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## **“Dieselgate” and Consumer Law: Repercussions of the Volkswagen scandal in the United Kingdom**

### **I. Introduction**

News of the Volkswagen emissions scandal broke in the United Kingdom in September 2015 leaving 1.2 million affected car users in the country bewildered as to the emission status of their vehicle, cautious about the resultant environmental and health impacts, and outraged about the potential loss in value of their cars.

Shortly after the news of the scandal broke in 2015 fault was conceded by the head of the Volkswagen brand in the US, Michael Horn, who admitted, ‘we have totally screwed up. We must fix the cars to prevent this from ever happening again and we have to make this right.’<sup>1</sup> However, a year and a half following the outbreak of the news, bewilderment and outrage remain as many in the UK argue that neither Volkswagen, nor the Government have taken great strides towards putting things right. Whilst Volkswagen, Audi, Skoda, and Seat are currently contacting affected vehicle owners to arrange the necessary alterations to rectify the issue, consumers, environmentalists, and politicians in the UK are not willing to allow these companies off the hook with this fix alone. From the House of Commons Transport Committee investigation, dissatisfaction was aimed towards Volkswagen for their inconsistent approach to compensation in the US compared to the UK. Criticism was also aimed at the Department for Transport’s response to the incident, claiming that the Department had been ‘far too slow to assess the applicability of powers to prosecute VW.’<sup>2</sup> In addition to this, the Mayor of London, Sadiq Khan, has called upon Volkswagen to reimburse £2.5 million to Transport for London for lost congestion charge revenue, proving that claims in this area are not just coming from consumers.<sup>3</sup>

In the absence of Government action, two law firms, Harcus Sinclair UK Ltd and Slater and Gordon, are seeking a Group Litigation Order (GLO) in the High Court to act on behalf of affected car owners.<sup>4</sup> From communication with Harcus Sinclair UK Ltd, it has been confirmed that over 30,000 affected owners have registered for this action so far.<sup>5</sup> In the case of the Harcus Sinclair GLO, the action is being funded by a third-party litigation funder providing an incentive to potential claimants to come forward. If the Volkswagen GLO application is successful, it will join a list of less than one hundred GLOs brought in the UK since the system was introduced in 2000.<sup>6</sup> Leigh Day is also planning to take

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1 Mark Clothier, ‘VW’s U.S. Chief Apologizes for Diesel Dupe: ‘We Screwed Up’ (Bloomberg, 22 September 2015) <<https://www.bloomberg.com/news/articles/2015-09-22/vw-s-u-s-chief-apologizes-for-diesel-cheating-we-screwed-up->> accessed 8 March 2017.

2 House of Commons Transport Committee, ‘Volkswagen emissions scandal and vehicle type approval’ (Third Report of Session, 2016-17) 3.

3 Haroon Siddique, ‘VW “Dieselgate” payout offer outrageously low, says Sadiq Khan’ (Guardian, 11 December 2016) <<https://www.theguardian.com/business/2016/dec/11/vw-dieselgate-payout-offer-outrageously-low-says-sadiq-khan>> accessed 9 March 2017.

4 ‘The Claim’ (Harcus Sinclair UK Ltd) <<http://www.vwemissionsaction.com/legal-case>> accessed 9 March 2017.

5 This figure is correct at the time of writing in March 2017.

6 ‘Guidance: Group Litigation Orders’ (HM Courts & Tribunals Service, 3 February 2017) <<https://www.gov.uk/guidance/group-litigation-orders>> accessed 9 March 2017.

group action on a conditional fee agreement using the Consumer Protection regime stemming from the Unfair Trading Regulations 2008.<sup>7</sup>

This country report will focus on action that has been taken against Volkswagen thus far, namely through the proposed group litigation actions that have arisen, as well as consideration of the government's response to the scandal. The report will then outline some further potential actions in environmental law and tort law that could be brought against Volkswagen.

