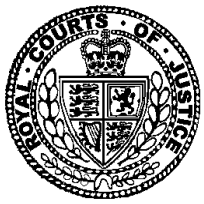

Neutral Citation Number: [2023] EWCA Civ 182

Case No: CA-2022-001066

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/02/2023

Before :

DAME VICTORIA SHARP PRESIDENT OF THE KING'S BENCH DIVISION
SIR JULIAN FLAUX CHANCELLOR OF THE HIGH COURT
and
LORD JUSTICE LEWISON

- -

Between :

NATIONAL HIGHWAYS LIMITED	**Appellant**
- and -	
(1)PERSONS UNKNOWN	**Respondent**
(2)ALEXANDER RODGER AND 132 OTHERS	

- -
- -

Myriam Stacey KC, Admas Habteslasie and Michael Fry (instructed by **DLA Piper UK LLP**) for the **Appellant**
Mr David Crawford and Mr Matthew Tulley, two of the named Respondents, addressed the Court on behalf of the 109 named Respondents

Hearing dates : 16 February 2023

Approved Judgment

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Sir Julian Flaux C:

Introduction

1. This is the judgment of the Court. The appellant, National Highways Limited ("NHL") appeals, with the permission of Whipple LJ, against various paragraphs of the Orders of Bennathan J dated 9 and 12 May 2022. By those Orders, the judge dismissed in part the application of NHL for summary judgment ("the SJ Application") by which NHL sought a final anticipatory or *quia timet* injunction (i) against 133 named defendants who were Insulate Britain ("IB") protesters who had been arrested by the police at various demonstrations on motorways and other roads and (ii) against persons unknown. The judge granted a final injunction against 24 of the 133 named defendants, consisting of those who had been found to be in contempt of Court but otherwise refused to grant a final injunction, although he did grant an anticipatory injunction on an interim basis against the remaining 109 named defendants and against persons unknown on essentially the same terms as the final injunction.

Factual and procedural background

2. NHL is the highways authority for the Strategic Road Network ("SRN") pursuant to section 1A of the Highways Act 1980 and has the physical extent of the highway vested in it. NHL commenced three sets of proceedings in response to a series of protests organised by IB which began on 13 September 2021 in and around London and south-east England. The protests involved protesters blocking highways forming part of the SRN, normally by sitting down on the road surface or gluing themselves to the road surface. The protests created a serious risk of danger and caused serious disruption to the public using the SRN and more generally.

3. NHL made urgent applications for interim injunctions to restrain the conduct of the protesters:

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

   (2) In QB-2021-3626, Cavanagh J granted an interim injunction on 24 September 2021 in relation to parts of the SRN in Kent;

   (3) In QB-2021-3737, Holgate J granted an interim injunction on 2 October 2021 in relation to M25 "feeder" roads.

   (4) 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.

4. 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 a number of 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. On 1 October 2021, May J ordered that 113 people arrested for participation in the protests be added as named defendants. NHL

continued to add further named defendants as protests continued. In October and November 2021 the claims were served on named defendants. No named defendants have been added since November 2021.

5. On 22 October 2021, NHL filed Consolidated Particulars of Claim in the three actions. The case was pleaded on the basis that the conduct of the protesters constituted (1) trespass; (2) private nuisance; and/or (3) public nuisance. The pleading described the protests that had already taken place and contended that they exceeded the rights of the public to use the highway and that the obstruction and disruption caused by the protests was a trespass on the SRN which endangered the life, health, property or comfort of the public and/or obstructed the public in the exercise of their rights. [18] and [19] of the pleading set out the basis for the anticipatory 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 to continue to cause obstruction to the SRN, unless restrained. Although a claim for damages was made in the pleading, that has not been pursued by NHL.

6. On the same day as the pleading was filed, NHL made its first contempt application in relation to breaches of the M25 Injunction, given that notwithstanding the injunction, blocking and disruption of the M25 by IB protesters was continuing. This was determined on 17 November 2021. Two further contempt applications in relation to breaches of the M25 injunction were made on 19 November 2021 and 17 December 2021, determined on 15 December 2021 and 2 February 2022 respectively. 24 of the 133 defendants (to whom we will refer as "the contemnor defendants") were found to have been in contempt of court.

