OUTER HOUSE, COURT OF SESSION

[2020] CSOH 66

A179/19

OPINION OF LADY WOLFFE

In the minute of

TRANSOCEAN DRILLING UK LIMITED

Minuters

against

(FIRST) GREENPEACE LIMITED

First Defenders

and

(SECOND) PERSONS UNKNOWN

Second Defenders

Pursuers: Barne QC; Pinsent Masons LLP
Defenders: Mure QC, Welsh; Harper Macleod LLP

3 July 2020

Background

Transocean's minute for breach of interdict by Greenpeace

[1] This case called before me as a minute for breach of interdict by Greenpeace UK Limited ("Greenpeace"). Transocean Drilling UK Limited ("Transocean"), who have brought the alleged breaches of interdict to the notice of the Court by minute ("the minute"),

sought and obtained an interdict (*angl* injunction) in June 2019, in the terms after-noted, against Greenpeace and against persons unknown.

Issues arising

[2] At the hearing on the minute for breach of interdict only Greenpeace lodged answers and appeared, represented by Mr Mure QC. In their answers, Greenpeace admit two breaches of the interdict corresponding to the two allegations in the minute. Nonetheless, Greenpeace put in issue whether they had the requisite *mens rea*. They also relied on Articles 10 (freedom of speech) and 11 (freedom of peaceful assembly) of the European Convention on Human Rights ("the Convention") as relevant to the Court's consideration of any sanction, if the conduct admitted or found to be in breach of the Court's order constituted contempt of court. In parties' submissions no distinction was drawn between Articles 10 and 11, and I shall refer to them collectively as "the Convention Rights".

[3] Accordingly, the issues that arise in consideration of the minute and answers are:

1) Whether the conduct of individuals associated (to put it neutrally) with Greenpeace may be attributed to Greenpeace, such as to make Greenpeace answerable for their individual conduct in the context of a charge of contempt of court;
2) On the hypothesis that Greenpeace are answerable for the conduct of these individuals, whether the requisite *mens rea* on the part of Greenpeace maybe inferred from the admitted or established conduct in breach of the Order;
3) On the further hypothesis that Greenpeace are answerable and had the requisite *mens rea*, whether it has been established beyond reasonable doubt that Greenpeace were in contempt of court; and

4) If the answer to the third issue is 'yes', in the whole circumstances, which include a consideration of the Convention Rights, what is the appropriate and proportionate sanction for that contempt by a corporate actor.

Materials produced by Greenpeace

[4] In advance of the hearing on the minute and answers, Greenpeace lodged 12 Affidavits (from 11 individuals) and four inventories of productions. Affidavits were provided from Greenpeace's Executive Director (John Sauven), Greenpeace's Logistics Director (Rachel Murray), Greenpeace's Action Coordinator (Frank Hewetson), two members of Greenpeace's Boat Team (Darryn Payne and Leanne Kitchin), a Board Director, Greenpeace volunteer and climber (Andrew McParland), Greenpeace's Head of Finance (Andrew Coates), and Greenpeace's Chief Scientist and Policy Director (Doug Parr). Professor Kevin Anderson provided an affidavit which, together with its substantial appendices, detailed the current scientific understanding of climate change, the relative political or policy initiatives to address climate change (eg the Paris Agreement) and his view as to the inadequacy of measures being taken. Affidavits were also produced from the solicitor who represented Andrew McParland at his trial for breach of the peace, James Bready, and from the English solicitor, Kate Harrison, whom Greenpeace have instructed in relation to a judicial review in England. Most of Greenpeace's productions are comprised of scientific papers and policy statements relative to climate change, but exchanges between Greenpeace and BP, certain press releases or copy cases involving Greenpeace are also included. Transocean lodged three inventories of productions, containing excerpts of the contract between them and BP, photos and video images of the occupation of the Rig and copies of Greenpeace's social media output relative to the occupation of the Rig. Both

parties lodged notes of arguments, reading lists bundles of authorities (totalling to 23 in number) and they handed up further cases at the Hearing.

Transocean's action for interim interdict in June 2019

[5] Transocean own a mobile offshore drilling unit known as "the Paul B Lloyd Jr" ("the Rig"). In June 2019 it was located within the port limits of the Cromarty Firth Port Authority ("the Port Authority"). At that time the Rig was contracted to BP Exploration Operating Company Limited ("BP") to provide drilling services. Transocean averred that:

> "At approximately 18:30 on 9 June 2019, three Greenpeace protestors boarded the Rig without permission. They did so as the Rig attempted to leave the Cromarty Firth under tow. They did so with a view to stopping the Rig reaching the Vorlich oil field in the central North Sea. The protestors scaled the structure and occupied a gantry on a leg of the Rig, below the main deck. The protestors unfurled a banner, declaring a 'Climate Emergency'. Two other protestors subsequently attempted to board the Vessel but were unsuccessful. Shortly after boarding the Rig, one of the protestors voluntarily left."

[6] After reference to the press release Greenpeace issued ("Greenpeace climbers halt BP oil rig bound for the North Sea"), and Greenpeace's statement that their activists had provisions for days, it was averred:

> "The Rig currently remains within the port limits of the Cromarty Port Authority. It cannot proceed to its intended location due to the presence of protestors on the Rig, The Port of Cromarty Firth established a 500 metre exclusion zone around the Rig."

[7] The occupation by the Greenpeace activists was without Transocean's consent and it was averred to be "disrupting the legitimate business activities of [Transocean] and BP" and that Greenpeace's action was "calculated and intended to prevent [Transocean] and BP from carrying on lawful business, [and] … to harm [Transocean's] and BP's business interests".

The Court's interlocutors for interim and permanent interdicts

[8] On 10 June 2019, Transocean sought and were granted on an *ex parte* basis an *interim* interdict ("the Order") against Greenpeace, as the first defenders, and as the second defenders the persons on board the Rig without consent, in the following terms:

> "The Lord Ordinary, having heard counsel for the pursuer, before calling, no caveat having been lodged, interdicts *ad interim* the first and second defenders by themselves or by their agents, employees, volunteers or servants, or by anyone acting on their behalf or under their instructions, procurement or encouragement, from boarding without permission, entering onto, occupying, attaching themselves to or approaching within 500 metres of the mobile offshore drilling unit known as the Paul B. Lloyd, Jr (the "Rig") or any vessel towing the Rig; authorises Messengers-at-Arms instructed by the pursuer to effect service on the second defenders by staking copies of the summons and interlocutor securely in conspicuous places on the Rig."

[9] The Order was served on Greenpeace and on the second defenders. Greenpeace admit that service was effected by 1:15 pm on the day following grant of the Order, that is, on 11 June 2019. Transocean detail the methods of service on the second defenders, in statement 2 of their minute:

> "The interlocutor was verbally communicated to the Second Defenders during the course of the morning on 11 June 2019 by the Pursuer's Offshore Installation Manager. Thereafter, on the same day, the Service Documentation was served by a Messenger-at-Arms on the Second Defenders. This was done by affixing copies of the Service Documentation securely in conspicuous places on the Rig, as required by the interlocutor. Personal service was also effected by the Messenger-at-Arms, using a rope to pass the Service Documentation to the Second Defenders, which they retrieved from the end of the rope. Service on the Rig was filmed by the Messenger-at-Arms."

[10] The defenders did not enter that process and on 31 December 2019 Lord Woolman granted a number of orders, including permanent interdict ("the Final Order") against the defenders in the same terms as the Order. The two alleged breaches on the part of Greenpeace relate only to the Order and not to the Final Order.

[11] There is no challenge in these proceedings to the terms of the Order or the Final Order. It is not argued that the terms of the Order (or Final Order) are too wide, ambiguous or are an impermissible interference with any person's Convention Rights.

Transocean's minute for breach of interdict

[12] The minute for breach identified two distinct episodes said to breach the Order. The context of the two allegations is the conduct by Greenpeace (or those associated with or supported by them) to board the Rig several days prior to the grant of the Order. I shall refer to the overall context in which the allegations took place as "the action". I stress that the conduct prior to, and forming the context for, the two allegations is itself not subject to any criticism or censure. This Court is concerned only with the two allegations, brought to its notice in the minute, and which are admitted or established.

The first allegation

[13] While the occupation of the Rig by several Greenpeace protesters prompted Transocean to obtain the Order, the first allegation for breach of the Order concerned the actions of two other Greenpeace protestors, who boarded the Rig on 14 June (contrary to the Order), after the team of Greenpeace volunteers occupying the Rig had been arrested and removed by the police on 13 June. Transocean's averments of the first allegation (in statements 7 and 8 of the minute as amended) are as follows:

> "7. At 04:10 on 14 June 2019, after intimation and service of the said interlocutor, two new Greenpeace protestors boarded the Rig. They occupied a location similar to that taken by the original protestors but on a different leg of the Rig. The protestors unfurled a banner stating 'Climate Emergency Greenpeace'. To have obtained access to the Rig, the protestors each time must have approached it by boat.

8. John Sauven, a member of the First Defender's senior management and its company secretary, is reported on the BBC News website as saying:

> *'Our climbers are back on the oil rig and determined to stay for as long as possible.*
>
> *BP are heading out to drill a new well giving them access to 30 million barrels of oil—something we can't afford in the middle of a climate emergency.*
>
> *We can't give up and let oil giants carry on with business as usual because that means giving up on a habitable planet and our kids' future. The UK government has announced a target of net zero greenhouse emissions by 2050 – we have started to enforce it.'*
>
> During the evening of 14 June 2019, the two protestors who had boarded the Rig at approximately 04:10 that morning were arrested and removed by the Police. One of the arrested protestors was a director of the First Defender, Andrew McParland. Mr McParland subsequently pled guilty to a breach of the peace that narrated unlawfully boarding the Rig, attaching himself to it with tethers, chains and padlocks, and placing himself and others in potential danger." (Emphasis by underlining added.)

I have underlined the passages in which Greenpeace expressly claim association ("Our climbers…") with the activists.

The second alleged breach of the Order

[14] The second allegation concerned the events on 16 June 2019. By that date, the Rig had been moved out from the Cromarty Firth and was under tow toward Vorlich in the North Sea. Greenpeace International ("GPI") own or charter a vessel known as the Arctic Sunrise. Greenpeace had accepted GPI's offer of use of the vessel several days earlier. It was from the Arctic Sunrise that two fast response craft ("FRCs", also described as Rigid Inflatable Boats ("RIBs") in some of the affidavits) were launched on 16 June 2019, with a number of Greenpeace members or volunteers on board, with the intention of enabling one or more climbers to board the Rig. The Arctic Sunrise followed the Rig, which was under tow. In the end, no Greenpeace activists succeeded in boarding the Rig, but the 500 metre

exclusion zone was breached. Transocean' relative averments (in statement 8 of the minute) are as follows:

> "On 15 June 2019, Mr Sauven was reported on the BBC News website as saying that the protest was not over and that *'our ship the Arctic Sunrise is sailing towards Scotland ready to play her part* in thwarting BP's plans.' The website www.greenpeace.org states that there are three ships in the Greenpeace fleet, one of which is the Arctic Sunrise. According to the website narrative, *these ships allow Greenpeace, among other things, to 'take direct action' and to 'provide invaluable support to all Greenpeace campaigns'.* The Arctic Sunrise travelled from Spanish waters in order to be near the Rig. It did so, under the First Defender's instructions or directions, in order to disrupt the Pursuer from undertaking its lawful business. At around 05:25 on 16 June 2019, the Arctic Sunrise contacted the Rig's Offshore Installation Manager to confirm that it had launched FRCs (fast response craft) with a view to boarding the Rig as part of a peaceful protest. Approximately 10 minutes later, two FRCs were spotted approaching the Rig with approximately five protestors in each FRC. At that stage, the Rig was under tow to Vorlich. <u>The FRCs approached within 500 metres of the Rig but were unable to put down any protestors on the Rig due to the wash created by the Rig.</u> The FRCs also attempted, unsuccessfully, to slow down the speed at which the Rig was being towed. By around 06:25 the FRCs returned to the Arctic Sunrise, which at that time was approximately 2.8 nautical miles away from the Rig and closing. The Arctic Sunrise thereafter followed the Rig, coming to within approximately 1 nautical mile of the Rig before changing direction to take up position at the Vorlich field. The Rig then adopted a holding pattern maintaining speed to avoid a reboarding. The Arctic Sunrise thereafter took steps to obstruct the Rig and impede its ability to safely moor on location. Periodically, the Arctic Sunrise located itself in the tow path of the Rig or crossed back and forth in front of the Rig's tow vessel. On the morning of 19 June 2019, FRCs were launched from the Arctic Sunrise. At least two protestors exited the FRCs to swim in the path of the Rig and its tow vessel, displaying banners. <u>At this time, the FRCs encroached within the 500-metre zone referred to in the first conclusion of the Summons.</u> Later that day, the Rig reached its destination. On the morning of 20 June 2019, the Arctic Sunrise left the location." (Emphasis added by underline and italics.)

