

**IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION**

BETWEEN:

NATIONAL HIGHWAYS LIMITED

Claimant

- and -

**(1) PERSONS UNKNOWN CAUSING THE BLOCKING OF,
ENDANGERING, OR PREVENTING THE FREE FLOW OF TRAFFIC ON
THE M25 MOTORWAY, A2 A20 AND A2070 TRUNK ROADS AND M2
AND M20 MOTORWAY, A1(M), A3, A12, A13, A21, A23, A30, A414 AND
A3113 TRUNK ROADS AND THE M1, M3, M4, M4 SPUR, M11, M26, M23
AND M40 MOTORWAYS FOR THE PURPOSE OF PROTESTING
(2) MR ALEXANDER RODGER AND 138 OTHERS**

Defendants

SKELETON ARGUMENT OF THE CLAIMANT

For Hearing 24 April 2023

PRELIMINARY

Hearing Time Estimate: **1 day** (this is greater than the hearing was initially listed for. The Claimant notified the Court on 27 March and 12 April of the potential need for additional hearing time).

References

[HB/x] page x of the Hearing Bundle

[AB/X] page x of the Authorities Bundle

[SM/x] paragraph x of the Witness Statement of Sean Martell dated 13 April 2023 (“**Martell 1**”)

[LH/x] paragraph x of the Witness Statement of Laura Higson dated 13 April 2023 (“**Higson 1**”)

Suggested Pre-Reading (t/e 4 hours)

- Martell 1 [HB/5 - 15] (and witness statement of Nicola Bell exhibited thereto [HB/297 – 312])
- Higson 1 [HB/335]
- NHL v Persons Unknown [2022] EWHC 1105 (QB) [AB/143] (“**Bennathan Judgment**”)
- NHL v Persons Unknown [2023] EWCA Civ 182 [AB/17] (“**CoA Judgment**”)

- Order of the Court of Appeal dated 14 March 2023 [HB/701] (“**Injunction Order**”)
- Costs Order of Bennathan J dated 16 January 2023 [HB/696]
- *TFL v Lee* [2023] EWHC 402 [AB/2]

INTRODUCTION

1. This is the Claimant’s (“**NHL**”) skeleton argument for the extension and variation of an injunction order protecting the Strategic Road Network (“**SRN**”) in the South East of England – particularly the M25, certain Kent SRN roads and feeder roads into the M25.
2. On 9 May 2022, in response to NHL’s application (“**SJ Application**”) for summary judgment, Bennathan J made an order (“**Bennathan Order**”) [HB/641] consolidating three extant proceedings (“**the Claims**”) and granting interim and final precautionary injunctions against certain named defendants (“**Named Defendants**”) and persons unknown. The learned judge’s reasons are recording in his judgment, *NHL v Persons Unknown* [2022] EWHC 1105 (QB) (“**Bennathan Judgment**”) [AB/143].
3. Bennathan J acceded to the SJ Application only in part: he dismissed the SJ Application in relation to (i) 109 of the (then) 133 Named Defendants (“**109 Defendants**”); and (ii) persons unknown (“**D1**”). A final injunction and costs were awarded against 24 Named Defendants (“**24 Defendants**”).
4. On 16 January 2023, Bennathan J made a further order which dealt with the costs of the SJ Application (“**Costs Order**”) [HB/696].
5. NHL appealed the learned judge’s approach to the SJ Application. On 14 March 2023, for reasons set out in its judgment: [2023] EWCA Civ 182 (“**CoA Judgment**”) [AB/17], the Court of Appeal allowed NHL’s appeal and made an amended order (“**Injunction Order**”) [HB/701]. By paragraph 2 of the Injunction Order, the Bennathan Order was set aside bar certain paragraphs, and final injunctive relief was granted as against the Defendants until 23:59 on 9 May 2023. At paragraph 43 the CoA Judgment, the Court held:

“The only aspect of the final and interim injunctions granted by the judge and the final injunctions sought by NHL which caused us any concern is the reference in [10.1] and [11.1] of the Injunction Order dated 12 May 2022 to “tunnelling within 25m of the Roads”.”

