OUTER HOUSE, COURT OF SESSION

[2020] CSOH 7

A335/19

OPINION OF LADY CARMICHAEL

In the cause

SHELL UK LIMITED

Pursuer

against

STICHTING GREENPEACE COUNCIL AND ANOTHER

Defenders

Pursuer: Barne QC; Pinsent Masons LLP
Defenders: Mure QC; Harper Macleod LLP

15 January 2020

[1] The pursuer seeks to interdict the defenders by themselves or by their agents, employees, volunteers or servants, or by anyone acting on their behalf or under their auspices, from approaching within 500 metres of or boarding or attempting to board four offshore installations: Brent Alpha, Brent Bravo, Brent Charlie and Brent Delta, ("Alpha", "Bravo", "Charlie" and "Delta") and from instructing, procuring, encouraging or facilitating others to do so.

[2] The matter came before me as a motion for interim interdict on 28 November 2019. The motion had called on an earlier occasion, upon which the defenders had granted an undertaking which was due to expire on 29 November 2019.

[3] The pursuer avers that the four installations are at various stages of operation and decommissioning. Bravo and Delta have had their topsides removed. Only their legs and cells remain in place, along with navigational aids which alert vessels to their continuing presence. The last personnel occupying Alpha were removed on 20 October 2019. It is planned that between April and May 2020 four of the six platform legs will be cut with the topsides being lifted in June, and the removal of the upper jacket commencing in July 2020. Charlie remains in operation, but decommissioning activities are being carried out. Alpha has metal legs, whereas the others have concrete legs.

[4] It is a matter of admission in the pleadings that on 14 October 2019, two Greenpeace protesters boarded Alpha without permission in order to protest against the proposed method of decommissioning the platforms in the Brent oil field. They erected a banner on Alpha which stated "Shell! Stop Ocean Pollution" above the word "Greenpeace". One or more of the protesters scaled one of the legs of Bravo without permission. A second banner was erected which stated "Clean up your mess, Shell". The protesters approached Alpha and Bravo on rigid hull inflatable boats ("RHIBs") which were launched from the Rainbow Warrior. The protesters remained in position for approximately 24 hours, after which, due to deteriorating weather, they removed themselves and returned to the Rainbow Warrior. At least three protesters, using climbing equipment, were involved in painting the words "Toxic Waste" in large letters onto the side of one of the legs of Bravo.

[5] The context for that course of action is the decommissioning of the pursuer's installations in the Brent field. The Convention for the Protection of the Marine Environment of the North-East Atlantic ("OSPAR") is the current legislative instrument regulating international cooperation on environmental protection in the North-East Atlantic. Work carried out under the Convention is managed by the OSPAR Commission, which is

made up of representatives of the governments of the 15 signatory nations, and representatives of the European Commission, representing the European Union. The first defender has observer status, so that it participates in meetings of the OSPAR Commission and contributes to its work, and to the development of policy, but does not have voting rights.

[6] OSPAR Decision 98/3 on the Disposal of Disused Offshore Installations ("Decision 98/3") provides that the dumping, and the leaving wholly or partly in place, of disused offshore installations within the maritime area is prohibited. Derogations are available in respect of certain categories of installation, if the competent authority of the relevant Contracting Party is satisfied that an assessment shows that there are significant reasons why an alternative disposal, such as leaving part of the installation in place, is preferable to reuse or recycling or final disposal on land. Before a decision is taken to issue a permit for an alternative method of disposal, the relevant contracting party is required to consult the other contracting parties.

[7] As part of the decommissioning programme, the pursuer is seeking permits for derogations in terms of Decision 98/3. In relation to Bravo, Charlie and Delta, the proposed derogations involve leaving in situ the concrete gravity based structures and cell sediment contained within the structures on the basis that the risks associated with their removal are too great when viewed against the assessed risks to the local environment of leaving them in place. In respect of Alpha, the proposal is to remove the upper part of the steel jacket to 84.5 metres below sea level with decommissioning in situ of the jacket footings.

[8] The relevant authority in respect of the United Kingdom is the Offshore Petroleum Regulator for Environment and Decommissioning ("OPRED"). As part of the consultative process, two contracting parties, Germany and the Netherlands, have objected to the

pursuer's proposals. OSPAR held a special consultative meeting on 18 October 2019 in London at which interested parties could make representations in relation to the proposed derogations. At the meeting, OPRED committed to further discussions with parties before making any final decision on whether or not to grant the permits sought by the pursuer.

[9] It will be a decision for OPRED and the UK Government whether or not permits for the derogations will be issued. It appears that both the oil industry and the defenders regard the decision regarding derogation to be of great significance, and having the potential to set a precedent in relation to the region regulated by OSPAR.

[10] The pursuer maintains that the sediment contained in the base of the oil storage cells on Bravo, Charlie and Delta does not flow and is difficult to move, and that it contains no significant quantities of non-biodegradable compounds. They represent that when the oil storage cells degrade over time, the sediment will remain largely contained in the footprint of the structure, without significant impact on the local environment. The pursuer made representations to that effect in an email to Greenpeace dated 17 October 2019 (6/7 of process).

[11] The defenders are concerned that, if the structures are left in the ocean as the pursuer proposes, they may degrade and result in pollution of the marine environment. They complain that there has been inadequate assessment of the risks. They refer in the pleadings to a report and a review carried out for, respectively, the governments of Germany and the Netherlands, which raise concerns as to the adequacy of the derogation assessments by the pursuer and by OPRED. They have produced the report and review. They say that a number of other prominent non-governmental organisations take the same view. They have produced a letter from Scottish Wildlife Trust setting out that organisation's concerns (7/1 of process).

Submissions

Pursuer

[12] The pursuer submitted that the Brent field was situated in a very harsh marine environment. The protesters who took part on 14 October 2019 had put themselves in danger. Although the summons merely contained an averment that they had put themselves in extreme danger, they had boarded a spider deck at Alpha that was no longer accessible to the pursuer's employees and contractors, because of its condition. There was a risk of rapid deterioration in weather conditions and freak waves. Protesters had climbed on the legs of Bravo, using climbing equipment. The stability and security of the items to which they had moored that equipment must have been entirely untested. The pursuer now only had one support vessel in the region, serving Charlie, and that would not be able to respond rapidly to any incident. Whether or not the pursuer had any legal duty to rescue a protester who got into difficulties, it was likely that the pursuer's personnel would try to do so, thereby putting themselves in danger.

