OUTER HOUSE, COURT OF SESSION

[2025] CSOH 30

GP5/24

OPINION OF LORD SANDISON

In the cause

IAIN URQUHART

Representative party for pursuers

against

(FIRST) STELLANTIS AUTO SAS; (SECOND) AUTOMOBILES PEUGEOT SA; (THIRD) AUTOMOBILES CITROËN SAS; (FOURTH) IBC VEHICLES LIMITED; (FIFTH) PEUGEOT MOTOR COMPANY PLC; (SIXTH) CITROËN UK LIMITED; (SEVENTH) STELLANTIS & YOU UK LIMITED; (EIGHTH) STELLANTIS FINANCIAL SERVICES UK LIMITED; and (NINTH) STELLANTIS FINANCIAL SERVICES EUROPE SA

Defenders

Representative party for pursuers: Milligan KC, Black; Lefevres
Defenders: Ellis KC, T Young; Morton Fraser MacRoberts LLP

20 March 2025

Introduction

[1] These are group proceedings arising out of claims that prohibited defeat devices were installed into the diesel engines of certain Peugeot and Citroën vehicles with a view to reducing the effectiveness of those vehicles' nitrogen oxide ("NOx") emissions control systems under driving conditions which might reasonably be expected to be encountered in normal vehicle operation and use, that the vehicles in question were sold or leased to group members, and that loss and damage of various kinds was suffered thereby. Given the

narrow scope of the matter in dispute for present purposes, it is unnecessary to go into further detail about the nature of the litigation beyond observing that it bears many similarities to various other group proceedings before the court concerning other vehicle marques.

[2] The representative party seeks an order in terms of RCS26A.21(2)(b)(iv) and (v) requiring the defenders to produce the information and documents described in a list produced by him by 5 May 2025, or within such other period as seems appropriate to the court, so as to assist him in improving the statement of his case.

Relevant provisions

[3] Chapter 26A of the Rules of the Court of Session 1994 ("Group Procedure") contains *inter alia* the following provisions:

> "**Preliminary hearing**
> 26A.21.—(2) At the preliminary hearing, the Lord Ordinary …
> (b) may make an order in respect of any of the following matters
> …
> (iv) disclosure of the identity of witnesses and the existence and nature of documents relating to the proceedings or authority to recover documents either generally or specifically;
> (v) documents constituting, evidencing or relating to the subject-matter of the proceedings or any correspondence or similar documents relating to the proceedings to be lodged in process within a specified period; …"

[4] The law of the French Republic No 68-678 of 26 July 1968:

> "relative à la communication de documents et renseignements d'ordre économique, commercial, industriel, financier ou technique à des personnes physiques ou morales étrangères"
>
> ("on the disclosure of documents and information of an economic, commercial, industrial, financial or technical nature to foreign natural persons or legal entities")

is in the following terms:

"Article 1

Sous réserve des traités ou accords internationaux, il est interdit à toute personne physique de nationalité française ou résidant habituellement sur le territoire français et à tout dirigeant, représentant, agent ou préposé d'une personne morale y ayant son siège ou un établissement de communiquer par écrit, oralement ou sous toute autre forme, en quelque lieu que ce soit, à des autorités publiques étrangères, les documents ou les renseignements d'ordre économique, commercial, industriel, financier ou technique dont la communication est de nature à porter atteinte à la souveraineté, à la sécurité, aux intérêts économiques essentiels de la France ou à l'ordre public, précisés par l'autorité administrative en tant que de besoin.

Article 1 bis

Sous réserve des traités ou accords internationaux et des lois et règlements en vigueur, il est interdit à toute personne de demander, de rechercher ou de communiquer, par écrit, oralement ou sous toute autre forme, des documents ou renseignements d'ordre économique, commercial, industriel, financier ou technique tendant à la constitution de preuves en vue de procédures judiciaires ou administratives étrangères ou dans le cadre de celles-ci.

Article 2

Les personnes visées aux articles 1er et 1er bis sont tenues d'informer sans délai le ministre compétent lorsqu'elles se trouvent saisies de toute demande concernant de telles communications.

Article 3

Sans préjudice des peines plus lourdes prévues par la loi, toute infraction aux dispositions des articles 1er et 1er bis de la présente loi sera punie d'un emprisonnement de six mois et d'une amende de 18000 euros ou de l'une de ces deux peines seulement."

("Article 1

Subject to international treaties and agreements, it is prohibited for any individual of French nationality or habitually residing on French territory and/or any officer, representative, agent or employee of a legal entity having its registered office or an establishment on French territory, to communicate to foreign public authorities in writing, orally or by any other means, in any place whatsoever documents or information relating to economic, commercial, industrial, financial or technical matters, the disclosure of which may damage sovereignty, security or essential economic interests of France or the public order, specified by the administrative authority as required.

Article 1a

Without prejudice to international treaties or agreements and laws and regulations in force, it is prohibited for any person to request, search for or communicate, in writing, orally or in any other form, documents or information of an economic, commercial industrial, financial or technical nature for the purposes of establishing evidence in view of foreign judicial or administrative proceedings or in relation thereto.

Article 2

Persons referred to in Articles 1 and 1a are required without delay to inform the competent minister upon receiving any request concerning such communications.

Article 3

Without prejudice to any more severe penalties provided for by law, infringement of the provisions of Articles 1 and 1a of this law shall be punishable by imprisonment for six months and a fine of 18,000 euros or either of those two penalties.")

[5] The Convention on the Taking of Evidence Abroad in Civil or Commercial matters, opened for signature at The Hague on 18 March 1970, contains the following provisions:

"CHAPTER I.
LETTERS OF REQUEST

Article 1.

In civil or commercial matters a judicial authority of a Contracting State may, in accordance with the provisions of the law of that State, request the competent authority of another Contracting State, by means of a Letter of Request, to obtain evidence, or to perform some other judicial act.
…

CHAPTER II.
TAKING OF EVIDENCE BY DIPLOMATIC OFFICERS, CONSULAR AGENTS AND COMMISSIONERS
…
Article 17.

