IN THE COURT OF APPEAL (CIVIL DIVISION) **CA-2022-001066**
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
Bennathan J [2022] EWHC 1105 (QB)

B E T W E E N:

NATIONAL HIGHWAYS LIMITED

Appellant

-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 132 OTHERS

Respondents

APPEAL SKELETON ARGUMENT
of the Appellant, National Highways Limited

References to:

- page numbers in the core appeal bundle are in the format [CB/--]
- page numbers in the supplementary appeal bundle are in the format [SB/--]
- paragraph numbers in the Witness Statement of Nicola Bell of 22 March 2022 are in the format Bell/WS/§§
- paragraph numbers in the Witness Statement of Laura Higson of 24 March 2022 are in the format Higson/WS/§
- paragraph numbers in the Witness Statement of Laura Higson of 25 April 2022 are in the format Higson/WS2/§

1. This Skeleton Argument is structured as follows:

Introduction

2. This is the skeleton argument of National Highways Limited (**"NHL"**) in support of its appeal against the Order of Bennathan J (**"the Judge", "Order"**) the reasons for which are recorded in the judgment in ***NHL v Persons Unknown*** [2022] EWHC 1105 (QB) (**"the Judgment"**). Whipple LJ granted permission to appeal on 27 October 2022.

3. By the Order, the Judge determined NHL's application for summary judgment (**"the SJ Application**") in three extant proceedings (**"the Claims"**)[1] brought by NHL against protestors associated with Insulate Britain (**"IB"**). The defendants to the Claims were a combination of named defendants (**"the Named Defendants"**) and persons unknown. The main remedy that NHL sought was a final precautionary[2] injunction substantially in the terms of interim injunctions already granted to prevent future IB protests, on the basis of the imminent and real risk of torts of trespass and nuisance being committed. NHL also sought a declaration as to the unlawfulness of future protests. NHL did not seek to pursue damages.

4. The Judge acceded to the SJ Application only in part. The Judge dismissed the SJ Application in relation to (i) 109 of the 133 Named Defendants ("**the 109**") and (ii) persons unknown. The Judge concluded that he could only accede to the SJ Application and grant a final injunction in relation to 24 of the Named Defendants who had been found to be in contempt of court for breaches of interim injunctions already granted ("**the Contemnor Defendants**"). However, the Judge went on to grant an interim precautionary injunction, on precisely the same terms as the final injunction, against the 109 and persons unknown.

5. NHL's case on appeal is that the Judge clearly applied the wrong test in his determination of the SJ Application. While the Judge's reasoning is not entirely clear, in NHL's submission, on analysis of the Judgment it appears that the Judge proceeded on the basis that a claim for a final injunction and/or the summary judgment procedure imported some further requirement on NHL to show on the balance of probabilities that each defendant had already committed the torts in question. In NHL's submission, there can be no sound

[1] On NHL's application, the Judge consolidated the proceedings by the Order.
[2] Or *quia timet*/anticipatory injunction. The Judge uses the terminology of an anticipatory injunction.

legal basis for such a conclusion. In any event, however, the Judge clearly did not apply the correct tests in determining the SJ Application.

6. As recognised by the Whipple LJ in granting permission, the present appeal raises important issues about the court's approach in cases of this kind. In particular, the reasoning and conclusions of the Judge appear to present a difficulty for claimants who, having obtained interim relief that substantially achieves the results sought by the underlying claim, then name defendants and seek to progress the proceedings to a conclusion in line with their procedural obligations and the guidance given by the courts.[3] The Judge's reasoning appears to present a disincentive to adopting such an approach, and an incentive to, in such situations, leave the interim relief in place indefinitely.

Background - the Claims

7. NHL is the highways authority for the Strategic Road Network (**"the SRN"**) pursuant to s.1A of the Highways Act 1980 (**"the 1980 Act"**), and, as highways authority, has the physical extent of the highway vested in it pursuant to s.263 of the 1980 Act. 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 IB (**"the IB Protests"**). 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 create a serious risk of danger and have caused serious disruption both to ordinary users of the SRN and more broadly.

8. 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:

   (1) On 21 September 2021, Lavender J granted an interim injunction in relation to the M25 (claim no. QB-2021-003576) [Ref];

   (2) On 24 September 2021, Cavanagh J granted an interim injunction in relation to parts of the SRN in Kent (claim No. QB-2021-3626) [Ref];

[3] E.g. ***Canada Goose v Persons Unknown*** [2019] EWHC 2459 at [87]-[89]

(3) On 2 October 2021, Holgate J granted an interim injunction in relation to certain M25 'feeder roads' (claim No. QB-2021-3737) [Ref]

(collectively, **"the Interim Injunctions"**).

(4) The Interim Injunctions were continued on the return date of 12 October 2021 until trial or further order and the claims were consolidated.

9. The Interim Injunctions were originally made against persons unknown only, but each contained an express obligation for NHL to identify and add named defendants. To facilitate that, a number of consequential disclosure Orders were made for the Chief Constables of the relevant police forces to share with NHL the identities of those they arrested on the Roads in the course of or as a result of the IB Protests (**"the Disclosure Orders"**), together with material relating to possible breaches of the Interim Injunctions.[4] NHL discharged its obligation to add and name defendants by periodically filing a schedule of named defendants as and when notified by the relevant police forces of the details of those arrested in the course of or as a result of the IB Protests. The offences for which those individuals were arrested are offences which would constitute a contravention of the Interim Injunctions.

10. NHL pleaded its case in Consolidated Particulars of Claim on the basis that the conduct of all of the defendants in participating in the IB Protests constituted (1) trespass; (2) private nuisance; and/or (3) public nuisance. The pleading referred to the fact that the Named Defendants had been added as persons identified as participating in the IB Protests on the Roads following arrest. It claimed a final injunction, damages[5] and a declaration that the use of the SRN for the IB protests which caused an obstruction to the highway was unlawful and a trespass.

11. The pleading described the IB Protests that had already taken place and asserted that the IB Protests exceeded the rights of the public to use the public highway; and that the obstruction of and disruption to the highway caused by the IB Protests was a trespass on the SRN which endangered the life, health, property or comfort of the public and/or

[4] See Witness Statement of Anthony Nwanodi of 30 September 2021, §§5-15.
[5] Although, as noted above, damages were ultimately not pursued by NHL and did not form part of the SJ Application.

obstructed the public in the exercise of their right.

12. Paragraphs 18 and 19 of the Consolidated Particulars of Claim set out the basis for the *quia timet* injunction sought: *"there is a real and imminent risk of trespass and nuisance continuing to be committed across the SRN including to the Roads"* and referred to open expressions of intention by the defendants generally to continue to cause obstruction to the SRN, unless restrained.

13. Following the grant of the Interim Injunctions, NHL made three contempt applications in relation to breaches of the M25 Injunction (**"the Contempt Applications"**) on 22 October 2021 (determined on 17 November 2021),[6] 19 November 2021 (determined on 15 December 2021)[7] and 17 December 2021 (determined on 2 February 2022).[8] The Contemnor Defendants were found to have been in contempt of court.

14. On 24 March 2022, in the interests of achieving finality, NHL brought the SJ Application in respect of its claim for a final injunction. In relation to the majority of the Named Defendants, NHL was also entitled to apply for default judgment, but wished to adopt a procedure that would afford those defendants the opportunity to engage with the merits of the claim.[9] Its approach was driven by the practical desire to secure finality of the proceedings in a proportionate manner rather than having to proceed with a trial against 100+ Defendants and Persons Unknown. That course was taken in circumstances where there was clear evidence of past unlawful acts and NHL was seeking a continuation of orders in substantially the same terms as the Interim Injunctions against (i) the same Persons Unknown and (ii) against Named Defendants who had been joined following their arrest in the course of protests on the Roads, served with the proceedings and who had not applied to be removed as defendants[10].

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[6] ***National Highways Limited v Ana Heyatawin and others*** [2021] EWHC 3078 (QB).
[7] ***National Highways Limited v Benjamin Buse and others*** [2021] EWHC 3404 (QB).
[8] ***National Highways Limited v Arne Springorum and others*** [2022] EWHC 205 (QB).
[9] Higson/WS/§62 **[insert bundle reference]**.
[10] The Court is invited to note that there are some cases, such as the first hearing of possession claims under CPR 55, where proceedings akin to summary judgment proceedings are provided automatically as a filter so as to ensure that only those cases which have a real prospect of defence go forward to trial. See CPR 55.8 in particular.