[13] Other agencies, such as police and coastguard might require to intervene, and might themselves be endangered. Counsel referred to Greenpeace action taken against the Paul B Loyd Jnr rig in the Cromarty Firth in June 2019. The defenders had referred to it in their own Note of Argument. Counsel referred to press articles relating that five protesters had pled guilty to breaches of the peace libelling conduct involving placing the accused and others in danger. Copy complaints were produced. The sheriff was said to have noted that the activities of the protesters resulted in the RNLI and coastguard being diverted from a possible legitimate emergency elsewhere. The press article narrated that the court was told

that when the platform was boarded it was in the process of raising anchors, which were swinging loosely.

[14] Parliament had made provision for a 500 metre safety zone around offshore installations, which could be entered only for purposes specified in Regulation 21H of the Offshore Installations and Pipeline Works (Management and Administration Regulations 1995 (SI 1995/738), or with the consent of the "duty holder" (the pursuer, in the present context). Entry to the zone other than for those purposes, or pursuant to an exemption from the requirement to observe it, was an offence: Petroleum Act 1987 sections 21, 23 provided:

> 21. (1) Subject to subsections (3) and (4), there shall be a safety zone around every installation which, or part of which, is in waters to which subsection (7) applies if—
> (a) it is stationed there so that any of the activities mentioned in subsection (2) may be carried out on, from or by means of it, or
> (b) it is being assembled at a station where it is to be used for such a purpose, or
> (c) it remains or is being dismantled at a station where it has been used for such a purpose.
> (2) The activities referred to in subsection (1) are—
> (a) the exploitation or exploration of mineral resources in or under the shore or bed of waters to which subsection (7) applies;
> (aa) the exploration of any place in, under or over such waters with a view to the storage of gas in such a place;
> (ab) the conversion of any place in, under or over such waters for the purpose of storing gas;
> (b) the storage of gas [in, under or over]2 such waters or the recovery of gas so stored;
> (ba) the unloading of gas at any place in, under or over such waters;
> (c) the conveyance of things by means of a pipe, or system of pipes, constructed or placed on, in or under the shore or bed of such waters;
> (d) the provision of accommodation for persons who work on or from an installation satisfying the condition in [any of paragraphs (a) to (c)]4 of subsection (1).
> (3) Subsection (1) shall not apply to an installation in respect of which an order under section 22 has effect, or to one which—
> (a) is connected with dry land by a permanent structure providing access at all times and for all purposes, or
> (b) does not project above the sea at any state of the tide.
> (4) The Secretary of State may by order exclude any installation or any description of installation from the operation of subsection (1), and may do so generally or by reference to specified activities or locations or in any other way.

(5) A safety zone established by subsection (1) shall extend to every point within 500 metres of any part of the installation (ignoring any moorings) and to every point in the water which is vertically above or below such a point.
(6) A safety zone established by subsection (1) may extend to waters outside waters to which subsection (7) applies.
(7) The waters to which this subsection applies are—
(a) tidal waters and parts of the sea in or adjacent to the United Kingdom up to the seaward limits of the territorial sea, and
(b) waters in an area designated under section 1(7) of the Continental Shelf Act 1964.
(8) In this section "gas" means gas within the meaning of section 2(4) of the Energy Act 2008.

23. (1) Where by virtue of this Act there is a safety zone around an installation, no vessel shall enter or remain in the zone except—
(a) in the case of a safety zone established by an order under section22, in accordance with that order, or
(b) in that or any other case, in accordance with regulations made by the Secretary of State or a consent given by the Health and Safety Executive.
(2) If a vessel enters or remains in a safety zone in contravention of subsection (1) then, subject to subsection (3), its owner and its master shall each be guilty of an offence and liable—
(a) on summary conviction, to a fine not exceeding the statutory maximum;
(b) on conviction on indictment, to imprisonment for a term not exceeding two years or to a fine or to both.
(3) It shall be a defence for a person charged with an offence under this section to prove that the presence of the installation or the existence of the safety zone was not, and would not on reasonable enquiry have become, known to the master.
(4) Where the commission by any person of an offence under this section is due to the act or default of some other person, that other person shall also be guilty of that offence and shall be liable to be proceeded against and punished accordingly.
(5) Where an offence committed by a body corporate under this section is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of, any director, manager, secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence and shall be liable to be proceeded against and punished accordingly.
(6) Where the affairs of a body corporate are managed by its members, subsection (5) shall apply in relation to acts and defaults of a member in connection with his functions of management as if he were a director of the body corporate.
(7) Proceedings for an offence under this section may be taken, and the offence may for all incidental purposes be treated as having been committed, in any place in the United Kingdom.

> (8) In this section "vessel" includes a hovercraft, submersible apparatus (within the meaning of [section 88(4) of the Merchant Shipping Act 1995]2) and an installation in transit; and "master"
> (a) in relation to a hovercraft, means the captain,
> (b) in relation to submersible apparatus, means the person in charge of the apparatus, and
> (c) in relation to an installation in transit, means the person in charge of the transit operation.

Regulation 20 of the 1995 Regulations made provision for the HSE to grant exemptions in relation to the 500 metre zone. The purpose of the zone was to protect installations, particularly from the risk of collision with other vessels.

[15] The common law protected the pursuer's interests in the installations: *Shell* v *McGillivray* 1991 SLT 667; *Phestos Shipping* v *Kurmiawan* 1983 SC 185. In the present case there had been both unlawful occupation and criminal damage, in the form of the painting on the leg of Bravo. Vessel operations linked to preparatory leg strengthening works on Alpha had had to be stopped as a result of the protest, and the contractor had submitted a claim of £100,000 for an additional day for the lost time.