In a civil or commercial matter, a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contracting State in aid of proceedings commenced in the courts of another Contracting State if (a) a competent authority designated by the State where the evidence is to be taken has given its permission either generally or in the particular case; and (b) he

complies with the conditions which the competent authority has specified in the permission. A Contracting State may declare that evidence may be taken under this article without its prior permission.
…
Article 23.

A Contracting State may at the time of signature, ratification or accession, declare that it will not execute Letters of Request issued for the purpose of obtaining pre-trial discovery of documents as known in Common Law countries …"

Documents and information in issue

[6] The salient terms of the list of documents and information in respect of the production of which the representative party seeks the court's order are as follows:

"Certificates of Conformity

1. The COC delivered by the First, Second, Third and Fourth Defenders under Article 18.1 of Directive 2007/46/EC of the European Parliament and of the Council, to accompany a vehicle with one of each of the models listed in the Schedule of Affected Models.

Vehicle Emissions Control Systems and Devices and NOx Emissions Levels

2. All documents (including, but not limited to, NOx emissions levels testing results; software, hardware and firmware design and specification documents; engine failure modes, effects and analysis documents; and, written communications between the First, Second, Third and Fourth Defenders' engineers, between said engineers and said Defenders' management and between said engineers and said Defenders' internal regulatory compliance personnel) in the hands of the First, Second, Third and Fourth Defenders, relative to the design and manufacture of the emissions control systems ('ECS') (including, but not restricted to Exhaust Gas Recirculation, and Selective Catalytic Reduction, referred to by the Representative Party in Condescendence 11 installed into (i) the 1.560L litre DV6 Citroën C4 model manufactured in 2014 to Euro 5 Standard; (ii) the 1.560L DV6 Citroën C4 model manufactured in 2015 to Euro 6 Standard; (iii) the 1.560L DV6 Peugeot 2008 model manufactured in 2015 to Euro 5 Standard; (iv) the 1.560L DV6 Peugeot 2008 model manufactured in 2018 to Euro 6 Standard, showing or tending to show:
   (a) the engine used in said models, including the engine model, code and engine capacity;
   (b) the elements of design of the ECS in said models which sense temperature, vehicle speed, engine speed, transmission gear, manifold vacuum or any other parameter for the purpose of activating, modulating, delaying or deactivating the 102 2 operation of any part of

said models' ECS, so as to reduce the effectiveness of said ECS as regards NOx emissions (hereinafter referred to as a 'device(s)');

(c) the function and calibration of each software, hardware and firmware component that is, or contains, such a device(s) in said models;

(d) the mode and parameters of the operation and effect of such a device(s) on the said models' NOx emissions levels while driven under regulatory test conditions;

(e) the mode and parameters of the operation and effect of such a device(s) on said models' NOx emissions levels while driven outwith regulatory test conditions;

(f) the internal analysis conducted by or on behalf of the First, Second, Third and Fourth Defenders relating to and demonstrative of what amount to driving 'conditions which may reasonably be expected to be encountered' by said models 'in normal vehicle operation and use', in terms of Article 3.10 of the Emissions Regulations;

(g) the nature, extent and consequences of the engine damage or accident (if any) which would be sustained to said models without the use and operation of such a device(s);

(h) in what way said models could not be operated safely without the use and operation of such a device(s);

(i) that such device(s) in said models do not function beyond the requirements of engine starting;

(j) that the conditions in which such device(s) operate in said models are substantially included in the test procedures for verifying evaporative emissions and average tailpipe emissions; and,

(k) the levels of NOx (measured in terms of milligrammes per kilometre or otherwise) emitted by said models when driven both under and outwith regulatory test conditions.

Type-Approval Authorities

3 All documents (insofar as not already called for in Call 2 hereof) submitted by the First, Second, Third, and Fourth Defenders to and their correspondence with the Relevant Type-Approval Authorities, in the hands of said Defenders, relevant to the applications for and granting of Type-Approval for (i) the 1.560L litre DV6 Citroën C4 model manufactured in 2014 to Euro 5 Standard; (ii) the 1.560L DV6 Citroën C4 model manufactured in 2015 to Euro 6 Standard; (iii) the 1.560L DV6 Peugeot 2008 model manufactured in 2015 to Euro 5 Standard; (iv) the 1.560L DV6 Peugeot 2008 model manufactured in 2018 to Euro 6 Standard, showing or tending to show:

(a) the date, nature and content of the application package (including the 'information folder' and 'information package', as defined in Articles 3.38 and 3.39 respectively 103 3 of said Directive 2007/46/EC) for EU Whole Vehicle Type Approval submitted to said Relevant Type-Approval Authorities in respect of said models, insofar as relevant to the NOx emissions of said models;

(b) the date, nature and content of the application package (as defined in Call 3(a) hereof) for Emissions Type-Approval of the ECS submitted to said Relevant Type Approval Authorities, insofar as relevant to the NOx emissions of said models;
(c) the information provided to the Relevant Type Approval Authorities by the First Second, Third and Fourth Defenders for the purpose of satisfying the Relevant Type-Approval Authorities that said models conformed to the relevant type approval as regards NOx emissions levels, in accordance with Regulations 4 and 5 of the Emissions Regulations, and that they met the NOx emissions limits set out in Annex I thereof; and,
(d) the date and content of the Type-Approval Decision issued by the Relevant Type Approval Authorities in respect of said models.

Recalls and Software Updates

4. All documents (insofar as not already called for in Calls 2 and 3 hereof) in the hands of the First, Second, Third and Fourth Defenders, relating to (i) the recall notices issued by the Regulatory Authorities detailed in Cond 14; (ii) the ECS software updates offered to group members following the issuing of regulatory recall notices, referred to in Cond 14, showing or tending to show:
   (a) the nature of said recall notices issued by the Regulatory Authorities in relation to the NOx emissions levels of each affected engine type
   (b) for each affected engine type, where software updates have been carried out relative to the recall notices detailed in Condescendence 14:
      (i) the brand and model (including the engine model, engine code, engine capacity and production period) relevant thereto;
      (ii) the date(s) when the First, Second, Third and Fourth Defenders were first advised that such recalls and software update programmes were required and how and by whom they were so advised;
      (iii) the nature of all faults, issues and emissions strategies that such recalls and software updates were intended to rectify in relation to the NOx emissions of affected engine types; and
      (iv) the nature and effect of said recalls and software update programmes on the NOx emissions levels of the affected engine types, including details of (a) what vehicle ECS parameters were updated (b) the effect that said recalls and update programmes had on the ECS with regards to the level of NOx emitted outwith regulatory testing conditions, and (c) the effects of said recalls and updates in relation to fuel economy, engine damage and accident, component service life, diesel exhaust fluid refill interval and driveability.