6. In consequence, tunnelling was removed from the prohibited activities. This was the only substantive amendment.

7. At paragraphs 7 – 9 of the Injunction Order the Court of Appeal provided for alternative service of the Injunction Order. At paragraphs 10 – 13 of the Injunction Order, the Court made a third party disclosure order in respect of the Police. In respect of costs, the Court noted that:

“It will be for the High Court at any review hearing to determine what if any costs Order to make in the case.”

8. Although discharged by the Injunction Order, paragraph 19 of the Bennathan Order provided for a hearing in April 2023:

“...at which the Court shall review whether it should vary or discharge [the Bennathan Order] or any part”.

BACKGROUND

9. NHL is the highways authority for the SRN pursuant to s.1A of the Highways Act 1980 (“**1980 Act**”), and, as highways authority, has the physical extent of the highway vested in it pursuant to s.263 of the 1980 Act.

10. The Claims were brought by NHL in response to a series of protests that commenced on 13 September 2021 on the SRN in and around London and the south-east of England under the banner of Insulate Britain (“**IB**” and “**the IB Protests**”).

11. The IB Protests involve protestors blocking highways comprising parts of the SRN (“**the Roads**”) with their physical presence, normally by sitting down on the road or gluing themselves to the road surface. The IB Protests created a serious risk of danger and have caused serious disruption both to ordinary users of the SRN and more broadly. The three sets of proceedings arose following urgent applications made by NHL for interim injunctions restraining conduct arising from the IB Protests. Each of these applications was successful:

a. In QB-2021-003576, Lavender J granted an interim injunction on 21 September 2021 in relation to the M25;

- b. In QB-2021-3626, Cavanagh J granted an interim injunction on 24 September 2021 in relation to parts of the SRN in Kent;
 - c. In QB-2021-3737, Holgate J granted an interim injunction on 2 October 2021 in relation to M25 "feeder" roads.
 - d. On the return date of 12 October 2021, the three injunctions were continued until trial or further order and the claims were ordered to proceed together.
12. Each of the injunctions was originally made only against persons unknown, but contained an express obligation on NHL to identify and add named defendants. To enable that to occur disclosure orders were made, providing for Chief Constables of the relevant police forces to disclose to NHL the identity of those arrested during the course of the protests, together with material relating to possible breaches of the injunctions.
13. Once NHL received disclosure from the police, it made applications for committal. Between October 2021 and February 2022, 34 defendants were committed for contempt [SM/9 – 11].
14. On 15 February 2022, IB announced that it had joined Just Stop Oil (“**JSO**”) [SM/12], in coalition with Animal Rebellion (“**AR**”) [SM/13].
15. On 20 July 2022, JSO direct action protests took place on the M25 [SM/17]. One defendant was committed for contempt for her part in the protest [SM/18].
16. On 17 – 18 October 2022, two protestors (“**Bridge Protestors**”) attached themselves to cables approximately 200 feet above the carriageway of the Queen Elizabeth Bridge at the Dartford Crossing [SM/20]. Mr Martell notes that an estimated 629,206 vehicles were impacted by the Bridge Protestors with a total economic impact of £916,696. NHL attempted personal service of the Bannathen Order upon the Bridge Protestors, but doing so was an impossibility given the precarious position that the Bridge Protestors had occupied.
17. NHL made an application for retrospective alternative service of the Bridge Protestors. On 3 November 2022 at the hearing of that application, NHL was granted permission to discontinue the application after the Court had indicated that it considered that the issue of alternative service should be dealt with in committal proceedings and not separately. Those

committal proceedings are to be listed for hearing shortly. Both of the Bridge Protestors only defend on the basis that they were not personally served with the Bennathan Order [LH/11].

