Neutral Citation Number: [2026] EWCA Civ 532

Case No: CA-2025-001423

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE, BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES, INTELLECTUAL PROPERTY LIST (ChD)
Mr Justice Miles
[2025] EWHC 1239 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 May 2026

Before :

LORD JUSTICE ARNOLD
LADY JUSTICE ELISABETH LAING
and
LORD JUSTICE WARBY

- -

Between :

BARGAIN BUSTING LIMITED	**Claimant/ Appellant**
- and -	
SHENZHEN SKE TECHNOLOGY CO. LTD	**First Defendant/ Respondent**

- -
- -

Michael Edenborough KC and Thomas St Quintin (instructed by **Brandsmiths**) for the **Appellant**
Jonathan Moss KC, Laura Adde and Joseph Kay (instructed by **Stobbs (IP) Ltd**) for the **Respondent**

Hearing date : 28 April 2026

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Approved Judgment

This judgment was handed down remotely at 10.30am on 8 May 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Arnold:

Introduction

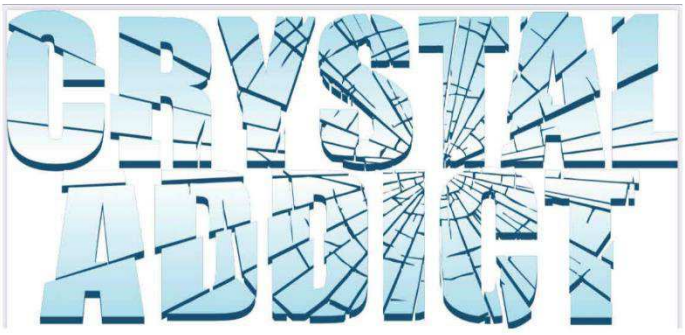
1. This is an appeal by the Claimant ("BBL") against an interim injunction restraining threats of trade mark infringement proceedings granted by Miles J (as he then was) on 27 May 2025 on the application of the First Defendant ("SKE") for the reasons given by the judge in his judgment of 21 May 2025 [2025] EWHC 1239 (Ch). The appeal raises an important issue of law as to the effect of section 12(3) of the Human Rights Act 1998 in this context.

The Trade Marks

2. BBL is the registered proprietor of the following United Kingdom Registered Trade Marks ("the Trade Marks"):

   i) Number 3235344 ("344") consisting of the words CRYSTAL CLEAR VAPOURS ELECTRONICS CIGARETTES registered in respect of goods in Class 34 including, amongst other things, "electronic cigarettes" and "liquid nicotine solutions for use in electronic cigarettes". 344 was applied for on 5 June 2017 and entered onto the register of trade marks on 18 August 2017. BBL acquired 344 on 26 June 2024 from Tashmeen Kaur, an employee of BBL, who had acquired 344 on 5 December 2023 from an unrelated party.

   ii) Number 3534551 ("551") consisting of the device shown below registered in respect of goods in Class 34 including, amongst other things, "electronic cigarettes" and "electronic cigarette liquid [e-liquid] comprised of flavourings in liquid form used to refill electronic cigarette cartridges". 551 was applied for on 17 September 2020 and entered onto the register of trade marks on 8 January 2021. BBL acquired 551 from an unrelated party on 28 January 2025.



   iii) Number 3786148 ("148") consisting of the words CRYSTAL BAR registered in respect of goods in Class 34 including, amongst other things, "electronic cigarettes" and "electronic cigarette liquid". It was applied for by Ms Kaur on 10 May 2022 and entered onto the register of trade marks on 19 September 2025. BBL acquired 148 from Ms Kaur on 26 June 2024.

Factual and procedural background

3. BBL and SKE are rival suppliers of e-cigarettes or vaping devices ("vapes").

4. On 18 August 2022 SKE filed an opposition to the application for 148 at the United Kingdom Intellectual Property Office ("UKIPO").

5. On 19 July 2024 SKE filed an application to revoke 344 for five years' non-use at UKIPO.

6. On 18 September 2024 BBL issued the claim form in these proceedings alleging that SKE had infringed 344 through the use of signs consisting of or containing the word CRYSTAL, including the words CRYSTAL BAR, in relation to vapes.