7. On 23 November 2021, defences were served on behalf of three of the named defendants. Mr Horton and Mr Sabitsky stated in identical terms that they had never trespassed on the SRN and had no intention of doing so. Proceedings against them were discontinued. Mr Tulley admitted being involved in protests on the M25 on three days in September 2021. He asserted that he was not involved in the IB protests covered by the injunctions but admitted being involved in IB protests not covered by the injunctions. He has remained a defendant. No other defences have been served and up to and including the hearing before the judge there was no engagement with the proceedings and no statements that the other defendants were not intending to continue the protests.

8. On 24 March 2022, NHL issued the SJ Application in the interests of finality. Although it would have been entitled to apply for default judgment against all the remaining named defendants other than Mr Tulley, it was explained in the witness statement in support of the SJ Application of Ms Laura Higson, an associate at DLA Piper UK LLP, NHL's solicitors, that this procedure was adopted to afford the defendants the opportunity to engage with the merits of the claim. The SJ Application was served on the named defendants, but as already indicated, they chose not to serve defences or otherwise engage with the merits of the claim.

9. Ms Higson's witness statement sets out details of the protests which had already occurred and the risk of future protests including quoting an IB press release of 7 February 2022 on its website which stated:

> *"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.*
>
> *Now we must accept that we have lost another year, so our next campaign of civil resistance against the betrayal of this country must be even more ambitious. More of us must take a stand. More of you need to join us. We don't get to be bystanders. We either act against evil or we participate in it.*
>
> *We haven't gone away. We're just getting started."*

Ms Myriam Stacey KC on behalf of NHL explained that it was because of this two to three year time frame that the draft order served with the SJ Application sought a final injunction until a date in April 2025.

10. Ms Higson also quoted another IB press release dated 15 February 2022 stating that it had joined Just Stop Oil. She referred to a presentation by Roger Hallam, a leading figure within both organisations, who said: *"Thousands of people will be going onto the streets and onto the motorways to the oil refineries and they will be sitting down."*

11. She referred to the disclosure orders and to the fact that each of the named defendants had been arrested on suspicion of conduct which constituted a trespass and/or nuisance on the roads subject to the interim injunctions. In 28 sub-paragraphs of [51] of the statement she set out details of all the arrests between 13 September and 2 November 2021. At [60] she summarised the evidence before the Court and at [61] said that on the basis of that evidence, there was a real and imminent risk of further unlawful acts of trespass and nuisance on the parts of the SRN covered by the interim injunctions and that risk was unlikely to abate in the near or medium future. The Court was accordingly invited to accede to the SJ Application.

12. The SJ Application was heard by the judge on 4 and 5 May 2022.

The judgment below

13. Having set out the background to the claims, the judge referred to the SJ Application at [4]. He evidently considered summary judgment a distinct process from the grant of a final injunction, since at [4] of the judgment he says that the application for a final injunction is being made "in addition to" the application for summary judgment. The judge then goes on to deal separately with summary judgment at [24] to [36] then with the injunction at [37] to [49] of the judgment.

14. It is also evident both from what the judge said in the course of argument and in the summary judgment section of the judgment that he considered that summary judgment could not be granted unless NHL could establish tortious liability of the named defendants in respect of the protests which had taken place in the past. At [25] the judge said that an injunction was a remedy, not a cause of action, then at [26] that summary judgment under CPR Part 24 was available for a cause of action not a remedy. He then identified the causes of action pleaded by NHL as trespass, public nuisance and private nuisance.

15. Having summarised the law on those torts, he then found at [32] that, in relation to the 24 contemnor defendants, there was sufficient evidence to give summary judgment under Part 24 against them based on the judgments of the Divisional Court finding them in contempt. The factual summaries in those cases gave sufficient details for the judge to conclude that there was no realistic basis to believe there would be any issue if there were to be a trial.

16. However, at [33] the judge said that the position of the 109 other named defendants was different. He said the only evidence against them was in the 28 sub-paragraphs of [51] of Ms Higson's witness statement, the first two of which he then quoted. He said at [34] that at no point did she identify which defendant was arrested on what date or give details of the activities which led to the arrest. He noted that Ms Stacey KC relied upon the fact that apart from the three defences we have mentioned above, none of the defendants had served a defence to the claim.