I have highlighted (by underlining) the averments admitting the conduct which breached the Order and I have also highlighted (by italics) Greenpeace's claims associating themselves with the FRCs and the Arctic Sunrise.

Greenpeace's claims in social media of responsibility for the protests

[15] Transocean invite the Court to impute liability for the conduct comprising the two allegations to Greenpeace. They aver that Greenpeace "claimed responsibility and credit for the reoccupation of the Rig by its protestors" and " for the responsibility for the actions of the Arctic Sunrise". Transocean quoted from some of Greenpeace's social media output at that time, including the following statements:

1) "BP have just served an injunction on Greenpeace to try to stop <u>our action</u> on their oil rig. They want to silence <u>us</u>, but <u>we won't be gagged</u>" (emphasis added) (posted on 12 June 2019 on Greenpeace' Twitter page) ("the Twitter post");

   and

2) "Three full days into the BP oil rig occupations, and <u>we're not going anywhere</u>" (emphasis added) (posted on Greenpeace' Facebook page on 13 June 2019) "(the Facebook post").

While Greenpeace do not formally admit these posts in their answers, they are met with the standard acknowledgement ('beyond which no admission is made'), I did not understand their Senior Counsel to suggest that these were not to be attributed to Greenpeace. Conversely, no explanation was tendered to suggest that these were somehow posted on Greenpeace's social media pages without their knowledge or consent or that Greenpeace publically distanced themselves from these posts at that time or the sentiments therein.

Greenpeace' answers to the minute for breach

[16] Greenpeace admit the essential averments of conduct by the individual activists on the Rig (the subject-matter of first allegation) and by the Arctic Sunrise (the subject-matter of the second allegation). They also admit that they were aware of the terms of the Order following service at 1:15 pm on 11 June 2019, the day after it was granted. The also admit, under explanation, that "by its actions, [Greenpeace have] acted in breach" of the Order.

[17] Greenpeace couple their admissions with the extensive averments in Answer 8 to the minute, which are as follows:

> "The Pursuer's averments in respect of the BBC's reports of Mr Sauven's remarks are admitted. Admitted that, during the evening of 14 June 2019, two protestors who had boarded the Rig at approximately 4.10 a.m. that morning were arrested and removed by the police. Admitted that one of the arrested protestors was Andrew McParland. Admitted that Mr McParland is a director of the first defender under explanation that this is a voluntary, unpaid role. Admitted, under reference to Answer 6 above that Mr McParland subsequently pled guilty to breach of the peace in the terms averred. Admitted, under explanation following, that the Arctic Sunrise travelled from Spanish waters in order to be near the Rig. Admitted that, at around 5.25 a.m. on 16 June 2019, the Arctic Sunrise contacted the Rig's Offshore Installation Manager to confirm that it had launched FRCs (fast-response craft) with a view to boarding the Rig as part of a peaceful protest. Believed to be true that, approximately ten minutes later, two FRCs were spotted approaching the Rig with approximately five protestors in each FRC. Believed to be true that, at that stage, the Rig was under tow to Vorlich, under explanation that the tow was at a very low speed. Admitted that the FRCs approached within 500 metres of the Rig, under explanation that because of safety concerns no protesters attempted to board the Rig at that stage. Admitted that the FRCs returned to the Arctic Sunrise, under explanation that they did so at 7.00 a.m. on 16 June 2019. Admitted that the Arctic Sunrise thereafter followed the Rig. Admitted that the Arctic Sunrise changed direction to take up position at the Vorlich field under explanation that, as the Rig and the Arctic Sunrise approached the Vorlich field, the Arctic Sunrise remained a few nautical miles from the Rig. Admitted that, on the morning of 19 June 2019, two FRCs were launched from the Arctic Sunrise under explanation that, prior to this launch, the Artic Sunrise informed the Rig of this planned activity via radio. Admitted that at least two protestors exited the FRCs to swim in the path of the Rig and its tow vessel, displaying banners. Admitted that, on the morning of 20 June 2019, the Arctic Sunrise left the location. Not known and not admitted that the Rig then adopted a holding pattern maintaining speed to avoid a reboarding. Greenpeace International's website is referrred to for its terms beyond which no admission is made. *Quoad ultra* denied, except in so far as coinciding herewith. *Explained and averred that Mr McParland accepted responsibility for his actions. Neither he nor anyone else involved in the protest was compelled to take part in it. Every participant in Greenpeace direct action makes his or her own decision to participate based on that person's beliefs and convictions, and their willingness to take responsibility for their actions in accordance with the core values of Greenpeace and the act of 'bearing witness'.* Further explained and averred that having approached within 500 metres of the Rig on 16 June 2019, the two FRCs called off their protest because of safety concerns. This was consistent with the parameters for the conduct of the protest that it would be peaceful, proportionate and safe, and that any action that might be unsafe would be halted. Those involved in the protest boarded and left the Rig only while it was stationary. Explained and averred that on 17 June 2019 at approximately 8.05 a.m., the Rig

> and the Arctic Sunrise approached the Vorlich field. The Arctic Sunrise sped up to overtake the Rig. The Rig's support vessel, *Havila Venus*, attempted to cut off the Arctic Sunrise. The *Havila Venus* informed the Arctic Sunrise to keep a safe distance. The Arctic Sunrise asked the *Havila Venus* to slow down or alter course. The *Havila Venus* eventually changed course. The Arctic Sunrise altered course and asked the *Havila Venus* to keep safe distance. The *Havila Venus* asked the Arctic Sunrise to reduce her speed. The Arctic Sunrise reiterated that the *Havila Venus* should keep a safe distance. The Arctic Sunrise stayed at least 500 metres from the Rig. Further explained and averred that, at 8.25 a.m. on 19 June 2019, the Rig requested via radio that the Arctic Sunrise move out of its path and that, at 8.29a.m. The Arctic Sunrise acceded to that request. At 8.40 a.m. the two FRCs and swimmers returned to the Arctic Sunrise. The Arctic Sunrise then radioed the Rig that she would keep a safe distance and remain outside the 500-metre safe zone from the Rig's position. Explained and averred that Arctic Sunrise's radio message on the morning of 19 June 2019 informed the Rig that she did not intend to stop the Rig or interfere with its navigation; that she would keep a safe distance and respect the Rig's 500-metre safe zone; that there would be swimmers in the water and two safety boats; and that the Arctic Sunrise would not interfere with the Rig's towing. The Rig acknowledged this radio message. At all times the Arctic Sunrise kept a safe distance away from the Rig and the vessel towing it. Further explained and averred that the scientific evidence shows that climate change is being caused by the emission of greenhouse gases from the burning of fossil fuels such as oil. Unless action is taken to limit climate change, that change will soon become irreversible. The scientific evidence thus justified Mr Sauven's use of the term 'climate emergency'. By their activities in extracting and using fossil fuels, the Pursuer and BP have contributed to that climate emergency. They have also undermined domestic and international efforts to limit climate change. Mr Sauven's comments thus explained the reasons for the protest…." (Emphasis added by underlining and italics.)

The underlined passage is Greenpeace's admission of conduct relevant to the second allegations. As will be seen, Mr Barne took issue with the passage in italics. For completeness, I should note that not all of these averments are admitted by Transocean.

[18] In its written submissions, Greenpeace's further comments on the second allegation were as follows:

> "The other circumstances averred in the minute, which occurred after service of the interim interdict, relate to the movements of the Arctic Sunrise during 16 -20 June 2019, including the movements of fast response craft (FRC; also known as rigid inflatable boats or RIBs) launched from the Arctic Sunrise: see Statement 8 and Answer 8. During that period, the minute states that on two occasions there were

> FRCs within the 500 metre zone referred to in the interim interdict, namely on 16 and 19 June 2019. The Minuter does not aver that the Arctic Sunrise entered within that 500 metre zone. The first defender explains that the Arctic Sunrise kept a safe distance from the Rig and the vessel towing it; and stayed outside that 500 metre zone, advising the Rig that it would do so. The FRCs were launched from the Arctic Sunrise. While the first defender admits that on 16 June 2019 two FRCs did come within 500 metres of the Rig, it denies that FRCs encroached …on 19 June 2019…"

[19] Greenpeace's final position in submissions was to admit the two allegations:

> "the first defender admits that following service of the interim interdict, that order was breached (i) when Mr McParland and another protester boarded the rig on 14 June 2019, staying until that evening when they were removed; and (ii) when on 16 June 2019 FRCs encroached for a time within the 500m limit mentioned in the interdict."

Greenpeace's answers also raise points in mitigation, which I note below.

Greenpeace's reliance on the conduct of others

[20] I also note the following passages from Greenpeace's answers, insofar as relevant to the issues of the extent to which Greenpeace puts in issue their responsibility for the conduct of others. (The whole of answer 8 is quoted at para [17]; in this context see the passages in italics.) After referring to the conduct of one of the climbers, Andrew McParland, who had been served with the Order while on the Rig, it is averred that Mr McParland "accepted responsibility for his actions. Neither he nor anyone else involved in the protest was compelled to take part in it." This is followed by the more general averment:

> "Every participant in Greenpeace direct action makes his or her own decision to participate based on that person's beliefs and convictions, and their willingness to take responsibility for their actions in accordance with the core values of Greenpeace and the act of 'bearing witness'."

Mr McParland is a director of Greenpeace, although he receives no remuneration in that role. In relation to the second incident, it is averred that

> "having approached within 500 metres of the Rig on 16 June 2019, the two FRCs called off their protest because of safety concerns. This was consistent with the

> parameters for the conduct of the protest that it would be peaceful, proportionate and safe, and that any action that might be unsafe would be halted".

At a late passage in Answer 8, Greenpeace aver that "at all times the Arctic Sunrise kept a safe distance away from the Rig and the vessel towing it."

Greenpeace's social media posts

[21] In relation to their social media posts, Greenpeace aver:

> "9. Admitted that the First Defender claimed responsibility and credit for the initial occupation and subsequent reoccupation of the Rig by the protestors, under explanation that no one was compelled to take part in the protest. Reference is made to answer 8 above. The Pursuer's averments in respect of the First Defender's social media posts during the protest are admitted, under explanation that part of the First Defender's purpose as a campaigning organisation is to stop the environmental damage being caused, and that publicising any protest it organises is an essential part of that purpose. The extracts from the First Defender's Twitter and Facebook Pages are referred to for their whole terms, beyond which no further admission is made. *Quoad ultra* denied. Explained and averred that the First Defender publicised this protest to raise public awareness of the climate emergency and its causes. Further explained and averred that the Arctic Sunrise is operated by Greenpeace International, which is responsible for its operations and safety."

Notwithstanding the terms of their answers, Greenpeace's final position was not to dispute their social media posts.

[22] Transocean make the further point that by the time of the grant of the Order, approximately 29 hours after the initial boarding, Greenpeace had already garnered significant press coverage in respect of the issue they wanted to raise. In those circumstances, there was no need to re-occupy the Rig and thereafter harass it as it proceeded towards the drilling location in the North Sea. Transocean state that: "[as] a result of the Greenpeace's actions, the Rig was the subject of direct action for almost 10 days at significant cost and disruption to both Transocean (and BP), including their personnel

onshore and offshore who were caught up in or required to manage the event". I have already noted Greenpeace's final position, which was not to dispute their media posts.