Relevant principles

Injunctions: general

15. As to the relevant principles pertaining to the grant of injunctions:

(1) The test for an injunction (whether interim or final) is whether it is just and convenient to grant it: s.37(1) of the Senior Courts Act 1981 (**"the 1981 Act"**). The Court has undoubted jurisdiction to grant final injunctive relief to protect a claimant's rights on a *quia timet* basis where appropriate, and thereby prevent an apprehended tort from being committed in the future. There was no dispute before the Judge as to the Court's jurisdiction to grant such precautionary injunctions and the following principles are applicable[11]: A precautionary injunction can be granted on an interim or final basis.[12] The test is whether there is an imminent and real risk of a tort being committed to justify *quia timet* relief: ***Ineos Upstream Ltd v Persons Unknown*** [2019] 4 WLR 100 (CA) per Longmore LJ at [34(1)] ("**the Precautionary Injunction Test**").

(2) 'Imminent' is used in the sense that the circumstances must be such that the remedy sought is not premature: ***Hooper v Rogers*** [1975] Ch 43 (CA) per Russell LJ at 49-50.[13] Per *Gee, Commercial Injunctions*, 7th ed (2016) at §2-035: *"There is no fixed or "absolute" standard for measuring the degree of apprehension of a wrong which must be shown in order to justify quia timet relief. The graver the likely consequences, the more the court will be reluctant to consider the application as "premature". But there must be at least some real risk of an actionable wrong. If the court decides to grant a final injunction the width of that injunction is a matter*

[11] As cited to the Judge in NHL's Skeleton Argument in support of the SJ Application.
[12] See also ***Vastint Leeds BV v Persons Unknown*** [2019] 4 WLR 2 "*The court applies a two-stage test: "(a) First, is there a strong probability that, unless restrained by injunction, the defendant will act in breach of the claimant's rights? (b) Secondly, if the defendant did an act in contravention of the claimant's rights, would the harm resulting be so grave and irreparable that, notwithstanding the grant of an immediate interlocutory injunction (at the time of* actual *infringement of the claimant's rights) to restrain further occurrence of the acts complained of, a remedy of damages would be inadequate?"*.
[13] Per Russell LJ: *"the degree of probability of future injury is not an absolute standard: what is to be aimed at is justice between the parties, having regard to all the relevant circumstances."*

for the court's discretion and can be tailored according to the circumstances."

(3) A permanent precautionary injunction can only be granted if the claimant has proved that there will be an actual infringement of his rights unless the injunction is granted: ***London Borough of Islington v Elliott*** [2012] EWCA Civ 56 per Patten LJ and cases referred to at [29], [30] (see also per Chadwick LJ in *Lloyd v Symonds* [1998] EWCA 511 at [31] *"a strong probability that, unless restrained, the defendant will do something which will cause the plaintiff irreparable harm that is to say, harm which, if it occurs, cannot be reversed or restrained by an immediate interlocutory injunction and cannot be adequately compensated by an award for damages").*

(4) Where an injunction is sought on a precautionary basis, past interference is relevant to the assessment of risk under the Precautionary Injunction Test. Where the defendant has already infringed the claimant's rights, it will normally be appropriate to infer that the infringement will continue unless restrained: see discussion in ***Secretary of State for Transport and HS2 Limited v Persons Unknown*** [2019] EWHC 1437 (Ch) at [122] to [124]; and *Snell's Equity* at §18-028.

(5) However, there is no requirement for a claimant to establish that there has been a past infringement to obtain a precautionary injunction. It is in principle open to the court to restrain even lawful activity in an appropriate case, in order to afford effective protection to the rights of the claimant (subject to not imposing an injunction which is in wider terms than necessary to do justice): ***Cuadrilla Bowland Ltd and others v Persons Unknown*** [2020] 4 WLR 29 (CA) per Leggatt LJ (as he then was) at [50]; ***Canada Goose UK Retail Ltd v Persons Unknown*** [2020] 1 WLR 2802 (CA) at [78].

Final injunctions against 'Persons Unknown'

16. In ***London Borough of Barking and Dagenham and others v Persons Unknown and others*** [2022] EWCA Civ 13 (Vos MR, Lewison and Laing LJJ), this Court held that there was undoubtedly power under s.37 of the 1981 Act to grant final injunctions against persons who were unknown and unidentified ('newcomers'): [71]. In concluding that there was no jurisdictional obstacle to such an order, it rejected the reasoning of this

Court in ***Canada Goose UK Retail Ltd v Persons Unknown*** [202] 1 WLR 2802 and considered that the first instance judge was wrong to suggest that there was a fundamental difference between interim and final injunctions and to hold that the court could not grant final injunctions to prevent persons unknown from trespassing [89], [93], [101]. The Supreme Court has recently granted permission to appeal against the Court of Appeal's decision in ***Barking***, and NHL understands that the appeal is due to be heard in February 2023.

Summary judgment

17. CPR 24.2 provides that:

> "The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –
> (a) it considers that –
> (i) that claimant has no real prospect of succeeding on the claim or issue; or
> (ii) that defendant has no real prospect of successfully defending the claim or issue; and
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

18. The principles governing the grant of summary judgment are well-established: see the formulation of Lewison J in ***Easyair Ltd v Opal Telecom Ltd*** [2009] EWHC 339 (Ch) at [15], approved by this Court in ***AC Ward & Sons Ltd v Catlin (Five) Ltd*** [2009] EWCA Civ 1098; [2010] Lloyd's Rep. I.R. 301 at [24] (cited also in *Civil Procedure 2022* at §24.2.3). One of those principles is that "*in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial": **Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd*** [2007] F.S.R. 3. Attention is also drawn, in this connection, to the guidance in Civil Procedure 2022 at §24.2.5: "*If the applicant for summary judgment adduces credible evidence in support of their application, the respondent becomes subject to an evidential burden of proving some real prospect of success or some other reason for a trial."*

The Judge's decision

The SJ Application

19. By the SJ Application, NHL sought the grant of a single final precautionary injunction against all defendants, and other ancillary orders. The SJ Application was considered by the Judge at an in-person hearing on 4 – 5 May 2022.

20. The evidence produced by NHL in support of the SJ Application included the following:

    (1) Evidence of: the IB Protests that had taken place; that they had been carried out by IB knowingly in breach of courts orders; and that IB had openly expressed its intention to continue to obstruct the Roads as part of its campaign[14]

    (2) Evidence as to the joinder of the Named Defendants and that *"each of the Named Defendants has been arrested on suspicion of conduct which constitutes a trespass and/or nuisance on the roads subject to the Interim Injunctions"*. [15] That evidence was set out in the form of a timeline of protests identifying how many of the Named Defendants were arrested at each protest.[16] As noted above, the Interim Injunctions placed an obligation on NHL to identify and add named defendants.

    (3) Evidence of service of the Claims and the SJ Application on each of the Named Defendants [17].

    (4) Evidence of the success of the Interim Injunctions in limiting the disruption caused by the IB Protests on the SRN, NHL's concerns about the "*prospect of a renewed and strengthen further round of disruptive protests"* and its plans for *"a serious, ambitious continuation of IB's campaign"* and threats to continue *"for the next 2-3 years"*.[18]

    (5) Evidence as to the impact of the IB Protests in terms of danger and disruption.[19]

The Judge's approach

21. At [5], the Judge summarised what the Claimant was seeking on the SJ Application as

[14] Higson/WS/§14-34; 37-38; 39-47; Higson/WS2/§ 27-32 **[insert bundle reference]**.
[15] Higson/WS/§50 **[insert bundle reference]**.
[16] Higson/WS/§51 **[insert bundle reference]**.
[17] Higson/WS2/§§4-25 **[insert bundle reference]**.
[18] Higson/WS/§§55-57 **[insert bundle reference]**.
[19] Higson/WS/§58 **[insert bundle reference]**; Bell/WS/§§19-20 **[insert bundle reference]**.

follows (emphasis added):

> "…In addition to summary judgment, the Claimant sought:
> (1) A final injunction in terms similar, but not identical to, to those granted in the interim orders, and
> (2) A declaration that the use of the SRN for protests is unlawful…"

22. The Judge's reasoning in relation to the issues before him on the SJ Application can be found at [19] to [57]. These paragraphs of the Judgment are broken up into a series of sections under headings. The SJ Application was brought in respect of the substantive claims rather than "in addition to" those claims. However, the Judge dealt separately with 'Summary judgment' at [24] to [36]; and then with 'Injunction' at [37] to [49].

23. Under the 'Summary judgment' section of his reasoning, the Judge made the following points:

    (1) at [24] the Judge referred to his *"concerns about the evidential basis for the summary judgment applications"*. He went on to set out his understanding of NHL's submissions as being that *"even if I doubted there was sufficient evidence to find tortious liability, the same evidence could and should be seen as an ample basis to show the justification for granting a final injunction."* That was not an accurate characterisation of the submissions made which did not draw any distinction between *"tortious liability"* and the giving of summary judgment (see e.g. para 29 below)[20]. The remainder of that section of the Judgment sets out the Judge's reasons for rejecting what he understood to be NHL's submissions on that distinction, which the Judge considered to be of some relevance to the matters before him.