17. At [35] he concluded, in relation to the question whether NHL had shown that there was no real prospect of a successful defence to the claims by the 109 named defendants, that NHL's evidence was "manifestly inadequate" for a number of reasons. The first was, so the judge said:

> "I would have to be satisfied in each case. 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."

The judge then went on to cite examples of individual defendants who had been arrested, but in relation to whom it transpired that they had not committed any of the torts. He concluded at [36] that the consequence of his decision was that he had been persuaded to grant both a final injunction in respect of the 24 contemnor defendants and an interim injunction in respect of the 109 and the unknown defendants.

18. The judge then turned to the question of injunction. At [37] he cited the test for the grant of an interim injunction in *American Cyanamid*. In relation to the first two aspects of that test, whether there was a serious issue to be tried and whether damages would be an adequate remedy, he concluded that they were easily met:

> "…the actions previously carried out and those threatened by IB clearly amount to a strong basis for an action for trespass and private and public nuisance. Given the scale of disruption at risk and the impracticality of obtaining damages on that scale from a diverse group of protestors, some of whom may have no assets, damages would obviously not be an adequate remedy."

19. At [38] the judge adopted the summary of Marcus Smith J in *Vastint Leeds BV v Persons Unknown ("Vastint")* [2018] EWHC 2456 (Ch); [2019] 4 WLR 2 as to the effect of Court of Appeal decisions on anticipatory injunctions. He said there were two questions he had to address:

> "(1) Is there a strong possibility that the Defendants will imminently act to infringe the Claimants' rights?

> (2) If so, would the harm be so "*grave and irreparable*" that damages would be an inadequate remedy. I note that the use of those two words raises the bar higher than the similar test found within *American Cyanamid*."

20. Counsel who appeared before the judge for various environmental campaigners who were not IB protesters pointed out that the protests described by NHL were all in 2021 and had not been repeated at that stage in May 2022. The judge said at [39] that was a fair point but was outweighed by some of the public declarations made by IB. The judge said:

> "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 the 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."

21. At [40] the judge concluded that the criteria in section 12 of the Human Rights Act 1998 were satisfied and did not prevent the grant of an injunction. At [41] the judge cited two Court of Appeal cases dealing with injunctions against persons unknown, *Ineos Upstream Ltd v Persons Unknown ("Ineos")* [2019] EWCA Civ 515; [2019] 4 WLR 100 and *Canada Goose Retail Ltd v Persons Unknown* [2020] EWCA Civ 202; [2020] 1 WLR 2802. He summarised the combined effect of those cases as being:

> "(1) The Courts need to be cautious before making orders that will render future protests by unknown people a contempt of court [*Ineos*].
>
> (2) The terms must be sufficiently clear and precise to enable persons potentially effected to know what they must not do [*Ineos* and *Canada Goose*].
>
> (3) The prohibited acts must correspond to the threatened tort. They may include lawful conduct if, and only to the extent that, there is no other proportionate means of protecting the claimant's rights [*Canada Goose*]."

22. The judge then referred to cases where the balance between the competing rights of protesters and others have been considered, starting with *DPP v Jones* [1999] 2 AC 240. As the judge noted, that decision was reached before the Human Rights Act came into force and has to be read with a degree of caution in the light of *DPP v Ziegler* [2022] AC 408. In that case, protesters blocked a road leading to a venue where an arms fair was held. The Supreme Court restored the decision of the District Judge dismissing the prosecution because the lawful excuse defence under section 137 of the Highways Act 1980 applied. The judge also referred to *DPP v Cuciurean* [2022] EWHC 736 (Admin) saying at [44]:

> "The limits to *Ziegler* were made clear in *DPP v Cuciurean* [2022] EWHC 736 (Admin) in which Lord Burnett CJ held that *Ziegler* did

> not impose an extra test in a case of aggravated trespass under section 68 of the Criminal Justice and Public Order Act 1994, as Article 10 and 11 rights do not generally include the right to trespass, and parliament had set the balance between those rights, and the lawful occupier's rights under Article 1 of Protocol 1 ["*A1P1*"], by the terms of that offence. The type of trespass in *Cuciurean* was on premises to which the public were not allowed any access, so while the decision is important and, of course, informative, it does not provide a direct and complete answer to a case, such as the instant one of trespass on a highway."