[16] There were grounds for apprehending that the defenders would seek to occupy an installation in the Brent field. Boarding and occupation was a means of protest they had used before. They had been invited to confirm they did not intend to carry out such a protest, but had not responded. Their press releases evinced an intention to pursue the issue of the decommissioning of the installations. Particular reference was made to an article on the Greenpeace website dated 25 November 2019 referring to the present proceedings, and including the phrase: "Shell can try to shut us up, but we will only get louder" (6/17). The opposition to the motion indicated an intention to resume the protest.

[17] The balance of convenience favoured the pursuer. The order sought did not prevent the defenders protesting by other means. I should bear in mind that the defenders were not

without a voice. They had observer status in relation to the proceedings of the OSPAR commission. The pursuer raised safety issues. It might not be possible to determine on the basis of submissions whether those were well-founded, and the status quo should be maintained in the meantime. It was impossible to say how long protesters might remain if they boarded again. The Brent Spar protest in 1995 had lasted almost a month.

[18] The submissions by the defenders regarding A10 and A11 ECHR required the court to carry out a balancing exercise, which again might require the court to find facts on the basis of evidence in due course, and the status quo should be maintained at this stage. I did not understand Mr Barne to dispute that those articles were engaged. Any interference with the rights protected by A10 and/or 11 would be prescribed by law: *Steel and others* v *United Kingdom* (1998) 28 EHRR 603, paragraph 145. It would pursue a legitimate aim, namely safety and the protection of property rights. As to proportionality, and whether the restriction would be necessary in a democratic society, the state enjoyed a greater margin of appreciation in relation to restrictions on the time, location or manner of public assemblies than in relation to content-based restrictions: *Lashmankin and others* v *Russia* (2019) 68 EHRR 1, paragraph 417.

[19] There was no absolute right to choose the forum in which protest was to take place: *Appleby* v *United Kingdom* (2003) 37 EHRR 38. In particular there was no right to protest on privately owned property. The ordinary law of civil trespass constituted a limitation on the exercise of the rights protected by A10 which was according to law and unchallengeably proportionate. A10 did not confer a licence to trespass on other people's property in order to give voice to one's views: *Richardson* v *Director of Public Prosecutions* 2014 AC 635, Lord Hughes, paragraph 3. Authorities cited by HHJ Pelling QC in *Manchester Ship Canal*

Developments Ltd v *Persons Unknown* [2014] EWHC 645, at paragraphs 28 to 37 supported that proposition.

[20] The order sought would not represent any significant restriction on the ability of the defenders to protest, to express their views, and to exercise their right of freedom of assembly in order to do so. Mr Barne referred to *Driemann* v *Norway,* (app no 33678/96), an admissibility decision in which the court drew a distinction between activity aiming to convey disapproval of an activity, and activity aimed at disrupting the activity. States had a wide margin of appreciation in their assessment of the necessity of taking measures to restrict the latter sort of activity. The court had attached weight to the fact that the purpose of the measure was to ensure the efficient implementation of the legal protection of lawful exploitation of the living resources in the respondent state's exclusive economic zone.

Defenders

[21] Mr Mure opened his submission by referring to Lord Hoffmann's comments in *R v Jones (Margaret)* [2007] 1 AC 136, at paragraph 89, regarding the role of civil disobedience in a democratic society. He went on to make submissions about the factual background, and in particular about the pursuer's averments that the protesters had put themselves in danger. He referred to affidavits produced by the defenders. These related principally to the safety measures undertaken by the defenders when planning for and executing protests such as that of 14 October 2019. The defenders carried out open source research into the installations, and spoke to people who had worked offshore. They used their own experience. They studied available documents and technical drawings relating to the Brent field. They risk assessed the venture. Those involved had certificates as to their medical fitness. All activists were trained, and some were IRATA (International Rope Trade

Association) certified. The activists were trained in non-violent direct action techniques, and had been on climbing training days. They were trained in first aid.

[22] The Rainbow Warrior did not enter the 500 metre zone but served as a support vessel. RHIBs were used to "scout" the approaches to the installations. The RHIBs remained in the water at all times. Weather conditions were monitored. Watch keepers monitored the standby boat drivers, and maintained radio contact with the activists. The decision to depart after 24 hours, having monitored the weather, was evidence both of a proportionate protest and a commitment to safety.

[23] The authorities referred to in *Manchester Ship Canal Developments* all related to lengthy occupations. The balance as to proportionality was different when direct action of shorter duration, such as undertaken on 14 October, which had been for only 24 hours, was in issue.

[24] An interim interdict would represent an interference with the rights protected by A10 and A11 ECHR. Like Mr Barne, Mr Mure focused on proportionality. He did not dispute that a restriction would be prescribed by law, or that the interests of safety and the protection of property were legitimate aims. He submitted that nine relevant factors could be identified in the jurisprudence of the Strasbourg court:

(i) The exceptions to the right to protest must be narrowly interpreted: *Annenkov* v *Russia* (app no 31475/10, 25 July 2017), paragraph 131.

(ii) A balance must be struck between the interests at stake: *Kudrevičius and others* v *Lithuania* (2016) 62 EHRR 24, paragraph 144. This approach had been applied by the Amsterdam District Court in *Shell Nederland Verkoopmaatshapij BV* v *Stichting Greenpeace Nederland and Stichting Greenpeace Council* and a related case brought against the same defenders by a number of other Shell

companies (cases 525686/KG ZA 12-1250 HJ/JWR and 526023/KG ZA 12-1271 HJ/JWR) on 5 October 2012. The cases had involved protests at petrol stations and operational sites against Shell's activities in the Arctic. The court had said at paragraphs 5.5-5.9:

> "5.5 The basic principle is that organisations such as Greenpeace are in principle free to take action and to make their views publicly known. The sole fact that such action causes inconvenience to the company targeted by the action – in this case Shell – does not mean that such action is wrongful.
>
> In the case of the actions that prompted Shell to demand a prohibition on future action, the activities in question are activities that may be prohibited under criminal law (eg the disabling of petrol pumps, which may be punishable under criminal law on the grounds that it constitutes damage to property) or, if they are not punishable, activities of which it can be claimed that they may be wrongful. The wrongfulness may be attributable to a violation of a right (ownership of the petrol pump, for example) or contravene the unwritten duty of care. Hindering customers from purchasing the products or services of a specific company may constitute a breach of the duty of care if it is know that this will result in damage to that company (ie loss of sales). It can also be unlawful to occupy business premises or to hinder operations there in such a way that damaging consequences can be expected to result. In view of these norms, the right to take action is not unlimited. Greenpeace's interest in being able to express its opinion freely and in a forceful manner had to be weighed against the legitimate (business) interest of Shell.
>
> Account has to be taken of the possibility that Shell may have to accept the cost of a certain loss of sales resulting from the action and that it will not be able to seek recourse to Greenpeace Nederland et al, and action cannot therefore be completely prohibited in advance simply because it is damaging to Shell.
>
> 5.6 The interests referred to above can generally be weighed against each other only on the basis of the specific facts and circumstances of the case. With regard to future actions, to which Shell's claims relate, it is at this stage possible only to indicate certain outer limits. Acts that are in any event wrongful in the preliminary judgment of the court in summary proceedings can be prohibited in advance. An action not prohibited in advance can nevertheless subsequently be found to be wrongful.
>
> 5.7 In setting the outer limits. Beyond which action will at this stage be regarded as wrongful and therefore prohibited, it has to be noted that

> Greenpeace must in any event comply with the requirements of subsidiarity and proportionality. Greenpeace has itself also invoked the concept of 'civil disobedience'.
>
> 5.8 Greenpeace will firstly have to comply with the principle of *subsidiarity.* In this case this means that actions causing damage to Shell may be taken only after it has been attempted to use less far-reaching means to achieve the intended result. It has not been claimed or shown that Greenpeace has violated this principle; the evidence submitted to these proceedings shows that Greenpeace has used multiple means to try to persuade Shell from drilling for oil in the Arctic. Shell has continued to adhere to its plans and, where possible, also to implement them. This means that it cannot be stated at this stage that future action must be prohibited because les far-reaching means are still available.
>
> 5.9 Action must also be *proportional*. In a case such as this it cannot be stipulated that action must not cause any damage whatsoever to Shell. A company such as Shell, which performs or wishes to perform actions that are controversial in society, and to which many people object, can and must expect that action will be taken to try to persuade it to change its views. To be effective, such action will also be able to cause damage to Shell. However, such action may at least be required not to cause substantial damage by, for example, lasting longer than is needed to achieve the intended objective."

(iii) Protest on matters of serious public concern is entitled to heightened protection: *Kuznetsov* v *Russia* (app no 10877/04, 23 October 2008). That case had concerned perceived dysfunction in the judicial system.

(iv) A breach of law (such as the 1987 Act) does not itself warrant interference: *Kudrevičius*, paragraph 150. In the context of international law, the international arbitral tribunal established to hear a dispute between the Netherlands and Russia arising from a peaceful protest by the first defender had stated that the coastal state should tolerate some level of nuisance through civilian protest as long as it did not amount to an interference with the exercise of its sovereign rights: *The Arctic Sunrise Case (Kingdom of the Netherlands* v *the Russian Federation)* Award on the Merits, PCA Case no

2014-02, paragraph 328.) The Amsterdam District Court had discharged an accused charged with entering the 500 metre safety zone, stating that the sole circumstance that the actions of the accused were illegal is not in itself sufficient to conclude that a restriction of the right to protest is justified: *Proceedings against Jukka Paavo Valtteri Huhta*, 2 May 2019.

(v) Demonstrators have the right to choose the form and place of their protest, and have the right to protest "within sight and sound" of their target: *Lashmankin and others* v *Russia* (2019) 68 EHRR 1, paragraphs 405, 426. An order to keep protesters at least 500m away from oil rigs against which they wish to demonstrate would violate this principle.

(vi) General bans on protests near particular sites require a particular justification: *Lashmankin,* paragraph 434, 436-438. It was incumbent on the state to demonstrate that that the disadvantage of demonstrations being caught by such a ban was clearly outweighed by the security considerations justifying the issue of the ban.

(vii) Speculative safety risks do not justify specific bans on holding assemblies at particular locations: *United Civil Aviation Trade Union and Csorba* v *Hungary* (app no 27585/13, 22 May 2018). In *Huhta* the Amsterdam court had noted:

> "The fact that the risks against which Article 43 of the Mining Act is intended to protect do not in themselves mean that the right to protest should be restricted applies even more strongly, given that it is possible to obtain an exemption to be present within the security zone of a mining facility. The court infers from this that the safety risks associated with entering the 500 metre zone are not absolute."

(viii) The limits of acceptable criticism are wider in the case of large public companies: *Ärtzekammer für Wien and Dorner* v *Austria* (app no 8895/10, 16 February 2016), paragraphs 65, 66.

(ix) *NGOs* carry out public watch roles that warrant higher protection under the Convention: *Helsinki Bizottság* v *Hungary* (app no 18030/11, 8 November 2016), paragraphs 166, 167.

[25] The passage in *Richardson* v *DPP* relied on by the pursuer was obiter. Examination of the arguments recorded in the Appeal Cases report disclosed no discussion of A10 or A11 rights. In any event it was not binding on this court. It was an English case relating to a statutory provision creating an offence that did not apply in Scotland.

[26] A distinction fell to be drawn between a court assessing in retrospect whether an interference had been proportionate, particularly in relation to the imposition of a criminal conviction or penalty, and a court which was asked to impose a restriction on the exercise of the rights protected by A10 and/or A11. A criminal sanction might be proportionate in the context of a breach of section 21 of the 1987 Act. It did not follow that an interdict prohibiting conduct that would contravene that section would be proportionate.

[27] Mr Mure submitted that cases like *Manchester Ship Canal*, and the other English cases referred to in it, could be distinguished. While they involved the occupation of private property, what was notable was that all of the cases involved a prolonged interference with the proprietor's right to uninterrupted occupation of his property.

