the court has to decide what is conscionable or unconscionable, which will depend on its view of what would be acceptable to the community as a fair and proper standard of behaviour. This requires the court to make an evaluative judgment, but it does not have an unfettered discretion.
- (5) In cases where the party claiming confidentiality is a branch of Government, or a body performing a governmental function, a separate principle applies. In such cases detriment to the public interest is an essential ingredient of the cause of action.”

46. The iniquity exception is not limited only to crimes or civil wrongs, but “*should extend to crimes, frauds and misdeeds, both those actually committed as well as those in contemplation, provided always – and this is essential – that the disclosure is justified in the public interest*” (per Lord Denning MR in *Initial Services Ltd v Putterill* [1968] 1 QB 396 at 405E). The proposed disclosure “*must relate to serious misconduct (actual or contemplated)*” (*Phipps* at §5-165).
47. A claim of iniquity must have some evidential base. Allegations which are “premature and speculative” will not satisfy the test (*Saab* at [163]). It does not however require proof: what is required is:

- i) “following such investigations as are reasonably open to the recipient, and having regard to all the circumstances of the case, the allegation in question can reasonably be regarded as being a credible allegation from an apparently reliable source” (per *Spycatcher* at page 283).
 - ii) “a real likelihood of the existence of a crime, civil wrong or serious misdeed of public importance” (per Gummow J in *Corrs Pavey Whiting & Byrne v Collector of Customs* (1987) 74 ALR 428, 450, quoted in *Saab* at [168]).
48. There is recent discussion of the iniquity exception in the context of legal professional privilege in *Al Sadeq v Dechert LLP* [2024] EWCA Civ 28 from [52]-[108]. Popplewell LJ’s conclusion at [108] was that:
- “The merits threshold for the existence of an iniquity which prevents legal professional privilege arising, whether legal advice privilege or litigation privilege, is a prima facie case, which means that on an assessment of the material available to the decision maker, whether that be the party or its legal adviser conducting disclosure, or the court, it appears more likely than not on a balance of probabilities that such iniquity exists. In an interlocutory context there is no distinction to be drawn between cases in which the iniquity is one of the issues in the proceedings and those where it is not. This is subject to the proviso that there might exist exceptional circumstances which could justify a court taking the view that a balance of harm analysis has a part to play.”
49. The wrongdoing does not necessarily have to be that of the party seeking to maintain a claim to confidentiality (see e.g. (i) *Lion Laboratories Ltd v Evans & Ors* [1984] 3 WLR 539; [1985] QB 526).
50. There is a separate exception which relates to environmental matters: Regulation 12(9) of the Environmental Information Regulations 2004 which implement the Environmental Information Directive 2003/4/EC restricts the ability of public authorities to refuse disclosure of emissions information on confidentiality grounds.

DISCUSSION

Approach to the application

51. The Defendants submitted that the Court should approach any question of the confidentiality of the information in the Disputed Documents as follows;
- i) Has the information ever possessed the necessary quality of confidence;
 - ii) Has the information lost the quality of confidence through:
 - a) Obsolescence;
 - b) Reverse engineering; or
 - c) Dissemination.

- iii) If not, should the Defendants' claims to confidentiality nevertheless be set aside on public interest grounds?
52. I am persuaded that while this is an approach which does engage with the various aspects of the authorities, it is both unsound in terms of displacing the starting point of open justice and in practical terms unhelpful. This is perhaps particularly so where, as the Defendants' evidence (in particular section D of Ms Johnson's Sixth Witness Statement) makes clear, the Defendants – and probably other GLO defendants – have a very acute sense of commercial sensitivity about all matters that might be of direct interest and benefit to other vehicle producers.
53. The better approach is to stick much more closely to the identification of confidentiality at the time of consideration, against the backdrop of the starting point of open justice.
54. I make clear that in taking this approach I entirely accept that there is likely to have been, in many documents which fall within the ambit of disclosure in these proceedings, information which was at the time of authorship confidential. But that is not the end of the story. Nor is it determinative or even influential that at the hearing on 18 July 2023, Mr Justice Fraser said: *“There is by definition naturally going to be a high degree of confidential information anyway relating to the operation of software and engines, which are effectively proprietary products of those manufacturers.”* That was an off the cuff remark made in the context of an early hearing and applauding the parties' co-operation to put in place a confidentiality ring.
55. The question of confidentiality cannot be pre-judged. It must be carefully interrogated.