7. On 11, 14 and 15 October 2024 BBL's solicitors wrote to 11 distributors, wholesalers and/or retailers of SKE's products ("the Recipients") notifying them of (i) 344 and the application for 148 and (ii) BBL's contention that the use by SKE of signs including the word CRYSTAL infringed BBL's rights. It is common ground that, even if these letters constituted implicit threats of trade mark infringement proceedings, they were permitted communications, and therefore not actionable.

8. On 8 November 2024 Judi Pike acting for the Registrar of Trade Marks issued a written decision rejecting SKE's opposition to the application for 148 (O/1063/24). SKE subsequently appealed to the High Court against this decision. As a result, 148 did not proceed to registration at that stage.

9. On 11 November 2024 SKE served its Defence and Counterclaim in these proceedings contending among other things that 344 should be revoked for non-use.

10. On 23 and 24 December 2024 BBL's solicitors sent letters before claim to each of the Recipients asserting that they had infringed 344 and 148 and notifying them that BBL intended to apply to join them as defendants to BBL's claim against SKE unless satisfactory undertakings were given. It is common ground that each of these letters was a threat of trade mark infringement proceedings. It is also common ground that SKE is a person aggrieved by those threats (meaning that it has standing to bring a claim for unjustified threats).

11. On 21 January 2025 SKE issued an application for an interim injunction to restrain BBL from making threats of trade mark infringement proceedings. It did not seek relief pending the effective determination of that application. Nor did it seek an expedited hearing of the application.

12. On 12 March 2025 UKIPO ordered that SKE's application for revocation of 344 be referred to the High Court for determination. Subsequently SKE issued a claim which was consolidated with its counterclaim in these proceedings. (The point of doing this when it had already counterclaimed for revocation was to preserve the date of its application to UKIPO as being the relevant end date for assessment of the non-use claim.)

13. On 25 March 2025 BBL amended the claim form in these proceedings pursuant to a consent order dated 24 March 2025 (i) to join the Second to Sixth Defendants as defendants and (ii) to add claims for infringement of 551. The Second Defendant is a subsidiary of SKE. The Third to Sixth Defendants are four of the Recipients. The other seven Recipients were not joined as defendants. BBL's explanation for this is that it

joined a "representative sample" of SKE's distributors, wholesalers and/or retailers and that it would not be proportionate to join all eleven.

14. SKE's application for an interim injunction was heard by the judge on 30 April and 1 May 2025. At that time BBL was still awaiting the registration of 148. BBL made it clear that, if and when 148 was registered, it intended to amend its claim form to add claims for infringement of 148.

15. Counsel for BBL confirmed to the judge on instructions that the letters to the Recipients referred to in paragraph 10 above were the only threats it had sent. There was no evidence that BBL intended to send any further threatening communications, but BBL declined to offer an undertaking not to do so and explained that it might discover other distributors, wholesalers or retailers who it wished to pursue in the future.

16. It was common ground before the judge that the question whether BBL's threats were justified turned upon the validity of the Trade Marks. Although SKE had not yet served its Amended Defence and Counterclaim, it set out its case that 344 should be revoked for non-use and that 511 was invalidly registered. Furthermore, it explained that, even if its appeal against the hearing officer's decision failed, it would contend that 148 was invalidly registered, both on the ground rejected by the hearing officer (under section 5(4)(b) of the Trade Marks Act 1994) and on a ground not advanced before the hearing officer, and indeed first raised in oral argument (under section 3(6) of the 1994 Act).

17. BBL accepted that SKE's attacks on the validity of the Trade Marks raised serious issues to be tried, but disputed that they were likely to succeed.

18. No trial date had been fixed at that time. Neither side suggested to the judge that the trial of the proceedings be expedited, nor did the judge raise this question of his own motion.

19. On 12 May 2025 SKE served its Amended Defence and Counterclaim contending, among other things, that 344 and 551 were invalidly registered.

20. On 24 June 2025 SKE's appeal against the hearing officer's decision was heard by Michael Tappin KC sitting as a Deputy High Court Judge. On 1 July 2025 Mr Tappin KC dismissed the appeal for the reasons given in his judgment of that date [2025] EWHC 1629 (Ch). Subsequently SKE applied to this Court for permission for a second appeal. For reasons that it is unnecessary to go into, BBL succeeded in obtaining registration of 148 while this application was pending. On 10 October 2025 I refused permission.