Greenpeace's knowledge of the Order

[23] Finally, Greenpeace's averments in relation to their knowledge of the Order are as follows:

> "10. Admitted that, following service of the interlocutor on 11 June 2019 the First Defender was aware of the contents of the interdict *ad interim* granted against it. Admitted that the continued presence of protestors on or near the Rig was part of a coordinated campaign orchestrated by the First Defender under explanation that this was a non-violent, proportionate and safe protest with the aim stated at answer 4 above. *Admitted, under explanation following that, by its actions, the First Defender has acted in breach of the interdict ad interim. Quoad ultra* denied. The First Defender breached the interim interdict on this exceptional occasion because (i) the scientific evidence on the global climate emergency has gone unheeded and (ii) despite the First Defender's continued engagement with BP the Pursuer's and BP's activities in the North Sea are contributing to that emergency in spite of the irreversible damage being caused. The process by which BP and others were given consent to develop the Vorlich field was not lawful. The First Defender and others have made applications in the High Court for judicial review of the process by which consent was given to the development of the Vorlich Field." (Emphasis added.)

The Hearing

Hearing on submissions and affidavits

[24] It was parties' common position that I could determine the question of contempt without hearing parole evidence, but should proceed on the basis of the affidavits, productions and parties' oral and written submissions. No cross examination was sought of those persons associated with Greenpeace who had submitted affidavits. Most of the facts pled by Transocean were not in dispute. I have already noted above the substantial

materials produced for the Hearing. I have had regard to all of those materials and to parties' oral submissions at the one-day Hearing.

Transocean's submissions

Summary

[25] Mr Barne QC, Senior Counsel for Transocean, outlined their position as follows:

1) Transocean were not calling into question the sincerity of beliefs and motives of Greenpeace or their activists;

2) Even so, it is extremely important that parties conducting lawful activities can seek the Court's protection;

3) This form of direct action presents serious risks to protestors and others. It also involves the diversion of resources.

4) Convention rights, although engaged, do not protect direct action in the same way they protect peaceful protests.

Mr Barne developed his submissions of these matters.

Greenpeace's admission of the conduct but not of mens rea

[26] Mr Barne referred to passages in Greenpeace's pleadings which indicated a degree of equivocation on the part of Greenpeace, in that, while they admitted the conduct breached the Order, and indeed in his affidavit John Sauven, the executive director of Greenpeace, stated that he took "full responsibility for the peaceful action carried out…" (paragraph 4), Greenpeace nonetheless appeared to hint at having an absence of *mens rea* and they sought to distance themselves from the conduct of their activists and volunteers. (See the passages

in answer 8 highlighted in italics, quoted in para [17], above.) Mr Barne noted that Greenpeace's ambivalence in their answers is also reflected in their note of argument which, on this matter, is in the following terms:

> "9. The first defender is a corporate entity. Its Executive Director, Mr John Sauven, explains at Para 4 of his affidavit: "I take full responsibility for the peaceful action carried out to stop BP drilling a new oil well in the North Sea." The volunteer who boarded the rig on 14 June 2019 and is identified in Statement 8 of the minute was Mr Andrew McParland. In his affidavit Mr McParland makes the following points:
>
> 9.1 "Anyone who volunteers as an activist *does so on their own behalf as a responsible individual. Volunteers are not paid and they make their own decisions and can pull out of an action at any time*. This is also true of Greenpeace UK employees." [§5]
>
> 9.2 "I do not make day-to-day decisions about the actions taken by Greenpeace UK, nor does the Board. The chief decision maker is John Sauven. *The board did not make any decisions about the action in relation to the Rig*. As far as I am aware, most members of the board did not know about it until it happened." [§10]
>
> 9.3 "I see my actions as an activist separately to my position as a member of the Board. I decided to join the action as an individual on the basis of my individual beliefs and motivation." [§11]
>
> 9.4 "Non-violence is an essential part of any Greenpeace protest. At the heart of the moral belief is that sometimes, if the circumstances warrant it, it is right to peacefully stand up and act to prevent or highlight serious harm. In doing so, each of us individuals take responsibility for what we do, or fail to do, in the face of threats to the environment and those who depend on it." [§12]
>
> 9.5 "Sometimes that belief brings individuals or Greenpeace in conflict with the law, in which case we regret it but take responsibility for it." [§13]
>
> 9.6 "I also accept that I was served with the interdict when I was on the Rig and decided to stay on the Rig. I stayed because I believed it was essential to try to stop the extraction of new oil for as long as possible." [§15]
>
> 9.7 "However, it is extremely unusual for Greenpeace not to obey a court order. Our actions to disobey the interdict in the present case is a measure of how important and urgent the threat to life from BP's planned activities is, including the extraction and burning of oil from the Vorlich well." [§17]
>
> 9.8 "I very much regret coming into conflict with the Court and did not see my actions in that way. I saw them only as doing what I could to

> prevent otherwise inevitable harm to the environment, people and property." [§18]

Greenpeace activists do not take such actions lightly. They take safe, peaceful direct action in order to bear witness to major environmental issues, including the realities of the present climate emergency and the lack of action to tackle, slow or reverse it (see Mr Sauven's affidavit at §§19-24.). Indeed, in this case, they highlighted the fact that companies such as the minuter and BP Exploration Operating Company Ltd ("BP") are seeking to *increase* the fossil fuels that are available when it is now known and accepted that fossil fuels are a leading cause of climate change (see the affidavits of Dr Doug Parr and Professor Kevin Anderson).

10. *The one individual named in the minute, Mr McParland, was there only in a personal capacity, making his own choices about the matter. The fact that Mr McParland was acting in a purely personal capacity* was the basis for his being charged by the Procurator Fiscal at Tain Sheriff Court: see no. 7/4 of process. The background to Mr McParland's guilty plea is explained in the affidavit of Mr James Bready who acted as his solicitor: No. 20 of Process. Mr McParland states at the end of his affidavit dated 8 January 2020:-

> "I was sentenced to 135 hours of unpaid work which I am now undertaking. To date I have completed 87.5 hours."

11. The Sheriff proceeded on the basis that Mr McParland was freely undertaking the protest *on his own account, and not as an agent for any other person or corporate body*. Other activists who appeared at court with Mr McParland on similar charges were also sentenced to periods of unpaid work under Community Payback Orders ranging from 80 hours to 135 hours: see the supplementary affidavit of Mr Bready at no. 31 of Process. These included Meena Rajput, who accompanied Mr McParland onto the Rig on 14 June 2019. Thus the individuals who boarded the rig on 14 June 2019 *in an individual capacity* have already been charged, convicted and sentenced. It is submitted that the actions of Mr McParland and Ms Rajput, for which they have already been punished, should not therefore also form the basis for a penalty against the first defender. Mr McParland's evidence is that he was personally served with the interim interdict and hence was aware of it in that personal capacity." (Emphasis added.)

The test for contempt of court

[27] Under reference to observations in *Beggs* v *The Scottish Ministers (Contempt of Court)* 2005 1 SC 342 ("*Beggs*") (at paragraph 30-32. 39), Mr Barne noted that, in cases involving

admitted breaches of an undertaking or court order, this was *prima facie* indicative of contempt and the onus thereafter shifted to Greenpeace to explain their conduct.

The test applied to Greenpeace's admitted conduct

[28] Mr Barne submitted that, in this case, in light of the statements Greenpeace put out on social media (quoted above, at para [15]), claiming credit for the direct action and stating that Greenpeace would not "be gagged" and that "Greenpeace is continuing the occupation in defiance of the injunction (sic)", it would be untenable for Greenpeace to argue before the Court that this was not intentional conduct in defiance of the Court's authority. However well-intentioned Greenpeace's motivation might be, that did not elide the inference that Greenpeace had the requisite mental element or *mens rea* to establish contempt.

[29] In relation to the conduct of Greenpeace's activists, Mr Barne submitted that the Order clearly extended to conduct undertaken by Greenpeace through their activists, and in particular the direct action orchestrated by Mr Sauven, and provisioned and enabled by Greenpeace. It was, he submitted, irrelevant that individual activists had been found guilty of breach of the peace in Tain Sheriff Court.

The impact of the Convention Rights

[30] Turning to the Convention Rights, Mr Barne readily accepted that Articles 10 and 11 were engaged. They did not, however, give Greenpeace *carte blanche* to do whatever they wanted. He referred to the observations of Leggat LJ in *Cuadrilla Bowland Ltd and Others* v *Persons Unknown* [2020] EWCA Civ 9, [2020] 4 WLR 29 ("*Cuadrilla*") at paragraph 91, to the effect that there is

> "no principle which justifies treating the conscientious motives of a protestor as a licence to flout court orders with impunity from imprisonment, whatever the nature or extent of the harm caused provided only that no violence is used".

Mr Barne also founded on the distinction drawn in that case (at paragraph 43), between protests which cause disruption "as an inevitable side-effect" and protests which are "deliberately intended to cause disruption, for example by impeding the activities of which the protestors disapprove". Accordingly, he submitted, while the Convention Rights apply to direct action, activities intended to obstruct the activities of others are "not at the core" of those freedoms (*per Kudrevicius* v *Lithuania* (2016) 62 EHRR 34 ("*Kudrevicius*"), cited by Leggat LJ in *Cuadrilla* at paragraph 44).

[31] Mr Barne acknowledged that when a court order was disobeyed it was potentially relevant that this had occurred in the context of acts of civil disobedience (see *Cuadrilla* at paras 97 to 99). However, he also noted that those observations related to custodial sentences being considered in respect of individuals. He was unclear as to how these applied to the acts of a corporate body. In any event, the second and third reasons Leggatt LJ provided (at paragraph 98) for taking into account the context of civil disobedience were inapt in respect of corporate bodies. (The second and third reasons were, respectively, that those engaged in civil disobedience were otherwise generally law-abiding and in respect of whom a lesser deterrent would suffice, and that in part the purpose of imposing sanctions was to engage in a dialogue with the defendant with a view to persuading them that it was their duty as responsible citizens to obey the law and to respect the rights of others.)

Consideration of the interference with any Convention Rights inherent in imposition of a sanction

[32] In relation to the assessment of any sanction as an interference of Greenpeace's Convention Rights and whether it is necessary in a democratic state to achieve a legitimate

aim, Mr Barne noted that the legitimate aims included "the prevention of disorder" and "the protection of the … rights of others" (in both Articles 10 and 11) and "maintaining the authority … of the judiciary" (in Article 10). It was legitimate and proportionate for the Court to impose a sanction where its order and authority had deliberately been disobeyed.

[33] Transocean submitted that the actions undertaken by Greenpeace's activists were "inherently dangerous": the marine environment can be hostile and unpredictable; activists had no direct knowledge of the Rig, its condition and whether there are safe tether points; and they will have no prior knowledge of what activities those operating the Rig will be undertaking from time to time.

[34] In their note of argument, Transocean set out in detail the safety concerns the activists' actions gave rise to. This was augmented by photos and video images they lodged. These were as follows:

> "26.1 Safety concerns when the Rig was in port. The first defender had no idea what work the pursuer was carrying out on the Rig when its activists boarded. When the activists initially boarded (on the evening of 9 June 2019), anchor handling operations were taking place on the Rig. The part of the Rig where they boarded was in close proximity to these operations. In particular, the Havilla Venus anchor handling vessel was less than 30 metres away and in the process of recovering the Rig's number 7 anchor at the time of the first boarding. At one point on 12 June 2019 an activist took up a position just below an anchor winch.
>
> 26.2 The port and after ladders which the activists climbed in order to board the Rig was also potentially dangerous (especially given that not all the protestors were tethered on/using carabiners). These would have been quite slippery, especially since part of it can lie below the water line. Some activists were recorded climbing all the way to the protestor platform level using the emergency escape ladders without being clipped onto them. Crew members also had to remind the activists to clip into the Rig.
>
> 26.3 In advance of boarding the Rig, the first defender and its activists would not have been able to assess the integrity of the ladder before climbing it. A fall from the ladder would likely have resulted in serious injury or death.