18. In November 2022, JSO activists targeted gantries on the M25 [SM/24 and 28]. As a result of the issues with service highlighted by protest undertaken by the Bridge Protestors, NHL made an urgent application for a further interim injunction to protect gantries and other structures on the M25.
19. Chamberlain J granted the injunction (“**M25 Structures Injunction**”) which was continued subject to amendment by Soole J at the return date hearing. The M25 Structures Injunction provided for alternative service of the claim form and injunction order as against persons unknown. By the return date hearing, NHL had named 65 defendants, and Soole J revised the service provisions to require personal service upon those named defendants.
20. On 28 February 2023, the Claimant made an application for permission to serve the M25 Structures Injunction and documents in those proceedings by alternative service upon the 65 named defendants on account of the difficulties in serving 25 of the named defendants. On 1 March 2023, Fraser J granted an alternative service order.

NEED FOR CONTINUED INJUNCTIVE RELIEF

21. There is a compelling case for the Injunction Order to be continued, and the Court is respectfully invited to do so.
22. The effect of the Injunction Order was to transform the Bennathan Order into a final injunction in respect of both D1 and Named Defendants and the purpose of this hearing is to review it as expressly provided for under the terms of the Bennathan Order (and in line with the court’s ongoing supervisory jurisdiction: *Barking and Dagenham LBC v Persons Unknown* [2022] 2 WLR 946 at [89] [AB/219] and [108] [AB/223]). The terms of the Injunction Order were recently considered by the Court of Appeal and were endorsed subject to one minor amendment (“the only aspect...which caused us concern”). The Bennathan and CoA Judgments confirm that the relevant legal tests for the grant of an injunction on the basis of a real and imminent risk of unlawful activity have been met and the sole questions for the Court at this Review Hearing is whether there is a continuing

threat which justifies the continuation of the CoA Order and whether it should be maintained, varied or discharged.

23. The Injunction Order has been kept under review by NHL, and it continues to discharge its duties under the terms of the Injunction Order and the relevant case authorities. NHL's position is that the Injunction Order should be continued for a period of at least another year on the basis that there continues to be a real and imminent risk of serious harm as set out in *Martell 1* and that the protection of the Injunction Order in materially identical terms remains necessary, subject to the variations proposed by its applications, which are supported by *Higson 1* and discussed further below.

Continued threat

24. Between 3 November 2021 and 19 July 2022, no direct action took place on the SRN but the JSO campaign continued throughout that period and the protest tactics varied in nature and location [SM/15 – 16]. Direct action protest returned to various parts of the SRN on separate occasions between July 2022 and November 2022, targeting the specific junctions on the M25 and the Queen Elizabeth II Bridge at the Dartford Crossing on the M25. The M25 was said by JSO to be a site of civil resistance and that the protest action was part of a month long campaign of civil resistance. The protest actions resulted in road closures and significant cost and disruption [SM/17, 20, 23, 24, 28].
25. NHL accepts that there was a pause in direct action protest on the SRN after its peak in late 2021, but experience has shown that the absence of, or reduction in, protests for periods of time should not be interpreted as a sign that the protesters have stopped for good. Direct action protest returned to the SRN from July 2022, perhaps as the weather improved. Although there has been no direct-action protest on the SRN itself since 10 November 2022 [SM/29], there have been a number of broader incidents of direct-action protests which have been designed to cause disruption on other roads and bridges in central London and elsewhere between October 2022 – March 2023 [SM/23, 30].
26. The JSO activities involving blocking roads both in London and elsewhere since October 2022 were also summarised by Cavanagh J in *TfL v Lee* [2023] EWHC 402 (KB) at [12]-[13]. As Cavanagh J put it in *TFL v Lee* at [22] [AB/10]:

“It is true that the protests are less frequent than before the end of October 2022, but there has been no change to JSO’s position that it will continue its protests indefinitely, and there have been a substantial number of protests on the roads in London since that time, including one in February 2023. The reduction in protest may be the result of a tactical decision, or it may be a result of the Winter weather, or it may be the result in part of some reduction in appetite because of the earlier injunctive relief, or a combination of all of these things, but in any event the evidence that protests will take place unless restrained by injunctive relief is as strong now as it was before Freedman J. The mere fact that some people have chosen to act in breach of the injunctions is not, of course, a reason for declining to grant a continuation (*South Buckingham DC v Porter* [2003] 2 AC 558; [2003] UKHL 26 at paragraph 32).”