## II. Civil settlements

The majority of action that has been taken in the UK so far has been in the form of preparing civil litigation from car owners against Volkswagen and associated brands in the form of a Group Litigation Order. A GLO is a form of collective redress which allows multiple claimants to bring their claims together against a defendant which can often be very large and well resourced. The benefits of taking group action for claimants include the reduced cost and time burdens compared to bringing individual claims, as well as the benefit of sharing knowledge and information for the case. In the UK, Group Litigation Orders are currently being prepared by a number of law firms who are aiming to bring claims in the various jurisdictions within the UK. Two examples of such claims are currently being prepared by Marcus Sinclair UK Ltd and Slater and Gordon on a pre-funded basis, and Leigh Day on a Conditional Fee Agreement.<sup>8</sup> This is also known as the 'no win no fee' funding agreement, and is advertised to potential claimants as an avenue to allow them to bring their claim where they cannot afford the legal fees.<sup>9</sup>

The application for the former GLO claim is to be brought on the basis of fraudulent misrepresentation against five defendants: Volkswagen AG, Audi AG, Skoda Auto a.s., Seat S.A, and Volkswagen Financial Services (UK) Limited. The action was initially due to be heard at the High Court on the 30th January 2017, however this has been adjourned until October to allow more owners to sign up to the claim. The claim can be divided into a number of interlinked issues. Firstly, the first four defendants listed above knew or ought to have known that the vehicle they were producing did not meet the Annex I limits required from European standards, and are subsequently in breach of the emissions regulations, the testing regulations and the framework directive.<sup>10</sup> As a

<sup>7</sup> 'Volkswagen Emissions FAQs' (*Leigh Day*) <<https://www.leighday.co.uk/Illness-and-injury/Defective-products-and-consumer-law/Faulty-consumer-products-and-consumer-law-claims/Volkswagen-FAQs>> accessed 9 March 2017.

<sup>8</sup> A group action is also being brought specifically for consumers who purchased vehicles in Scotland by Thompsons Solicitors in Scotland, and Reid Black Solicitors in Northern Ireland.

<sup>9</sup> Conditional Fee Agreements have recently been altered through the Legal Aid, Sentencing and Punishment of Offenders Act 2012, and the Conditional Fee Agreements Order 2013 SI 2013/689. If the case is won by the claimant, they will have to pay the normal rates of service as well as a success fee, and any after-the-event premium from their damages. If the claimant loses their case, they will not have to pay the solicitor's fees, however may still be liable for expenses and disbursements.

<sup>10</sup> Regulation of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information [2007] OJ L 171/1 (the Emissions Regulations); Commission Regulation of 18 July 2008 implementing and amending Regulation (EC) No 715/2007 of the European Parliament and of the Council on type-approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information [2008] OJ L 199/1 (the Testing Emissions; Directive of the European Parliament and of the Council of 5 September 2007 establishing a framework for the approval of motor vehicles and their trailers,

result of this knowledge, these first four defendants subsequently made misrepresentations about the emission levels from the vehicles that they either knew to be untrue, or were reckless as to whether they were true. The claimants had ultimately relied upon these misrepresentations, and would not have purchased the vehicles, had the first four defendants not have been deceptive in advertising them. The precise details of the reliance will be provided on a case by case basis to the court as required. In addition to those who purchased vehicles, a portion of the claimants in the group litigation order entered into hire agreements with the fifth defendant, Volkswagen Financial Services (UK) Limited. Whilst these contracts varied, they were regulated by the Consumer Credit Act 1974. For all of the hire agreements entered into by the claimants and the fifth defendant, the implied term of satisfactory quality is protected by statute. If the consumer contracts were entered into on or after the 1st October 2015, section 9 of the Consumer Rights Act 2015 provides the implied term of satisfactory quality. Whereas hire purchase agreements entered into before the 1st October 2015 will be governed by section 10 of the Supply of Goods (Implied Terms) Act 1973, and any other agreements whereby the fifth defendant had agreed to supply a vehicle will be subject to section 9 of the Supply of Goods and Services Act 1982 will apply. If the court finds an unfair relationship between the fifth defendant and the claimants, it may make an order under section 140B Consumer Credit Act 1974. In this case, the claimants are seeking damages for the loss they have suffered. In their guidance to potential claimants, the law firm notes that whilst US claims received \$8,000 on average, this figure is likely to be more modest in the UK.<sup>11</sup> The claimants also seek exemplary damages in this case for the deceptive nature of the defendant's behaviour.