26.4 On 10 June 2019, one of the protestors on board the Rig, in the process of fixing a banner to it, walked backwards on the platform and almost fell through the opening for the vertical emergency escape ladder. A crew member on board the Rig shouted to her to watch where she was going. She was not hooked up to anything at that time. She would have fallen a distance of over 80 feet to the ponton below, almost certainly resulting in a fatality.

26.5 On 10 June 2019, one of the first defender's FRCs was also tied to the number 8 anchor chain chasing collar on the Rig. If the collar, which is not fixed (it is held in place with its own weight and can move gravitationally), had slipped, then the FRC could have capsized or been pulled under the water towards the anchor.

26.6 On 14 June 2019 activists were logged going up and down one of the emergency escape ladders carrying heavy equipment and struggling to climb it. They were trying to access the safe access platform. These individuals appeared to be less trained than the two activists who were on the Rig before them.

26.7 The first defender also used a drone around the Rig to obtain footage to promote its campaign. The drone interfered with helicopters accessing the Rig and required some rig crew changes to take place by personnel crane transfers.

26.8 Safety concerns when the Rig was under tow. In the repeated attempts to board the Rig on 16 June 2019 one of the FRCs was so close it almost touched the pontoon. As a result, there was a risk of the FRC getting caught in the bolstered framework of the pontoon.

26.9 The Rig was being towed at an increased speed in order to try and prevent the activists from boarding. The Arctic Sunrise engaged in various manoeuvres. Including cutting across the path of the tow vessel and support vessel (Havila Venus) in order to get to the intended rig location before it and causing Havila Venus, and with it the Rig, to the change its course.

26.10 Various attempts were made to board the Rig on 16 June 2019 while it was under tow. The activists were only unable to do so because of the swell of the waves around the Rig which created significant danger.

26.11 If the activists had boarded the Rig when under tow, the activists would have had to access the pontoon in order to access the Rig. The pontoon was slippery and had a curved surface. There was nothing on the pontoon that the protestors could safely hold onto in order to assist them with climbing onto it.

27. The pursuer would also note that it was an inevitable result of the first defender's actions that third parties, such as the police, would become

> involved in trying to remove the activists from the Rig, thereby exposing themselves and the activists to danger. "

These observations prompted Greenpeace to lodge a second affidavit from John Sauven responding to the matters in paragraph 21.1 to 26.11 (but not to para 27).

[35] Mr Barne also noted that third parties, such as the police, would inevitably become involved in trying to remove Greenpeace's activists from the Rig. Transocean drew attention to the sentencing remarks of the Sheriff at Tain Sheriff Court, deprecating the diversion of the RNLI and Coastguard away from possible legitimate emergencies elsewhere. Finally, Transocean noted that the Port Authority staff, the coastguard, the RNLI lifeboat and a helicopter were all placed on standby in case of an emergency rescue, all at considerable cost. It had been reported that the estimated costs for the Rig operators were about £120,000 per day and the police operations costs totalled £140,000. The cost to BP was unknown.

[36] Mr Barne concluded his submissions by noting that there are admitted breaches of the Order. There is no basis on which the Court might conclude that Greenpeace did not act in contempt of Court. It would be both legitimate and proportionate for the Court to punish Greenpeace for their contempt. The Court has a wide margin of appreciation in relation to the nature of punishment. In particular, the decision to board and then re-board the Rig, and thereafter pursue it in the sea, was reckless, potentially endangering lives and diverting resources. Transocean submitted that these acts do not enjoy the same privileged position as peaceful protests do under Articles 10 and 11 of the Convention.

[37] Quite correctly, Mr Barne made clear that Transocean were not making any submission on the nature of any penalty to be imposed on Greenpeace. Indeed, it would be incompetent for them to do so (see *Forbes v Forbes* 1993 SC 271 at 275). The question of sanction is a matter entirely for the Court.

Greenpeace's submissions

The scope of Greenpeace's admissions of breach of the Order

[38] Greenpeace accept that by lunchtime on 11 June 2019 they were aware of the Order. They also accept that the terms of the Order were thereafter breached on two occasions, namely:

(i) when two activists boarded the rig on 14 June 2019, staying until that evening when they were removed; and

(ii) when, on 16 June 2019, FRCs encroached for a time within the 500m exclusion zone around the Rig in the interdict.

[39] Greenpeace made additional observations in relation to the second allegation:

> "[Greenpeace deny] that FRCs encroached within that zone on 19 June 2019 as averred by the Minuter. At §7 of its Note of Argument dated 18 February 2020, the pursuer and minuter explains that it does not insist on the averments made in the Minute about encroachment within the 500-metre zone on 19 June 2019.
>
> 13. As Mr Sauven explains in his affidavit at §§54 & 56 **[No. 21]**, the Artic Sunrise is chartered, operated and controlled by Greenpeace International. At §§58-59, Mr Sauven explains the first defender's plan. At §60, Mr Sauven explains how the protest then changed:-
>
> > 'Once the Artic Sunrise came available the protest continued at sea. The Artic Sunrise did follow the rig, which was travelling under tow very slowly but at a safe distance. Swimmers entered the water and displayed banners. This is a method of protest frequently and safely used by Greenpeace at sea. Everyone involved is trained and knows how to do this safely. I was not in direct operational control of this stage of protest. While FRCs approached the Rig, for safety reasons it was decided not to put down any protestors on the rig. Indeed, at no point when climbers were on the rig was the rig moving, and at no point did climbers climb or try to climb a moving rig'.
>
> Mr Sauven accepted the assistance offered by the Arctic Sunrise, but had no operational control beyond that point. He also called a halt to the action on 20 June 2019 'because it was clear that we had succeeded in drawing attention to BPs activities and because of that I considered continuing the action would be disproportionate' (§64). That being the case, this underlines the true motivation of the first defender in these actions: highlighting the approach of a company, BP, whose focus is the increased exploitation of fossil fuels at a time when the UK

> government has signed up to international obligations to try to limit the extent and impact of global warming and climate change. Once the point had been made, the first defender removed itself and the protest came to an end. The actions of the first defender were taken in accordance with deeply held and widely shared social and political views about the environment in which we live."

Greenpeace's position on the issue of mens rea

[40] Greenpeace 's position is that they did not seek to confront the Court's authority, but rather to complete a peaceful protest that they regarded as vitally important in drawing public attention to the present climate emergency and the need for BP and similar companies to change course. Greenpeace leave it for the Court to determine whether the facts, as admitted and explained, are sufficient to prove beyond reasonable doubt that Greenpeace have displayed the requisite *mens rea* for the offence of contempt of court. The circumstances Greenpeace invite the Court to consider are set out in their written submissions. Paragraphs 9 to 11 of Greenpeace's submissions, which prompted Mr Barne's concern about the equivocation on Greenpeace's part on *mens rea*, are set out above (at para [26]) in full. In those passages Mr Mure drew a distinction between Greenpeace and the acts of individuals (such as Andrew McParland), who volunteer "on their own behalf as a responsible individual" (stated at paragraph 5 of his affidavit and relied on by Greenpeace at paragraph 9.1 of their written submission), whom Greenpeace submit (at paragraph 10 of their submission) are "there only in a personal capacity, making [their] own choices about the matter".

Matters Greenpeace invoke relevant to mitigation

[41] As set out in their answers, which are very full, and as augmented in submissions, Greenpeace rely on the following factors going to mitigation:

1) Greenpeace engaged in peaceful, safe and proportionate protest.

2) Greenpeace had engaged in this protest (i) to draw the public's attention to BP's proposed exploitation of the new oil field, and (ii) to seek to prevent Transocean and BP from causing more climate change by reason of their extraction from that field. There are extensive averments about climate change, the contribution of burning fossil fuels to climate change, the scientific evidence concerning the same, and the concern that its changes will soon be irreversible. There are further averments about the contribution of BP's activities to climate change and an asserted lack of justification for BP's activities.

3) In relation to the motivation of Greenpeace and the individual activists, Greenpeace genuinely believe there to be an imminent climate emergency (see paragraphs 18 of John Sauven's affidavit) and the affidavits of Dr Parr (especially at paragraphs 38-52) and Professor Anderson. Greenpeace's work is supported by detailed research, expertise and scientific understanding (many of the productions related to this aspect of Greenpeace's position). Reference was also made to: (i) the Paris Agreement, containing international obligations on the signatory states to reduce the consumption of fossil fuels, (ii) the Intergovernmental Panel on Climate Change ("the IPCC") IPCC report, "Summary for Policymakers" (2018), which set out the impacts of global warming of 1.5 degrees Celsius above pre-industrial levels and related global greenhouse gas emission pathways, (iii) the recent declarations of a climate change emergency by the Scottish Government (on 28 April 2019) and the UK Parliament (on 1 May 2019), and (iv) the statement in the BP Group Chief Executive's introduction to BP's Statistical Review of World Energy (June 2019) that "there

seems little doubt that the current pace of progress is inconsistent with the Paris climate goals. The world is on an unsustainable path…"

From these materials, Greenpeace conclude that a climate emergency now exists.

4) In Greenpeace's view, the involvement in these protests by Greenpeace and the individual activists was necessitated by the requirement for immediate action to be taken to prevent, slow and reduce the effect of climate change caused *inter alia* by the use of fossil fuels. The estimated yield of the Vorlich field (once brought into production) was 30 million barrels of oil. But for the climate emergency, there is no suggestion that any of those individuals would have felt it necessary to take the action that was taken.

5) Greenpeace's methods include, but are not limited to, direct action and which is taken only as a last resort.

6) These direct actions are non-violent and conducted in accordance with the Quaker principle of "bearing witness to morally objectionable acts and it has at its heart a belief in individual responsibility and testimony".

7) Greenpeace stressed the training and planning they provided to address safety issues in any direct action. Rachel Murry provided the fullest description of the training Greenpeace provide to their activists.

8) In relation to the first incident, it is averred that "those involved in the protest boarded and left the Rig only while it was stationary". In relation to the second incident, it is averred that "having approached within 500 metres of the Rig on 16 June 2019, the two FRCs called off their protest because of safety concerns. This was consistent with the parameters for the conduct of the protest that it would be peaceful, proportionate and safe, and that any action that might be

unsafe would be halted". At a late passage in Answer 8, Greenpeace aver that "at all times the Arctic Sunrise kept a safe distance away from the Rig and the vessel towing it."

9) Greenpeace are funded entirely through individual donations.

10) Greenpeace also emphasise how, "throughout any action involving" Greenpeace, the relevant authorities were kept informed and safety measures are taken in order to reduce risk. This was spoken to by Frank Hewetson. Greenpeace explain that the individuals involved do not cause wanton damage. They do not seek to disrupt simply in order to cause inconvenience and nuisance. They were taking action – as is their protected right – to protest against a global corporate entity which is seeking, contrary to the United Kingdom's international obligations, to *increase* the output of climate-change-causing fossil fuels during the climate emergency which has been recognized by both the Scottish Government and the House of Commons (see Dr Parr's affidavit at paras 29-52).

11) The individual protestors who had been arrested were charged with breach of the peace; the libel was amended (by insertion of the word "potential") to read "place yourselves and others in potential danger". The arrested protestors pled guilty to that amended libel and had been given non-custodial sentences.

12) Greenpeace admit the BBC's report of John Sauven's remarks. Greenpeace also admitted the content of the social media quoted in the minute (more social media posts were produced by Transocean and referred to in submissions at the Hearing). The admission was made by Greenpeace's Senior Counsel in the course of his submissions at the Hearing.

13) In relation to timing, Greenpeace emphasise the urgency (as they saw it). They explain that as originally planned the action was against a stationary rig in the Cromarty Firth before the Rig began to be towed out of harbour. Once the Rig was in place, the effect of any action to prevent the mining of those millions of barrels of oil would be significantly reduced. Greenpeace understood that the Rig would shortly be leaving port and action was therefore required, Greenpeace assert, to avoid imminent and serious damage to the world's climate.

The role of the Convention Rights

[42] Mr Mure also addressed the role of Convention Rights. Mr Mure submitted that Articles 10 and 11 are engaged, including at the stage of considering sanctions imposed for any breach of the Order, and may only be justified if the restriction (in the form of the sanction) "…satisfied the requirements of Articles 10.2 and 11.2" of the Convention (*per* Leggatt LJ in *Cuadrilla* at paragraph 45).