27. The injunctions granted so far, and the pursuit of committal applications against contemnors, have been effective in deterring direct action protest on the SRN, but:

- a. they have not been wholly effective, and the SRN continues to be at risk of being targeted – hence the requirement for the M25 Structures Injunction in November 2022; and
- b. there is no indication that direct action protest has reached its zenith. Rather the public statements made on behalf of JSO make clear that JSO has no intention of bringing its campaign of protests to an end and that there has been no change to JSO’s position that it will continue its protests indefinitely. Martell 1 refers to JSO’s announcements that its direct action activities should be expected “*every day and anywhere*” and that they “*will not be stopped by injunctions sought to silence nonviolent people*” which were considered to be “*irrelevant*” [SM/24]. Reference is also made to the “*ultimatum letter to 10 Downing Street*” having recently been issued by JSO seeking assurances that the UK Government would “*immediately halt all future licensing and consents for the exploration, development and production of fossil fuels in the UK*” by 10 April 2023, failing which the group would be forced to “*escalate*” its protest activity [SM/32]. 10 April has now come and gone with no such assurance from the UK government.

- c. The evidence is that direct action protest groups such as JSO remain motivated, are continuing to recruit new members and includes members who are willing to be arrested in pursuance of their goals [SM/33/35]. The SRN continues to be a prime location for the direct action protest activities and the evidence that protests will take place on the SRN unless restrained by injunctive relief is as strong now as it was before Bennathan J.

28. The importance of the SRN and the gravity of the potential harm and some of the anticipated consequences of unlawful protest activity are addressed at [SM/39-40] and Nicola Bell's witness statement (exhibited to Martell 1).

29. Three more points tell in respect of further extending the Injunction Order:

- a. No evidence or pleadings against variation have been received in respect of the Review Hearing. Indeed, many of the Named Defendants have provided personal undertakings promising that they would not engage in the unlawful conduct which forms the subject of the Injunction Order which the Court is asked to accept [HB/835 - 916]. As the CoA Judgment discusses at paragraphs 40 – 41, a lack of engagement or opposition to the order sought is indicative of the absence of any arguable defence, and it is submitted that the same applies in respect of a review of a final injunction;
- b. Other Named Defendants have refused to provide such undertakings, citing moral reasons/solidarity with other Named Defendants and other reasons such as sharing costs. Nevertheless, the point is that there is nothing to prevent a person (1) signing an undertaking to the effect that they do not intend to engage in the unlawful activity, whilst continuing to take a principled moral stand, (2) agreeing to share costs with persons who refuse to sign the undertaking, and (3) continuing to protest against climate change and the Government through lawful means. In such circumstances, the Court is invited to draw an inference that a person refusing NHL's invitation to explicitly to provide the suggested undertakings remains a potential risk of future direct action protest.
- c. NHL has sought the injunction in furtherance of its statutory duties to assert and protect the rights of the general public to use the highways under the Highways Act 1980. The Court of Appeal itself noted at paragraph 23 of the CoA Judgment:

“It is worth noting at this point that, under regulation 15 of The Motorways Traffic (England and Wales) Regulations 1982, pedestrians are not allowed on a motorway save in cases of accident or emergency (which these protests did not constitute) so that the defendants had no right to be on the M25 or other motorways and a lawful excuse defence would not have been available. Although we drew the attention of Ms Stacey KC to that provision, it was not relied upon by NHL either before the judge or before this Court.”