    (2) At [25], the Judge makes the point that *"[a]n application for an injunction can only succeed if it is advanced as a necessary relief for an underlying substantive claim."*. At [26], the Judge further distinguishes a 'remedy', such as an injunction, from a 'cause of action' at [26], saying that summary judgment is not available in respect of the former (as opposed to the latter). He goes on to say that that consequent relief may be granted on a summary judgment basis, but "only after the

[20] NHL's case was (and is) that in order to obtain a precautionary injunction there is no need for a claimant to establish past tortious liability. Rather, the Precautionary Injunction Test involves consideration of whether there is a 'real and imminent risk'.

cause of action has been resolved". It is not entirely clear what the Judge meant by the "*underlying cause of action [being] resolved*" but he seems to have considered that it was necessary for him to make a finding of tortious liability before being able to grant summary judgment.

(3) At [27], the Judge then went on to consider the SJ Application *"[o]n the basis of the approach I have described"*. He considered "potential defences" by reference to his summary of the law of trespass, which was drawn from two decisions, ***DPP v Jones*** [1999] 2 AC 240 and ***DPP v Ziegler*** [2022] AC 408, (both concerned with criminal offences (see also [31])).

(4) At [32] to [35] the Judge set out his conclusion in respect of the SJ Application. At [32], he found that there was "sufficient evidence" to give summary judgment in respect of the Contemnor Defendants on the basis that *"[a]lthough the Court in those cases was deciding whether there had been breaches of an injunction, rather than the commission of torts, the factual summaries in those cases gives sufficient details for me to conclude there is no realistic basis to believe there would be any issue were there to be a trial of those defendants."* The Judge did not spell out what he meant by *"any issue"* or what test he was applying, but it seems tolerably clear (from his earlier references to the need to 'resolve' the cause of action and the absence of any reference to the risk) that he was considering the prospects of the defendants raising a defence in respect of past breaches as opposed to the prospects of them being able to dispute the risk of future infringements.

(5) At [33]-[35] the Judge dealt with the 109 and refused to give summary judgment. His reasoning was as follows:

    (a) NHL's evidence did not identify each specific defendant arrested, and that there were *"no details of the activities that led the police to arrest"* [34].

    (b) At [35(1)] he said that the evidence was *"manifestly inadequate"*, because he *"would have to be satisfied in each case"*. It is not expressly stated of what the Judge considered that he would have to be satisfied of. However, he went on to say: *"As a matter of common sense, it is highly likely that many of the defendants have committed the 3 torts alleged but I am not able to take a broad brush approach that "lumps together" all 109 in a case where I am*

dealing with important and fundamental rights." (emphasis added)

(c) At [35(2)], he evaluated the relevance of arrest: *"The fact a protestor has been arrested may well mean they have been obstructing a road so as to commit the torts, but it is entirely realistic that, on a few occasions, the police's reasonable suspicion [the requirement for an arrest] was misplaced or mistaken. English law does not proceed on the basis that a person arrested is assumed to be guilty, even [as here] on a balance of probabilities test."* (emphasis added, brackets in original)

(d) At [35(4)], he considered the third committal application and evaluates the relevance of the fact the application was dismissed against three defendants, stating *"I am conscious that the Court was dealing with breaches of an injunction, not tortious liability, but I doubt that the activities of those 3 could amount to the latter. Once more, this serves as an obvious example that the mere fact of an arrest does not necessarily establish the tortious conduct."*

(e) At 35(5) he considered the fact that all but four of the Named Defendants had not responded to the claim, including by filing a Defence, and dismissed that as irrelevant[21]: *"In some situations, the failure to serve a defence could provide such evidence but, in my view, this is not such a case, given the general attitude of disinterest in Court proceedings as described in Ms Higson's witness statement, as above."*

(6) At [36], the Judge summarised his conclusions on the SJ Application as regards the Named Defendants. He made no reference to, and does not appear to have considered, the SJ Application for a final injunction as against Persons Unknown. However, he recorded that the consequence of his determination was, *"the injunctions I was persuade[d] to grant are both final, for the 24, and interim, for the 109 and the unknown defendants."*

24. Having dealt with the SJ Application, the Judge then proceeded to deal separately with

[21] As to those four Named Defendants who did respond/file a Defence, NHL dealt with those in its Skeleton Argument on the SJ Application at §44 **[insert bundle reference]** and in Higson/WS2/§§33-35 **[insert bundle reference]**.

injunctive relief at [37] to [49], under the heading 'Injunction':

(1) He set out the *American Cyanamid* test for the grant of an interim injunction at [37] and expressed the view that it could be satisfied in this case subject to modification of the terms of the draft order proposed by NHL on the basis that "*the actions previously carried out and those threatened by IB clearly amount to a strong basis for an action in trespass and private and public nuisance"*.

(2) At [38], he noted that the injunctions sought were precautionary injunctions and referred (for the first time) to the Precautionary Injunction Test. At [39], the Judge applied the test to the facts, and held that the Precautionary Injunction Test was satisfied ("*once a movement vows "to cause more chaos across the country in the coming weeks" and threatens" a fusion of other large scale blockade- style actions you have seen in the past", the Claimant must be entitled to seek the Court's protection without waiting for major roads to be blocked. In my view the scale of protests being discussed, and those that have already occurred are sufficient to meet the heightened test of harm so grave and irreparable that damages would be an inadequate remedy").* On that basis, he accepted that NHL was entitled to a precautionary injunction. In that paragraph, the Judge conducts, for the first time, a forward-looking analysis in accordance with the Precautionary Injunction Test.

(3) At [40], the Judge addressed s.12 of the Human Rights Act 1998 (**"the HRA 1998"**) and held that he was satisfied that NHL would secure the same orders at trial.

(4) At [41] to [49], the Judge set out the applicable principles under the HRA 1998 for the balancing of the human rights of those participating in protests and the countervailing rights sought to be protected by way of injunction. That discussion arises from and informs the Judge's conclusions on the terms of both the final and interim injunctions which he granted: see [49].

Submissions

The judge applied the wrong test

25. The issue for the Court is whether the Judge applied the wrong test (or failed to apply the

correct test) in determining the SJ Application. In NHL's submission, the Judge did apply the wrong test. In particular, the Judge erred by approaching the SJ Application for a final precautionary injunction without apparent assessment of future risk and on the basis that NHL was required to establish tortious liability in respect of each of the defendants on the balance of probabilities. That confusion of principle proceeded to infect his assessment of the evidence.

26. In NHL's submission, the correct analysis in respect of the SJ Application is as follows:

(1) There were three consolidated Part 7 claims before the Judge in which a precautionary injunction was sought as a final remedy in respect of apprehended trespass and nuisance. NHL applied for summary judgment in respect of its Claims for such relief. In doing so, NHL was asking the Court to grant at the hearing of the SJ Application the same relief that it would have sought at trial. The relevant question on the SJ Application under CPR 24.2(a)(ii), was whether the defendants had *"no real prospect of successfully defending the claim or issue"*, namely NHL's entitlement to a precautionary injunction, and whether there was any other compelling reason why the matter should not be disposed of before trial. CPR 24.2 is an expedited procedure for obtaining what was already being sought in an extant claim and did not introduce a different substantive legal test or a different remedy.

(2) The legal tests that the Judge was required to apply were, therefore:

(a) the Precautionary Injunction Test, namely whether there was an imminent and real risk of commission of the torts averred, being trespass and nuisance;

(b) s.6(1) of the HRA 1998, whether there was a disproportionate interference with any Convention rights;

(c) CPR 24.2, whether the defendants had no real prospect of successfully defending the claim, that is, of persuading the court at trial that NHL would not be able to make out an affirmative answer to point (a) and a negative answer to point (b).

27. It is, respectfully, not at all clear from the Judgment what legal test the Judge applied in determining the SJ Application and which led to his dismissal of the SJ Application in

relation to the 109 (which is the aspect of the Judge's decision that NHL challenges) or Persons Unknown. It is for that reason that the relevant reasoning in the Judgment has been set out in some detail above. However, the following aspects of the Judge's reasoning provide some insight into his approach and bear emphasis:

(a) At [24], the Judge identifies the need to *"find tortious liability"*, but distinguishes this from what might justify the grant of a final injunction;

(b) At [25], the Judge distinguishes *"an application for an injunction"* from *"an underlying substantive claim"*, making the point that the former *"can only succeed if it is advanced as a necessary relief"* for the latter.