Software Updates and Communications with Customers

5. All documents in the hands of the Defenders relating to the recalls and software updates referred to in Call 4 hereof, carried out on the affected engine

types and showing or tending to show the reasons given to the group member owners, registered keepers and lessees of vehicles with affected engine types as to why said software updates were required.

6. Failing principals, drafts, copies or duplicates of the above or any of them."

It is expressly accepted by the representative party that no documents prepared in contemplation of litigation should be recovered.

[7] Shortly before the representative party's motion was heard, my opinion in relation to a document recovery exercise in analogous litigation against Vauxhall/Opel was issued: *Batchelor* v *Opel Automobile GmbH* [2025] CSOH 18. In *Batchelor*, I held that the powers given to the court relating to the provision of documentary material in group proceedings were very wide indeed, and did not fall to be exercised in strict conformity with the principles developed by the court in the exercise of its common law powers to grant commission and diligence, but rather that the proper exercise of those powers would turn on (a) consideration of how directly or otherwise the material sought to be recovered appeared to bear upon matters properly in (or likely properly to be in) dispute, (b) the respective positions of the parties in relation to access to potentially significant information (including their ability or inability to access it without the assistance of the court) and (c) the respective legitimate benefits and burdens (the latter in terms of time, trouble and expense) of the making of the order sought or something approximating to it.

[8] The defenders wished in principle to oppose the grant of the orders sought by the representative party on the same general grounds as those which had been advanced by the defenders in *Batchelor*, but recognised in practical terms that they were unlikely to secure a different result, and thus confined their oral opposition at the hearing to two specific and relatively minor matters concerning the framing of the list and to one more general issue concerning the impact on the recovery exercise of the laws of the French Republic to which

the first, second, third and ninth defenders are subject. Since the position of the representative party was essentially reactive to that of the defenders, it is helpful to begin by setting out the submissions of the latter.

Submissions for the defenders

[9] On behalf of the defenders, senior counsel submitted that paragraph 2 of the representative party's list sought the recovery of documents relating to the design of four different vehicle models. That was excessive and unwarranted. In *Batchelor*, the corresponding request was restricted to two different vehicle models - one with a Euro 5 engine, the other with a Euro 6 engine. The same approach should be adopted here, otherwise the exercise of disclosure would be unnecessarily and disproportionately burdensome for the defenders.

[10] Paragraph 4 of the list was, further, unjustified. The recall notices to which it referred had already been produced by the representative party. The defenders should not be required to produce that which the representative party already held.

[11] A more general objection to the form of recovery exercise proposed by the representative party (ie an order requiring the defenders to produce directly to the court documents falling within the ambit of the list) arose from the fact that the first, second, third and ninth defenders were French domiciled corporations and as such subject to the domestic French law, Law No 68-678 of 26 July 1968 "relative à la communication de documents et renseignements d'ordre économique, commercial, industriel, financier ou technique à des personnes physiques ou morales étrangères" (or, in translation: "on the disclosure of documents and information of an economic, commercial, industrial, financial or technical

nature to foreign natural persons or legal entities") and more colloquially known as the "French Blocking Statute".

[12] The terms, nature, and practical administration of that law had been summarised in some detail by Cockerill J in *Joshua* v *Renault SA* [2024] EWHC 1424 (KB), and the essential elements of that summary for present purposes were:

> As originally drafted, the law regulated the provision of documents or information on carriage by sea only. Its scope was significantly extended in July 1980. Articles 1 and 1a, the substantive articles of the law, were not infringed if the request for the information in question was made in accordance with the provisions of international agreements or treaties, such as the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 1970, to which both the United Kingdom and France are parties.
>
> Despite the law in its modern iteration having been in force for almost 45 years, there had so far been only one reported conviction for a breach of Article 1 or Article 1 a, which involved the most egregious circumstances. However, Decree No 2022-207 nominated the Service de l'Information Stratégique et de la Sécurité Economiques, within the Direction Générale des Entreprises section of the Ministère de l'Économie, des Finances et de la Souveraineté Industrielle et Numérique as the point of ministerial contact contemplated by Article 2, and obliged it to investigate the case with the relevant ministries and to issue, within one month, an opinion on the applicability of the law to the circumstances reported to it. The French authorities had made a number of statements emphasising that from their perspective the 2022 reforms had strengthened the effectiveness of law No. 68-678 of 26 July 1968. The SISSE was obliged to inform and cooperate where appropriate with the public prosecuting authorities.

Against that background, the affected defenders submitted that an order requiring them to produce the sort of material sought by the representative party for the purpose of providing evidence in this action would breach the statute and expose them to a very real risk of prosecution in France. There was, however, a viable alternative route for recovery of the documents sought by the representative party via the Hague Convention which would not involve any contravention of the statute. This could be either by way of: (i) the grant of a letter of request by this court for enforcement in France under Chapter I of the Hague Convention; or (ii) the court appointing a commissioner who could then obtain permission

from the relevant French authorities to inspect and recover documents in France under Article 17 of Chapter II of the Hague Convention. That would be entirely consistent with judicial comity, given that the UK and France were both signatories to the Hague Convention. The affected defenders would comply voluntarily with a Chapter II process.

[13] The defenders recognised that the risk of prosecution was not an absolute bar to the court ordering disclosure of documents. It was, however, a fundamental factor for the court to consider in the exercise of its discretion to order such disclosure. The basic principle was that:

> "An order will not lightly be made where compliance would entail a party to … litigation breaching its own (i.e., foreign) criminal law, not least with considerations of comity in mind…": *Bank Mellat* v *HM Treasury* [2019] EWCA Civ 449 at [63(iii)].