21. On 16 January 2026 BBL re-amended the claim form in these proceedings to add claims for infringement of 148.

22. The claim and counterclaim are now listed for trial, together with another claim between BBL and SKE, in March 2027.

Claims for unjustified threats

23. Threats provisions in intellectual property law date from 1883, when the first provisions were introduced for patents. The essential rationale was that patentees could easily use threats of suing a competitor's customers to deter those customers from dealing in the competitor's products without having to bring proceedings. In that way patentees could obtain the same benefit as an interim injunction against the customers, but without being either required to give a cross-undertaking in damages, or exposed to the risk of an adverse costs order, if the infringement claim turned out to be unfounded. Absent statutory intervention, there was no protection against groundless threats unless malice could be proved.

24. After 1883 the threats provisions were gradually extended to trade marks and designs. Even now, they do not apply to threats of proceedings for copyright infringement or passing off.

25. The threats provisions were reformed and harmonised by the Intellectual Property (Unjustified Threats) Act 2017 as result of a Law Commission project. So far as can be ascertained from the Law Commission's Consultation Paper (Law Commission Consultation Paper No 212: *Patents, Trade Marks and Design Rights: Groundless Threats: A Consultation Paper*) and two Reports (Law Commission Report No 346: *Patents, Trade Marks and Design Rights: Groundless Threats* (Cm 8851) and Law Commission Report No 360: *Patents, Trade Marks and Designs: Unjustified Threats* (HC 510)), no consideration was given to the effect of section 12(3) of the 1998 Act in this context.

26. The 2017 Act substituted section 21 of the 1994 Act and inserted sections 21A-21F. It is not necessary for present purposes to set out all of these provisions. It is sufficient to note that section 21C provides, so far as relevant:

> "**Remedies and defences**
>
> (1) Proceedings in respect of an actionable threat may be brought against the person who made the threat for—
>
> (a) a declaration that the threat is unjustified;
>
> (b) an injunction against the continuance of the threat;
>
> (c) damages in respect of any loss sustained by the aggrieved person by reason of the threat.
>
> (2) It is a defence for the person who made the threat to show that the act in respect of which proceedings were threatened constitutes (or if done would constitute) an infringement of the registered trade mark.
>
> …"

27. It is common ground that an interim injunction is an available remedy in cases of alleged unjustified threats. Counsel for SKE submitted, and I accept, that, in some circumstances, it is an important remedy.

Section 12(3) of the 1998 Act

28. Section 12 of the 1998 Act provides, so far as relevant:

> "**Freedom of expression**
>
> (1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression.
>
> …
>
> (3) No such relief is to be granted so as to restrain publication before trial unless the court is satisfied that the applicant is likely to establish that publication should not be allowed.
>
> …"

The judge's judgment

29. For the purposes of the appeal, the salient points in the judge's judgment are as follows. First, the judge recorded BBL's submission that section 12(3) of the 1998 Act applied to SKE's application. Although he did not explicitly accept that submission, it is clear from his judgment that he proceeded on that basis.

30. Secondly, he held at [78] that the correct approach applying section 12(3) was as follows:

> "… it appears to me that applications for injunctions in respect of allegedly unjustified threats will often fall within the exceptional category of cases identified by Lord Nicholls in *Cream Holdings*. The key question as far as the merits threshold is concerned is whether the court is satisfied the applicant's prospects of success at the trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case. To require the higher threshold to be met in all such cases would to my mind undermine the protection intended by Parliament in enacting the unjustified threats provisions. A party may need to move quickly to seek such an injunction as losses can be rapid as the market is cleared. It would to my mind generally place too high a barrier in the way of applicants in such cases to require them to show that they will probably win at trial."

31. Thirdly, he held in relation to 148 that "[w]hile SKE was able to show a serious issue to be tried, I cannot properly conclude on the limited materials before me on this application that SKE has a better than evens chance of success on" its section 5(4)(b) case ([86]) and that "SKE has established no more than a standard serious issue to be tried" on its section 3(6) case ([88]). In relation to 344, he was "satisfied that SKE has a realistically arguable case [of non-use], which may well succeed at trial" [89]. In relation to 551, he could "conclude no more than that there is at least a serious issue to be tried in relation to it" ([89]). Overall, so far as the requirements of section 12(3) were concerned, he was "satisfied that [SKE]'s prospects of success at the trial are

sufficiently favourable to justify such an order being made in the particular circumstances of the case" ([110]).