(c) At [26], the Judge distinguishes between a *"cause of action"* and a remedy, and, perhaps importantly, between *"granting summary judgment"* and granting *"consequent relief"*, making the point that *"consequent relief"* can *"only* [be granted] *after the cause of action has been resolved"*.

(d) The Judge sets out what he understands to be the applicable principles governing the giving of summary judgment at [24] to [26], and then describes himself as applying them at [27] to [35], with the result that the Judge determines the SJ Application and gives his reasons for doing so at [36]. Only then does the Judge, having given advance indication of his conclusion on summary judgment and relief at [36], move on to set out the applicable principles relating to the grant of injunctions in a different section of his judgment ('Injunction') at [37] to [49]; at the end of that section of his judgment, the Judge concludes that an injunction should be granted in the terms provided.

28. In NHL's submission, it can be taken from the above that:

(1) The Judge considered that there was a need to *"resolve"* the cause of action, in order for summary judgment to be granted. That appears to have been understood by the Judge as requiring an evaluation of whether *"tortious liability"* had been made out.

(2) The Judge considered that exercise of 'resolving' the cause of action as being

distinct from the consideration of whether NHL was entitled to an injunction. That is evident from the distinctions that the Judge drew in his analysis of the applicable principles at [24] to [26], and is also reflected in the structure of the judgment which deals separately with 'summary judgment' and 'injunction' and by his consideration of summary judgment at the outset.

(3) In light of those points, the substance of the reasoning of the Judge in determining what he appears to have considered to be the two issues of the SJ Application and NHL's entitlement to injunctive relief was:

(a) in relation to the Contemnor Defendants, that he was able to grant summary judgment because:

(i) those defendants had been found to be in contempt of court, notwithstanding that what had been made out were previous breaches of the Interim Injunctions *"rather than the commission of torts";* and

(ii) the factual summaries in those determinations of applications for contempt of court gave *"sufficient details"* of individual wrongdoing in order for the Court to be satisfied that tortious liability was made out in relation to them.

(b) in relation to the 109, he was unable to grant summary judgment because NHL had failed to adduce evidence to show that each individual had personally committed one of the alleged torts/engaged in tortious conduct. In particular:

(i) the fact that it was *"highly likely"* that many of the 109 had committed the alleged torts was not enough to establish such tortious liability and the Judge was *"not able to take a broad brush approach that "lumps together" all 109"*: [35(1)]; and

(ii) the fact that a protestor had been arrested *"may well mean they have been obstructing a road so as to commit the torts"*; however, the police's reasonable suspicion could be wrong and so an arrest was not tantamount to establishing that the tort had occurred i.e. *"on a balance*

of probabilities test": [35(2)]; it is doubtful that arrest could amount to *"tortious liability"* [35(4)].

(c) The Judge does not appear to have considered the question of whether or not summary judgment should be given against persons unknown. The effect of his decision was that the SJ Application was dismissed against persons unknown.

(d) Separately and following on from those points, in relation to all Named Defendants, NHL was nevertheless entitled to an injunction restraining the conduct of the IB protests, albeit only an interim injunction in relation to the 109 and persons unknown.

29. In NHL's submission, the Judge's approach appears to have been that he needed as a matter of principle to consider whether a tort had been committed in addition to the three tests set out above, before a final injunction could be granted as a remedy on a summary judgment basis. That approach was clearly wrong as a matter of law.

30. A number of features of the way the Judge dealt with the SJ Application bear that out and underscore the confusion of principle underlying the Judge's reasoning.

(1) First, the judgment contains no reasoning to explain his dismissal of the SJ Application against Persons Unknown. He refers at [17] to the Named Defendants falling into "2 groups" and makes no reference to the Persons Unknown in his analysis (other than at [41] which was after he had already dismissed the claim for a final injunction against them). In the absence of any other explanation, it appears that the dismissal was on the basis that the Judge considered that it would be a conceptual impossibility for persons unknown to have committed a tort. If that is the test he applied, it is plainly wrong and would mean that a final injunction could never be obtained against Persons Unknown.

(2) Second, the Judge's view that he did not need to distinguish between an interim and final injunction in the 'Injunction' section of the Judgment, his reference to a 'hybrid' injunction that operated simultaneously as an interim and final injunction and the fact that his analysis of the entitlement to injunctive relief was only undertaken after he had dismissed the SJ Application (see [36]) support the view

that the Judge considered that determination of summary judgment was a distinct process in a category of its own.

(3) Third, the way in which the Judge summarises his understanding of NHL's submissions at [24]. His reference to NHL's submissions is inaccurate, as shown in the following excerpt from NHL's note of the hearing (when counsel was addressing why NHL did not consider that it needed to satisfy the Court that past torts had been committed by all Named Defendants) at 40 of Appendix 1:

> "JB [the Judge]: I am trying to uncover summary judgment.
>
> MSQC [for NHL]: You can't uncouple this because they are part and parcel. A prospective injunction of a real and imminent tort being committed in the future. The evidence you have is sufficient to meet the threshold in relation to named individuals who were arrested at protests. Doesn't this establish that there is a risk of these individuals engaging in this conduct in future?
>
> …
>
> JB: What's the claim in 24.2(a)(ii)?
>
> MSQC: The claim is for an injunction.
>
> JB: Not a claim for summary judgment against 130?
>
> MSQC: The claim is for a final injunction. We have title to the land and so have the right to bring a cause of an action.
>
> JB: You are arguing about trespass and I understand the nature of nuisance but (inaudible).
>
> MSQC: This is a claim for an injunction based on that cause of action, we do not have to establish that a tort has already occurred because it's a prospective injunction. All you need to be satisfied with is that there is a real and imminent risk that these individuals named for the reason I give you have a sufficient threat of going on the roads."

(4) In NHL's submission, the Judge's reference to a *"claim for summary judgment"* – a conceptual impossibility – is consistent with its analysis of his reasoning as set out above. The transcript is littered with references by the Judge to the need for NHL to show that the defendants had "committed the tortious acts" in the context

of a summary judgment claim (e.g. p. 4 *"You're seeking summary judgement which invites me to find that 130 defendants have committed tortious acts";* and p. 5 *"I am concerned whether the claimant can advance evidence for summary judgment" "My understanding … is that … I should give summary judgment for trespass, nuisance and public nuisance … How can I be satisfied that all 130 have committed the torts? … I would need to be satisfied that the 130 had committed tortious acts"*).

(5) Fourth, the manner in which the Judge dealt with this point at the hearing of the SJ Application also supports the above analysis: see §§34 to 39 of NHL's PTA Skeleton Argument.

31. Even if the Court disagrees with NHL's positive interpretation of the Judge's reasoning, the salient point for the purposes of this appeal is a narrower one: did the Judge apply the correct test and approach the determination of the SJ Application on the correct basis? In NHL's submission, the Judge plainly did not.

32. First, there was no reference to the Precautionary Injunction Test at any point in the Judge's reasoning on the SJ Application or any indication that he was evaluating the evidence with a view to assessing the question of future risk of harm. The somewhat mechanistic approach taken by the Judge at [32] to [35] did not take into account the future risk of harm at all, or the seriousness of the consequences that would arise from that harm eventuating. Nor did he expressly identify any reason why he considered that there was a greater risk of the 24 committing future trespasses than the others. That alone is sufficient to allow the appeal. The fact that the Judge only went on to consider this issue at [39], after he had determined the SJ Application and refused to grant a final injunction in respect of the 109 and Persons Unknown, underscores the legal error.

33. Second, even if the Court were to take the view that the Judge was (implicitly) applying the correct test and merely expressing views on whether or not the evidence before him was more than sufficient to meet that threshold (an analysis of the Judgment that, for the reasons set out above, does not bear scrutiny and assumes too much), the Judge erred in his assessment of the evidence:

(a) The Judge's approach to the evidence is internally inconsistent in circumstances where he decided to grant an interim injunction in precisely the same terms as the final injunction in relation to the 109 and Persons Unknown without explaining

why. In this context, the test for the two remedies is practically identical, given the Judge's assumption that a claim seeking interim relief would require NHL to persuade the court that the relief sought is more likely than not to be obtained at trial and the Judge's finding that he was so satisfied: see [40] and reference to s.12(3) HRA 1998[22]. It follows that the Judge accepted the evidence that there was a real and imminent risk and was satisfied that the same order would be granted at trial. Given that, it is difficult to see on what basis he dismissed the SJ Application.