The Recall Decisions

56. As for the Recall Decisions: these are said to be confidential because they;
- i) *“generally contain descriptions of the function of the Defendants' emissions control systems and their company-specific activation parameters, including the company-specific concrete calibration data, which, if not treated as confidential, would provide competitors with specific insights into the Defendants' approach to these functions, which competitors could then use in the development or review of their own vehicles”;*
- ii) *“could reveal the overall design philosophy of the Defendants' systems”* because *“disclosure of details regarding one part of the system tends to reveal information about other part [sic] of the system”*.
57. There are essentially two short answers and a long answer to this point. The first short answer is that this is a manifestly inadequate basis for saying that the whole of any Recall Decision is confidential. The first part is no more than assertion. It completely fails to grapple with the passage of time and the effect of that on confidentiality. It is also, as the Claimants note, in considerable tension with the argument advanced in the case management context that determination of PDD issues for Mercedes will not be an effective case management tool at the Pan- NOx level because the engines are heterogenous. As for the second, it is not even an assertion (it is couched in terms of “could”) and it is vague to the point of meaninglessness. These statements do not comprise evidence which matches the legal test for establishing confidentiality. Any

attempt to do so would need to explain exactly what is revealed by a particular part of a particular document and how it could be used.

58. The second short answer, which is likely to apply to most if not all Recall Decisions, is that these amount to findings by the regulator that the Defendants have used impermissible defeat devices of a kind incapable of any plausible explanation. This is in my judgment plainly within the ambit of “serious misconduct” of precisely the sort to which the iniquity rule applies. The fact that there are no determinations in this litigation is irrelevant; the iniquity rule does not require such a finding.
59. The fact that the decisions are under appeal is not a sufficient basis for disapplication of the iniquity rule. As matters stand there is such a determination. The rule requires that “*the allegation in question can reasonably be regarded as being a credible allegation from an apparently reliable source*”. Such a determination, albeit under appeal, is such a source. Nor is this a case where the detailed arguments on appeal can be examined to provide an indication that the first instance determination does not reach the credible/reliable standard. The appeals appear not to have progressed at all.
60. I am however not convinced that there is in addition an exception based on the environmental regulations. That appears to relate to public authorities and the argument that the equivalent public interest should apply to manufacturers seems a little ambitious. But the point was not fully argued and was not necessary for me to determine at this point.
61. Those short answers are enough; but bearing in mind the fact that there may well be many more documents with material which was originally confidential in them, it is worth while to deal to some extent with the long answer.
62. Reference was made to the Recall Decision dated 23 May 2018 with a KBA case number ending in 084. The particular passage to which I was pointed as exemplifying the confidentiality which concerns the Defendants was the passage which says:

“The vehicle integrates the raw NO_x mass over the driving cycle. If a mass of 12.5 g NO_x is exceeded, the return to storage operation is only possible if an SCR temperature of 155 °C or an NO_x mass flow of 10.4 mg/s is not reached. If a mass of 17.6 g is exceeded without an ignition change, there is no longer a switch to storage mode. The storage operation is thus switched off after reaching an NO_x mass of 17.6 g. Switching off the storage mode reduces the effectiveness of the emission control system. The maximum efficiency in feed forward mode is limited to 75% by the software.”

63. Reliance was also placed on the fact that the decision contains details of five functionalities used in one of the Defendants’ vehicles. The first, Strategy A, is part of Dual Dosing (defined at Generic Defence paragraph 84) which switches AdBlue dosing modes from FL to FF (both defined at Generic Defence paragraph 86) based on SCR Temperature, NO_x mass flow (i.e. the total amount of NO_x flowing over a given time) and NO_x integral (i.e. the total amount of NO_x during a drive cycle). The Defendants pray in aid the fact that those parameters, and the thresholds used in the vehicle in question, are discernible from the Recall Decision.