23. 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.

24. The judge cited *City of London Corporation v Samede* [2012] PTSR 1624 where Lord Neuberger MR said that political and economic views were at the top end of the scale in terms of views whose expression the European Convention on Human Rights is invoked to protect. At [48] he said, in drawing together the various legal threads:

> "…in deciding the terms of the injunctions I had to be conscious of the right to protest which may, on occasions, mean a protest that causes some degree of interference to road users is lawful [*DPP v Jones* and *DPP v Ziegler*]. I should not ban lawful conduct unless it is necessary to do so as there is no other way to protect the Claimant's rights [*Canada Goose*]. The consequence of my banning protests that should be permitted would be to expose protestors to sanctions up to and including imprisonment, as there is no human rights defence by the time of contempt proceedings [*NHL v Heyatawin*]."

25. At [49], in balancing the competing interests, he said:

> "The general character of the views held by IB protestors are properly described as "*political and economic*" and as such are at the "*top end of the scale*", as described in *Samede*, and the protests are non-violent; these matters weigh in favour of lawfulness. There are a number of matters, however, that go the other way. Having regard to the sort of criteria described in both *Samede* and *Ziegler*, there is no particular geographical significance to the protests, they are simply directed to where they will cause the most disruption. The public were completely prevented from travelling to their chosen destinations by previous protests; there was normally not, in contrast to the facts in *Ziegler*, an alternative route for other road users to take. While the protestors themselves have been uniformly peaceful, the extent of previous protests has caused an entirely predictable reaction from other road users, as described in Ms Higson's statement, above. Judging the future risks of protests against IB's past conduct I approved the terms of the

> draft injunctions that would ban the deliberate obstruction of the carriageways of the roads on the SRN but would not eliminate the possibility of lawful protests around or in the area on those roads."

The ground of appeal

26. NHL appeals on the single ground that the judge erred in law in concluding that a final injunction could not be granted against the 109 named defendants (and the unnamed defendants) 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 all defendants had actually already committed the torts in question.

The submissions

27. Ms Stacey KC submitted that the judge had applied the wrong legal tests in determining whether to grant a final precautionary or anticipatory injunction. The test for whether to grant such an injunction is whether there was an imminent or real risk of commission of the torts alleged, here trespass and nuisance: per Longmore LJ in *Ineos* at [34(1)]. This form of injunction was granted when the claimant's rights were threatened, but for whatever reason the claimant's cause of action was not complete: per Marcus Smith J in *Vastint* at [31(2)]:

> "*Quia timet* injunctions are granted where the breach of a claimant's rights is threatened, but where (for some reason) the claimant's cause of action is not complete. This may be for a number of reasons. The threatened wrong may, as here, be entirely anticipatory."

28. The court's jurisdiction to grant *quia timet* or anticipatory injunctions extends to the grant of final injunctions, not just interim ones: *Vastint* at [27]. Ms Stacey KC referred to the two stage test for considering whether to grant a *quia timet* injunction set out by Marcus Smith J in *Vastint* adopted by the judge in the present case and which we quoted at [19] above. In relation to the first stage, whether there is a strong possibility that, unless restrained, the defendants would imminently act in contravention of the claimant's rights, Ms Stacey KC drew attention to the factors identified by Marcus Smith J at [31(4)], in particular the attitude of the defendants, which she submitted was a significant factor here. In relation to the second stage, whether the threatened harm would be grave and irreparable, she referred to real harm suffered by members of the public such as missing a hospital appointment or a funeral or having an accident.

29. In relation to that part of the final injunction which was sought against persons unknown, Ms Stacey KC submitted that, whilst the law had been in a state of flux, the decision of the Court of Appeal in *London Borough of Barking and Dagenham v Persons Unknown ("Barking")* [2022] EWCA Civ 13; [2022] 2 WLR 946 represents the law as it currently stands. In that case, this Court held that there was power under section 37 of the Senior Courts Act 1981 to grant a final injunction against persons who were unknown and unidentified, so-called "newcomers". This Court held there was no jurisdictional obstacle to such an injunction, rejecting the reasoning of the earlier Court of Appeal decision in *Canada Goose*.