(b) The Judge was also wrong to dismiss, as having no probative relevance, the fact that Named Defendants who had been joined to the proceedings had failed to file a Defence. The Judge's approach risks diluting the importance of procedural requirements. Having been named and served with both the claim and the SJ Application, each of the Named Defendants became subject to the jurisdiction of the Court and could be expected to have engaged, responded and defended their position if they considered that they had any arguable defence (with the risk that adverse inferences will be drawn if they do not).[23] The fact that Named Defendants had the opportunity to file a defence and did not do so is self-evidently a factor which ought to have been weighed in the assessment. The Judge's failure to do so indicates that the Judge was applying too high a threshold for summary judgment (whether as a matter of principle or in his approach to the evidence), contrary to the guidance in the Civil Procedure Rules 2022 (paragraph 17 above).[24] The basis for the injunction was made out, and there was no reasonable basis to expect that any further evidence would be forthcoming at trial (paragraph 17 above). It bears emphasis that this was a case in which NHL was entitled to obtain default judgment against (at least) all but four of the Named Defendants.

(c) The Judge's erroneous view that NHL needed to establish tortious liability infected

[22] The Judge thereby proceeded on the basis of the approach in ***Ineos*** [2017] EWHC 2945 (Ch) per Morgan J at [85]; cf ***Cream Holdings Ltd and Others v Banerjee and Another*** [2005] 1 AC 253 per Lord Nicholls at [22].
[23] See footnote 9 (above) and the relevance of the absence of a defence at the first hearing of possession claims under CPR 55.8, where the question of whether there is a seriously arguable defence is assessed in a manner similar to summary judgment.
[24] See also ***Abaidildinov v Amin*** [2020] 1 WLR 5120 at [43] ("*the summary judgment test is being applied to this particular stage of the analysis by first of all setting out the defendant's submissions as to why the factual basis is not made out*").

his approach to the assessment of the evidence. In particular, the Judge was wrong to focus (and focus alone) on the individual evidence of wrongdoing in relation to each identified individual protester. That approach was too restrictive in the context of these claims. The context of the arrests was an IB-organised protest with the stated aimed of causing disruption; that movement was formed of protestors acting as a single, coordinated group with general consensus as to the method of civil resistance to be deployed, and that their activities were consistent, and did not vary in their methodology. The Judge's analysis of the evidence and focus on the absence of details and circumstances of each individual's arrest ignored that critical context and had no regard to the fact that the activities complained of were not individualised but part of a campaign designed to conduct protests in a unified manner and that each of the Named Defendants had been arrested in connection with IB Protests on the Roads. Notably, in ***Vastint*** a final injunction was granted against Persons Unknown on the basis of general evidence of past incidents, without the need for the claimant to identify the persons likely to trespass or adduce evidence regarding the attitude of anticipated defendants [32] – [34].

(d) The evidential position here was much stronger and the Judge was wrong to refuse the final injunction on the basis that the evidence was inadequate to satisfy the tests at paragraph 25 above:

(i) The Judge himself stated at [35(1)] that it was *"highly likely that many have committed the torts alleged"*; at [35(2)] that the fact that the Named Defendants had been *"arrested may well mean that have been obstructing the road so as to commit the torts"*;

(ii) The evidence of past IB Protests and the Judge's finding as to IB's public declarations and NHL's entitlement to advance protection [39];

(iii) The fact that each Named Defendant had been joined to the proceedings and made party to the injunctions as a result of arrests in the course of protests which constituted a breach of the Interim Injunctions;

(iv) The fact that the Named Defendants had been served with the proceedings, been made aware of the nature of the application against them and had an opportunity to put in Defences and contradict NHL's evidence, disassociate

themselves from the movement group but did not do so and had not expressed any intention to do so.

Practical consequences

34. The practical consequences of the way in which the Judge determined the SJ Application are significant and call for consideration. Whatever the basis for the Judge's reasoning is found to be, the Judge's approach creates difficulties for those parties seeking to effect the guidance of the courts to name defendants and to the effect that interim injunctions should not be allowed to 'drift' and that proper progression of litigation requires parties to take appropriate steps to bring proceedings to a conclusion once an interim injunction has been granted: see the guidance given by Nicklin J in ***Barking and Dagenham LBC v Persons Unknown*** [2021] EWHC 1201 (QB) [86] to [95], which this Court did not disturb on appeal.[25]

35. In this case, NHL applied for summary judgment in circumstances where, in relation to the majority of the Named Defendants, it was entitled to apply for default judgment but took this procedural course because it wished to adopt a procedure that would allow defendants the opportunity to engage with the merits of the claim, as set out above. To the extent that the Judge's decision creates unnecessary or problematic obstacles to obtaining summary judgment in this context, it creates an incentive for claimants in similar position to NHL to either obtain interim relief and then take no further steps; or to seek default rather than summary judgment. In either case, a final determination of the underlying claim is avoided. Equally, the Judge's rejection of the claim for a final injunction against Persons Unknown leaves claimants unclear as to the basis of that dismissal and what the appropriate test is said to be. If the rationale was (as it seems) the Judge's view that it is necessary to prove tortious liability, a final injunction would be conceptually impossible to obtain against Persons Unknown.

Expedition and disposal

36. In NHL's submission, the Judge's Order was wrong for the reasons set out above and the Court is respectfully invited to allow the appeal and set aside the Order.

[25] And also, to similar effect, ***Canada Goose UK Retail Ltd and another v Persons Unknown*** [2020] 1 WLR 417 at [89], [154] and [161].

37. If the appeal is made out, it would follow that a new Order, on the correct legal basis, would need to be made. In that context, the final injunction granted by the Judge expires on 9 May 2023, with provision for a hearing to be listed in April 2023 at which the court is to review whether or not to vary or discharge the injunctions.

38. In light of those points:

(1) NHL has already written to the Court seeking expedition of the appeal and requesting that the appeal be heard by 24 February 2023. This is to allow the appeal to be determined prior to the hearing to take place in the court below for review of the injunctions granted by the Order (the **"Review Hearing"**); and

(2) If NHL is successful on the appeal, it would seek the following consequential Orders:

(a) that the matter be remitted to the High Court in order that the High Court make, at the Review Hearing, the final injunction sought by NHL on the correct legal basis; and, further

(b) that the Court (pursuant to its powers under CPR 52.20(1)) make directions in relation to the Review Hearing to the effect that:

(i) NHL is to file and serve evidence in support of its proposed application to be made at the Review Hearing for (a) an extension of the time period for the injunction/injunctions under the Order and (b) alternative service provisions to be included within that Order; and

(ii) the Respondents are to file and serve any evidence in response.

MYRIAM STACEY K.C.
ADMAS HABTESLASIE
Landmark Chambers

MICHAEL FRY
Francis Taylor Building

24 November 2022

APPENDIX 1

ATTENDANCE NOTE

CLIENT: National Highways Limited

MATTER: Insulate Britain – Application for Summary Judgment Hearing

ATTENDING: Mr Justice Bennathan (**"JB"**) (**Judge**)

Myriam Stacey QC (**"MSQC"**), Admas Habteslasie (**"AH"**) (**Counsel for the Claimant**)

Ruth Hobbs, Lucy Tangen, Nicola Bell, Harry-Jay Bellew (**National Highways Limited**)

Petra Billing, Laura Higson, Alexa Parkinson (**DLA Piper**)

Tony Nwanodi and Amy Freeman (**Government Legal Department**)

Alice Hardy (**"AH"**) (**Solicitor from Hodge Jones and Allen**)

Owen Greenhall (**"OG"**) representing Caspar Hughes and Jessica Branch (**Counsel for interested parties**)

Ben Horton (**"BH"**) (**Defendant**)

DATE: 04 May 2022 at 14:00

Start time: 14:00

MSQC: I appear on behalf of the claimant and OG appears on behalf of two persons and has submitted a skeleton on their behalf.

JB: You need to keep your voice nice and loud. Do we have any named defendant's amongst us?

BH: Yes.

JB: I have a skeleton of yours. Are you unrepresented?

BH: Yes.

MSQC: My client on receipt of Mr. Horton's submission and his particular circumstances took a pragmatic decision not to bring a claim against him. He's come here today because he objects to having the claim against him and seeks costs.

JB: Is that right?

BH: I feel I've been pursued unjustly by National Highways and I have made repeated attempts to explain I have never trespassed on roads and I have been repeatedly mislead. I have a friend who is a barrister and she pointed out all the problems in the case against me and there is no case and she helped me prepare a defence which shows how DLA has mislead the court. I have tried to settle with DLA and suggested costs which they have refused and now my costs are higher and it's taken hours from my

helpful friend. So I am here to claim those costs and raise the case of those who aren't so lucky to have a barrister who did not protest on the strategic road network.

JB: I will come back to you. There is a lot to get through and I've been talking to people in court as to how we move that. My plan would be first a few preliminary bits, OG's status and procedural bits. The first thing I need to consider is the application for summary judgment against it is now I anticipate 143 defendants?