[28] In relation to the 500 metre safety zone, he submitted that international law – Article 60(4) and (5) of the United Nations Convention on the Law of the Sea ("UNCLOS") – required that any such zone must be necessary for safety reasons. I understood him to

submit that it had not been demonstrated that enforcement of the safety zone for which provision was made by statute was necessary in this case.

Decision

[29] For the reasons that follow, I determined to grant the motion for interim interdict.

[30] I noted that in *Cuadrilla Bowland Ltd & 9 Others* v *Persons Unknown* 2018 WL 03591283, 1 June 2018, HHJ Pelling had considered whether section 12(3) of the Human Rights Act 1998 applied in a case involving protests against fracking at a particular location. The claimant in that case conceded, for the purpose of the hearing only, that section 12(3) did apply, and the judge proceeded on that basis: paragraph 32. I raised the matter with parties.

[31] Mr Mure submitted that section 12(3) did apply. In any event, a strong case would be required to justify an interference with the Convention rights in question. Mr Barne submitted that it did not. The language of section 12(3) referred to publication, which was not apposite in the present context.

[32] I have not required to reach a concluded view on this question, as I consider that the pursuer is likely to succeed in establishing that interdict should be granted in this case. I accept also that the pursuer has a reasonable apprehension that the defenders intend further protests, on the basis of the article already referred to. Mr Mure did not indicate positively that any protest was imminently intended, but did not represent that there was no intention to protest further in relation to the decommissioning of the Brent field installations.

[33] I accept that the matter to which the defenders wish to draw attention by protesting is one of public importance. That is a relevant matter: *City of London* v *Samede* [2012] EWCA Civ 160, at paragraph 41:

> "… we accept that it can be appropriate to take into account the general character of the views whose expression the Convention is being invoked to protect. For instance, political and economic views are at the top end of the scale, and pornography and vapid tittle-tattle is towards the bottom. In this case, the Judge accepted that the topics of concern to the Occupy Movement were 'of very great political importance' - [2012] EWHC 34 (QB), para 155. In our view, that was something which could fairly be taken into account. However, it cannot be a factor which trumps all others, and indeed it is unlikely to be a particularly weighty factor: otherwise judges would find themselves according greater protection to views which they think important, or with which they agree."

[34] I regard the following matters as demonstrating that the restriction imposed by the grant of interim interdict is necessary and therefore proportionate.

[35] First, that a restriction is sought in relation to protest on private property is, at least, a very significant factor supporting the proportionality of the restriction.

[36] *Appleby* concerned an environmental group formed to campaign against a plan to build on the only public playing field near Washington town centre. The applicants had tried to set up stands in a privately owned shopping mall in Washington, but were prevented from doing so by security staff. The court found that the state bore no responsibility for the restriction imposed on freedom of expression, and none could be derived from the fact that a public development company had transferred the property to a private company. The issue was, therefore, as to whether the state had any positive obligation to protect the exercise of Convention rights from interference by the private owner of the shopping centre.

> "43. The Court recalls that the applicants wished to draw attention of fellow citizens to their opposition to the plans of their locally elected representatives to develop playing fields and to deprive their children of green areas to play in. This was a topic of public interest and contributed to debate about the exercise of local government powers. However, while freedom of expression is an important right, it is not unlimited. Nor is it the only Convention right at stake. Regard must also be had to the property rights of the owner of the shopping centre under Art.1 of Protocol No.1.

44. The Court has noted the applicants' arguments and the references in the US cases, which draw attention to the way in which shopping centres, though their purpose is primarily the pursuit of private commercial interests, are designed increasingly to serve as gathering places and events centres, with multiple activities concentrated within their boundaries. Frequently, individuals are not merely invited to shop but encouraged to linger and participate in activities covering a broad spectrum from entertainment to community, educational and charitable events. Such shopping centres can assume the characteristics of the traditional town centre and indeed, in this case, the Galleries is labelled on maps as the town centre and either contains, or is in close proximity to, public services and facilities. As a result, the applicants argued that the shopping centre must be regarded as a "quasi-public" space in which individuals can claim the right to exercise freedom of expression in a reasonable manner.

45. The Government have disputed the usefulness or coherence of employing definitions of "quasi-public" spaces and pointed to the difficulties which would ensue if places open to the public, such as theatres or museums, were required to permit people freedom of access for purposes other than the cultural activities on offer.

46. The Court would observe that, though the cases from the United States in particular illustrate an interesting trend in accommodating freedom of expression to privately owned property open to the public, the US Supreme Court has refrained from holding that there is a federal constitutional right of free speech in a privately owned shopping mall. Authorities from the individual states show a variety of approaches to the public and private law issues that have arisen in widely differing factual situations. It cannot be said that there is as yet any emerging consensus that could assist the Court in its examination in this case concerning Art.10 of the Convention.

47. That provision, notwithstanding the acknowledged importance of freedom of expression, does not bestow any freedom of forum for the exercise of that right. While it is true that demographic, social, economic and technological developments are changing the ways in which people move around and come into contact with each other, the Court is not persuaded that this requires the automatic creation of rights of entry to private property, or even, necessarily, to all publicly owned property (Government offices and ministries, for instance). Where however the bar on access to property has the effect of preventing any effective exercise of freedom of expression or it can be said that the essence of the right has been destroyed, the Court would not exclude that a positive obligation could arise for the State to protect the enjoyment of Convention rights by regulating property rights. The corporate town, where the entire municipality was controlled by a private body, might be an example.

48. In the present case, the restriction on the applicants' ability to communicate their views was limited to the entrance areas and passageways of the Galleries. It did not prevent them from obtaining individual permission from businesses within the

> Galleries (the manager of a hypermarket granted permission for a stand within his store on one occasion) or from distributing their leaflets on the public access paths into the area. It also remained open to them to campaign in the old town centre and to employ alternative means, such as calling door to door or seeking exposure in the local press, radio and television. The applicants do not deny that these other methods were available to them. Their argument, essentially, is that the easiest and most effective method of reaching people was in using the Galleries, as shown by the local authority's own information campaign. The Court does not consider however that the applicants can claim that they were, as a result of the refusal of the private company, Postel, effectively prevented from communicating their views to their fellow citizens. Some 3,200 people submitted letters in their support. Whether more would have done so if the stand had remained in the Galleries is speculation which is insufficient to support an argument that the applicants were unable otherwise to exercise their freedom of expression in a meaningful manner."