32. Fourthly, he held that the balance of the risk of injustice favoured the grant of an injunction. In this context he concluded that there was a threat by BBL to send further threatening communications, and that, if it did so, SKE would not be adequately compensated by an award of damages for the following reasons:

> "97. BB argued that SKE had not advanced any evidence that the December 2024 letters had led to actual losses. The evidence suggested that the threatened parties had carried on using the allegedly infringing goods. There was therefore no reason to think that any further threats of infringement proceedings would lead to losses to SKE. I am unable to accept this submission. Suppliers and retailers may be more or less robust and have varying appetites for risk and for ignoring threats of the kind made in December 2024. Moreover the evidence shows that SKE has had to offer indemnities to suppliers/retailers to ensure continuity of supply. It is possible that if further threats are made to suppliers or retailers they will lead to the threatened parties no longer using goods supplied by SKE. I do not think that it is safe to assume that all such parties will have the same apparently sanguine reaction as the original threatened parties.
>
> 98. I also take account of the fact that the sales made by SKE in the UK are very substantial. They have increased from $40.8m in 2022 to $405.6m in 2024. If even one significant customer were to cease trading with SKE the damages could be material.
>
> 99. I am also satisfied that if further threats were to lead to threatened parties to cease taking goods from SKE damages would be difficult to assess. …"

Grounds of appeal

33. BBL appeals on two grounds. Ground 1 is that the judge erred in law in imposing a requirement for likelihood of success under section 12(3) that was lower than "more likely than not". Ground 2 is that the judge wrongly failed to take into account the fact that, if the threats in respect of 148 were justified, then the threats in respect of 344 or 551 would be of no consequence even if unjustified. It is plain that 148 represents BBL's strongest case on infringement, and thus SKE's weakest case that the threats were unjustified.

34. There is no respondent's notice. Thus SKE does not contend either that section 12(3) is inapplicable or that it is more likely than not that its claim for unjustified threats will succeed at trial.

Ground 1

35. Section 12(3) was considered by the House of Lords in *Cream Holdings Ltd v Bannerjee* [2004] UKHL 44, [2005] 1 AC 253. In a speech with which Lord Woolf CJ,

Lord Hoffmann, Lord Scott of Foscote and Baroness Hale of Richmond agreed, Lord Nicholls of Birkenhead said at [22]:

> "… Section 12(3) makes the likelihood of success at the trial an essential element in the court's consideration of whether to make an interim order. But in order to achieve the necessary flexibility the degree of likelihood of success at the trial needed to satisfy section 12(3) must depend on the circumstances. There can be no single, rigid standard governing all applications for interim restraint orders. Rather, on its proper construction the effect of section 12(3) is that the court is not to make an interim restraint order unless satisfied the applicant's prospects of success at the trial are sufficiently favourable to justify such an order being made in the particular circumstances of the case. As to what degree of likelihood makes the prospects of success 'sufficiently favourable', the general approach should be that courts will be exceedingly slow to make interim restraint orders where the applicant has not satisfied the court he will probably ('more likely than not') succeed at the trial. In general, that should be the threshold an applicant must cross before the court embarks on exercising its discretion, duly taking into account the relevant jurisprudence on article 10 and any countervailing Convention rights. But there will be cases where it is necessary for a court to depart from this general approach and a lesser degree of likelihood will suffice as a prerequisite. Circumstances where this may be so include those mentioned above: where the potential adverse consequences of disclosure are particularly grave, or where a short-lived injunction is needed to enable the court to hear and give proper consideration to an application for interim relief pending the trial or any relevant appeal."

36. It can be seen from this that Lord Nicholls laid down a general rule that the threshold to be applied under section 12(3) is that the applicant must be more likely than not to succeed at trial. He identified two exceptions to that general rule, namely (i) where the potential adverse consequences of not granting an injunction are particularly grave and (ii) where a short-term injunction is needed to enable the court to hear and properly consider an application for longer-term interim relief.

