

**Claim No: QB-2016-00011
(formerly HQ16X03625) & Ors**

THE VW NO_x EMISSIONS GROUP LITIGATION

**IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
B E T W E E N : -**

ANTHONY JOSEPH CHAMPION CROSSLEY & ORS

Claimants

-and-

(1) VOLKSWAGEN AKTIENGESELLSCHAFT

(2) AUDI AKTIENGESELLSCHAFT

(3) SKODA AUTO a.s.

(4) SEAT S.A.

(5) VOLKSWAGEN GROUP UNITED KINGDOM LIMITED

(6) VOLKSWAGEN FINANCIAL SERVICES (UK) LIMITED

(7) AUTHORISED DEALERSHIPS

Defendants

Before:

MR JUSTICE WAKSMAN

SUMMARY OF JUDGMENT HANDED-DOWN ON 6 APRIL 2020

Hearing dates: 2-6 and 9-13 December 2019

Further Written Submissions: 5 and 11 February and 4 and 9 March 2020

Introduction

1. This is a short précis of the lengthy written judgment handed-down today after a trial of two preliminary issues. It does not form part of, nor is it a substitute for the actual judgment to which reference should be made for my detailed findings and reasons.
2. The issues arise in the context of a very large group action brought by about 91,000 owners and lessees of VW, Audi, Skoda and SEAT cars, all of which used a particular VW diesel engine with type designation EA 189 (“the Engine”). The claim is brought against the manufacturers of the affected vehicles namely, VW, Audi, Skoda, and SEAT, the relevant VW financial services arm here and against a variety of authorised VW dealers.
3. Put briefly, as part of their claim, the Claimants say that the Engine had a software function which enabled it to recognise when it was being tested for compliance, among other things, with EU vehicle emissions standards. The particular emissions concerned are various nitrogen oxide compounds referred to generically as NOx. Under these test conditions, the Engine’s Engine Control Unit (“ECU”) - in effect the car’s computer - instructed the Engine to run in such a way that it would comply with the test in respect of NOx emissions. However, on the road, in “normal” driving conditions, that function was turned off and impermissible NOx levels were produced. In other words, so it was said, the Engine was able to “cheat” and thereby pass the test, compliance with which was vital to the ability of VW to sell vehicles with this Engine. This is because it was a pre-condition to such vehicles being given EU “type-approval”.
4. It was research undertaken in the US which led to the disclosure that on the road, the affected VW cars were consistently producing far more NOx Emissions than they should have done, and as had been recorded in the tests.
5. One underlying issue in this case is whether the Engine’s software function constituted a “defeat device”, because if it was, it was prohibited (unless it fell within one of three exceptions stated in the Regulation). This allegation forms the basis for a number of the claims made by the Claimants against VW. A second issue is whether, in any event, by a series of letters from the German Federal Motor Transport Authority (“the KBA”) dated 15 October, 20 November, and 11 December 2015, the KBA itself made a binding decision that there was a defeat device which bound this Court. Another part of that issue is whether, likewise, the UK’s Vehicle Certification Agency (VCA) had made a similar binding decision in a letter dated 22 October 2015.

6. This trial has been concerned with determining those two preliminary questions. It is not the trial of the action as a whole. I decided those questions in the order in which I have just referred to them.
7. Questions of EU law arise here. Brexit does not affect the position because of the “transitional period” ending on 31 December 2020, during which time the UK is treated, for present purposes, as if it is still a Member State of the EU.

The Defeat Device Issue

8. NO_x emissions are a danger to public health. As far as vehicles are concerned they come principally from diesel engines. The EU, like many other places in the world, has strict limits for such emissions from such engines. In the EU a manufacturer can only market a particular vehicle if it gives a “certificate of conformity”. It can only get such a certificate if “type-approval” has been granted for that particular model. Every Member State in the EU has a type-approval authority which is empowered to grant that approval. But, unusually, only one type-approval authority in one Member State can grant an approval. Once it does so, then that approval is valid throughout the EU. It binds all the other Member States and their own type-approval authorities. Usually, a manufacturer will approach the type-approval authority in the Member State or principal Member State where it is located. That is why, for most of the vehicles manufactured by VW, they gained their type-approval authority from the KBA. In the case of Skodas, their type-approval was granted by the VCA. (Type-approval for SEAT vehicles is granted by MIDI, the Spanish approval authority.)
9. At all times material to this case, type-approval could only be granted after the vehicle had passed a test. In the case of the cars relevant to this case, the test was undertaken on a dynamometer or “rolling-road”. The vehicle and its engine were tested for compliance with a very large number of standards applicable across the EU. One of those standards dealt with limits on NO_x emissions.
10. It is common ground that the Engine has a function whereby the exhaust gases from its combustion chamber (which include NO_x) can be recirculated through the chamber. The effect of this recirculation is to reduce significantly the amount of NO_x in the gases which then proceed, after recirculation, through the catalytic converter and diesel particulate filter in the exhaust system and ultimately out of the exhaust pipe. This process of recirculation is called Exhaust Gas Recirculation (“EGR”). However, the EGR function can be turned off or turned down. In that event, less or no NO_x will be recirculated but will proceed straight to the exhaust system. The result is higher NO_x emissions.