[37] In the present case it is the court that is being asked to impose the restriction on the defenders' Convention rights. The restriction, so far as relating to boarding and occupying the installations, would apply to the private property. The defenders have no right or title to enter or occupy the installations. Normally the rights associated with being the proprietor or operator of the installation would entitle the pursuer to ask the court to interdict boarding or occupation which was not authorised.

[38] In *Appleby* the court contemplated that there might be a positive obligation to regulate property rights where a bar on access to privately owned property had the effect of preventing any effective exercise of freedom of expression, or it could be said that the essence of the right had been destroyed. The example it gave, of a corporate town, appears to have derived from its consideration of *Marsh* v *Alabama* 326 US 501, 66 S Ct 276, 90 L Ed 265 (1946). That related to a company town which had all the other characteristics of a municipality, although it was privately owned, and the United States Supreme Court had found that it was subject to the First Amendment rights of free speech and peaceable assembly. As the Strasbourg court observed, the United States Supreme court had refrained from holding that there was a federal constitutional right of free speech in a privately owned

shopping mall: *Pruneyard Shopping Center* v *Robbins,* 447 US 74, 64 L Ed 2d 741, 100 S Ct 2035 (1980). Some State courts in the United States had gone further in recognising a right of access to privately owned property open to the public for the purposes of freedom of expression.

[39] Mr Mure sought to draw the installations into the public realm by submitting that they were located in an exclusive economic zone – that is a zone in which the coastal state has rights regarding the exploration and use of marine resources. They were located where they were only because the state licensed them to be there. He did not dispute, however, the pursuer's economic interest in the structure of the installations, or that they had an exclusive right to occupy them.

[40] In *Appleby*, the Strasbourg court was not persuaded that a state required to create rights of access to private property, or even, necessarily, all publicly owned property. That would arise only where a bar on access had the effect of preventing any effective exercise of freedom of expression, or that the essence of the right had been destroyed. It seems to me that the Amsterdam District Court, in taking the approach that it did in the cases at Shell's instance went further than the Convention requires.

[41] I was not addressed on any of the jurisprudence from the United States, which has continued to develop since the European Court of Human Rights considered some of the case law in *Appleby*. What follows was not material to my reasoning, but I note that where the California Supreme Court did recognise a right of access to privately owned shopping malls for free speech purposes under the state constitution, it did so only in relation to "public forum" areas so designed and furnished as to encourage the public to congregate and socialise there for leisure: eg *Ralph's Grocery Co* v *United Food and Comm Workers Union Local* 8, 55 Cal 4th 1083,1093 (2012), and not in relation to the whole of the mall.

[42] So far as domestic jurisprudence is concerned, *Shell UK* v *McGillivray* 1991 SLT 667 related to a sit-in on offshore installations. In granting interim interdict, Lord Cameron of Lochbroom said the following, page 669G-L:

> "It was submitted by counsel for the respondents that since neither the platforms nor the vessels were heritable property, and since the law of trespass was applicable to heritable property only, the respondents' occupation of accommodation within the platforms and the vessels, and thus their remaining aboard them, was not unlawful. In particular it did not constitute a delict within the meaning of that term in Scots law.
>
> In my opinion, the short answer to that submission is to be found in the case of *Phestos Shipping Co. Ltd.* v *Kurmiawan*. There interim interdict was pronounced in terms very similar to those sought in the present case, against members of the crew of a vessel who having withdrawn their labour were subsequently dismissed and who from that date had remained on board the vessel, occupying the mess room and their sleeping quarters. The vessel was not heritable property but was capable, like other moveable property such as a caravan, of occupation. In particular Lord Dunpark at p. 391 said: "Scots law offers remedies for the unlawful occupation of property, be it heritable or moveable, even where that occupation is not affecting the owner's pocket." It is sufficient at this stage to say that in principle I can find no distinction between the admitted facts in the present case and those obtaining in *Phestos Shipping Co. Ltd. v. Kurmiawan*. I am therefore of opinion that the petitioners do have a prima facie case setting out a delict arising from unlawful occupation of property to which they have an exclusive right of occupation. The occupation in the present cases is continuing against the wishes of those who own or operate the platforms and the vessels and the respondents have neither right nor title to remain on board, following upon their dismissal from employment with their employers, not least since the latter have no place of business aboard the platforms or the vessels. That being so, the occupation is wrongful. In my opinion, the use of the word "trespass" has no particular significance in these petitions other than indicating that the actings of the respondents are averred to be wrongful acts of occupation of parts of property of which the petitioners have the exclusive right of occupation."

[43] The starting point is that Scots law provides a remedy in relation to the unlawful occupation of property, whether that is heritable or moveable: *Phestos Shipping*; *Shell UK Ltd* v *McGillivray*. Both of those cases pre-date the Human Rights Act 1998. I do not consider that I am bound to take the view, expressed in *Richardson*, that in every case the "civil law of trespass", or more properly for the purposes of this case, the civil law relating to unlawful

occupation of property, will constitute a limitation on rights under A10 and/or A11 which is unchallengeably proportionate. That view appears to be obiter, and the case concerns a provision of English statutory criminal law. The Strasbourg court in *Appleby* contemplated circumstances, albeit of an extreme nature, in which the essence of those rights might be destroyed, were there not a right of access afforded to privately owned property.