37. It is common ground that Lord Nicholls' language was inclusive, and so there may conceivably be other exceptions. SKE does not rely upon a third category of exception in this case, however. SKE relies upon the first category of exception identified by Lord Nicholls.

38. Section 12(3) and *Cream Holdings* were applied in the trade mark context in *Boehringer Ingelheim Ltd v Vetplus Ltd* [2007] EWCA Civ 583, [2006] Bus LR 1456. Having cited from Lord Nicholls' speech, Jacob LJ, with whom Longmore and Pill LJJ agreed, said at [48]:

> "The general 'threshold' which must be crossed by the claimant is that he will probably succeed at the trial. I do not see why that should not be the general rule for trade mark infringement in a comparative advertising case. Indeed there is every reason why it should. …"

Since that was a case about comparative advertising, it is not surprising that Jacob LJ confined his remarks to such cases.

39. So far as counsel's researches have been able to discover, this is the first case in which the effect of section 12(3) on an application for an interim injunction to restrain allegedly unjustified threats has arisen for consideration. Be that as it may, the principles set out in *Cream Holdings* and applied in *Vetplus* are equally applicable in this context.

40. Counsel for SKE argued that granting an interim injunction to restrain allegedly unjustified threats was only a limited interference with the respondent's rights under Article 10 of the European Convention on Human Rights, and therefore the application of the principles laid down in *Cream Holdings* should be qualified in this context. I do not accept this argument, which finds no support in Lord Nicholls' speech. Lord Nicholls treated the effect of section 12(3) as a question of statutory interpretation, and the principles he articulated were clearly intended to be of general application. Furthermore, he made it clear that the threshold imposed by section 12(3) may require the court to consider the balance between the respondent's rights under Article 10 and any countervailing Convention (or, I would add, other) right relied upon by the applicant; but that is a separate matter, and does not involve any modification of the threshold. (In the present case SKE relies upon its rights under Article 1 of the First Protocol to the Convention in the goods it supplies under the contested signs, but it is not necessary to consider the extent to which those rights would be interfered with by unjustified threats against its customers given that a successful claim for trade mark infringement does not generally prevent goods from being sold under a non-infringing sign.)

41. Counsel for SKE also argued that applying these principles in this context without qualification would run counter to the general procedural consideration which has been recognised and applied since *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 that interim applications should not be permitted to turn into mini-trials. I do not accept this argument either. The whole point of section 12(3) is to require the courts to apply a merits threshold before granting interim relief that affects freedom of expression. It necessarily follows that the court hearing such an application must take a view as to which party is more likely to prevail at trial based on the available evidence and arguments. It does not mean that the court should not exercise case management discipline to ensure that the time and expense devoted to such applications is proportionate. There is nothing about an interim injunction to restrain allegedly unjustified threats which would prevent the application of this approach. No mini-trial was required in the present case. The parties sensibly adduced limited evidence and did not engage in extensive arguments on the merits, and the judge rightly assessed the evidence and arguments as best he could in those circumstances.

42. As counsel for SKE was constrained to accept in the course of argument, the judge did not say that this was a case in which it was appropriate to depart from the general rule articulated by Lord Nicholls because the potential adverse consequences of not granting an injunction would be particularly grave for SKE. Nor is this implicit in his reasoning. It can be seen from what the judge said at [97]-[99] (paragraph 32 above) that SKE had not lost any sales as a result of the threats in December 2024. Although the judge considered that there was a risk of sales being lost if BBL were to make further threats, he did not find that there was either a strong likelihood of BBL making further threats

if not restrained or that the risk of lost sales was a strong one. Still less did he find that the consequences for SKE of losing sales would be particularly grave. I would add that, if they had been, one would expect SKE to have sought interim relief considerably more urgently than it did.

43. Accordingly, in my judgment, the judge erred in not applying the general rule laid down by Lord Nicholls. Since he did not find that SKE's claims were more likely than not to succeed, and there is no respondent's notice contending that he should have, it follows he was wrong to grant the injunction.

Ground 2

44. The conclusion I have reached in relation to ground 1 makes it unnecessary to consider ground 2.

Conclusion

45. I would allow the appeal and set aside the injunction.

Lady Justice Elisabeth Laing:

46. I agree.

Lord Justice Warby:

47. I also agree.