It would be fair, just and proper for one of the two routes under the Hague Convention to be used in these circumstances, particularly as that could be done with no prejudice to the representative party. The use of a letter of request under Chapter I of the Convention was straightforward, efficient, and familiar. There was no particular reason why it could not be used in the present case, save that it was understood that the timescale required by the French Ministry of Justice to process a Chapter I letter of request ranged between 2 and 6 months.

[14] If a Chapter I letter of request was seen as undesirable for that or any other reason, the appointment of a commissioner under Chapter II of the Convention would equally be eminently reasonable. The appointment of a commissioner to recover documents was a standard feature of many contested litigations in Scotland. There was nothing unusual or abnormal about that process from a Scottish perspective. The relative evidence in *Joshua* (which the defenders were content to adopt as factually accurate in the absence of any intention on the part of the representative party to contest it) was that in many cases the

process of appointing a commissioner and having that commissioner authorised in France under Article 19 of the Hague Convention was a straightforward and quick process: see *Joshua* at [74(1)].

[15] A letter to the defenders' agents from the *cabinet* of Alexander Blumrosen, an avocat at the Paris bar and attorney at the bar of New York, was lodged. That letter explained that Mr Blumrosen had considerable experience acting as a Hague Convention commissioner to facilitate recovery of documents from French companies for use in foreign courts. It set out that Chapter II provided for the appointment of a commissioner by an official of the Requesting State (ie, in this case, the Lord Ordinary), which commissioner was then approved by the Central Authority of the Requested State (ie, in this case, the French Ministry of Justice), and who then oversaw the production and transfer of the evidence. The commissioner could not be counsel to a party in the litigation and was typically a lawyer located in France.

[16] While France had initially made a full reservation excluding pre-trial discovery when acceding to the Convention, in 1987 it had modified that position so that French parties were permitted to participate in the recovery of documents in civil matters abroad provided that the documents sought were specifically identified and relevant to the underlying dispute.

[17] As to the practicalities, this court should first issue a letter of request to file with the French authorities, based on the model form set out at Annex 4 to the Practical Handbook on the operation of the Convention. That request needed to provide the French Ministry of Justice with sufficient information about the underlying dispute, and the claims and defences asserted, so that the Ministry in its review of the request could assess the relevance of the information sought. It also required to set out the specific requests for discovery which were made, so that the Ministry could assess whether the requests were sufficiently

specific in accordance with the French reservation under Article 23. Mr Blumrosen had a thorough understanding of what was expected by the Ministry, and could assist in the drafting of the letter of request. Once complete and approved by this court, the letter would be sent to the desired commissioner (who could equally be Mr Blumrosen) and submitted by him to the Ministry of Justice along with an explanatory memorandum. No government agency other than the Ministry of Justice required to be consulted as part of the process. The time required by the Ministry to approve the request could vary from 48 hours to about 2 weeks. Mr Blumrosen had never known a Chapter II request supported by the parties to the litigation to be rejected, though on occasion the Ministry had limited the scope of the requests to conform to the French reservation in terms of Article 23. It was necessary to obtain Ministry approval for each set of document requests, but supplemental requests tended to be approved quickly. The commissioner would review documents produced by the parties to ensure that they had a direct and precise link with the object of the proceedings and had been authorised by the Ministry for production. Any further tasks which this court wished the commissioner to carry out could be specified in his appointment. The transfer of disclosed documents could be done on a one-off occasion, or on a "rolling" basis if need be.

[18] It was recognised that in *Joshua* the court had declined to require the appointment of a commissioner under Chapter II of the Hague Convention because, amongst other things, it concluded there was no, or no real, risk of prosecution of the defendants under the statute: see [138] - [139]. However, that outcome was not binding on this court. The "real risk of prosecution" test should not be the one adopted in this jurisdiction. *Joshua* was a wrong exercise of the court's discretion as a result of having taken its own assessment of the level of risk of prosecution as determinative. At the very least, the whole circumstances and

procedural context in the present case were materially different. Use of the Hague Convention by an English requesting court would require a letter of request to be issued by the High Court's Foreign Process Section, a procedure apparently involving considerable delay. It further appeared that, in English procedure, a commissioner appointed by the court required to be subject to its jurisdiction. By contrast, in Scottish proceedings transmission of the relevant request would be made by the relevant Scottish Government department, which was not experiencing any delay in its operations. It was not obvious that there was any rule of Scots law or practice that a commissioner appointed by the court had to be subject to its jurisdiction. Section 10 of the Court of Session Act 1988 enabled a Lord Ordinary to grant a commission to "any person competent" to take and report in writing the depositions of havers, or to take and report in writing the evidence of any witness resident beyond the jurisdiction of the court. It was noted in MacSporran and Young's *Commission and Diligence* at 4.12 that appointments as commissioners were normally given to advocates, sheriffs, magistrates and clerks of court, but cited occasions on which an English town clerk had been appointed in respect of a commission to be carried out there: *Craig* v *Craig* (1905) 13 SLT 556 (perhaps not the best example, since the execution of the commission was botched and it had to be recommenced) and where the pilot of a ship involved in a collision in the Suez Canal had been examined by the British Consul at Port Said as commissioner, it being a rule of the Suez Canal Company that its pilots should be examined only before one of its own officers, or before one of the foreign consuls: *Owners of the SS Hilda* v *Owners of the SS Australia* (1885) 12 R 547. MacSporran and Young observed at 4.13 and 4.14 that if a commission was to be executed abroad, someone acquainted with Scottish practice and procedure should be appointed, but that ultimately the choice of

appointee was a matter for the court. The defenders had no firm view on which party or parties should, in the first instance, bear the fees and costs of any commission process.

[19] The defenders maintained that the very existence of the statute, together with an acceptance that disclosure of documents would be in breach of it, showed in itself that there was a risk of prosecution. In any event, any request or any order to provide documents was itself a breach of the statute and so the court should be slow in any case to make such an order. In contrast, use of the Hague Convention by appointment of a commissioner would not cause any prejudice to the representative party.