30. The Supreme Court heard the appeal from the decision of the Court of Appeal in *Barking* on 8 and 9 February 2023 and judgment is reserved. In answer to the question from the Court as to what would happen if we follow the decision of the Court of Appeal in *Barking* and the Supreme Court concludes that the Court of Appeal decision was wrong, Ms Stacey KC pointed out that the terms of the order for an injunction (whether the final or interim form) provided for a review hearing before the High Court in April 2023 to determine whether the injunction should be discharged in whole or in part.

31. She asked this Court to note that the judge had dealt with the conditions to be satisfied in granting an injunction against persons unknown at [41] of his judgment and that there was no issue that the conditions were met. The judge had been referred to the decision of the Court of Appeal in *Barking* and no part of his judgment was founded on the notion that it was wrongly decided.

32. In relation to summary judgment under CPR Part 24, Ms Stacey KC submitted that there was no suggestion in CPR Part 24.3 that summary judgment was not available in a claim for a final precautionary injunction. She referred to the well-established principles applicable to applications for summary judgment set out by Lewison J (as he then was) in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) followed and applied many times since, as cited at 24.2.3 of Civil Procedure. She submitted that principle (vii) was precisely in point here. There was a short point of law and there was no reason not to decide it on the SJ Application.

33. Ms Stacey KC also relied upon the statement by Cockerill J in *King v Stiefel* [2021] EWHC 1045 (Comm) also cited at 24.2.3:

> "21. The authorities therefore make clear that in the context of summary judgment the court is by no means barred from evaluating the evidence, and concluding that on the evidence there is no real (as opposed to fanciful) prospect of success. It will of course be cautious in doing so. It will bear in mind the clarity of the evidence available and the potential for other evidence to be available at trial which is likely to bear on the issues. It will avoid conducting a mini-trial. But there will be cases where the Court will be entitled to draw a line and say that -even bearing well in mind all of those points - it would be contrary to principle for a case to proceed to trial.
>
> 22. So, when faced with a summary judgment application it is not enough to say, with Mr Micawber, that something may turn up..."

34. Ms Stacey KC relied upon CPR Part 24.5 which refers to the requirement that, if a respondent to a summary judgment application wishes to rely on written evidence, he should file and serve such evidence. She submitted that there was a process and an expectation that a respondent who wishes to oppose a summary judgment application should put in evidence. Other than the three defendants who served defences, the named defendants in the present case had not put in any evidence or defence, either formally or informally, and had not otherwise engaged with the Court process. The judge had erroneously dismissed this failure to serve defences and evidence as irrelevant to the SJ Application. Ms Stacey KC submitted that the fact that the named defendants had an opportunity to file a defence and did not do so was self-evidently a

factor to be weighed in the assessment of the issue which the judge had to decide on the SJ Application, which was whether on the evidence, the defendants had no real prospect of successfully defending the claim for a final precautionary injunction. She submitted that there was no real prospect of any defence succeeding and no reasonable basis to expect that any further evidence would be forthcoming at trial.

35. At the hearing of the appeal, some 20 of the named defendants attended Court. Three of those were contemnor defendants against whom the judge granted a final injunction and in respect of whom there was no appeal before the Court. The other 17 were some of the 109 defendants. One of them, David Crawford, was deputed to address the Court on their behalf. He made polite and measured submissions explaining his own motives in participating in IB protests and denying that there was any imminent and real risk of further protests. Similar points about the absence of risk were made shortly by one of the other 17 named defendants, Matthew Tulley, who had served a defence and who also spoke.

36. The difficulty which the named defendants face is that none of their points was made before the judge, because they simply failed to engage in the proceedings. In relation to the test for the grant of an anticipatory injunction, the judge considered the evidence which was before him and concluded that there was a real and imminent risk of the torts of trespass and nuisance being committed so as to justify the grant of the injunction against the 109 named defendants, albeit on an interim basis. There was and is no cross-appeal by the defendants against any part of the judgment dealing with the grant of an injunction. The matters which Mr Crawford and Mr Tulley put forward cannot be relied upon before this Court as a basis for challenging the judge's conclusion as to real and imminent risk and as to the appropriateness of granting an injunction.