64. The first point to note is that these are small portions of a much longer document: even if these aspects of the decision were confidential, that would not justify a blanket assertion of confidentiality over the entire document.
65. The second point to note is that much of this is in the public domain. Any claim to surviving confidentiality must in such circumstances grapple with the public domain material. So the description above cross references to the (open) Generic Defence. The material in the Generic Defence cannot be confidential. The claim to confidentiality would have to reflect that.
66. Further that is not all that is in the public domain. For example, parameters influencing emissions control strategies including numerical values were published in the context of the VW EA189 engines by the Schleswig-Holstein Court. There is considerable further granular data in the full range of VW mandatory recall decisions and mandatory and voluntary update decisions as well as in decisions relating to Porsche which have been published in a German newspaper. These of course do not relate to Mercedes engines, but they put certain elements of some approaches into the open, and that may impact on any similar approaches adopted by Mercedes and hence to any surviving portions of confidentiality in such documents. Then there is such material as the chip tuning websites which make it clear that a number of software versions are available from such sources. While the Defendants' evidence does deal with this point in broad terms it does not come home to a specific piece of information which is said to be confidential despite all of the above.
67. The third is that the impact of effluxion of time and technical developments is entirely ignored. The Claimants argued that it is utterly illogical to say that this material is confidential when such technologies have caused the manufacturers to be on the receiving end of findings of non-compliance; and still more so when the emissions standards which must be met have moved on further since and the technology in question has been removed from engines since.
68. That is an argument which appears to me to have considerable force. It was not fully engaged with before me. It may be that there remains a core of confidential information even so – the Defendants say that “*some portions of software were not required to be removed*” or that the information about what was required to be changed could lead to an inference of what Mercedes did in response and hence to the updated systems; but the indication I would give to those dealing with such material via this long answer is that in such cases, if there does remain such a core, that needs to be identified and explained:
 - i) by reference to the kinds of factors identified above;
 - ii) with far more clarity and granularity than has currently been done.

Recall Amendments/KBA Appeals

69. As for the Recall Amendments, the Defendants have agreed to the de-designation of all but two of the Recall Amendments. They are those dated 12 September 2019 with a KBA case number ending in 120 and dated 5 June 2020 with a KBA case number ending in 120. While the Defendants submitted in writing that these do contain details

of the technology used in the Defendants' vehicles, that assertion fails for essentially the same reasons.

70. A similar point then arises as regards the KBA Appeal Decisions. These deal with the same subject matter as the corresponding Recall Decision. For example, in the KBA Appeal Decision that relates to Strategy A (i.e. the one dated 27 January 2021 with a KBA case number ending in 003) there are references to a switch of AdBlue dosing modes based on NO_x mass flow, SCR temperature, or NO_x integral. Those references relate to both Strategy A (which was the subject of a corresponding Recall Decision) and to other uses by the Defendants of such parameters for a switch of AdBlue dosing modes. Further submissions were made orally that there was granular detail for example at pp 7-8 in terms of use of NO_x integral dependency for SCR dosing and that components remained the same even when calibration is different. The submissions by reference to small fractions of the document illustrated that blanket assertions of confidentiality had been unjustified. Then the detail which was finally highlighted still fell short of sufficient detail and clarity bearing in mind the other factors which affect confidentiality at this stage.
71. There is further no logical basis on which the Recall Decisions/Amendments would be non-confidential and these appeal documents would not. The contrary was not seriously suggested.

