



No Relief from Missed Cut-Off Date

By Kathleen Donnelly and Thomas Evans

Claimants who missed the cut-off date for joining the VW NOx Emissions Group Litigation were refused relief from sanction in *Baker & Ors v VWAG & Ors* [2022] EWHC 810 (QB).

Kathleen Donnelly and Thomas Evans appeared for the successful VW Defendants.

The Judgment, handed down on 7 April 2022, emphasises the critical importance of cut off dates and the obligation on claimant firms to co-operate. It will be of relevance to all practitioners involved in Group Litigation, and the application of the *Denton* test to defaults in that context.

Key Facts and Background

1. A GLO made in May 2018 included provision for the establishment of a Group Register, and a cut-off date for inclusion. The cut-off date was extended by consent, but the E Rex Makin (**ERM**) Claimants failed to join the Group Register. A consent order was agreed which resulted in relief from sanctions being granted and they were required to join the Group Register by a re-extended cut-off date. However, they failed to do so and so were automatically struck out.
2. They then applied for relief from sanctions for a second time. They claimed that the fault was that of the Lead Solicitor appointed to manage the Group

Register and that it was the “*obstinance*” of that firm in refusing to add them which caused their breach. Having delayed in applying, they then didn’t pursue a listing, such that the hearing didn’t come on until February 2022, by which time the Lead Cases had been selected, pleadings had progressed, and other significant hearings had taken place.

Judgment

3. The application for relief from sanction was forcefully dismissed by the Senior Master, who characterised it as “*hopeless*”. The Judgment addresses the roles of a Lead Solicitor and claimant firms in relation to the Group Register, and the application of the Denton test to a failure to join the Group Register in time.

Role of the Lead Solicitor

4. A Lead Solicitor appointed to establish and maintain the Group Register is not required to obtain agreement to their approach from all claimant firms. So long as they fulfil their obligations under the GLO and act in a “*sensible and proportionate manner*”, that is sufficient.
5. The Lead Solicitor had done so in this case. It had agreed with the Defendants’ solicitors an Excel spreadsheet format for the Group Register, and had required all claimant firms to complete the agreed Excel template with the details of their claimants to be added. All claimant firms other than ERM had agreed and co-operated with that process.

Obligations on Claimant Firms

6. The requirement of co-operation in the context of Group Litigation is particularly important:

It is especially important in group litigation for parties to behave in a responsible and cooperative manner so that the litigation can progress in an orderly and proportionate way ... it is necessary for all parties to behave in such a way as to enable the court to progress the litigation justly and efficiently.

7. ERM had failed to provide the information requested by the Lead Solicitor in the form required, by reason of its own “intransigence and lack of cooperation”.

Seriousness of Failure

8. A failure to join a Group Register before the cut-off date is a serious and significant breach, meeting the first stage of the *Denton* test.
9. In this case the seriousness was further emphasised by the fact it was a second breach, of an extended cut-off date, and a breach of an unless order, which itself indicates the breach is serious and significant.

Absence of Good Reason

10. ERM had refused to complete the template spreadsheet for their own claimants because they regarded this as generic work to be undertaken by the Lead Solicitors. This was clearly wrong, but in any event could have been argued after the Group Register was served.
11. There was also no good reason for the long delay in listing the hearing. The alleged effect of Covid 19 on listing was a wholly inadequate

explanation, given that hearings had continued remotely over the entire period. The fact that ERM'S counsel of choice was no longer in practice was obviously not a good reason, as alternative counsel could have been instructed.

All the Circumstances

12. All the circumstances clearly militated against the grant of relief in this case. In addition to delay, this was a second breach, and there had been a wholly unjustified attempt by ERM to blame the Lead Solicitor for their own failings. In addition, the delay in issuing and then pursuing the application was a critical factor, which would have been sufficient on its own to merit the dismissal of the application.
13. The progress of the Group Litigation in the meanwhile was a significant consideration, especially since Lead Case selection had taken place:

Mr Makin states in his evidence ... that there is no prejudice to the Defendants for the ERM Claimants to be included in the Group Register. That is only one of the factors for consideration at the third stage of the test, but in any event it is not, in my view, correct. It is contrary to the efficient progress of group litigation for one group of Claimants to effectively remove themselves from the group for a period of now almost three years (since April 2019), and for that Claimant group to take advantage of a preliminary issue trial determined in the Claimants' favour, with no risk of an adverse finding incurred because they were not on the Group Register, and to benefit from the selection process for lead cases without making themselves available for selection. Waksman J. regarded the fact that the Lead Claimant selection process had not yet been completed in March 2019 as a decisive factor in his decision to grant

relief from sanction to those Claimants whose applications were not made by consent: see his judgment [2019] EWHC 686 (QB) at [6] and [13].

Conclusion

14. Claimants wishing to join Group Litigation should be vigilant to ensure that they join the Group Register before the cut-off date. If the date is missed, it will be a serious and significant breach. The Court will scrutinise whether there is any good reason for the failure, and in doing so will look to whether the claimants concerned (as represented by their solicitor) have co-operated with the Lead Solicitor. Progress in the litigation in the meanwhile, in particular Lead Case selection, is likely to be a powerful reason against the grant of relief.
15. The claimants who failed to join the Group Register in this case had their claims struck out and faced an order to pay the costs of both the VW Defendants and the Lead Solicitor. The judgment is a salutary reminder that litigation of this nature is not without risk, and there are important obligations on claimant firms, even those not appointed Lead Solicitor.

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