[20] It would be wrong for the court to approach the question on the basis of any instinctive or impressionistic resistance to using established mechanisms of international law for the recovery of evidence in another jurisdiction. In similar cases against the defenders in other European jurisdictions, courts had been perfectly willing to use Regulation (EU) 2020/1783 of the European Parliament and of the Council of 25 November 2020 (being EU legislation modelled on and very similar to the Hague Convention, but operating only between Members States) for recovery of documents in France as a result of the statute. In particular, the Dutch courts had used that route for recovery of evidence against the affected defenders on several occasions in the course of 2024 without difficulty. The representative party would require to point, at least, to some precise and quantifiable prejudice in using the routes available under the Hague Convention, and had entirely failed to do so.

[21] In these circumstances, the court should refuse the representative party's motion on the basis that his request could and should proceed by one of the available routes under the Hague Convention in respect of recovery of documents. The fourth to eighth defenders were not subject to the statute and so the issues it created did not apply to them directly.

A direct production order could, therefore, be made directly against them. However, they were highly unlikely to hold any of the types of documents sought to be recovered and, accordingly, such an order would be likely to have no practical purpose. The defenders subject to the statute were not seeking to be obstructive. If the court was inclined in principle to order recovery of documents similar to those made the subject of the order in *Batchelor*, the defenders would seek to co-operate with the representative party in framing any suitable alternative motion for orders under the Hague Convention processes which he might seek.

Submissions for the representative party

[22] On behalf of the representative party, senior counsel submitted that paragraph 2 of the list of documents sought to recover material relating to four sample vehicle models, being one vehicle with a Euro 5 engine and one with a Euro 6 engine manufactured by each of Peugeot and Citroën. It was accepted that the first defender had designed and manufactured both Peugeot and Citroën vehicles. However, the second and third defenders had respectively designed and manufactured Peugeot and Citroën vehicles, making the recovery of material concerning both engine types from both marques reasonable.

[23] The representative party had copies of the actual recall notices referred to in paragraph 4 of the list, and had sought to make it clear that it did not require any recovery exercise to encompass their further production. Paragraph 4(a) clarified that what was sought was documentation showing or tending to show the nature of the recall notices, not the notices themselves.

[24] As to Law No 68-678 of 26 July 1968, the affected defenders had been parties to the litigation in *Joshua*. It was not suggested that that decision was in any way binding on this

court, but it was persuasive and directly in point. The defenders criticised the decision and suggested that the court had erred in making its own assessment of the risk of prosecution. Cockerill J had held a lengthy hearing that included much expert evidence from French lawyers. The defendants in that case had maintained the same argument as was advanced here. In particular, they had argued that there was a real risk of prosecution if they complied with this court order. The agreed evidence of the legal experts was that there had only been one such prosecution in over 40 years, and that that was an exceptional case involving US litigation, which was the main target of the legislation. There was disagreement as to whether the relatively recent changes described in *Joshua* had increased the risk of prosecution.

[25] The correct approach to the issue was that set out in *Joshua* at [78] - [79], namely that the court first had to establish whether the defenders had established a "real risk of prosecution" and, if so, then go on to balance that risk against the fairness and convenience of adopting the Hague Convention route as advocated by the defenders. That approach correctly set out the requirements of judicial comity in such circumstances. Cockerill J held at [139] and [166], after detailed consideration of the law and the evidence, that there was no real risk of prosecution and, even if there was, that the balance of fairness lay with the claimants. Use of the Hague Convention processes would entail additional administrative steps and an increase in the time and expense to be incurred in securing disclosure, with no real added value to the process. The Hague Chapter II process was at least capable of being derailed if the French Ministry of Justice sought to recast the list of documents approved by this court.

[26] Although the representative party did not wish to take any technical point based on the need to prove foreign law as a matter of fact, it could not be overlooked that the

defenders were not tendering any expert evidence, nor were they suggesting that the decision in *Joshua* had caused any prosecutions in France. An approach similar to that taken by the English courts to the matter had also been taken in Australia and the United States. All of the defenders were undoubtedly subject to the jurisdiction of this court. Letters written by Mr Blumrosen in similar terms to those before this court had been before Cockerill J in *Joshua* and had not affected the outcome.

[27] In light of the decisions in *Batchelor* and *Joshua*, the court should simply grant the order sought.

Discussion and decision

[28] The defender's objections in principle, so far as they were insisted upon, to the grant of orders along the general lines sought by the representative party are rejected for the reasons set out in *Batchelor*. In relation to the specific objections, the representative party avers that the first defender designed and manufactured engines installed into certain vehicles bearing both the Peugeot and Citroën marque, that the second defender manufactured Peugeot vehicles and was responsible for the issuing of the Certificates of Conformity therefor, that the third defender manufactured Citroën vehicles and issued the relative Certificates for them, and that the fourth defender manufactured light commercial vehicles bearing both marques. Although these averments do not appear to be accepted as correct, at least in their entirety, by the defenders, they provide a sufficient potential distinction between the responsibility of at least some of the defenders for only one or the other marque to justify the exercise contemplated by paragraphs 2 and 3 of the list of documents, and no restriction on the recovery sought by those paragraphs will be imposed.

[29] The objection to paragraph 4(a) of the list of documents, which seeks to recover documents showing or tending to show "the nature" of the recall notices which are the subject of the paragraph, however, is well-founded. Counsel for the representative party made it clear that he did not wish to recover the notices themselves, as copies of them were already in the hands of the representative party, but I was unable to discern from his submissions just what kinds of document it was anticipated would show the nature of those notices in any way more clear or advantageous than the notices themselves. No order for recovery in terms of this sub-paragraph will be granted. The remainder of the list will be the subject of an order of the court, and the question of what form that order should take now requires to be addressed. That question is easily answered in the case of the defenders not subject to the French statute - a direct order requiring them to produce any documents in their possession or control falling within the scope of the approved list of documents will be pronounced. However, the 5 May 2025 deadline for such production sought by the representative party will not be imposed. As was done in *Batchelor* and the analogous group proceedings concerning Mercedes-Benz, the defenders not subject to Law No 68-678 of 26 July 1968 will be ordained to lodge a brief note setting out the progress made by them in searching for and producing the relevant documents on a rolling 28-day cycle thereafter. Either the court or the representative party may, at any time during the process, and even though there remain repositories still to be searched by those defenders for responsive documents, pronounce themselves satisfied with what has been produced to that point, in which case the obligations incumbent on those defenders in terms of the interlocutor to be pronounced will cease.