It is submitted in that regard that in considering the balance of any rights a person may assert in respect of protesting on the SRN, there is a statutory bar, as well as strong authority in respect of the right to protest not being a right to protest in any location (*DPP v Cuciurean* at [45 – 46] [AB/168]). The recitals to the Injunction Order make plain that the Claimant does not intend to prohibit lawful protest – although NHL accepts that it is difficult to envisage disruptive direct action protest on the SRN which would be lawful.

NHL’s APPLICATIONS

30. NHL seeks a continuation of the Injunction Order in materially identical terms, subject to three proposed variations.

Schedule of Defendants

31. First, NHL seeks to amend the Schedule of Defendants to:

- a. Remove certain Named Defendants who have provided personal undertakings at NHL’s invitation and one Named Defendant who is regrettably deceased.
- b. Add certain ‘Newcomers’ as named defendants who have engaged in direct action protest on the SRN since the Bennathan Order was granted in accordance with the procedural guidelines laid down in paragraph 82 of *Canada Goose v Persons Unknown* [2020] EWCA Civ 303, which requires people who join the protest and fall within the description of D1 to be joined as individual defendants to the proceedings.

Submissions

32. Higson 1 sets out the evidential basis for the proposed variations to the Schedule of Defendants and the Court is respectfully requested to endorse those variations. The position in relation to those who have confirmed that they do not intend to engage in prohibited activities in the future is that by giving the undertakings requested, they will remain subject to similar prohibitions as in the Injunction Order, have confirmed that there is no longer any realistic prospect that they will protest on the SRN so as to justify their continued presence as Named Defendants and are nevertheless capable of falling within the description of persons unknown in respect of any future breaches of the Injunction Order.

Alternative Service

33. Second, NHL seeks to amend the service provisions to allow service by alternative method. The difficulties which NHL has faced in effective personal service are set out at [LH/3 – 16], but in summary the position is as follows.

34. The Bennathan Order provided for personal service in respect of all defendants both D1 (persons unknown) and Named Defendants. The Bennathan Order expressly stated that alternative methods would not constitute service on any Defendant. That wording was replicated in the CoA Order. Bennathan J considered there to be an “absence of any practical and effective method to warn future participants about the existence of the injunction” which meant that service by an alternative method was not possible. The solution reached by the Judge was that anyone arrested would first have to be identified and then served with the Order: *NHL v Persons Unknown* [2022] EWHC 1105 at [52] [AB/158].

35. The approach of Bennathan J that those who are not served personally are not bound by the terms of the Injunction Order is at odds with the approach taken in other cases (see e.g. *HS2 v Persons Unknown* [2022] EWHC 2360 (KB))¹ [AB/67]. The approach of Bennathan J has proven to be significantly problematic in respect of Persons Unknown and even in respect of Named Defendants, it has been impossible for NHL to personally serve many of them. In both instances, this has led to significant costs and a requirement for satellite

¹ Where Knowles J endorsed alternative methods of service on Persons Unknown such as advertisement in libraries, publications and on twitter and website), despite the injunction covering the entire HS2 route: [229].

litigation and further orders, which, it is submitted is not in accordance with the over-riding objective.

36. As set out in Higson 1, the effect of the service provisions is that the Injunction Order can only be served upon an individual whose name and address is known. Given that protestors are only identifiable after they have carried out a prohibited act, that means that each individual has a ‘free pass’ [LH/8]. Two practical examples are given at [LH/9, 10], where unknown individuals who took part in JSO protests which resulted in road closures and significant disruption could not be personally served and were thus able to argue that the Injunction Order was not binding on them, despite NHL’s considerable efforts to effect alternative service in circumstances where personal service was impossible (see also [SM/46]). The approach to service in the Bennathan Order has necessitated further applications by NHL, for a new injunction in November 2022 in respect of further protest activities on structures on the M25 in order to secure effective alternative service provisions and for alternative service orders against named defendants [LH/13-15].