Annexes and Enclosures

72. The Annexes and Enclosures are the only aspect which has caused me any difficulty. The reason is that the documents are not all *sui generis*, and I was shown such a very small sample of them.
73. The catchment for this part of the application is 495 Annexes and Enclosures to Voluntary Update Decisions and Type Approval Decisions provided for inspection on 21 December 2023. 8 sets of these were included in the bundles for the hearing. They comprised:
 - i) A number of National Type Approvals. These comprise about 4 pages of certificate with address details, identification markings, test report number and date, description of any relevant modification, and signatures. After this come substantial enclosures with an index page, generally listing the presence of a test report and information document and where applicable list of modifications. Those documents then follow (including detailed instructions in two languages on how to appeal the test, and lists of vehicles to which the type applies). The test running to anything from 10-25 pages is the detailed test of the type's performance;
 - ii) The information documents sometimes have attached to them technical drawings, for example of a catalytic converter, or a towing bracket or a door arrangement or an exhaust system or bumper assembly. There are photos of locations of VINs and how the blind spot monitor works;
 - iii) Within one of the Type Approvals is a document called "*Auxiliary Emission Strategy (AES) Base Emission Strategy (BES) Documentation*". It is dated 13 October 2021 with a date later in the document of 21 March 2022. It runs to 12

pages. It is described as part of a communication with the KBA to explain the changes in the emission control system Mercedes intends to implement. Within the document are a number of technical descriptions and charts. For example:

- a) It describes in section 1 how the EGR system or SCR calibration or SCR tank system works in different phases of operation – warm up, ambient, altitude and so forth, giving different possibilities within those phases and giving threshold values;
- b) It includes drawings of the Emission Control System and a chart or map explaining how it operates.

74. I would make the following preliminary observations:

- i) The assertion that confidentiality is justified because the Annexes and Enclosures to the Voluntary Update Decisions contain technical material is again far from sufficiently particular. Here I have in mind such responses as:
 - a) they “*specifically contain trade secrets, including inter alia technical information in relation to specific vehicle tested, including part numbers and version details*”;
 - b) they include “*[i]nformation sheets (also referred to as information documents) which contain extensive information about the ... technical characteristics of the Defendants’ vehicles..., it would be possible to draw conclusions about vehicle configurations ...*”
 - c) they include “*technical drawings ... so detailed that it would be possible for a third party to manufacture the components in question in a similar manner*”.
- ii) The approach (treating the entirety of any such document as confidential) is manifestly erroneous.

75. I was not able to get an overall impression of the entirety of the Annexes and Enclosures because such a small sample was before me. However I have, since the hearing concluded, been provided with an index of all the Annex material in the bundles, and have conducted my own review. I have been through every single page of the Annexes and Enclosures in the bundles, and I am quite clear from that that the impression sought to be given in Ms Johnson's Sixth Witness Statement at paragraph 55 is not a fair one. Ms Johnson makes the statements she makes there on instructions and it is possible that she has not performed the exercise which I have done so as to satisfy herself that the instructions she was being given were accurate.

76. But having done that exercise and revisited the oral submissions I am quite satisfied that most of what I have seen is not confidential. In particular:

- i) For the vast majority of pages it is impossible to see any possible objection which could be taken on the ground of confidentiality. There is a huge amount of anodyne material;