[30] The question of what should be done in relation to the defenders who are subject to Law No 68-678 of 26 July 1968, or similar legislation elsewhere, is not one that has received

previous treatment in this jurisdiction. The legal position applying to the situation where production of documents is resisted on the ground that it would expose the person doing so to criminal proceedings abroad has, by contrast, a lengthy history in England, beginning with *King of the Two Sicilies* v *Willcox* (1851) 61 ER 116, 1 Sim NS 301, where a claimed privilege not to produce in such circumstances was rejected on the basis (which still has some resonance in the present day) that a domestic judge could not know what would or would not be penal in a foreign country, and so could not evaluate the force of the objection. A contrary result was reached in *United States of America* v *McRae* (1867) LR 4 Eq 327, LR 3 Ch App 79 on the basis of much better evidence about the foreign law and the fact that the country which would be enforcing it was the plaintiff in the action.

[31] It appears from the discussion in *Bank Mellat* that English law regards the claim of a party to litigation there to have a right to withhold inspection of documents because a failure to do so would give rise to a contravention of foreign criminal law as one of confidentiality. That is seen as a relevant but not determinative factor in the decision as to whether or not to order such inspection, the aim of the court being to strike a just balance between the competing interests involved. Thus, a party might be excused from having to produce a document on the grounds that this would violate the law of the place where the document is kept, but had no right to insist on such excusal: *Mackinnon* v *Donaldson Lufkin & Jenrette Securities Corp* [1986] 1 Ch 482, [1986] 2 WLR 453; and it has been stressed that the relevancy of the material in respect of which discovery is sought, and the absence of entitlement to privilege in that connection, need not automatically result in the conclusion that unconditional orders for production and inspection must be ordered, and that the process of discovery is not an "uncontrollable juggernaut": *Ventouris* v *Mountain (The Italia Express) (No 1)* [1991] 1 WLR 607 per Bingham LJ at 622.

[32] The potential significance of a "real risk of prosecution" in respect of contravention of the foreign law in question as a factor in striking the requisite balance appears first to have been posited in the slightly different context of the privilege against self-incrimination by the Board of the Privy Council, speaking through Lord Nicholls of Birkenhead, in *Brannigan* v *Davison* [1997] AC 238, [1996] 3 WLR 859, where it was noted that foreign law could not be afforded the ability to override the domestic court's right to conduct its proceedings in accordance with its own procedures and law. In the specific context of the Law No 68-678 of 26 July 1968, it was held by Neuberger J in *Morris* v *Banque Arabe et Internationale d'Investissement SA* [2000] CP 65, [2001] IL Pr 37 that the court had a discretion whether or not to order a person resident and domiciled in another country to do something which would be a breach of that law, and that the discretion should be exercised in favour of ordering discovery on the facts of the case because of the centrality of the documents in question to the ability to pursue the case and have it determined fairly, and because on the basis of the evidence before the court, the risk of prosecution was probably no more than purely hypothetical. The view (or at least the hope) was expressed that given the "massive and notorious international financial scandal" with which the case was concerned, the French criminal authorities would not enforce the statute, and that to do so "would not correspond with generally accepted notions of comity."

[33] The criterion of a "real risk of prosecution" reappeared in *Secretary of State for Health* v *Servier Laboratories Ltd* [2013] EWCA Civ 1234, [2014] 1 WLR 4383, in the judgment of Beatson LJ, and in the specific context of the French statute. It was reaffirmed that the court retained its jurisdiction to order production despite the fact that it would put the defendants in breach of the statute, but that it was legitimate for the court, in deciding how

to exercise that discretion, to take account of a real risk of prosecution in respect of that breach.

[34] In *Bank Mellat*, the Court of Appeal similarly held that the court retained its jurisdiction to order production and inspection of documents regardless of the fact that compliance with the order would or might entail a breach of foreign criminal law in the home country of the party who was the subject of the order, but that its discretion to do so would not lightly be exercised where compliance would entail a party to English litigation breaching its own (ie, foreign) criminal law, not least with considerations of comity in mind. When exercising its discretion, the court would take account of the real - in the sense of the actual - risk of prosecution in the foreign state and a balancing exercise had to be conducted, on the one hand weighing the actual risk of prosecution in the foreign state and, on the other hand, the importance of the documents of which inspection was ordered to the fair disposal of the English proceedings. The existence of an actual risk of prosecution in the foreign state was not determinative of the balancing exercise but was a factor of which the court would be very mindful. The view was again expressed that a foreign state might well not wish to prosecute its own nationals for complying with the court's order, as comity cut both ways.

[35] In *Joshua*, Cockerill J sought to follow the guidance lately provided by *Bank Mellat*. Her Ladyship observed, under reference to *Public Institution for Social Security* v *Al Wazzan* [2023] EWHC 1065 (Comm) that a party alleging that it was under a risk of prosecution had the burden of proving that, and that a difference of views amongst experts did not mean that there was such a risk. The rule was proof (by the party invoking it) of a real, rather than fanciful, risk of prosecution: *Tugushev* v *Orlov* [2021] EWHC 1514 (Comm) and the relevant issue was risk of prosecution, not mere risk of a sanction or of simply breaching the foreign law. The greater the risk, the more weight would fall to be given to it.

Once the threshold of the existence of a real risk had been made out, the court had to conduct a balancing exercise. In many cases that would involve balancing the risk of prosecution in the foreign state against the importance of the documents to the fair disposal of the proceedings. In appropriate cases, that would involve the risk of prosecution being balanced against the fairness and convenience of adopting the Hague Convention route, considering *inter alia* elements such as delay and additional expense.

[36] Her Ladyship noted the previous cases involving Law No 68-678 of 26 July 1968 which had been considered by the English courts, including *Partenreederei M/S Heidberg* v *Grosvenor Grain & Feed Co Ltd (The Heidberg) (No 1)* [1993] 2 Lloyd's Rep 324, [1993] IL Pr 718 (Cresswell J; no risk of prosecution established, disclosure ordered); *Morris* v *Banque Arabe* (*supra*); *Elmo-Tech Ltd* v *Guidance Ltd* [2011] EWHC 98 (Pat), [2011] FSR 24 (Lewison J; disclosure ordered); *Servier Laboratories Ltd* (*supra*); and *Qatar Airways Group QCSC* v *Airbus* SAS [2022] EWHC 3678 (TCC) (Waksman J; no real risk of prosecution, disclosure ordered).