[43] In relation to the role of the Convention Rights, Mr Mure began by noting that this Court is required to have regard to Greenpeace's Convention Rights (see section 6(1) of the Human Rights Act 1998). Articles 10 and 11 of the Convention protect the rights of freedom of expression and of peaceful assembly and association with others, respectively. Article 10 and 11 rights are closely linked to related concerns such as the protection of religious and philosophical convictions. Any infringement of either Article 10 or Article 11 rights must (i) be prescribed by law, (ii) pursue a legitimate aim as envisaged by Articles 10.2 and 11.2 respectively, and (iii) be necessary in a democratic society. Mr Mure noted that the European Court of Human Rights had issued Guidance on Article 11 on 31st December 2019. Guidelines were also issued in July 2019 jointly by the European Commission for Democracy

Through Law (the Venice Commission) and the Organisation for Security and Co-operation in Europe's Office for Democratic Institutions and Human Rights (OSCE/ODIHR).

[44] Assessing whether any infringement was necessary for these purposes requires consideration of the specific circumstances before the Court. Mr Mure submitted that the questions that arise for the Court may be summarised as follows:-

1) Is what Greenpeace did in exercise of the rights protected under Articles 10 and 11? Mr Mure submitted that in this case, the answer is yes.

2) If so, is there an interference by a public authority with those rights? Again, as the case of *Cuadrilla* shows, the answer is yes: the Order and any penalty imposed by this Court constitute interferences with those rights.

3) Is any such interference "prescribed by law"? Greenpeace accept that once an *interim* interdict has been served, it was sufficiently clear that if the Court's order was breached, there might be proceedings for breach and those proceedings might involve the imposition of a penalty – the nature and scope of which is laid down by the Contempt of Court Act 1981.

4) Is the interference that a penalty would constitute in pursuit of a legitimate aim under paragraph 2 of each of Articles 10 and 11? Greenpeace accept that, in principle, a penalty could fall within one or other of these aims.

5) Is the interference necessary in a democratic society to achieve a legitimate aim? It is to this question, essentially one of proportionality, that Greenpeace principally directed their submissions. Of particular importance is whether a fair balance is struck between the rights of Greenpeace and the general interest of the community, including the rights of others.

[45] Turning to consider the scope of what the Convention Rights protect, Mr Mure submitted that freedom of assembly under Article 11 protects demonstrations which may annoy or cause offence and any measures taken which interfere with freedom of assembly do a disservice to democracy, and may even undermine or endanger it: *Kudrevicius* at paragraph 145; *Stankov v Bulgaria* (app no 29221/95, at paragraph 95). Under reference to *Christian Democratic People's Party* v *Moldova* ((app no 28793/02) (2007) 45 RHHR 13, at paragraph 77) and *Balcik* v *Turkey (*(app no 25/02), at paragraph 41), Mr Mure submitted that the Court must have regard to the chilling effect that any restrictive measures would have and this includes any post-fact enforcement measures such as penalties which may have the effect of discouraging people from participating in future assemblies. The authorities from the Strasbourg court require this Court to have regard to the nature and severity of any penalties which may be considered. In particular, there must be a balancing assessment of the proportionality of an interference with the participants' Convention rights in relation to the aim that such interference pursues (*Kudrevicius* at paragraph 146). Further, where sanctions imposed on participants in a demonstration are criminal in nature, they require particular justification (*Rae and Evans* v *UK* (app no 2655/07). Greenpeace submit that, for the purposes of the contempt of court Hearing, the exercise of a Convention right must be considered as a relevant factor when determining whether (and which) penalty should be imposed (*Cuadrilla* at paragraph 100).

Greenpeace's perception of urgency

[46] One of the themes covered in the affidavits from Greenpeace's scientific advisers was the urgency of climate change, and Greenpeace's assessment of the need to block any increase in capacity of oil output (one of the consequences they identify as flowing from the

installation of the Rig at the Vorlich field). It is in this context that Mr Mure made his submission that the right to protest, in time-critical circumstances, against the actions of a company dedicated to *increasing* the availability and use of climate change causing substances notwithstanding international obligations to *reduce* such use, is a fundamental right, protected by the Convention (Mr Mure's emphasis). It is a time-tested method of raising awareness of a political or philosophical belief and the freedom to do so is fundamental in a democratic society. Mr Mure emphasised that in the circumstances of the present case, these rights were not exercised in order to show a lack of respect for this Court. That was not the intention of Greenpeace or the volunteers, and he noted Andrew McParland's regret (at paragraph 18 of his affidavit) that his actions brought him into conflict with the courts. These rights were exercised for one purpose only: to bring to the public's attention the damage being caused to the global climate (and thereby to people around the world) by the actions of BP and Transocean. Greenpeace, like the individual activists, takes action in accordance with the conscientious philosophy explained by John Sauven (at paragraph 5 in his affidavit), where he stated:

> "Greenpeace was created in 1970 and adopted many of the principles of its Quaker founders who adopted a form of campaigning based on the principle of 'bearing witness' which includes a refusal to look away from morally objectionable acts and emphasizes instead taking peaceful action to confront, highlight and expose wrongdoing."

[47] Mr Mure emphasised that Greenpeace are committed to peaceful protest, and he submitted that at no point were the actions complained of in the minute anything other than peaceful expressions of a deeply-held view. Further, the actions of Greenpeace merely *delayed* the ability of Transocean to begin the process of drilling the wells. Once Greenpeace and the activists had made their point and it became known that there was a possibility of a

judicial review of the permit on which BP was relying to commence the extraction, the actions were halted and the demonstration came to an end.

[48] Mr Mure submitted that in light of the mitigating factors which explain the actions taken by Greenpeace and the individual activists, and the extent to which those actions were tempered so as to be proportionate and go no further than was necessary in the circumstances of a climate emergency, any penalty should be at the most lenient end of the Court's spectrum.

The case-law illustrating proportionality

[49] Turning to the case-law, Mr Mure noted that these issues had recently been considered by the Court of Appeal in *Cuadrilla.* In that case (and which Greenpeace submits is unlike the present case), the court was dealing with acts of civil disobedience which constituted a criminal offence or contempt of a court order which was so serious that they crossed the "custody threshold" (see paragraph 99). Even in those circumstances, the court explained that the fact that acts of deliberate disobedience to the law were committed as part of a peaceful protest is a relevant factor in assessing culpability for the purpose of sentencing: see e.g. Leggatt LJ (at paragraphs 87-88), citing Lord Hoffmann in *R* v *Jones (Margaret*) [2007] 1 AC 136 (at paragraph 89) and citing Lord Burnett of Maldon CJ in *R* v *Roberts (Richard)* [2019] 1 WLR 2577 (at paragraph 34) noting that "the value of the right to freedom of expression finds its voice in the approach to sentencing". Leggatt LJ noted in *Cuadrilla* that where protesters engaged in "deliberately disruptive but non-violent forms of direct action protest for conscientious reasons", the courts were frequently reluctant to make orders for immediate imprisonment. He also explained (at paras 97 to 99) why it was appropriate to show greater clemency in cases of civil disobedience. Since the penalties

imposed in such cases constitute restrictions imposed on the protesters' exercise and enjoyment of their Convention rights, they must qualify as proportionate in terms of the test laid down by sub-paragraph (2) in each of Articles 10 and 11: see Leggatt LJ at paragraph 100 of *Cuadrilla*.

[50] Mr Mure also referred to the decisions of courts in the Netherlands, France and Switzerland as illustrative of the court's assessment of proportionality, including in particular on environmental issues, on the basis of deeply and genuinely held views. By way of recent examples, and not as authorities binding upon this Court, the first defender refers to the following decisions: *Shell Netherlands* v *Greenpeace International and Greenpeace Netherlands* (Judgment 5 October 2012 with certified translation from Dutch) especially at paragraphs 5.1-5.18; *Ruling* of Amsterdam District Court against Jukka Paavo Huhta, 2 May 2019 especially sections 6 and 8; *The State of the Netherlands* v *Stichting Urgenda* (Supreme Court of the Netherlands, Civil Division, 20 December 2019); *State* v *Delahalle and Goinvic* 16 September 2019.

Greenpeace assert their actions were proportionate having regard to the climate emergency

[51] Mr Mure explained that it was Greenpeace's deeply felt view that the issue of climate change is one of such existential importance that society as a whole is now recognising the need for everyone to change their behaviour. Mr Mure accepted that it is not for this Court to express a view on the correctness or otherwise of the views expressed about the role played by BP and Transocean. He stressed that where governments and parliaments recognised that there is a climate emergency and where citizens are engaged in a dialogue with their representatives and industry about the urgent need for action, it is submitted that

Greenpeace's involvement in this direct action was necessary and proportionate. It is a matter of regret to Greenpeace that their actions have brought it before this Court.

[52] If in the Court's judgment the charge of contempt of court is made out Greenpeace invite the Court to take account of the mitigating factors relied on, when considering what penalty, if any, to impose on Greenpeace. (I have set these out, at para [41], above.)

Discussion

The two allegations

[53] I proceed on the basis of Greenpeace's admission of the essentials of the first allegation and their more limited admission of the second allegation (confined to the contravention of the 500 metre exclusion zone on 16 June 2019). I have had regard to the wider context in which Greenpeace seek to place their conduct. Much of this context goes to mitigation, and I will address this to the extent it is necessary to do so under that heading, below. Of the two allegations, the first allegation, concerning the boarding and occupation of the Rig on 14 June, was by far the more serious and prolonged breach of the Order. For all of Greenpeace's insistence on their safety training and planning, I accept Mr Barne's submission that the unauthorised boarding of the Rig, even if stationary, took place in the context of a hostile or unpredictable marine environment in which the potential for danger is inherent. One need only note Mr Barne's explanation of the danger of an 80-foot fall by one of the climbers being averted (in paragraph 26.4 of Transocean's submissions, quoted at para [34], above), to acknowledge the force of this. While in his second affidavit, John Sauven responds to each of Transocean's safety concerns, and in response to this episode noted that the climber was clipped onto the Rig, the very *necessity* for harnesses, clips,

training and pre-boarding surveillance underscores that the actions of the activists involved the assumption of risks. There are also the additional potential risks posed to those who may have to respond, whether that is the police, the RNLI or any helicopter pilots who might require to approach the Rig in order to remove occupying activists. I find that this admitted conduct constituted a deliberate and prolonged breach of the Order and which, in my view, is culpable to a very high degree. Greenpeace also admit that the Order was breached, albeit briefly, by an FRC launched from the Arctic Sunrise on 16 June 2019. In relation to the second allegation, it is no answer to assert that the Arctic Sunrise did not breach the 500-metre exclusion zone. Of the two allegations, this is much less serious in terms of the risks posed, the impact on Transocean and those towing the Rig; and it was of materially shorter duration than the first allegation, which involved the occupation of the Rig on 14 June 2019 for some hours. Greenpeace do not suggest that this second breach was accidental; after all, the intention was to land an activist on the Rig while under tow. Nonetheless, the second allegation is of a significantly lower magnitude of culpability than the first allegation.

The test for contempt of court by corporate bodies

Contempt of court generally

[54] Parties cited a number of cases to vouch certain propositions: namely, that contempt of court is an offence *sui generis* but with characteristics that in many cases make it quasi-criminal in nature: *CM* v *SM* 2017 SC 235 (Ex Div) (at paragraph 43 *per* Lord Glennie delivering the Opinion of the Court). The characterisation of the proceedings as quasi-criminal echoes Lord President Inglis' language in *Christie Miller* v *Bain* (1879) 6 R 1215 at 1216. However it is characterised, a contempt of court must be proved to the criminal

standard, namely beyond reasonable doubt: *Gribben* v *Gribben* 1976 SLT 266 (at page 269 *per* Lord President Emslie). In respect of a contempt of court flowing from breach of interdict, the *mens rea* of the offence requires proof beyond reasonable doubt that the failure to comply with the court's order was one of wilful disobedience: *CM v SM*, *cit supra*, at paragraph 44; *Panel on Takeovers and Mergers v King* 2018 SLT 1205 (at paragraph 60). It is conduct that is "wilful and [shows] a lack of respect or disregard for the court" (*Beggs* at para 30). Conduct which is accidental or unintentional will not be a contempt of court (*ibid*).