Submissions

37. NHL seeks a variation of the alternative service provisions in respect of both D1 and Named Defendants. It accepts that prospective alternative service against Named Defendants is a high bar, but there is nothing in CPR 6.27 (or 6.15) restricting the exercise of the court’s powers to after a claimant has attempted service. Moreover, this is a review of a final order with an extensive background and in these circumstances although the proposed order operates prospectively, the reality is that the Court has the benefit of seeing how the service provisions have operated in practice.

38. In other, similar proceedings, the Court has accepted that alternative service was appropriate in cases where protestors have a great deal of constructive knowledge that orders previously granted will be extended, that alternative service was necessary for the relief to be effective, and that Bennathan J’s approach should not be adopted. For example, in respect of the Transport for London (“TfL”) where injunctions were secured against a materially identical backdrop of JSO protests of TfL roads in central London, Cavanagh J held in *TfL v Lee* [AB/13] at [32]:

“Similar orders have been made in other cases of a like nature. Alternative service is necessary for the relief to be effective. Moreover, as Mr Ameen points

out, the Defendants already have a great deal of constructive knowledge that the TfL Interim JSO Injunction may well be extended: the extent and disruptive nature of the JSO protests since March 2022 (and the Insulate Britain protests which began in September 2021); the multiple civil and committal proceedings brought in response to those protests by National Highways Limited, TfL, local authorities and energy companies and the frequent service of documents on defendants within those proceedings including multiple interim injunctions; the extensive media and social media coverage of the protests, their impact, and of the legal proceedings brought in response; the large extent to which, in order to organise protests and support each other, JSO protesters are in communication with each other both horizontally between members and vertically by JSO through statements, videos etc. shared through its website and social media. These are not activities that single individuals undertake of their own volition. In my judgment, in the perhaps unusual circumstances of this case, it is very unlikely, perhaps vanishingly unlikely, that anyone who is minded to take part in the JSO protests on JSO roads in London is unaware that injunctive relief has been granted by the courts. An order for alternative service has already been made in identical terms in this litigation, by Freedman J. For these reasons, I do not consider that it is necessary to adopt the step adopted by Bennathan J in the *NHL v Persons Unknown* case of directing that those who had not been served would not be bound by the terms of the injunction and the fact the order had been sent to the relevant organisation's website did not constitute service. However, Mr Fraser-Urquhart KC has said that in practice the claimant adopts and will continue the practice of not commencing committal proceedings against a person unknown unless that person has previously been arrested and has been served with the order."

39. The procedural position is that in order to dispense with personal service under CPR r6.27 and to make an order for service by alternative method, the Court requires "a good reason" (CPR 6.15(1)). NHL submits that the evidence in Higson 1 provides those good reasons, in particular the imposition of further significant costs on the public purse in circumstances where the public have already been significantly inconvenienced and suffered economic harm as a result of the actions of the Defendants.

40. There is a further good reason particular to D1: the Claims were brought in circumstances where defendants were protesting on the Roads, being arrested and released, and then returning to the Roads to continue their protests. That approach appears to have changed, and protest organisations such as JSO are recruiting newcomers, who have been taking part in single protest events. As a result, the requirement for a person to be identified, named, and personally served with the Injunction Order has in hindsight failed to prevent the mischief for which the courts have granted the Claimant relief. As set out above, now, someone seeking to take part in direct action protest on the SRN has, in effect, a free go – an opportunity to carry out the prohibited actions with impunity.
41. This challenges significantly the authority of the Court, which has determined that the prohibited actions are sufficiently serious that it would contemplate, and indeed has, sent persons to prison for carrying out the prohibited actions. In such circumstances, NHL does not consider that an individual should benefit from procedural safeguards as against the significant harm and disruption caused to the general public by breaching injunctions made by the Court.
42. There are further good reasons to allow alternative service in respect of the Named Defendants and D1 in the particular circumstances of this case:
- a. The effect of the requirement for personal service may lead to direct action protestors placing themselves in increasingly more dangerous positions in order to seek to deny NHL an opportunity to serve personally (cf. the Bridge Protestors);
 - b. As in the TfL case the organisations which facilitate and support such direct action protest are plainly aware of the injunctions, and even go as far as providing legal training [SM/33]. Any defendant will already have a great deal of constructive knowledge of the proposed order; there have been multiple proceedings, including successful committal applications – those successful committals have been publicised and deprecated by organisations such as JSO; there has been extensive media and social media coverage.
 - c. The purpose of service provisions is to ensure that a defendant is aware of an injunction order and the essential requirement for any form of alternative service is that the mode of service should be such as could reasonably be expected to bring the proceedings to the attention of the defendant: *HS2 v Persons Unknown* [2022]