[37] Cockerill J concluded on the material before her that there was no, or no real, risk of prosecution on the facts in *Joshua*. It followed that the threshold which would have required a balancing exercise to be carried out was not passed, but her Ladyship in any event carried out a shadow such exercise. She concluded (leaving aside the delays apparently inherent in requiring to proceed through the High Court's Foreign Process Section, which would in any event not apply in this case) that the Hague Convention Chapter II route was workable, but would result in some additional administrative steps and an increase in the time and cost involved, with no substantive value added to the exercise. It added elements of uncertainty, given the possibility of the French Ministry of Justice quibbling (or worse) about the compatibility of the list of requested documents with the Article 23 derogation and the need for the party providing disclosure to be willing to go along with the process at all times. Her

Ladyship was mildly critical of the conduct of the defendants in *Joshua* for not having given wholehearted co-operation to the document recovery exercise nor having made any attempt to persuade SISSE that the statute was not engaged. She also considered as part of the balancing exercise that issues of confidentiality weighed against the Hague route (apparently since proceeding directly could involve the setting up of a confidentiality ring), and that there would be no obvious defence to any prosecution of the defendants that did in fact take place.

[38] Finally, her Ladyship considered issues of comity, recognising that as an important factor which could cut in either or both directions. It was reiterated that the court would not lightly make an order which involved a risk of prosecution of the subject of the order in another jurisdiction, but also that the court would, as a matter of comity, assume a respect for its proceedings by other courts. That was felt to mitigate any risk of prosecution in the first place and also to warrant the conclusion that a successful prosecution of a party to English proceedings for complying with an order for disclosure which the English court, acting within its accepted jurisdiction, had considered and decided was both necessary and proportionate in ambit in order to resolve the case before it, would be an act which would itself breach comity and that considerable weight should be given to that factor. The overall conclusion was that the balancing exercise indicated that it would be appropriate to make a normal discovery order even if that would result in a risk of prosecution to the defendants; a conclusion which was based most heavily on comity considerations, since cost and delay were fairly minor factors.

[39] I have dealt with the English authorities, especially *Joshua*, in some detail because the representative party in effect invites this court to receive that jurisprudence as also representing the as-yet unexpressed Scots law on the subject. If that were to be so, the

affected defenders' wish to use a Hague Convention route would be bound to fail, since although they assert that they would be subject to a "very real risk of prosecution" if they had to comply with a direct order for production made against them, they make no attempt to make good that assertion, the burden of establishing which lies on them (*Al Wazzan*) and offer no expert or other evidence at all on the subject.

[40] I do not consider, however, that the law of England as expressed in *Joshua* and the cases which it followed can be said to represent the relative law in Scotland. Scots law takes a rather more holistic approach to the question of document recovery generally than appears to be the case in England. In the particular context of disclosure and production orders sought in terms of RCS26A.21(2)(b)(iv) and (v), *Batchelor* makes it clear, putting matters briefly, that the directness or otherwise of the bearing of the possible fruits of the order on the matters properly or potentially properly in dispute, the availability by other means of at least the essence of the information sought, and generally the proportionality of the order desired, are all matters that fall to be taken into account in deciding whether to order recovery. I consider that *Batchelor* merely expresses directly and in modern terms the considerations which have long, albeit tacitly, underpinned document recovery exercises in Scotland. Issues arising out of compliance with an order for production made in Scotland putting a party in breach of a foreign criminal law to which it is subject are eminently capable of being dealt with in our law as a matter of proportionality, rather than (as seems to be the case in England) having to be hung on the often rather incongruous peg of confidentiality.

[41] There is undoubtedly a great deal of common ground at a fundamental level between Scots and English law as to the nature of the exercise to be carried out when potential contravention of a foreign law is raised as an issue in the document recovery

context. In particular, it is clear in both jurisdictions that the making of such procedural orders is entirely a matter for the *lex fori* and that the content of foreign law cannot displace the power of the court to do as it sees fit in determining an application for such recovery. It also appears to be entirely common ground that, when such an issue arises, the aim of the court ought to be to strike a just balance amongst the competing interests involved.

[42] The point of divergence appears to concern the establishment of a "real risk of prosecution" as a dominant consideration, or even as a pre-requisite, to attempting to take into account other matters in striking that balance. It is not apparent, at least to me, quite how and why that approach seems to have taken such a firm hold in the law of England. A more rounded approach would appear to be to acknowledge that requiring a party to litigation to put itself in breach of a law to which it is subject is in itself something ideally to be avoided, and that the availability of a reasonable alternative means of recovering the material in issue which would not involve such a breach is something to be considered and weighed whether the risk of prosecution in respect of that breach is considered "real" or not. This seems to me to flow from that aspect of comity which recognises that different countries have their own legitimate interests to pursue as they see fit and that reasonable compromise which accommodates differing such interests is to be looked for and implemented where that proves possible. That is quite apart from the practical consideration, long apparent, that establishing whether a real risk of prosecution exists in any particular case can be a delicate and difficult task which may become an anxious one if so much is to turn on it. It is not inaccurate to characterize the evidence before Cockerill J, outside a narrow core area of agreement, as *tot homines, quot sententiae*. I consider that a more appropriate approach to the issue than treating proof of a real risk of prosecution as the necessary gateway to the carrying out of a balancing exercise is to consider in the round, taking account of all relevant

circumstances (including, where possible, the existence and extent of a risk of prosecution, as well as the viability of other available modes of document recovery) whether an order for production in ordinary form would be a reasonable or unreasonable step for the court to take.