Discussion

37. Although the judge did correctly identify the test for the grant of an anticipatory injunction in [38] of his judgment, unfortunately he fell into error in considering the question whether the injunction granted should be final or interim. His error was in making the assumption that, before summary judgment for a final anticipatory injunction could be granted, NHL had to demonstrate in relation to each defendant that that defendant had committed the tort of trespass or nuisance and that there was no defence to a claim that such a tort had been committed. That error infected both his approach as to whether a final anticipatory injunction should be granted and as to whether summary judgment should be granted.

38. As regards the former, it is not a necessary criterion for the grant of an anticipatory injunction, whether final or interim, that the defendant should have already committed the relevant tort which is threatened. *Vastint* was a case where a final injunction was sought and no distinction is drawn in the authorities between a final prohibitory anticipatory injunction and an interim prohibitory anticipatory injunction in terms of the test to be satisfied. Marcus Smith J summarises at [31(1)] the effect of authorities which do draw a distinction between final prohibitory injunctions and final mandatory injunctions, but that distinction is of no relevance in the present case, which is only concerned with prohibitory injunctions.

39. There is certainly no requirement for the grant of a final anticipatory injunction that the claimant prove that the relevant tort has already been committed. The essence of this form of injunction, whether interim or final, is that the tort is threatened and, as the passage from *Vastint* at [31(2)] quoted at [27] above makes clear, for some reason the claimant's cause of action is not complete. It follows that the judge fell into error in concluding at [35] of the judgment that he could not grant summary judgment for a final anticipatory injunction against any named defendant, unless he was satisfied that particular defendant had committed the relevant tort of trespass or nuisance.

40. The test which the judge should have applied in determining whether to grant summary judgment for a final anticipatory injunction was the standard test under CPR Part 24.2, namely whether the defendants had no real prospect of successfully defending the claim. In applying that test, the fact that (apart from the three named defendants to whom we have referred) none of the defendants served a defence or any evidence or otherwise engaged with the proceedings, despite being given ample opportunity to do so, was not, as the judge thought, irrelevant, but of considerable relevance, since it supported NHL's case that the defendants had no real prospect of successfully defending the claim for an injunction at trial.

41. It is no answer to the failure to serve a defence or any evidence that, as the judge seems to have thought (see [35(5)] of the judgment), the defendants' general attitude was of disinterest in Court proceedings. Whatever the motive for the silence before the judge, it was indicative of the absence of any arguable defence to the claim for a final injunction. Certainly it was not for the judge to speculate as to what defence might be available. That is an example of impermissible "Micawberism" which is deprecated in the authorities, most recently in *King v Stiefel*. If the judge had applied the right test under CPR 24.2 and had had proper regard to CPR 24.5, he would and should have concluded that none of the 109 named defendants had any realistic prospect of successfully defending the claim at trial and that accordingly, NHL was entitled to a final injunction against those defendants.

42. Although *Barking* was cited to the judge and he refers to it at [36] of the judgment, albeit in a different context, the judge did not consider specifically in his judgment whether to grant a final injunction against the persons unknown. Given that the decision of the Court of Appeal in that case represents the current state of the law and we have no means of discerning what the Supreme Court will decide, it seems to us that we should grant a final injunction against the persons unknown as sought by NHL. The alternative would be to adjourn that part of the appeal until after the Supreme Court has handed down judgment, but since, as we have said, there is to be a review hearing in the High Court in April to determine whether the injunctions should be continued or discharged, it seems preferable to leave the High Court to determine the consequence in the event that the Supreme Court reverses the decision of the Court of Appeal.

43. 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". We are not aware of any such tunnelling having occurred or having been threatened by the IB protesters and Ms Stacey KC was not able to identify any such threats. In the circumstances, it seems to us that these words should be expunged from

the injunctions granted by the judge and from the final injunction which we will grant. Subject to that one point, the appeal is allowed.