[55] Contempt of court may take many forms: directly, in the face of the Court, or indirectly, by conduct which impedes the course of justice. It is sometimes said that the Court's inherent power to punish a contempt of court is to protect the "dignity" of the Court. While that language may be apt in relation to the orderly conduct of proceedings in Court, it has the potential to mask the more fundamental purpose for which the Court exercises this inherent jurisdiction; namely, "to take effective action to vindicate [the Court's] authority and preserve the due and impartial administration of justice" (*per* Lord President Emslie, *HM Advocate* v *Airs* 1975 JC64 at 69). This echoes the language of an earlier Lord President, Lord Clyde, in *Johnson* v *Grant* 1923 SC 789 (at 790). He began by observing that the phrase "'contempt of court' does not in the least describe the true nature of the class of offence with which we are concerned" and he deprecated that the use of the phrase might encourage the idea "that all that has to be done by a person who has, however deliberately, committed this class of offence, and then wishes to avoid the consequences of his conduct, has to present an apology, as for an offence against the dignity of the Court. " He continued: "It is not the dignity of the Court which is offended ….it is the fundamental supremacy of the law which

is challenged" (emphasis added). In short, the fundamental purpose for which the Court punishes a contempt of court is to uphold the rule of law.

Contempt of court by corporate persons

[56] In this case the question of contempt of court arises from breach of a court order by a corporate person and in respect of which there is a dearth of authority. In the case of *Beggs* the question of contempt arose in the context of a breach of an undertaking, not a court order. However, after a review of modern English authority, the Inner House took the opportunity to provide guidance on the law of contempt of court generally, as applied to corporate bodies. Its conclusion (at paragraph 39) was in the following terms:

> "We consider that it is no reason why a similar approach should not be valid in Scotland where a servant or agent of a company unknowingly does the act which is prohibited by a court order which has been served on the company or by an undertaking which has been given by the company to the court. The company would have a duty to take all reasonable steps to ensure that the relevant servants or agents were made aware of the requirement to comply with the order or undertaking and did not forget, misunderstand or overlook the requirement. Where the order or undertaking has been breached as a result of a failure in that duty, the company should be held to have committed a contempt of court. This is only reasonable if the court order or undertaking is to be effective in maintaining the rule of law. We should add that the failure to comply with the order or undertaking should be treated *prima facie* as indicative of contempt. It is only right that it should be for the company to satisfy the court that it took all reasonable steps to ensure that the order or undertaking was complied with." (Emphasis added.)

Although *Beggs* was not contained in Greenpeace's bundle of authorities, I did not understand Mr Mure to demur from the observations in that case or to suggest that they did not fall to be applied in this case.

[57] The context of those remarks is, of course, the court's articulation of a framework in which the responsibility for acts and omissions of individuals does not rest with them but which may be attributable to a corporate body. In *Beggs*, compliance with the undertaking

required a departure from the practice of routinely opening up all mail received by prisoners. However, no system or mechanism was put in place to ensure an exception was made in respect of letters from Mr Beggs' legal advisers. Those responsible for opening the mail were not aware of the undertaking. (That is a significant difference with the individuals in this case.) In the circumstances of *Beggs*, there was no prospect of establishing wilful disobedience on the part of the individuals who handled Mr Beggs' mail and who had no knowledge of the undertaking. However, corporate entities who grant undertakings (or, as in this case, who are subject to Court orders), cannot elide liability by reason of a want of the requisite *mens rea* on the part of the individual whose conduct (in *Beggs*, of opening letters from Mr Beggs' lawyers) constitutes the breach. In those circumstances, it is natural that the Court in *Beggs* articulated a rule, namely, the requirement for the corporate body to "satisfy the court that it took all reasonable steps to ensure that the order or undertaking was complied with" within its organisation and by those over whom it exercises control, and to infer *mens rea* from a failure to comply with that rule. I do not understand the observations in *Beggs* to displace the wilful disobedience test, where that might be demonstrated in respect of a corporate entity.

Application of the tests for contempt to the facts of this case

[58] Applying the observations in *Beggs* to this case, the starting point is to note that a breach of the Order is indicative of contempt and has the effect of shifting the onus to the alleged contemnor to demonstrate that it took all reasonable steps to ensure that the Order was obeyed. In none of the affidavits or other materials placed before the Court on behalf of Greenpeace was there any suggestion that Greenpeace did anything that could be construed as taking *any* steps to ensure compliance, much less "all reasonable steps". In response to a

question from the Court, Greenpeace's Senior Counsel acknowledged that it was no part of Greenpeace's response to the allegations to seek to demonstrate that they took any steps to comply with the Order. On that approach, there is no doubt that Greenpeace had the requisite *mens rea*, subject to the question (considered below) of whether they are answerable for the conduct of individual activists. Even if the test of wilful disobedience is applied, there was no suggestion (save possibly in respect of the second allegation) that the admitted breaches were only accidentally or unintentionally committed (ie such as might displace the inference of "wilful disobedience"). On the application of either of these tests for contempt the requisite *mens rea* may readily be inferred. I turn next to consider whether Greenpeace are answerable in proceedings for contempt of court for the action of the activists.

Are Greenpeace answerable in proceedings for contempt of court for the actions of the activists?

[59] Greenpeace admit the breaches of interdict. They do not suggest that those breaches may not be characterised as contempt of court. However, they do not concede that they had the requisite *mens rea*. This is the dissonance Mr Barne noted between an admission by Greenpeace's Executive Director, John Sauven ("I take full responsibility for the peaceful action carried out ... ") and statements Greenpeace relied on in meeting the allegations of contempt, to the effect that volunteers made their own decision of whether or not to board the Rig (See the passages in italics quoted in paras [17] and [26], above.) As I understand Greenpeace's position, they emphasise the observations in Andrew McParland's affidavit to the effect that he was acting solely in a personal capacity. It is for that reason that it will be necessary to set out those parts of the affidavit which reveal Greenpeace's hierarchy of decision-making, and their planning and support in execution of those direct actions. Out of deference to Mr Mure's very full submissions and the volume of materials placed before

me bearing on this question, I note the following features of Greenpeace's internal organisation, the roles and responsibilities of members of their senior management team, their decisions relating to the planning and provisioning of the action, and the support Greenpeace provided to individual activists to enable them to carry out approved direct actions.

The senior management team within Greenpeace and its planning for and approval of the protest on the Rig

Greenpeace's Executive Director

[60] John Sauven is the Executive Director of Greenpeace, having held that role since 2007. Prior to that he had been responsible for Greenpeace Communications. He has been employed by Greenpeace for nearly 30 years. I have already noted the admission at the start of his affidavit. After recording his views of BP's attitude to climate change, its "refusal to transform its strategies" and its decision to apply to drill for oil in the mouth of the Amazon, he stated "[t]hat is why I and Greenpeace then took direct action …" (at paragraph 15) and, further (at paragraph 17):

> "the plan I authorized was the placing of two experienced climbers on a ladder firmly attached to the leg of [the Rig] … with the intention that they should climb the rig and hang a banner. I believe the plan was safe and proportionate and I relied on experienced Greenpeace volunteers to carry it out safely as they do and are trained to do. While others who were present at the scene had operational control I was responsible for strategic decisions. I called the action off once it was clear that the point of the protest had been made." (Emphasis added.)

He provides more detail as the basis for his decision to call off the action (at paragraph 64):

> "On 20 June 2019 I called the action off. I did so because it was clear that we had succeeded in drawing attention to BP's activities and because of that I considered continuing action would be disproportionate. I was also advised that Greenpeace UK could bring legal proceedings to challenge the lawfulness of BP's drilling permits".

John Sauven referred to having overall responsibility for strategic decisions and others having operational control. I note in the following paragraphs those concerned with the operational side of the action, in descending order of their levels of responsibility or oversight.

Greenpeace's Logistics Director

[61] Rachel Murray is the Logistics Director of Greenpeace, having been in that role for 12 years. For the five years immediately preceding that role, she was a Greenpeace UK Action Coordinator. She is a member of the senior management team and has overall responsibility for the "Action Team which designs, develops and delivers all the direct action by" Greenpeace. She manages the team

> "responsible for the warehouse which houses and maintains all equipment used in the commissioning and planning of direct action, such as boats, climbing equipment, vehicles and personal protective equipment (PPE)".

She also confirmed that the "Activist Coordinator" and the "Training Coordinator" report to her. She states that working with those coordinators "we highlight any specific needs and we design comprehensive activist training plans".

[62] In relation to "Action Planning" she confirmed that a direct action is preceded by "meticulous planning stages with rigorous checks and balances in place to ensure safety at all levels as well as the appropriateness, impact and effectiveness of any action". She explains the decision-taking as follows (at paragraphs 21-24):

> "21. Senior staff and heads of relevant departments conduct thorough interrogation of all plans before any action is authorised. This includes a full assessment of the mitigation measures in place, specific training required, and the potential impact on the public and those we intend to challenge.

22. Ultimate authorisation is given by the Executive Director, Action Coordinators present at the direct action have responsibility for the operational safety on the ground.

23. The Action Coordinator in charge at any direct action has the authority to decide that the action should be stopped on the grounds of safety…."

The Action Coordinator

[63] Frank Hewetson has been an Action Coordinator for Greenpeace for 21 years and has been employed by Greenpeace for 30 years. He specialises in "off-shore marine based actions" and his responsibilities include "preparation, planning and research of off-shore activities, the selection and training of activists, the selection of equipment required, and the management of activists included in direct action." He explains the steps he takes to investigate the Rig, its positioning and possible means of Greenpeace climb teams to access it, and the communications between the Rig and its support vessels. He confirmed that the teams involved in the action on the Rig (the climb teams) were given "precise briefings with detailed plans and photographs of the site, the Rig, and the vessels involved" (paragraph 18).

[64] He explained how the first climb team was landed on the Rig on the evening of 9 June and that thereafter "[r]egular changeovers of climb team and boat team personnel was also carried out to ensure safety and welfare of the activists involved" (at paragraph 26).

The Boat team

[65] Others associated with Greenpeace had operational control on the ground (or at sea, as it were). Two members of the Boat Team provided affidavits, namely Leanne Kitchin and Darryn Payne. Both had been members of the Boat Team since 2015 and both were involved

in that capacity on the RIBs used to land climbers on the Rig, including the climbers who accessed the Rig on 14 June 2019 (ie 3 days after Greenpeace were aware of the Order). Their affidavits, which were in substantially the same terms, confirmed that Frank Hewetson was the Action Coordinator who briefed the activists on the evening of 13 June and that thereafter Hannah Davey took over as the Action Coordinator

The climbers

[66] It should be noted that Greenpeace accept that they had notice of the Order by about 1:15 pm on 11 June 2019. By that point in time, Greenpeace protesters had been in occupation of the Rig since 9 June 2019. On 13 June the police removed the team then in occupation of the Rig. On 14 June a new climbing team comprised of two individuals boarded the Rig, one of whom was Andrew McParland.

[67] Andrew McParland is a Greenpeace volunteer and has been a member of the Board of Directors of Greenpeace for eight years, and is Chair of the Board of Directors. His work in that capacity is unpaid. He states that he sees his "actions as an activist separately to my position as a member of the Board. I decided to join the action as an individual on the basis of my individual beliefs and motivations".

Matters confirmed in Greenpeace's submissions relative to their support for the action

[68] In the course of his submissions, Senior Counsel for Greenpeace confirmed the following additional matters of fact:

1) The two allegations are admitted. It was clarified that John Sauven was *de facto* not a *de jure* director of Greenpeace. John Sauven authorised the action which Rachel Murray, as logistics director of Greenpeace, had planned, promoted and

discussed with him. It was part of this plan to have 4 or 5 members of the Boat Team deployed to assist. John Sauven was also aware of the extensive preparation carried out by Frank Hewetson. Notwithstanding passages in the affidavits that indicated that operational control resided with others, John Sauven accepted that those involved at an operational level were undertaking those roles with the permission and consent of Greenpeace. It was stressed that John Sauven did not abdicate his responsibility for the action; he was an Executive Director of Greenpeace.