[43] Turning to the application of that test to the present circumstances, it was not disputed before me that compliance by the affected defenders with a direct order of the court for production of the documents in question would, at least *prima facie*, render those defenders in breach of Law No 68-678 of 26 July 1968. No further material as to the likelihood of prosecution or the potential availability of defences was presented to me. The next issue which falls to be considered is the suitability of the Hague Convention routes as substitutes for a direct order against the affected defenders. The defenders accept that the Chapter I route would be likely to lead to considerable delay in the treatment of the appropriate letter of request by the French Ministry of Justice. That would render it an unattractive substitute, to the extent that, were it the only alternative available route to the appropriate recovery, the balance to be struck would probably lie in favour of the court issuing an order in normal form.

[44] However, there remains the Chapter II route. A preliminary question arises as to whether an avocat at the Paris bar is a person whom this court may properly appoint as its commissioner. Section 10 of the Court of Session Act 1988 enables the appointment of "any person competent" as the court's commissioner. Although I suspect that that expression had a long-standing pre-1988 meaning in practice which is now forgotten, and does not simply mean any person with the ability to carry out the task, there would appear to be no obstacle to appointing a lawyer qualified in the jurisdiction where the commission is to take place, at least in circumstances where the principal task of the commissioner requiring the exercise of

particular skill is that of liaison with the local Ministry of Justice. An alternative would be to appoint a qualified Scottish lawyer as commissioner and entitle him or her to instruct a suitable avocat for the provision of the requisite local assistance. One way or another, I do not anticipate any difficulty in the competent appointment of a suitable person. That would undoubtedly entail a cost being incurred, but it does not appear (at least from the indications provided by Mr Blumrosen) that that would be disproportionate in the context of the present litigation as a whole. Given that any need to engage in the process flows from the domicile of the affected defenders, it seems appropriate that that cost should, in the first instance at least, be borne by them.

[45] Similarly, an element of delay would be involved in taking the Hague Chapter II route, although again in the context of what was always assumed to be likely to be a relatively protracted recovery exercise, the timescales indicated by Mr Blumrosen do not seem particularly alarming, and the possibility of a "rolling" exercise would meet what in any event would have been the expectation were an order in ordinary form to be pronounced in a case of this kind.

[46] A further potential difficulty lies in the application of the French Article 23 "limitative enumeration" derogation. Mr Blumrosen, however, cites a decision of the Paris Court of Appeals on September 18, 2003 (case No 2002/18509, "Executive Life") in which the court ruled that requests for broad categories of documents are authorised under the reservation, especially where (as here) it was not reasonably to be expected that an accurate description of each requested document could be given, but where a reasonable level of specificity based on criteria such as date, nature, or author was given. At the least, then, it cannot be said that a document request of the kind contemplated would necessarily be rejected or unacceptably altered by the Ministry.

[47] I can discern nothing in the conduct of any party, in particular the affected defenders, which would make resort to Hague Chapter II inappropriate. The issue of the impact of Law No 68-678 of 26 July 1968 on them was raised as soon as the question of document recovery came before the court and I accept their submission that they entertain a genuine concern about its effect on them and are in no way attempting to be obstructive of the court's processes - a position confirmed by their expressed willingness to comply with the Hague process voluntarily if the court chooses that route. It appears that they have not liaised with SISSE in connection with the perceived problem, but I do not regard that as an unreasonable position given that this court is only now deciding now whether to make an order for document recovery and, if so, in what terms. Any approach to SISSE before this point could only have been an abstract one, inherently unlikely to produce a useful response one way or the other from the *Service*.

[48] A question might arise about who would deal with matters if (as seems likely) a requirement for an excerpting exercise based *inter alia* claims of confidentiality (including claims that some documents fell to be regarded as *post litem motam*) were to be asserted in relation to material falling within the terms of the requested documents list in the course of a Hague Chapter II process. It would evidently be necessary for any such exercise to be carried out by a person demonstrably familiar with Scots law and procedure on those subjects. That would not be the case were a French avocat to be appointed commissioner and the defenders insisted on the exercise being carried out by him. However, I take the defenders' general declaration of willingness to cooperate with document recovery by way of the Hague Chapter II process as extending to an acceptance that any excerpting exercise should be carried out once the commissioner (if that is to be an avocat) has ingathered relevant documents and transmitted them to the court rather than (as appears to be the usual

practice in French Hague II commissions) to the parties directly. I do not anticipate that such an arrangement would be problematic from the point of view of the French Ministry of Justice or the commissioner, since it does not run contrary to any provision of the Convention and would not obviously contravene any fundamental principle of the law of France (which proved a problem in *National Grid Electricity Transmission Plc* v *ABB Ltd*, decided and reported along with *Servier*, when an attempt was made to place the defendant's own lawyers into the position of ingathering the evidence in question, in a process under Council Regulation (EC) No 1206/2001). The matter can be checked before a final decision about the identity of any commissioner is made.

[49] There remains the surprisingly vexed question of the role of comity in situations such as these, in particular the apparent view that it would require the French public prosecutor and courts respectively not to pursue or to convict the affected defenders for compliance with an order pronounced by this court in the exercise of its clear jurisdiction to make procedural orders in support of litigation properly proceeding before it. That view may or may not be correct, but since the risk of prosecution and conviction is not the determining factor in how a Scots court ought to deal with the situation at hand, the question is less acute here than it may be in England. It may suffice simply to observe that for now it is this court, and not the prosecutorial or judicial authorities in France, which is called upon to make a decision and perhaps to add that *comitas*, like *caritas* and *misericordia*, may well be something more apt to bless those who render it even more than those who receive it.

[50] Drawing all of these strands together, I consider that the balance in this case falls to be struck in favour of attempting to recover the documents in question, so far as in the hands of the affected defenders, by the Hague Chapter II route. That route has few drawbacks in comparison to the more usual mode of document recovery in this type of litigation, and

none which appears insuperable, at least at this stage. It prevents the affected defenders from being required to put themselves in breach of the criminal law of their own country, and displays an appropriate degree of comity towards the French legal system, which I consider to be the significant factors in determining the appropriate procedure to be adopted by this court in the present circumstances.

Conclusion

[51] An order for production in normal form will be made against the defenders not subject to Law No 68-678 of 26 July 1968 in the terms already noted. *Quoad ultra* the case will be put out by order in the near future for consideration of the parties' views on the identity of an appropriate commissioner and on any other practical issues which arise, with a view to commencing the Hague Chapter II process in relation to the affected defenders as soon as possible.