In a separate proposed action in the UK, Leigh Day are also looking to bring claims against Volkswagen Financial Services UK, and Volkswagen dealerships based on the Consumer Protection from Unfair Trading Regulations 2008 (as amended).<sup>12</sup> This will take the form of a separate GLO to the action described above, and will be made on a Conditional Fee Agreement. Leigh Day argue that this alternative claim removes the burden of proving that the claimant has lost money as a result of Volkswagen's conduct, and as a result makes the claim easier to bring in comparison to the fraudulent misrepresentation claim.<sup>13</sup> However, due to the legislation being relied upon in this claim, claimants must have purchased their affected vehicle from an approved Volkswagen Group dealership on or after the 1st October 2014.<sup>14</sup> For those who are unable to use this avenue of redress, Leigh Day are also considering alternative avenues of redress, and have submitted a test case for adjudication to the Motor Ombudsman.<sup>15</sup>

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and of systems, components and separate technical units intended for such vehicles [2007] OJ L 263/1 (the Framework Directive).

11 'FAQs: '26. How much Compensation Will I Get?' (*Harcus Sinclair UK Ltd*) <<http://www.vwemissionsaction.com/faqs-for-the-vw-emissions-action-legal-claim#27>> accessed 12 March 2017.

12 Consumer Protection from Unfair Trading Regulations 2008, SI 2008/1277.

13 'Lawyers for Volkswagen owners seek alternative route to compensation' (*Leigh Day*, 5 February 2017) <<https://www.leighday.co.uk/News/News-2017/February-2017/Lawyers-for-Volkswagen-owners-seek-alternative-route>> accessed 9 March 2017.

14 *ibid*.

15 'Leigh Day calls for the Motor Ombudsman to be used as avenue of redress for consumers' (*Leigh Day*, 23 December 2016) <<https://www.leighday.co.uk/News/News-2016/December-2016/Leigh-Day-calls-for-the-Motor-Ombudsman-to-be-used>> accessed 9 March 2017.

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### III. Government action

In contrast to the litigious approach that is currently being prepared by affected vehicle owners, the response of the government, and the Department for Transport in particular, has been criticised for being too slow. Throughout the first half of 2016, the Transport Committee met to investigate the emissions scandal, determine whether any laws had been broken, and question whether the government had done enough to respond to the scandal. The report from the Committee was published on the 15th July 2016,<sup>16</sup> with a follow up session that took place on the 20th February 2017.<sup>17</sup> Both matters are now deemed to be concluded by the Transport Committee. The main conclusions of the Committee were that much of the evidence provided by Volkswagen was not credible, and that it was very unfair that Volkswagen had refused to pay compensation within Europe, but were willing to do so in the US.<sup>18</sup> In addition to this, the Committee also showed concern for the 'Department of Transport's ambivalence towards assessing the legality of Volkswagen's use of defeat device software despite its condemnation of Volkswagen's actions.'<sup>19</sup> However, whilst the Report does condemn Volkswagen's approach to compensation in Europe, the main recommendations relate to amending the process for vehicle-type approval going forward. Naturally this is a very important consideration to prevent such a problem reoccurring in future, however does very little to compensate the 1.2 million affected car owners in the UK.