[44] Counsel was unable to refer me to any case from a court in the United Kingdom in which access had been afforded (or in which the court had declined to prohibit access) to privately owned property for the exercise of the rights protected by A10 and/or 11. On the contrary, recent decisions of courts in England and Wales indicate that the entitlement of an owner to enjoy its property without interference is a strong factor in the balance where A10/A11 rights are concerned: *Manchester Ship Canal*, paragraphs 34, 46; *Sun Street Property Ltd* v *Persons Unknown* [2011] EWHC 3432 (Ch), paragraph 29; *Samede*; *University of Sussex v Persons Unknown,* Sales J, Thursday, 28th March 2013. Relevant authorities are conveniently summarised by HHJ Pelling in *Manchester Ship Canal*, as follows:

> " 30.The interaction between the rights of protesters under Articles 10 and 11 on the one hand and the rights of a private land owner protected by A1P1 was considered by the Court of Appeal in *City of London v. Samede and others* [2012] EWCA Civ 160. That case was concerned with a protest camp established in the City of London in very close proximity to St Pauls Cathedral. The majority of the area occupied was highway land owned by the City Corporation but also included land owned by the Church Commissioners. The City's claim was for possession of the highway land that it owned. The Court of Appeal held that the protesters' rights under Articles 10 and 11 were engaged and that the question whether interference with those rights was lawful necessary and proportionate was inevitably a fact sensitive question that would depend amongst other things on "[39] …the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the protesters, the duration of the protest, the degree to which the protesters occupy the land and the extent of the actual interference the protect cause to the rights of others including the property rights of the owners of the land and the rights of any members of the public …" but "… it is very difficult to see how [the protesters' Article 10 and 11 rights]… could ever prevail against the will of the landowner, when they are continuously occupying public land, breaching not just the property owner's rights and certain statutory provisions , but significantly interfering with the public

and convention rights of others, and causing other problems (connected with health nuisance and the like) particularly in circumstances where the occupation has already continued for months and is likely to continue indefinitely.".

31.The notion that Articles 10 and 11 do not provide an arguable defence in relation to a claim by a private property owner of privately owned land has been adopted in a number of first instance decisions. Thus in *SOAS v. Persons Unknown* (2010) 25 November (Unreported) – which was concerned with the occupation by students of a particular part of SOAS known as the Brunei Suite - Henderson J considered a defence based on Articles 10 and 11. He referred to *Appleby v. UK* (ante) and the general principles to be derived from that case summarised above. He then said:

> "That … appears to be clear authority that Article 10 does not give any general freedom to exercise the right on private land. It is only in exceptional circumstances where the court considered that the inability to exercise the right on private land would prevent any expression of the right. In the present case it is entirely fanciful to suggest that preventing the students exercising their rights in the Brunei Suite would prevent them from exercising their rights of expression. The proposition that the law requires the property rights of SOAS to be overridden in their own building is unarguable."

32.A similar approach was adopted by Sales J in *University of Sussex v. Persons Unknown and others* [2013] EWHC 862 (Ch.). That case was concerned with an application by the university for possession of a part of its property known as Bramber House. Having cited Paragraph [47] from *Appleby v. UK* (ante), he then recorded a submission on behalf of the Defendants in that case that the campus was the equivalent of a corporate town and thus that the essence of the freedoms of free expression and association would be destroyed of a possession order was made, which he rejected on the facts. Sales J noted SOAS (ante), and quoted from Paragraph 39 of the lead judgment in *Samede* (ante), the material part of which is set out above. He noted that the outcome in that case was that the property owner was held entitled to recover possession of its property and that the court had noted that there were other places where the protesters could exercise their Article 10 and 11 rights. Sales J concluded that a possession order ought to be made in that case, amongst other reasons, because "… the continuation of the protest, denying the University its property rights would be a plain breach of domestic law …", because the protest had been going on for a long time and because of the availability of other means of expression and protest.

33.The final authority that I need refer to at this stage is *Sun Street Property Limited v. Persons Unknown* [2011] EWHC 3432 (Ch). I understand that permission to appeal from this decision was granted but not exercised. I accept that it must be read subject to the decision of the Court of Appeal in *Semede* (ante). *Sun Street* (ante) was concerned with an application made by the Defendants to set aside a possession order made against them following their occupation of a large complex of buildings in the City of London. The Defendants relied on Articles 10 and 11. Having recited

the relevant Articles, Roth J referred to Appleby (ante) at [29] , to SOAS and then to an argument on behalf of the Defendants that each case was fact sensitive and that in that case the occupiers' rights should prevail because the property was unoccupied, and the location was "… absolutely integral …" to the protesters' message. Roth J rejected that submissions in these terms:

> "Those submissions confuse the question of whether taking over the bank's property is a more convenient or even more effective means of the Occupiers expressing their views with the question whether if the bank … recovered possession, the Occupiers would be prevented from exercising any effective exercise of their freedom to express their views so that, in the words of the Strasbourg Court, the essence of their freedom would be destroyed. When the correct question is asked, it admits of only one answer. The individuals … currently in the property can manifestly communicate their views about waste of resources or the practices of one or more banks without being in occupation of this building complex. … I need hardly add that the fact that the occupation gives them a valuable platform for publicity cannot in itself provide a basis for overriding the respondent's own right as regards its property."

These comments are perhaps rather starker than those contained in *Samede* (ante) and to the extent that they suggest that a full fact sensitive analysis is not required in the circumstances may be wrong. Nonetheless in my judgment it is reflective of the effect of *Appleby* (ante).

34.In my judgment Articles 10 and 11 do not even arguably provide the 2nd and 5th Defendants with a defence to the Claimants' possession claim. My reasons for reaching that conclusion are as follows. First, the land in respect of which possession is claimed is land owned otherwise than by a public authority. To permit the Defendants to occupy that property would be a plain breach of domestic law, because neither defendant has the licence or consent of the Claimants to be or remain on the land. It is also an interference with the Claimants' A1P1 rights in relation to their property. Although Mr. Johnson submitted that this factor was circular and had the effect of defeating the Defendant's Article 10 and 11 rights, I reject that argument. I do not regard the points as being of themselves decisive. They are two factors that have to be weighed in the balance with others. Nonetheless they are powerful factors because if effect is not given to them then the result will be to deprive a property owner of its entitlement to enjoy its property without interference. As Appleby (ante) demonstrates, it will only be in exceptional circumstances in which such an outcome could be justified, particularly in relation to privately owned land.