MSQC: We have lost Mr Sabitsky and Serena Schellenberg. We've lost 3 defendants.

JB: And also those people who couldn't be served as set out in Ms. Higson's statement. I think there's 4. The first thing I have decide is whether it is a summary judgment against some or all defendants. It would help me most to hear from you on that and then I need to decide that because if you don't get summary judgment against anyone, then this will be the end of this case and the interim injunctions. If I find summary judgment against some or all the named defendants the next stage is whether to grant an injunction and the terms and the declaration and damages and the costs issues. Its seems to be purely on practicality, I need to resolve summary judgment and if I was to grant an injunction I need to decide its terms. Declarations, damages and costs could be subject to a reserved judgment?

MSQC: I don't disagree, we are not seeking damages.

JB: OG do you agree?

OG: In relation to injunctive relief are we considering this for both named defendants and persons unknown?

JB: Yes I will be considering this. I have seen your skeleton arguments.

MSQC: We haven't seen an updated skeleton.

JB: Do you have the bundle?

MSQC: Yes.

JB: Look at the index to Bundle B. The hearing date states the 4 April why is that? My worry is that people are using different bundles.

MSQC: I will investigate that.

JB: What should my last page be?

MSQC: I am not going to look at the index and will look at the last page. The last page is not numbered in my bundle.

JB: Is it a certificate of service?

MSQC: It's the certificate of service of Emily Brocklebank.

JB: Mine is the same, let's move on and if I find myself lost in a bundle then maybe I have an excuse. You and I have had a conversation about CPR rule 40.9 which is a provision that allows someone who is not a defendant to make submissions about an injunction. OG, you are instructed by Hodge Jones and Allen on behalf of 2 people who are concerned with the protests but who are not defendants.

JB: My starting point is that CPR rule 40.9 means I can hear submissions from someone directly affected. It is not naturally the language that would allow me to hear

submissions but for the context of the case concerning protests and convention rights my preliminary review is that it is wide enough for this case.

MSQC: The particular circumstances of those 2 people is that they have vowed not to protest in the future. In Chamberlain J's order at paragraph 13-14 found in Bundle C, there was specific directions made that any interested person should apply to be joined not less than 48 days before the hearing and to furnish upon the other side their name and address. This is relevant to the context of the application. They should be joined and provide their name and address. Where do I go with that? I am not saying that they shouldn't be heard but they certainly should be joined as named persons.

JB: Let's look at 40.9 if we may. It gives the opportunity to have a judgment set aside by a person who is not a party. In what circumstances would I require a party to be joined as a named defendant in order to make that application?

MSQC: In Bundle C, tab 18, paragraph 13, its applicable to anyone affected and is not limited to defendants.

JB: With great respect to Chamberlain J, no doubt he had a reason for that but I do think to say that a person must be joined as a named defendant sits uneasily with CPR rule 40.9.

MSQC: I suggest that the purpose of it is that if any party wants to challenge the order that party will subject themselves to the jurisdiction of the court and be subject to costs. That's the practical reason and that's indeed standard practice. The only distinctions is that we were anticipating more notice and an application rather than receiving a 31 page skeleton the day before the hearing.

JB: That being the same as the one before Lavender J.

MSQC: Which we have drawn your Lordship's attention to.

JB: Entirely properly. OG?

OG: My Lord my application would be under CPR rule 40.9 and my submissions are in relation to orders ongoing and are limited to an order in relation to persons unknown. My submission is that it's not a requirement that a person automatically becomes a party. It is CPR rule 40.9 that provides the most appropriate mechanism for what I hope will be submissions that will be helpful and I apologise for the late arrival and the submissions are similar to the submissions made earlier. My application would be limited to Ms. Branch but I can make submissions on behalf of both Mr Hughes and Ms. Branch.

JB: I have a statement from Ms. Branch here. Yes Ms. Stacey.

MSQC: Our position is that they cannot have it both ways. It's not within the objective of justice and fairness to file a statement and submissions which extend to points including matters of principle to grant an injunction which have complete immunity for consequences for the court finding in our favour. We should be entitled to costs and it's not fair in other words. Its standard for a party to come to court they cannot hide behind a screen and not subject themselves to costs implications which is what OG is seeking.

JB: I will permit OG to make submissions. Ms. Branch does provide an address in her witness statement. With great respect to Chamberlain J I am troubled he is seeking to require defendants to be joined in order to make submissions. CPR rule 40.9 is at odds

with that requirement. I take the point made by claimants in another case that it may be reason for the court not to allow the parties to make submission but in a case with absent defendants and persons unknown and competing rights I do think I will be assisted by someone who can articulate those arguments. I will use trial management powers to ensure those submissions made under 40.9 don't take an unproportionate time. Under CPR rule 24.4(1) I don't think absence of acknowledgement of service is a barrier to summary judgment because they have been served. We need not take time about that. My preliminary view is that section 12(2) of the Human Rights Act ("HR Act") act has also been satisfied by service to date on named defendants. Section 12(3) I have to consider when I get to it.

MSQC: Chamberlain J deals with service of persons unknown as well as named Defendants.

JB: Can we turn to matters of substance. It seems to me that named defendants have 3 categories: 24 have been subject to findings of contempt in 3 hearings in the high court; subgroup of possibly 3 people who have replied.

MSQC: I characterise those as people who have put in defences.

JB: That leaves a large number of 134 unnamed defendants. My question for the 134, where is the evidential basis in the claimant's papers for me to give summary judgment?

MSQC: The short answer is that they have been involved in at least one protest and arrested by police and none of the defendants have filed defences. The test is whether I am asking you to grant a final injunction and have we established whether there is trespass being the owner of the road and as a backup the Highway Authority may bring a claim in nuisance as well. Have we established active trespass on our land? Yes. Does this give the right to an injunction? Yes, if there is a real and imminent threat which justices a final junction being granted.

JB: Maybe I have misunderstood the claim. Your seeking summary judgment which invites me to find that 130 defendants have committed tortious acts and not breached the injunction?

MSQC: They've breached the injunctions. The injunctions prevented them from blocking highways, they were arrested by police and claims made for trespass and nuisance. Is there any further evidence that would enable you to make a better determination of the issues? I suggest no you have everything you need and there is the duty on the claimant who has obtained judgment to prosecute quickly which is what Chamberlain J has in mind.

JB: It is not for the claimant to say what evidence they have in mind. Although closely linked it is my current view that they are distinct. Whether a tortious act has been committed and whether an injunction has been breached are not identical and are different. For example, if we imagine an injunction says you will not trespass on this road but a protestor was briefly on the road thus breaching the injunction but on circumstances that would be considered in Ziegler or Jones and if we consider the test for public nuisance and private nuisance (Illinois) there must be legal room to have a protestor who has breached the injunction but isn't tortiously liable.

MSQC: This injunction which involves the strategic network, entry onto road and the activity which is forming human road blocks is one of the same in that there is trespass. I accept there could be differences in a particular case but we're seeking to restrain a specific type of protest activity.

JB: You agree as a matter of law there could be differences but not in this instance?

MSQC: We are seeking to restrain a very specific type of protest activity which was described by Lavender J in his judgment.

JB: Lavender J is highly persuasive but at the moment I am not concerned whether to grant injunctive relief against unknown people, I am concerned as to whether the claimant can advance evidence for summary judgment. Let's look at Bundle A, page 112.

MSQC: Before you take me to that in response an injunction is forward looking and we are seeking to restrain future conduct and there is the need to establish sufficient evidence to justify an injunction being granted and that there is an imminent risk of breach.

JB: Does the claimant have sufficient evidence to advance summary judgment against 130 unknown people?

MSQC: There's no defence and clear past activity. As a matter of principle the fact that past wrongs have been committed lowers the evidential threshold. We're not saying people are on the roads now but they have participated in protests and they have not put in defences.

JB: My understanding of the way you have advanced your case is that you have put forward before me sufficient evidence for 130 unknown defendants and that I should give summary judgment for trespass, nuisance and public nuisance. Am I wrong?

MSQC: No you are not wrong.

JB: My first point is whether there is any point going to trial on the evidence you have?

MSQC: There is a conceptual difference. You would be in no better position then you are now if you were at trial today. We are seeking a final injunction against the named persons referred to and those unnamed. I am not seeking judgment in respect of their past behaviour but I am seeking an order for the continuation of the interim injunctions as those particular individuals have been involved in the past and breached the injunctions. They have not put in a defence which is sufficient for my purposes. We could have waited for a trial but this would not bring things to a close and would just let the injunction drift which is not consistent with the obligation to not let the injunction drift.