2) At least two of Greenpeace's FRCs (or RIBs) were transported by land from London to the Cromarty Firth. This was done with the knowledge and consent of the Greenpeace senior management team, as this was part of the action plan that had been proposed and approved. The vans used for transport were either owned or rented by Greenpeace. While neither of the Boat Team coordinators was employed by Greenpeace, they had the use of the RIBs for the purposes of this action with the prior knowledge and consent of Greenpeace.

3) It was accepted that members of the climbing team would not have been able to board the Rig, as for example Andrew McParland did, but for the planning and resources provided by Greenpeace for that purpose. It was also accepted that Greenpeace essentially facilitated the whole action, which could not have been undertaken without Greenpeace's active planning and support, and the provision of their financial and other resources.

4) In relation to Andrew McParland, Senior Counsel confirmed that Andrew McParland was aware of the Order but chose to act inconsistently with it. He was aware of the Order, and evinced the requisite intention to breach it.

5) In relation to the Arctic Sunrise (which was involved in the second allegation), Greenpeace International ("GPI") offered the use of this vessel to Greenpeace, which Greenpeace accepted. On 10 June 2019 GPI became aware of Greenpeace's action in the Cromarty Firth. On that date the Arctic Sunrise was off the North coast of Spain and it proceeded from there to the Cromarty Firth, arriving in the general area on 15 June. By this point, the Rig was at sea. GPI is not remunerated for the provision of the Arctic Sunrise to Greenpeace. GPI coordinates with local Greenpeace companies, such as Greenpeace, in the local action in which the Arctic Sunrise will be deployed. John Sauven and Rachel Murray were both aware of the Arctic Sunrise's deployment to the North Sea to assist in the action. There were calls on at least a daily basis between John Sauven and the captain of the Arctic Sunrise. The captain of the Arctic Sunrise retained operational control.
6) It was expressly confirmed that if John Sauven had indicated at any point that the action should cease, it would have ceased, as in fact occurred on 20 June. He did not 'authorise' the breaches of interdict but he accepted he had overall responsibility and could have ended the action at any point.
7) Volunteers for Greenpeace may claim expenses, travel, accommodation and subsistence which Greenpeace will pay.
8) Mr Mure stated that he did not take any issue with the attribution of knowledge to Greenpeace of those acting on its behalf or in its name in carrying out the action.

Conclusion whether Greenpeace are answerable for the conduct of the activists

[69] On the information placed before me regarding the planning, provisioning and execution of this action, I have no hesitation in concluding that on the particular facts of this case, Greenpeace are answerable in this Court for contempt of court arising from the breaches of the Order by the activists.

[70] Greenpeace's most senior personnel were involved at all stages, from planning and approval, through to the execution of the direct action to board the Rig (the first allegation) and otherwise to delay its progress (both allegations). Without Greenpeace's active support and resources none of those who boarded or approached the Rig would have been in a position to do so. Furthermore, it is no answer, in this case, to seek to decouple the final act of the individual activists from the chain of events, entirely facilitated by Greenpeace, which brought those individual activists to the foot of the ladder of the Rig (the first allegation) or on board the FRCs that launched from the Arctic Sunrise on 16 June 2019 (the second allegation).

[71] While Andrew McParland purports to take sole responsibility for the first allegation, he was acting with the full knowledge, consent and support of Greenpeace, and in furtherance of their own objectives. In my view, Greenpeace's knowledge and the active and *essential* support they provided preclude their argument that the final decision of the individual activist breaks the chain of events Greenpeace set in train or relieves them of ultimate responsibility. In my view, the comprehensiveness of the support and resources Greenpeace provided to enable the individual activists to engage in the action are such as to render Greenpeace responsible in law for the consequences of the actions of their volunteers and members involved in direct actions which Greenpeace had approved and supported. Nor, in my view, does the retention of operational control (eg by members of the boat team

or those operating the RIBs from Arctic Sunrise on 16 June 2019) relieve Greenpeace of responsibility for their actions which breached the Order. The circumstances in this case are unusual in that what is under consideration are the acts of volunteers, not employees or agents in the conventional sense (and in respect of such actors the doctrine of vicarious liability has been developed). On no view can it be said that the Greenpeace members and volunteers whose conduct breached the Order acted on a 'frolic of their own', or in a manner that was unforeseen, or without the knowledge and consent of Greenpeace. Rather, the converse is true: it is one of the avowed tactics of Greenpeace, in circumstances they deem appropriate, to disrupt, by direct action, the activities of others in furtherance of the causes Greenpeace hold dear. The matters I have set out above (at paras [61] to [69]) demonstrate that Greenpeace applied their experience and resources in a comprehensively planned action, which was carried out with their full knowledge and support by individual activists.

[72] I do not accept that the fact that the division between executive and operational decision–taking, which John Sauven and Greenpeace sought to emphasise for the purposes of deflecting liability from themselves, made any difference. There is no doubt that John Sauven was acting in his capacity as en executive director of Greenpeace. He retained overall control and could have ended the action at any point; most critically, he could have ended the action at the point where its continuation might breach the Order. He did not call off the action until 20 June 2019, and then for his own purposes. It is notable that ensuring compliance with the Court order was not one of the reasons he offered for calling a halt to the action on that date. Having regard to the whole circumstances, I find that the conduct of the volunteers and Greenpeace members whose actions were essentially facilitated by Greenpeace, are to be treated as acts for which Greenpeace are responsible. I have already addressed the issue of *mens rea*. To the extent that it is necessary to infer *mens rea* from the

admitted conduct and its wider context, I have no hesitation in drawing the inference that, through the acts of their activists, Greenpeace had the requisite *mens rea* to breach the Order and that in the whole circumstances I have described that element of the contempt has been established beyond a reasonable doubt. Finally, for completeness I should comment on the social media posts, which Mr Barne relied on as the basis for demonstrating *mens rea* on the part of Greenpeace. While I have fully set out the conduct from which I have inferred the presence of *mens rea* on the part of Greenpeace, it suffices to note that the content of Greenpeace's media posts is consistent with, and supports, the conclusions I have reached on that issue.

Mitigation

Aggravating factors

[73] In the course of his submissions, Mr Barne identified matters that might be regarded as aggravating factors. He noted, for example, that from Greenpeace's public statements at the time, they treated defiance of the Order as a "badge of honour". He made the further point that, by the time the Order was served, Greenpeace had been in occupation of the Rig for around three days, and had already secured the desired publicity. Their point had been made. Greenpeace could therefore have readily complied with the Order and called off the action, but they chose not to do so. I accept the force of this submission.

[74] It is relevant, in my view, to consider the place where the infringing conduct occurred. It should also be noted, in respect of the first allegation at least, that the Cromarty Firth was a not a public space, as Greenpeace asserted in their submissions. The Port Authority had designated an exclusion zone of 500 metres around the Rig. Accordingly, the approach to and occupation of the Rig on 14 June was not comparable to a protest carried

out in public space to which protesters have free access, and which other members of the public may choose to observe or to pass by. At certain points, the actions on the 14 June amounted to an intrusion into a zone from which the public were legitimately excluded on the grounds of safety and once the Rig was boarded on that day, onto private property.

[75] I also note that, apart from John Sauven's expression of regret (which was only made in his second affidavit) that his "decision to continue with the protest… after Greenpeace were served with [the Order]" brought Greenpeace before this Court, there is no hint of an apology made by Greenpeace, either in the affidavits they produced or through their Senior Counsel at the Hearing, for breaching the Orders, or for the disruption caused or the effect of their actions on the emergency services.

[76] It must also be noted that a singular feature of every affidavit from those involved in the planning and execution of the action is the complete absence of any consideration given to complying with the Order or adapting their action to do so. It is significant, in my view, that the recognition of the requirement to comply with the Order was not a factor which appeared ever to inform the decisions of John Sauven or of any other member of Greenpeace's senior management team. As I have already observed, it was not even a factor in his decision to end the occupation; he decided to do so because he felt that Greenpeace's point had been made. The same observation applies to the other affidavits from those directly involved in the action and whose conduct breached the Order. They acted in utter disregard of the Order.

[77] I also have regard to the impact on other agencies, such as the police and the RNLI, as noted by the sheriff in her sentencing remarks. I recognise that her remarks were directed to the whole action concerning the Rig while it was in the Cromarty Firth, whereas the first allegation is concerned with a materially more restricted time-frame. There is also nothing

in the materials produced to suggest that the conduct encompassed within the second allegation had any impact on the emergency services.

Mitigating factors

[78] I have already noted above (at para [41]) the many factors Greenpeace invoke in mitigation. Subject to the following comments, I accept those factors. There is no doubt as to the *bona fides* of Greenpeace's motivations and their stance within an established and honourable tradition of civil disobedience. However, I do not regard the fact that some of the individuals involved in the action pled guilty and were sentenced in any way exculpates Greenpeace. In the first place, it is possible that the same conduct might constitute a crime as well as a contempt of court. Secondly, it is the individuals who must live with the consequences of their convictions and who served their sentences, not Greenpeace. More importantly, the convictions and sentences of some of the individuals engaged at the operational level do not relieve the more senior members in Greenpeace's hierarchy of their overall responsibility for the action. In my view, the converse is true: those members of the senior management team who planned and approved the action, and in whose power it remained at all times to continue or halt it, did so on behalf of Greenpeace and in furtherance of their aims. Greenpeace's insistence on the proportionality of their conduct runs like a *leit motif* through their answers and submissions. That is no more than their subjective understanding. A singularly objectionable feature of their insistence on the proportionality of their conduct is their presumption that they were therefore free to disregard the Order or the lawful exercise of the rights of others. Finally, in relation to Greenpeace's emphasis on training, I refer to my comments above relative to the risks inherent in the environment in

which the action was conducted. The fact that they were willing to assume risks or that on this occasion no physical harm ensued, does not excuse the impact of their actions on others.

[79] In light of these whole circumstances, but subject to consideration of the impact of the Convention Rights, I have no doubt that Greenpeace deserve to be sanctioned for their clear and deliberate breach of the Order. I therefore turn to consider the impact of the Convention Rights on the question of sanction and which corresponds with the fifth question Mr Mure posed (see para [44], above).

The impact of the Convention Rights

[80] I have no hesitation in accepting that Greenpeace's Convention Rights are engaged. They were engaged when the Order was pronounced (and in respect of which no issue arises) and they are also engaged at the stage any sanction is imposed as a consequence of breach of a court order (*per Cuadrilla* at paragraphs 40 to 45). This is because a sanction may also be a restriction on the rights protected by Articles 10.1 and 11.1 of the Convention. I also accept that Greenpeace's motivation and their pursuit of non-violent protest against activities to which they object are important features of the context in which any restriction (by way of sanction) for the purposes of Articles 10.2 and 11.2 is to be considered. In respect of those features, I agree with the observations of Lord Hoffman in *R* v *Jones (Margaret)* ([2006] UKHL 16; [2007] 1 AC 136, at paragraph 89) that "civil obedience on conscientious grounds has a long and honourable history in this country… It is a mark of a civilised community that it can accommodate protests and demonstrations of this kind.

Lord Hoffmann next referred to the conventions generally accepted by law-breakers and law-enforcers, and the proportion and restraint with which each side acts. It is a mark of the importance of those observations that they continue to be cited with approval (see, e.g., *R* v

Roberts (Richard) [2019] EWCA Crim 2739; [2019] 1 WLR 2577 at paragraph 34). While those observations were made in the context of an appeal against a sentence imposed following a criminal conviction, in my view, by a parity of reasoning they also apply to the question of sanction for a contempt of court, as is the context in the present case.

[81] Accordingly, I accept as a very significant factor to be weighed in the balance that Greenpeace engage in civil disobedience in good faith in pursuit of causes they regard as of the utmost importance and urgency. In doing so, I stress that I am expressing no view on the merits of the causes they promote.