- ii) The information sheets on which reliance is placed do not appear to contain extensive technical information in the sense suggested. They contain many technical details such as engine type, wheelbase mass, towable mass, variant combinations, whether it comes in left hand drive, fuel type, part types and so forth. But this hardly comes into the category of “*extensive information about ... technical characteristics*”. Much of this material will be in the public domain via catalogues, user manuals, technical documents issued to garages; and of course on websites run by professionals or enthusiasts;
 - iii) Nor is it possible to see how, as suggested, in any given case “*it would be possible to draw conclusions about vehicle configurations that have been developed and implemented on a company specific basis...*”;
 - iv) There are indeed some photos and technical drawings. For the most part these appear to be things which would be perfectly apparent if one purchased and cannibalized a vehicle. I struggle to see, for example, how the design of the bumper or towbar would be difficult to deduce from this exercise, or even from looking at the real thing in a car park. There may be exceptions to this. I do not currently see them and certainly they have not been properly identified from the morass and explained if they exist.
77. In oral submissions the document to which the Defendants pointed was the document entitled "AES/BES*SW-Update*0025*00 Version 13.10.2021" (the "AES/BES document"). That must be taken to be the high water mark of the Annexes. It was a 2021/2022 document – and hence within the EU five year rule of thumb for confidentiality. I would be prepared to accept a real possibility that such a document might contain some confidential material. But again the entire document had been treated as confidential, which was wrong. Certainly too, not all of it was on any sensible reflection confidential. As Mr De La Mare KC put it, it “*contains vast passages of things that are absolutely quotidian public information*”. Even orally what was pointed to was a very small portion of the document and again the confidentiality involved was not properly and specifically explained.
78. I therefore conclude that (i) I must assume that what I have seen is fairly representative of the Annexes and Enclosures material (ii) save in relation to this one document none of the material I have seen in the Annexes and Enclosures is to any appearance confidential. As regards this AES/BES document I was tempted to say that since no proper considered case on confidentiality had been made, the entire document should be treated as non-confidential. However, I will on this occasion, and because I am satisfied that there is probably some limited confidential content which I am unable to precisely delineate, allow the Defendants a short period in which to re-review this document for confidentiality. That review should be approached on the basis set out in this judgment.

CONCLUSION AND ORDER

79. Accordingly, the decision in this case is relatively straightforward. Save as regards the Annexes and Enclosures, all the Disputed Documents identified in this application should be treated as non-confidential. This means that the currently confidential annexes to the pleadings become non-confidential also.

80. So far as concerns the Annexes and Enclosures, as indicated above:
- i) All but the AES/BES Document should be treated as non-confidential;
 - ii) The Defendants have 7 days in which to conduct a review of that single document and indicate which portions of it are said to be confidential.
81. I should make clear that this is not a decision that all documents within these categories will always fall outside the ambit of the confidentiality ring, and to the extent I have been asked to do so I decline to make such an order. It is an order which relates to these documents disclosed in this litigation. However, at the same time it is inevitably the case that there will be a crossover. The parties to this litigation and the other Pan-NOx litigation should take this decision as a clear indication that the court will expect a designation of confidential material within such documents to be very carefully considered, and for it to be limited to that which is truly required – in line with the authorities.
82. In that connection I return to the question of approach. The first point to make is to reiterate that if confidentiality is to be asserted it must be justified. This is always the case as a matter of law, but the question will inevitably be scrutinised particularly carefully in this case because, as a result of the strategy in place for managing the litigation, this and the associated Lead GLOs will be spearheading litigation in which many other parties have an interest. It will be important that to the extent possible and proper other Pan-NOx litigants and the public can understand what is happening in the lead litigation.
83. Secondly a clear distinction must be drawn between what is regarded by commercial parties or even other authorities (such as the KBA) as confidential and what may properly be treated as confidential in these proceedings. As is apparent from Ms Johnson's evidence, a subjective sense of commercial sensitivity is often labelled confidentiality by those directly involved. That does not apply the same test as English law. The same goes for the approach of other authorities. Different jurisdictions have different approaches both to disclosure at large and to the test for confidentiality. Assumptions of read-across are unsafe.
84. Thirdly even if material was at some point confidential it is dangerous to start from a view that confidentiality exists at this point in time. That is because such an approach provides a starting point which says “no” in circumstances where there is much information which will have been confidential, but will have ceased to be so and because the authorities emphasise that the starting point should be openness.
85. Accordingly, in approaching confidentiality issues those dealing with the documents should bear in mind the points made above and specifically that:
- i) Documents as a whole are not confidential unless each part of them is confidential;
 - ii) Information within documents is *prima facie* not confidential – the designation must be justified;

- iii) The question of confidence now is not determined by any past status or treatment of that information;
- iv) In considering the status of material as at the current time regard should be had to the effect on the information in question of:
 - a) The EU "rule of thumb" on timing;
 - b) The range of information publicly available;
 - c) The range of information already disclosed in the litigation.