EWHC 2360 at [144]; *Canada Goose*, [82]. Here, the proposed variations have been carefully formulated and can reasonably be expected to bring the existence of the order to the attention of the Defendants. NHL submits that it is vanishingly unlikely that any person, named or unnamed, who now chooses to undertake direct action protest on the SRN would be unaware of the injunction. Moreover, even if alternative service were granted by the Court, it would remain open to any defendant on committal to argue that the alternative service provisions operated unfairly against them: *Secretary of State for Transport v Cuciurean* at [62(7)] [AB/273].

43. In the circumstances, NHL submits that the proposed alternative service provisions in the draft order are appropriate and sufficient to bring the injunction to the notice of persons unknown likely to become D1, and the Named Defendant. To state the obvious, the proposed provisions in respect of service of the Injunction Order on D1 will also have the effect of reaching many of the Named Defendants.

Costs

44. Third, NHL seeks to amend the Costs Order to give effect to the CoA Judgment, and to ensure that the 109 Defendants are subject to the same costs provisions as the 24 Defendants.

45. The Court will note that Bennathan J ordered that, in respect of those defendants where NHL's summary judgment was successful (i.e. the 'committal defendants'), costs should follow the event in the normal way, and made an order for payment of costs on account (paragraphs 1 to 2 of the Costs Order [HB/696]). In respect of those defendants where Bennathan J found the summary judgment was not made out, the judge ordered that the costs be costs in the case (paragraph 4).

46. The variation simply operates to extend Bennathan J's costs order at paragraphs 1 and 2 to all of the Named Defendants so as to include those 109 Named Defendants against whom the final injunction ought to have been granted. The Court of Appeal determined that Bennathan J, with respect to his Lordship, erred in the separation of his approach to the 109 and 24 Defendants and in not acceding to the application for summary judgment in respect of all defendants. That being so, NHL submits that there is no reason why the two sets of

defendants should be treated any differently in respect of costs. The proposed variation to the costs order simply applies the logic of Bennathan J's original costs order by imposing the same costs as were granted against the 24 Defendants in the Costs Order to all Named Defendants in respect of whom summary judgment should originally have been given had the law been applied correctly. Such an order is entirely consistent with the ordinary rule that the losing party should pay the successful party's costs.

Section 12 Human Rights Act 1998

47. Section 12 of the Human Rights Act 1998 ("HRA 1998") is addressed as follows:

- a. In relation to those Defendants who do not appear and/or are not represented at this review hearing, no issue arises as to s.12(2) because NHL has taken all practicable steps to notify those Defendants, and, as has been explained, NHL's contention is that this is a review hearing of a final order for which (a) there has been service on the Defendants, (b) the Injunction Order makes specific reference to the review hearing and (c) there is any event significant constructive knowledge of this review hearing.
- b. Similarly, in respect of s.12(3), this is a review of a final order, so, to the extent that direct action protest could amount to publication, the Court has already found that such publication should not be allowed.

CONCLUSION

48. For these reasons, the Court is respectfully invited to grant the Order in the terms sought:

- a. extending the injunction
- b. permitting amendments to the Schedule of Defendants
- c. permitting alternative service
- d. awarding NHL the costs of securing the Bennathan Order.
- e. as per paragraph 21 of the draft Order, awarding NHL its costs of the Review Hearing.

18 April 2023

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