11. It is also common ground that the software function in the Engine was able to detect when it was being tested. That is because the test is conducted in a uniform fashion for all vehicles according to very strict parameters, testing for urban and extra-urban driving, different speeds and accelerations and breaking etc. At this stage, the Engine would be in Mode 1 with EGR on. The result was that the NOx emissions were low enough to pass the test. But as soon as the software function detected that the Engine was no longer being tested (sometimes this would take a short period from when the Engine was started for the purpose of an ordinary road journey) the EGR function was switched off or significantly turned down. This was Mode 2. The result then was the production of significantly higher NOx emissions which the research (referred to in paragraph 4 above) showed were well above permitted limits.
12. For present purposes, the definition of a “defeat device” is contained in Article 3 (10) of EU Council Regulation 715/2007 dated 20 June 2007 (“the Regulation”). It states as follows:

“ ‘defeat device’ means any element of design which senses temperature, vehicle speed, engine speed (RPM), transmission gear, manifold vacuum or any other parameter for the purpose of activating, modulating, delaying or deactivating the operation of any part of the emission control system, that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use.”
13. The Claimants argued that the software function here fell within that definition because it was an element of design, sensing parameters like vehicle speed and RPM, so as to detect whether the vehicle was being tested or not, and when it detected the absence of those parameters, the resulting removal or reduction of the EGR function in turn reduced the effectiveness of the vehicles emission control system. That reduction would take place in normal vehicle operation and use on the road. There was a reduction in the effectiveness of the emission control system (“ECS”) because the emissions under Mode 2 were greater than those occurring during the test which is when Mode 1 operated.
14. VW argued that the software function was not a defeat device. It did so essentially for the following reasons:
 - (1) Because the EGR took place in the combustion chamber and not within the exhaust system, it was not physically part of the ECS and therefore the effectiveness of the latter was not actually reduced (“ the Locational Argument”); and/or
 - (2) Regardless of location, the EGR function did not reduce NOx emissions anyway; rather, because of the process in the combustion chamber, it prevented them from ever arising; for

that reason, functionally, the EGR was not part of the ECS (“the Functional Argument”); and/or

- (3) In any event, the only way to measure a reduction in the effectiveness of the ECS was to compare the operation of the two different modes while the vehicle was being driven normally on the road. It was not by comparing the emissions from the vehicle when being driven in Mode 2 with the performance of the vehicle in the test. Since the Claimants had produced no evidence of a comparison between the two modes while the car was being driven on the road, they had no evidence to demonstrate that there was a reduction in ECS (“the True Comparator Argument”);
 - (4) Finally, and in any event, the relevant measurements to be taken to see whether there was a reduction in ECS was not simply by comparing the NO_x emissions. Instead, the measurement must be of the totality of different emissions in Mode 1 and Mode 2, and then to see whether there was any reduction in emissions overall. Again, since the Claimants had produced no evidence of this, but only of the difference in respect of NO_x emissions, they could not prove their case here (“the Holistic Argument”).
15. As for the Locational Argument, I rejected it. The fact that EGR took place in the combustion chamber rather than the exhaust system did not mean that EGR was not part of the ECS. There was nothing in the relevant legislation which suggested the contrary and having regard to the underlying purpose of the Regulation, such a distinction would make no sense.
 16. As for the Functional Argument, I rejected this also. I considered that the distinction between preventing the NO_x emissions from arising prior to their entry into the exhaust system on the one hand, and reducing such emissions once they were in the exhaust system, to be technical and arbitrary. Again it made little sense in the context of the legislation’s purpose;
 17. I also rejected the True Comparator Argument. I decided that the language, context, and purpose of the defeat device definition all pointed to a comparison between (a) the NO_x emissions under Mode 2 and (b) such emissions as were produced during the test. The test was fundamental to the whole system of type-approval and there were further provisions to ensure that during the working life of the Engine it would stay within the appropriate limits; that was ascertained by reference to the requirements of the test. Part of the True Comparator Argument rested on a further argument called the Landscape Argument. The latter consisted of a detailed consideration of other pieces of EU legislation in particular that affecting the diesel engines of heavy-duty vehicles i.e. lorries and

the like. It was suggested that the provisions dealing with defeat devices there were more extensive than those to be found in the Regulation and in particular, that they included a specific comparison between actual emissions and the emissions results which would be expected from the test. Since the ordinary defeat device definition was there as well, the suggestion was that it must indeed involve a comparison with something other than the test, otherwise it would be redundant; that was because whatever would be caught by the defeat device definition would have already been caught by the other definition. So the defeat device definition must involve a different comparison. I did not accept VW's analysis about all of this and dismissed the Landscape Argument.