The Government's response to the Transport Committee's Report was published on the 17th October 2016.<sup>20</sup> With respect to the issue of compensation, the Government strongly agreed with the Transport Committee's conclusion that Volkswagen had applied an uneven approach to compensation in the US compared to Europe. It is stressed that individual car owners have a range of civil law actions available to them, and that the Government is not privy to the contents of private contracts between vehicle owners and dealerships, however the response does state that 'the Department of Transport has engaged, and will continue to engage, with consumer groups and legal firms and stands ready to provide any reasonable assistance to consumers who seek compensation directly from Volkswagen.'<sup>21</sup>

### IV. Potential environmental and tort law claims

The claims and considerations above have focused on compensation for affected vehicle owners, however environmental law and tort law also provide a range of potential claims from those either aiming to protect the environment, or those claiming from health impacts suffered as a result of the emissions scandal. Reeves and Arrandale explore the range of options available to potential claimants who wish to bring a claim based on the resultant air quality from the vehicles, as opposed to compensation for loss of value.<sup>22</sup> For example, Local Authorities could use the Environmental Protection

<sup>16</sup> House of Commons Transport Committee (n 2).

<sup>17</sup> 'Volkswagen emissions follow-up session' (*Transport Committee*) <<https://www.parliament.uk/business/committees/committees-a-z/commons-select/transport-committee/inquiries/parliament-2015/volkswagen-emissions-16-17/>> accessed 12 March 2017.

<sup>18</sup> House of Commons Transport Committee (n 2) 3.

<sup>19</sup> *ibid.*

<sup>20</sup> House of Commons Transport Committee, 'Volkswagen emissions scandal and vehicle type approval: Government response to the Committee's Third Report of Session 2016-17' (Fourth Special Report of Session, 2016-17).

<sup>21</sup> *ibid.*, 4.

<sup>22</sup> Eleanor Reeves; James Arrandale, '#Diselgate and beyond – where next for air pollution regulation and litigation?' [2016] IELR 190.

Act 1990 to prosecute persons causing nuisance, including that which is prejudicial to human health from air pollution emanating from premises.<sup>23</sup>

Other potential avenues for redress include negligence and public nuisance, however both contain their own limitations. In negligence, a claimant can be awarded damages for personal injury that has been suffered, however two significant hurdles to a negligence claim are that a claimant in this case would have to show that Volkswagen owed a duty of care to the public in the sense that it was reasonably foreseeable that the public would be harmed by the emissions. This would be difficult to prove.<sup>24</sup> If a duty of care could be found, the claimant would then need to establish that the emissions caused the claimant's injury. Reeves and Arrandale argue that it would be medically challenging to prove the initial link between emissions and injury, and continue to argue that making the determination that the injury was caused by a 'particular manufacturer or industrial operator... would be a further challenge still.'<sup>25</sup> Due to the difficulty of manoeuvring these two hurdles, negligence does not appear to be a hopeful option for a potential claimant. Public nuisance, on the other hand, does not carry with it such a high number of hurdles, however is a rarely sought remedy. As a criminal offence, a public nuisance claim would be brought by the Crown. It can be taken on behalf of a class of individuals who have been affected by air pollution. This would prevent individuals having to fight their case using private litigation, however prosecutions in public nuisance are rare.<sup>26</sup> It is currently unclear in the UK as to whether any of these avenues of redress under environmental law or tort law have been utilised by claimants.

## V. Conclusions

In summary, whilst the emotional response to Dieselgate in the UK has been one of anger and distrust, the legal response has been somewhat more reserved. The majority of legal action currently taking place is through civil law using Group Litigation Orders. It is too early to determine the outcome of these legal pursuits, as affected vehicle owners are still coming forward to join the claims. From a government perspective, action taken to prosecute Volkswagen and compensate affected owners has been disappointing, with the focus at government level being one of tightening regulations and preventing such a scandal from repeating itself in future. Finally, environmental law and tort law offer a range of remedies to potential claimants beyond the consumer and contractual relationships, however these bring with them a number of hurdles that could prove to be too onerous on the claimant to navigate. ■

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<sup>23</sup> *ibid*, 193.

<sup>24</sup> *ibid*, 195.

<sup>25</sup> *ibid*, 195.

<sup>26</sup> *ibid*, 195.