JB: The way the claimant's case is presented is that I should give summary judgment against named defendants and I can be satisfied I can find against them. The remedies you seek are primarily an injunction but there is mention of damages, why is damages listed if I don't have to be satisfied there's no defence. How can I be satisfied that all 130 have committed all 3 torts?

MSQC: If we were at trial we would be in the same position. I am asking for a final injunction following the hearing on the interim injunction and there was an arguable case that there were individuals who didn't come into the equation but the court was satisfied that these individuals were protesting and we were granted an interim injunction. We now have people arrested and we have served all the named defendants who have had the opportunity to put in defences and they all said they were involved in at least one Insulate Britain protest which is sufficient evidence for you to make the finding that we seek.

JB: There's 2 things that we're discussing here. First they have participated in tortuous acts and secondly for summary judgment I would need to be satisfied that the 130 had committed tortious acts.

MSQC: There is no seriously arguable defence to that in the absence of a defence and in circumstances they were arrested and the test for final injunction is whether there's a real and imminent risk and that's the relief were seeking.

JB: Can we forget the injunction for a moment. The fact someone is arrested is not alone enough- let's look at page 113 as an example at 51.1.

> 51.1 On 13 September 2021, 18 of the Named Defendants were arrested by Hertfordshire Constabulary in connection with a protest which took place under the banner of IB. Of those arrested, all were arrested under suspicion of wilful obstruction of the highway, and 6 under suspicion of conspiracy to cause a public nuisance. I am not personally presently aware of the current status of any prosecutions.

Is it your submission that this paragraph alone is enough to make me think the defendants have no chance of defending the claim successfully?

MSQC: Not on that paragraph alone. In this paragraph for GDPR reasons the information is not in the document. If your Lordship wants to see that evidence then we can provide it.

JB: I have no reason to doubt Ms. Higson's views, my concern is the mere fact someone in connection with the protests, I don't see that this gives me a point to say that person has no real prospect of defending a claim for trespass, private and public nuisance. What if one of those people was to say a journalist and the police believe it and the person was there for the public interest. That person might have a defence to trespass. How am I to say that someone might not have a defence?

MSQC: Because of the nature of the proof and the nature of the protest activity. It may be different protest activity but the fact of participation in these types of protests on live carriageways and sitting down gluing themselves to tarmac for the sole purpose of obstructing traffic is sufficient to establish a cause of action that were relying on.

JB: Let's assume you are right. Someone sitting on the M25 would be committing trespass, where do I get the fact that just because the person was arrested that this extinguishes any prospect of a defence.

MSQC: From the context of these arrests, there were ongoing Insulate Britain protests in 30 locations in 50 days from September to [inaudible] . Having been been served with proceedings, none of the individuals have served defences. You must have regard to this when considering whether we have met the standard**.**

JB: The fact they haven't replied is an evidential matter and not a matter of law. A lot of Ms. Higson's statement has quotations of activists of either Insulate Britain or Just Stop Oil. Insulate Britain tweets are retweeted by Just Stop Oil and lots of them say they don't care about court systems and given they haven't formed a defence doesn't this show that they're more concerned with the cause?

MSQC: It is consistent with the intention that they are doing something which is targeted at obstructing traffic. That's the purpose of their campaign. The campaign is a collective organisation that is designed to cause maximum disruption. The arrests are in the context of those being part of the movement and those not arrested.

JB: Actually the claimant does have a chapter and verse. There were deadlines for the claimant to serve evidence on 130 defendants and it is the claimant's choice in how they present their case.

MSQC: It's not practical or possible for my client to have served on the defendant all the details of the other persons involved in protests and it would expose them to breaches of GDPR legislation**.** There are good and practical reasons as to why that could not be done. We've done the next best thing with the solicitor signing a statement of truth. The purpose of the relief were seeking is to prohibit individuals from doing it again.

JB: I am trying to uncover summary judgment.

MSQC: You can't uncouple this because there part and parcel. A prospective injunction of a real and imminent tort being committed in the future. The evidence you have is sufficient to meet the threshold in relation to named individuals who were arrested at protests. Doesn't this establish that there is a risk of these individuals engaging in this conduct in future?

JB: Let's look at page 7 of the skeleton argument that refers to CPR rule 24.2(a)(ii). Subsection (ii) states that the defendant has no real prospect of successfully defending the claim. What's the claim in 24.2(a)(ii)?

16. CPR 24.2 provides that:

"The court may give summary judgment against a claimant or defendant on the whole of a claim or on a particular issue if –

(a) it considers that –

(i) that claimant has no real prospect of succeeding on the claim or issue; or

(ii) that defendant has no real prospect of successfully defending the claim or issue; and

(b) there is no other compelling reason why the case or issue should be disposed of at a trial."

MSQC: The claim is for an injunction.

JB: Not a claim for summary judgment against 130?

MSQC: The claim is for a final injunction. We have title to the land and so have the right to bring a cause of an action.

JB: You are arguing about trespass and I understand the nature of nuisance but (inaudible).

MSQC: This is a claim for an injunction based on that cause of action, we do not have to establish that a tort has already occurred because it's a prospective injunction. All you need to be satisfied with is that there is a real and imminent risk that these individuals named for the reason I give you have a sufficient threat of going on the roads.

JB: Ok I am concerned what a summary judgment would amount to?

MSQC: I am not trying to short circuit the process. The reason we have escalated and brought the matter to the court early is because there is no reason to wait to bring to this to trial and the final injunction will be a continuation of the current injunctions.

JB: Let's turn paragraph 18 of the particulars of claim.

18. By reason of the matters set out herein, there is a real and imminent risk of trespass and nuisance continuing to be committed across the SRN including to the Roads.

On this point OG, do you have a stance on this?

MSQC: OG isn't representing named defendants.

OG: My understanding of how the matter is set up is for summary judgment based on a claim for trespass and nuisance on named defendants.

JB: Your understanding is mine and I don't want to drag you into arguments you are not prepared for.

MSQC: We are asking for a finding of fact and if you look at the terms of the declaration it's about conduct that may happen not which has happened. I am not asking you to give a summary judgment for past conduct, I am asking you to look at past conduct as a spring board.

JB: Damages could confuse a judge.

MS: I accept that. The court has a discretion to award damages if he considers it appropriate to do so, so I can't assume the court will exclude equitable damages.

JB: Lets break for 5-10 minutes.

(Resume at 15:22).

JB: Lets proceed on the basis that the issue I have decided is whether it is likely there is a defence to an injunction and I do think there is sufficient evidence. The next stages are section 12(2) of the HR Act, does that arise?

MSQC: I don't think so.

JB: I don't think so either. I will go on the basis of the court of appeal. You need to identify that there is a real and imminent risk of tort under Canada Goose. A point OG makes and Ms. Higson sets out with great clarity is that the Insulate Britain protests have affected the strategic road network. I believe there have been no protests this year?

MSQC: Yes the last protest was 2 November last year and in Parliament Square on 4 November. There have been no protests since. You need to look at the whole picture which includes extensive protests in 2021 and indications that large scale protest activity is planned. The injunction is not premature and therefore there is a real risk. The first category is past activity, each named defendant has taken part in at least one protest and there has been some contempt applications. They have been arrested in connection with protests. There have been 3 contempt applications in respect of which the custody threshold was seen to be passed for those who contravened. The nature of the past activity cannot be secured and modus operandi is that they will obstruct again until moved. The primary aim is intentional obstruction. Where there's past activity there's a lower threshold. We have that evidence. The second category is evidence of on-going campaign. There's nothing to suggest they have hung up their banners, they're now targeting a different entity and this does not mean the risk is minimised but it has underscored the risk. They have not disavowed future protests on the strategic road network. The reason we didn't go for default judgment was to give the defendants the opportunity to be heard which they didn't take. There is evidence of ongoing campaigns. OG has said there has been

no action but there's evidence of a planned rave on the M25. Its didn't happen but it shows an attempt or an intention since 2 November 2021 and it was certainly well published. Second they have taken direct action not on the SRN roads and have continued to make statements until April 2022 about continuing to carry out actions despite the sanctions. Ms. Higson's second statement refers to a continuing wish to protest, they are still pursuing the campaign. Mr McKechnie was released from prison and said he would do it again. Paragraph 57.3 (page 124 of the bundle) references going onto the roads again and if you go back to page 110 at paragraph 43 she exhibits a screenshot stating:

43. I exhibit at 247 a screenshot of part of the homepage of JSO's website, which describes it as a *"new campaign [that] will mobilise 1000+ people from all walks of life to oppose the plans for new UK Oil fields during 2022"*.[47] I exhibit at 248-249 a timestamped note of a presentation given by Roger Hallam, a leading figure within both IB and JSO, at a community centre in south-east London on 7 February 2022,[48] in which Mr Hallam said as follows in relation to the planned future protests (emphasis added):