18. Finally, I rejected the Holistic Argument. I saw no reason why the comparison should be between anything other than NOx emissions, which had their own separate requirements in the test.
19. The upshot was that I found that the software function in the vehicles here did indeed amount to a prohibited "defeat device".

The KBA/VCA Issue

20. In the light of my findings on the Defeat Device Issue, it was strictly unnecessary for me to decide the KBA/VCA Issue. However, it was fully argued and might be relevant if I were proved wrong on the Defeat Device issue on any appeal.

The KBA Issue

21. The only live evidence in the trial arose here, given by expert witnesses on German law called by the Claimants on the one hand and VW on the other.
22. Once the Emissions Controversy emerged, the KBA became involved since it had granted the type-approval for most of the relevant vehicles. Discussions with VW led it to propose measures whereby all affected vehicles would be provided with a service action in the sense of the owners or lessees being able to take them to a local VW garage. There, the Engine's ECU software function could be changed within a short period so as effectively to remove Mode 2. Then, the Engine would run as it had run during the test and they would not be an increase in NOx emissions. Those measures (to which I referred in the written judgment as a "fix" simply for the sake of convenience) were then embodied in the relevant letters from the KBA ("the KBA Letters"). However, at the same time as proposing this plan, VW was maintaining to the KBA that there was no defeat device. The KBA disagreed and found that there was.

23. The question was whether the KBA letters contained in their regulatory part (known in German law as the “tenor”) a finding that the vehicle contained an impermissible defeat device. Although the KBA’s detailed reasons for finding that it did was set out in a later part of the Letters which was not their tenor, the tenor did refer to an “impermissible defeat device”. I held that the finding as to an impermissible defeat device formed part of the tenor of the KBA letters. The result was that this finding would bind any Courts in Germany on the issue as to whether there was a defeat device as a matter of German law.
24. A further question was whether VW had a right to appeal from the decisions in the KBA Letters. Under German Law, there could only be an appeal which would take the form of a judicial review of the KBA Letters if VW’s subjective legal rights had been interfered with by the decisions and if VW had a legitimate interest in any appeal. The KBA Letters in fact ended by telling VW that it had a right of appeal. I considered that there was such a right even though that part of the KBA Letters which required VW to undertake the “fix” was itself a result of the plan proposed by VW. There was a difference between a proposed voluntary action and it being embodied formally in a decision of the KBA which was then legally binding. The right of appeal would also encompass the finding that there was a defeat device which was made expressly against the arguments of VW. In fact, VW never sought to appeal the decisions in the KBA Letters and its own internal document shows that this was simply a commercial and pragmatic decision.
25. In all of the above, I generally preferred the expert evidence of the Claimants’ expert, Prof Hofmann, to that of VW, given by Prof Schröder.
26. I then had to consider whether, even if the KBA’s finding that there was a defeat device was binding in Germany, it would bind me in this Court. I decided that as a matter of EU law, it did. I took the view that because of the overall nature of the type-approval scheme where the type-approval authority in only one Member State (here the KBA) has the exclusive power to grant the approval, the binding nature of its decisions went further than the mere grant of the approval. It would, for example, include a decision to revoke a type-approval and in addition a decision that there was an impermissible defeat device. Without that decision, the KBA was unable to exercise any of its relevant powers, including the power to order the fix. I further found that the binding quality of the KBA Letters throughout the EU was supported by the principle of “sincere co-operation” between Member States and by analogy with certain principles of EU competition law.

27. I also found that it would be an abuse of process for the Defendants to seek in this Court to relitigate the issue of whether there was a defeat device, when the proper forum for that was the KBA and appellate courts in Germany, and where VW had decided not to appeal there.

The VCA Issue

28. I took a different view of the letter written by the VCA on 22 October 2015 to other EU type-approval authorities (“ the VCA Letter”). Although this followed discussions with Skoda and the VCA was aware of the position with regard to the KBA, the addressee of the VCA Letter was not Skoda. Nor did the VCA letter purport to be a formal order or decision. That was so even though there was a clear reference to the “prohibited use of a defeat device”. Nor did it end with any kind of statement of remedies available to Skoda. Therefore, whether as a matter of English or EU law, the VCA Letter did not contain a binding decision as to the existence of a defeat device.

Conclusion

29. I therefore concluded that the software function in the Engine here was a defeat device, that the KBA Letters also found that it was a defeat device which finding was binding on me; but that there was no such binding decision on the part of the VCA. I also concluded that VW’s attempt to relitigate the issue here was an abuse of the process (save in the case of Skoda and SEAT vehicles).