[82] In relation to the cases Mr Mure produced as illustrative of the assessment of proportionality in the context of Articles 10 and 11 of the Convention, I did not find these to be of much assistance. First, their facts are dissimilar to those in the present case. The case of *The Shell Netherlands v Greenpeace International* (no 7/13 of process) concerned Shell's successful application to prohibit Greenpeace protestors from organising protests at Shell's petrol stations and offices. While that was only a preliminary judgement, the prohibition was imposed notwithstanding that the court recognised the value of civil disobedience and weighed the proportionality of its order in the context of the protestor's rights under Articles 10 and 11 of the Convention. In *Jukka P.V. Huhta* (no 7/12 of process), the Finnish court discontinued criminal proceedings against an individual who had been charged with a criminal offence for breaching a 500 metre security zone around an oil installation without prior authorisation. In a brief judgement the court considered the rights under Articles 10 and 11 and, after noting that the prosecutor accepted that the actions had not resulted in any specific danger, it discontinued the prosecution. As was noted in that case, each case must be decided on its own facts. The second reason I found these cases of little assistance is that in none of them did the conduct under consideration involve a deliberate breach of a court

order or constitute a contempt of court, which is the critical and distinguishing feature in this case.

[83] In considering what sanction, if any, would be proportionate for the purposes of Articles 10.2 and 11.2, I take into account the nature and duration of the conduct infringing the Order. As I have already observed, I regard the first allegation as materially more serious. I also take into account the steps Greenpeace took to minimise the risks (as they saw them) and the communication they maintained with those in control of the Rig during its occupation.

[84] It is also relevant to consider the nature of the person or entity against whom the protests (whether in exercise of rights of freedom of speech or rights of free assembly) are directed. The Strasbourg Court in *Christian Democratic People's Party* v *Moldova*, *cit supra*, observed (at para 65) that "the limits of permissible criticism are wider" when directed against the state or government. The Court's reasoning was that in "a democratic system the actions or omissions of the Government must be subject to close scrutiny not only of the legislative and judicial authorities but also of the press and public opinion". By implication lesser latitude may be afforded to protests directed against private entities, though much may depend on whether the entity is an individual or a multinational, as well as on the nature and place of that protest. In this case, while Greenpeace take profound objection to the activities of BP (to whom the Rig was to be supplied), BP's activities are lawful. Greenpeace also produced the decision of the Court of Appeal in *R (on the application of Plan B Earth)* v *Secretary of State for Transport and Others* [2020] EWCA Civ 214 , which determined (among other things) that the Secretary of State had erred in not having regard to the Government's own policy commitment to climate change (at para 283) in the context of a planning decision. The court in that case was at pains to note that the Secretary of State was

not obliged to act in accordance with the UK's commitments under the Paris Agreement; the Secretary of State had a duty to have regard to the government's own policies and which included a commitment to the objectives of that agreement. Important though that case is, the case does not vouch the proposition, if this was Greenpeace's purpose in citing it, that Transocean's or BP's activities were unlawful.

[85] The matters spoken to by Professor Anderson and by Doug Parr and the substantial materials produced (eg in the form of the Paris Agreement and the IPCC Report), collectively disclose a significant consensus of scientific opinion about climate change. These matters form part of a wider debate in which Greenpeace are a powerful voice. But it remains the case that Transocean and BP are commercial entities, not governmental or state actors, and they were engaged in lawful conduct which Greenpeace sought to obstruct in the form of their direct action. The case that is most closely analogous on its facts is *Drieman* v *Norway (app no 33678/96)*, 4 May 2000 ("*Drieman*").

[86] In *Drieman*, in protest at Norwegian whaling activities, Greenpeace had used two vessels and several RIBs to harry and obstruct the activities of a whaling vessel over the course of a month. On several occasions the Norwegian coastguard had intervened and forced the RIBs away. The protestors were convicted of obstructing lawful whaling. The protestors applied to the Strasbourg Court, contending that the conduct of the coastguard constituted interferences with their rights under Articles 10 and 11 of the Convention. In ruling that their claim was inadmissible, the Strasbourg Court observed that:

> "the applicants were able to express and demonstrate without restraint their disapproval of the whaling activity concerned. The contested interference related exclusively to two specific incidents of conduct making it impossible for the whalers to catch whales. The object of the applicants' campaign was not simply to convey disapproval of the activity to which they were opposed but went further by trying to stop the activity physically… <u>In other words, the particular method of action used by</u>

> the applicants amounted to a form of coercion forcing the whalers to abandon their lawful activity." (Emphasis added.)

It concluded by observing that conduct which obstructs the lawful activities of others, even if in exercise of Articles 10 and 11 of the Convention,

> "could not enjoy the same privileged protection under the Convention as political speech or debate on questions of public interests or the peaceful demonstration of opinions on such matters".

In my view, the action Greenpeace engaged in, and which forms the context for the two allegations, falls into the category of conduct the Strasbourg Court described as "coercion".

[87] I return to consider one of the factors Greenpeace emphasise, namely that what they did was an act of civil disobedience, and whether that excuses Greenpeace's admitted (and, as I have determined, wilful) disobedience of the Order. I have already noted the observations in the English courts of the important role civil disobedience may play. Those remarks, however, were not made in relation to conduct which, although pursued as a form of civil disobedience, also constituted breach of a court order or a contempt of court. That combination of features was present in *Cuadrilla*.

[88] The court in *Cuadrilla* acknowledged that it is in the nature of an act of civil disobedience, which is "a public, non-violent, conscientious act contrary to law, done with the aim of bringing about a change in the law or policies of the government" (*per* Leggatt LJ in *Cuadrilla*, paraphrasing John Rawls, *A Theory of Justice* (1971) at p 364), to cause inconvenience to other members of society or the state. Nonetheless, it noted that in the jurisprudence of the Strasbourg Court on Articles 10.2 and 11.2, a distinction is drawn between conduct which causes disruption as an inevitable side-effect and conduct which is deliberately intended to cause disruption, eg by impeding the activities of which those engaged in civil disobedience disapprove (*Cuadrilla* at paragraph 43). Even so, conduct

falling into the category of deliberately intending to cause disruption does not *per se* justify a restriction for the purposes of Articles 10.2 and 11.2: rather such conduct "is not at the core" of the freedoms Articles 10 or 11 protect (*per* the Grand Chamber in *Kudrevicius*, quoted with approval in *Cuadrilla* at paragraph 44). (This reflects what the Strasbourg Court had observed in *Drieman*, although that case appears not to have been cited to the court in *Cuadrilla*.) Indeed, on the facts of *Kudrevicius*, the Grand Chamber of the Strasbourg Court did not find disproportionate the sentences to 60 days of custody (suspended for one year) imposed on the protesting farmers who had blocked the roads. The Court of Appeal in *Cuadrilla* concluded (at paragraph 91):

> "There is no principle which justifies treating the conscientious motives of a protestor as a licence to flout court orders with impunity from imprisonment, whatever the nature of the harm intended or caused provided only that no violence is used. Court orders would become toothless if such an approach were adopted…" (Emphasis added.)

It added these observations (at paragraph 95):

> "Where, as in the present case, individuals not only resort to compulsion to hinder or try to stop lawful activities of others of which they disapprove, but do so in deliberate defiance of a court order, they have no reason to expect that their conscientious motives will insulate them from the sanction of imprisonment." (Emphasis added.)

While *Cuadrilla* is a decision of the English court, I find the cogency of the court's reasoning highly persuasive, and I respectfully adopt these *dicta* as a correct statement of the law, and which I apply in the present case.

[89] In this case, I have found that Greenpeace orchestrated the action which gives rise to the first allegation and they took no steps to avert the breach of the Order, however briefly, which form the subject matter of the second allegation. Their conduct in respect of the first allegation, in particular, involved a form of "compulsion" (*per Cuadrilla*) or "coercion" (*per*

Drieman) to hinder or stop the activities of Transocean and, indirectly, of BP for the period the Rig was re-occupied on 14 June 2019.

[90] As I have already observed, Transocean were engaged in lawful activities, however much Greenpeace object to them. Greenpeace's occupation of the Rig on 9 June led Transocean to obtain the Order to protect them against unlawful interference by Greenpeace. By the time the Order was granted, Greenpeace's point had been made. By then, Greenpeace's conduct had crossed the line (in the sense discussed in *Drieman*, *Kudrevicius* and *Cuadrilla*) and ceased to fall within the core of the rights which Articles 10 and 11 protect. In light of the case-law just noted, and taking into account the whole circumstances (including the mitigating and aggravating factors and the important factor that the action was one of civil disobedience), I find that the imposition of a sanction in respect of Greenpeace's contempt of court is necessary in a democratic society in pursuit, first and foremost, of the aim of maintaining the Court's authority (Article 10.2). As I noted above (at para [55]) it is fundamental to the rule of law that court orders are obeyed. Greenpeace's admitted conduct was in wilful disobedience of the Order. I have also found the imposition of a sanction necessary for the protection of the rights and freedom of others (Article 11.2). The imposition of a sanction is therefore proportionate in a Convention-relevant sense.

Disposal

[91] The Court has a wide discretion available to it when determining any penalty for a contempt of court including the whole range of penalties from admonishment, at one end of the spectrum, to a fine or even a term of imprisonment of up to two years, at the other end: section 15(2) of the Contempt of Court Act 1981. A recent instance of imprisonment for contempt of court following breach of an interdict granted by this court, and a failure to pay

the fine imposed as a consequence, is the decision of Lord Ericht on 20 September 2018 in *Sky plc and Sky UK Ltd* v *Chambers* to sentence the contemnor to 14 days' imprisonment.

[92] I have considered very carefully whether I should impose a custodial sentence (to be suspended), as was done in *Cuadrilla*. That sentence could obviously not be served by Greenpeace, but by an individual within Greenpeace of sufficient seniority and position (amounting in effect to their controlling mind and will) and whose conduct rendered him responsible for their breaches of the Order. In this case, that would be John Sauven. He was the Executive Director of Greenpeace; he authorised the action from the start and was in every sense the controlling mind and will of Greenpeace in their support of the action. He could have brought it to an end at any time. Notwithstanding his knowledge of the Order, he did not call off the action at that time. A sentence to a term of imprisonment as sanction for Greenpeace's contempt of court would, in my view, be within the range of proportionate sanctions. However, in exercise of my discretion, and having regard to the whole circumstances, I intend to exercise leniency and confine this Court's sanction to a fine of Greenpeace.

[93] For the purpose of considering what level of fine is appropriate in all of the circumstances, it is relevant to have regard to Greenpeace's financial resources. In his affidavit, Greenpeace's Head of Finance, Andrew Coates, spoke to Greenpeace's financial means under reference to their accounts for the year ended 31 December 2018 ("the 2018 Accounts"). Shortly before the final hearing in this matter, Greenpeace's accounts for the year to 31 December 2019 ("the 2019 Accounts") were provided. In common with many charities, Greenpeace also engaged in trading activities as a means to generate funds in support of its principal, non-commercial activities. In brief, for the year covered by the 2018 Accounts, Greenpeace had income totalling £18,600,065 and expenditure of £17, 362,414. In

the 2019 Accounts Greenpeace's total income was £22,327,704 and their total expenditure was £22,736,178. In each of those years, the vast bulk of that expenditure (totalling £10,578,613 in 2018 and £14,828,150 in 2019), was spent on campaigning and other activities (*per* the Notes to the accounts, "in pursuit of Greenpeace's objectives"). In response to an enquiry from the Court, Greenpeace confirmed that the direct costs they incurred for the action was about £67,000. This figure does not include the legal fees Greenpeace have incurred in respect of these proceedings. The 2018 Accounts also disclose that Greenpeace have net assets of £5,075,712 and net current assets of £3,848,006 (including cash at bank and in hand of £3,694,608). While those figures are likely to have changed, they indicate the magnitude of the sums Greenpeace are able to marshal, and their willingness to expend these "in pursuit of Greenpeace's objectives". This is borne out in the 2019 Accounts, which disclose net assets of £4,667,238 and a figure for cash at bank and in hand of £4,239,078. A serious breach of contempt merits a substantial fine. Having regard to the whole circumstances and in the exercise of my discretion, the *cumulo* fine I impose for both breaches will be a fine of £80,000.

[94] I shall reserve all question of expenses meantime.