> *"Okay so there is a specific project. This is the project which is at the end of March in this country and ten of the western democracies. Thousands of people will be going onto the streets and onto the motorways to the oil refineries and they will be sitting down. The precise ask tonight is do you sign up for a full 36-hour commitment right? […] You join a non-violence training session in three weeks' time and then you join with other people in this locality, with other people in this room, you go to an oil refinery in an oil depot with hundreds or thousands of other people. Priti Patel will ensure you are arrested, don't worry about that. You'll spend about 5 hours in a police station with other people and around midnight you'll be released probably under investigation"* (51:21-52:18)
>
> *"This is what civil resistance looks like. It's not about everyone getting on, it's not about everyone being the same. It's about going, there's a date, there's a place, turn up and don't move. […]. That's what we need to do, and we need 3,000 people to do it and we've got about 500."* (53:26-53:40)
>
> *"I can 100% guarantee those of you that act on this knowledge and go on the roads will live happier lives"* (1:00:00-1:00:04)

The last quote is with regards going on roads. That's the evidence of an ongoing campaign. My third category is evidence of developments since November 2021, there have been protests on roads not covered by injunctions (see page 124 of witness statement of Ms. Higson). There's evidence that they have joined forces either with Just Stop Oil or other affiliated groups which has just started (see paragraph 47 at page 111 and para 36-31 of Ms. Higson's statement). There's the recruitment drive and a clear aim to attract new protestors and the fact they have moved to a different target does not mean they will not go back to the previous campaign. The final category, evidence of some deterrent effect, the fact there has not been protest activity since 2 November 2021 shows to some degree the effectiveness of the injunctions and this needs to be taken into account. It's too simple to say that as there's no protest there is no future risk, it needs to be looked at in relation to what's happening. The spring was the starting point for new protests. My client shouldn't have to wait and suffer, there remains a serious risk and it's not premature and the injunctions have the effect of letting the protestors know what is permitted giving clarity. The test is more than met.

JB**:** OG, you have submissions to make. I am working from your first skeleton argument unless you prefer an updated version?

OG: The difference between the versions is minimal, the only change was to paragraph 2.

JB: If I'm against you we will come to the terms of the injunction tomorrow.

OG: I will confine my submissions to the test in relation to an injunction against persons unknown and my simple submission is that the evidential basis is not there. There are not unnamed defendants who have not previously been arrested who are going to come onto the road to commit acts this injunction seeks to address. There has been no action since 2 November 2021 on the roads which is 6 months ago. In relation to the tweets, the fact that a twitter account associated with Insulate Britain has tweeted support for Just Stop Oil is not in my submission evidence that Insulate Britain are planning to take action on the roads. There is a big difference between tweeting and spreading the word and actually undergoing the actions themselves.

JB: Is that a big difference? If I consider a loose collection of activists who all share a primary concern about global warming and the cost of living crisis it's not hugely different people tweeting in support?

OG : I submit it is different. Just because Insulate Britain have tweeted this doesn't mean that Insulate Britain will take action or that other types of actions on these roads is going to be repeated from six months ago. There is evidence that some groups are targeting oil terminals and there have been injunctions granted in relation to those matters. There are differences to be drawn but it is wrong to draw a distinction simply on the basis of tweets sent out. There will be loads of tweets sent supporting different aspects of claims and there is a risk of a distorted picture if you just look at what Insulate Britain are saying. In relation to the rave on the M25, the tweet said some Insulate Britain supporters will be in attendance and it's not an Insulate Britain action.

JB: Well it didn't happen but it does look like a planned breach on the face of it.

OG: The wording is significant it says Insulate Britain supporters and not members or activists**.**

JB: I am not taken with the distinction between members and supporters. Members and supporters doesn't have that much distinction.

OG: There is no formal membership card but there is a difference between activists taking part in Insulate Britain actions and wider supporters and supporter has a wider meaning than an Insulate Britain activist. The other point is that it did not happen and there were no real steps to try to make it happen. The question is what else is there, if you ask the general public what Insulate Britain was about, it was a campaign from 2021 where people sat in roads. To grant an injunction the court must look at the risk of the conduct that the injunction seeks to prevent. Risk to these particular roads and in my submission there simply isn't the sufficient evidential basis that person unknown will be undertaking these activities**.**

MSQC: OG said the protest activity is effectively over. There's no evidence of it being over and there is evidence to point to the opposite. The evidence shows there has been no protests since 2 November 2021 and that they're regrouping. If I can take you to page 108 of the bundle, paragraph 39 includes a statement from Insulate Britain on 7 February for a press release regarding its intentions for the future. If I can take you to paragraph 39 of page 108 of the bundle. There is a statement from Insulate Britain from a press release regarding their intentions for the future. This points to it not being over and they say they haven't gone away and that they're just getting started**.**

39. On 7 February 2022, IB published a press release on its website summarising its intentions as to the future as follows:[43]

> *"We did not take part in this campaign to start an insulation brand. We did not cause you disruption to make history as Britain's quickest growing advertising campaign. We took part to force our government to stop failing its people.*
>
> *We will continue our campaign of civil resistance because we only have the next two to three years to sort it out and prevent us completely failing our children and hitting climate tipping points we cannot control.*

In respect of the rave, if you look at the context of what's happened before and a statement published in November regarding the M25 being a site of nonviolent civil resistance.

27. On 26 October 2021, IB published a statement on its website entitled 'We declare the M25 a site of nonviolent civil resistance'.[21] In that statement, IB said *"We are not concerned with endless injunctions. We are not concerned with our fears. We are concerned with fulfilling our duties and responsibilities at this 'period of consequence'. Starting from 7:00 on the morning of Wednesday 27th October the M25 will become a place of nonviolent civil resistance to stop our government committing crimes against humanity."* The statement also asked that *"[p]eople do not use the M25"* and that *"police refuse to arrest us"*. (155-156)

JB: If we proceed on the basis that there is a sufficient evidential basis but applying the law it is not the most compelling case. I think there is a sufficient basis but I need to consider the terms of any injunction in terms of service (in mind of OG's submissions).

JB: Mr Horton we're not going to finish today. I will grant some sort of injunction but I am conscious you are being dragged in to this with and you may have better things to do with your time. I doubt I will make any decision as to costs during the oral hearing either later today or tomorrow. An alternative mechanism would be if you are happy to is to set out what expense you have been put to. If you email this bullet point list to the email address of the court then I will allow MS and her team to reply by email. I will arrive at a costs order when I give the full written judgment next week. You can use this route rather than you coming back tomorrow.

BH: May I submit an email exchange between myself and DLA?

JB: You can but not now. Do you want to come back tomorrow?

BH: Yes I find this rather fascinating.

JB: It does seem to me that the tortious conduct/unlawful conduct which the claimant seeks to prevent is trespass which is more complicated than other types as some injunctions think of trespass where members of the public don't have a right but on the highway they do**.** Trespass and its lawfulness or unlawfulness has been considered in Zeigler. I'm not aware of an authority considering a Zeigler type of protestor where any court has balanced article 10 and 11 rights under the HR Act against Zeigler/tortious acts.

MSQC: We don't dispute the proportionality assessment. We accept it's a highway and I am not inviting you not to make an assessment but the reasoning in Cuciurian does apply, A1P1 is an important factor.

JB: The balancing exercise in Zeigler is about what happens to other members of public that want to use the road.

MSQC: It cannot be ignored that this is a trespass claim and it is an important one that cannot be put aside, this is a different factual situation to Zeigler. Zeigler was a symbolic location obstructing an access road to that purpose and there was limited destruction. Whereas in this case members of the public are being disturbed and in Zeigler there were other routes and it is not a trespass case. Yes it's a fact sensitive assessment but the nature of the assessment I am inviting you to carry out did not feature in Zeigler.

JB: In your favour, in Canada Goose which I don't think Lavender J states even if I were to conclude that a certain activity you found lawful, nonetheless there may be occasions where there is no other way of protecting. The court of appeal expressed reluctance to arrive at that stage. Is there somewhere obvious where I can see the draft order put before Lavender J and the agreed order. I am interested in the modifications made by Lavender J. I don't feel bound by Lavender J but it would be useful to look at it and the mechanics of how he come to term with the details, is there a simpler way of getting the draft order?

OG: I can get the draft order.

JB: You don't need to if MS's team can. Right shall we meet again at 10:30am, tomorrow. At the moment I am going to grant an injunction but I am a long way off in thinking of the terms. I will seek your assistance tomorrow and before the end of tomorrow I will make a decision as to what the injunction will look like. Declarations and legal costs can await written judgment next week.

End time: 16:26