35.Secondly, the continued presence of the Defendants and, more importantly, all those others coming within the scope of the phrase "Persons Unknown" is a source of interference with other legitimate users of the land concerned. […] This is obstruction of a public highway and thus unlawful apart from the factors considered in the previous paragraph. […]

> 36.Thirdly, the protest has been ongoing and escalating since last November. The length of the protest is a relevant consideration as Sales J demonstrated in *University of Sussex v. Persons Unknown and others* (ante). Whilst this factor may not be a particularly weighty one it is nonetheless of importance when considered with the others I have so far mentioned.
>
> 37.The final and key point is that there is absolutely nothing to prevent the protesters from carrying on their protest elsewhere and/or by other means that does not involve interfering with the A1P1 rights of the Claimants, their licensees and visitors. There is no evidence offered by the Defendants on this issue. Rather what is said is that the camp is the most effective means of protest available to them – see in this regard the evidence of the 2nd Defendant at Paragraphs 14, and 26 – 30; that of Mr. Pitfield at Paragraphs 21-22; and that of Mr. Burke at Paragraph 11. This may be so but is not the point as the ECtHR held in *Appleby* (ante) as Roth J explained in Sun Street (ante) at the part of his judgment set out in Paragraph 33 above. This point is probably decisive because as the ECtHR said in Appleby (ante), Articles 10 and 11 will only provide a defence to a claim for possession of privately owned land if the effect of requiring the protesters concerned to give up possession would be to prevent "… any effective exercise of freedom of expression …" or would be that " … the essence of the right has been destroyed …". This hurdle is obviously and intentionally a high one that the Defendants do not even arguably clear on the facts of this case. As I have said, this factor is probably decisive but is clearly so when viewed in combination with the other factors I have mentioned above."

[45] Both parties referred in the course of submissions to *Ziegler*. That case involved an allegation of obstructing the highway without lawful excuse. The Court of Appeal read down the " without lawful excuse" element of the offence in a manner compatible with Article 10 and Article 11: paragraph 94:

> "… We would respectfully suggest that, although the Convention rights are not "trump cards", since they are qualified rights and not absolute ones, they must be regarded as more than simply "a significant consideration". This is because, if otherwise there would be a breach of the Convention rights, then section 3 of the HRA requires an interpretation to be given to section 137 [of the Highways Act 1980], so far as possible, which is compatible with those rights. We have explained in this judgment how a compatible construction can indeed be given to section 137. This is by considering there to be reasonable behaviour and therefore lawful excuse when a person is lawfully exercising their Convention rights. That does not mean that those rights will always prevail. The focus of the enquiry will be, as Hickinbottom LJ observed, on whether restrictions have been lawfully placed on the Convention rights under para. (2) of Articles 10 and 11, in particular on the assessment of proportionality."

The court then went on to say that the assessment under Articles 10 and 11 would normally depend on a number of factors which summarised at paragraph 39 of *Samede*, which include the extent to which the continuation of the protest would breach domestic law, the importance of the precise location to the protesters, the duration of the protest, the degree to which the protesters occupy the land, and the extent of the actual interference the protest causes to the rights of others, including the property rights of the owners of the land, and the rights of any members of the public.

[46] There are significant difficulties associated with the Court's, in effect, providing for a right of access to privately owned property by declining to grant interdict in a case such as the present. The proprietor or lawful occupier might find the views of the protester repugnant, or at odds with its own. The rights to each in relation to freedom of expression might be in conflict. The present case is an example. I have already referred to the competing contentions of the parties respectively about the potential of the remaining parts of the installation to pollute the marine environment. In the context of protests on publicly owned property the court does not engage with the merits of the views of the protester, but assesses whether the issue is one of public interest or importance: *Director of Public Prosecutions* v *Ziegler* [2019] 1 Cr App R 32, paragraphs 55, 98:

> "55. However, the courts – which are strictly neutral arbiters of people's rights – cannot adjudicate upon the validity or legitimacy of particular points of view. An instructive distinction is drawn in American constitutional law between the "content" of speech and "viewpoint discrimination." The fact that the *content* of speech is political may well be highly significant in a democratic society. However, what the courts cannot do is to engage in discrimination as between different *viewpoints*. It is not the function of the court to express a view about the acceptability of a political opinion, still less to express approval or disapproval of those opinions. We leave to one side the views of those organisations which are (exceptionally in a democratic society) proscribed organisations; and any other offences that may be committed, such as incitement to racial hatred, since those are not the subject of the present appeals.

…

> 98. However, we would respectfully observe that what was said by Lord Neuberger MR at paras. 40-41 [in *Samede*] was not intended to, and does not have the effect of, entitling a court to enter into expressing approval or disapproval of a particular viewpoint. Rather, when read fairly and as a whole, what Lord Neuberger MR was saying is the same as what we have said in this judgment, namely that the content of expression (for example political speech) may well require it to be given greater weight but the particular viewpoint being expressed is not something on which it is permissible for a court to express its own view by way of approval or disapproval."

[47] It is difficult to see on what basis a court could hold that the pursuer ought to be expected to tolerate the presence of the defenders so they could apply the slogan "toxic waste" on the remaining leg of an installation, without at least implicitly indicating that the view of the defenders either was correct, or carried more weight than the view of the pursuer.

[48] Another problem is this. If a proprietor or lawful occupier is to have to bear in mind at least the potential for access to the property for the purposes of protest, then duties may arise in relation to making the property safe for such persons. While that might not pose any obvious difficulty for places, like shopping malls, to which the public generally has access, it is likely to cause very significant difficulty in relation to an environment such as an offshore installation, or the remnants of an offshore installation.

[49] I take into account that, not only would action involving occupation of the installations interfere with property rights, but that the defenders in October 2019 damaged one of the installations by painting a slogan on it. Conduct of that sort could constitute a criminal offence.

[50] I accept that, in general, the duration of the protest, how disruptive or otherwise it is, and the importance of the location to the protesters will be relevant factors in assessing the proportionality of an interference with the rights protected by A10 and/or A11. In this case

the protest in October 2019 was of relatively short duration. I accept also that the location is important to the defenders. It is, however, clear that there is not an absolute right to choose a location for a protest, for the reasons I have already discussed. Occupation of an installation involves risks to safety, which I discuss more fully below. While the location is highly desirable to the defenders, lack of access to it is not destructive of the right of freedom of expression or freedom of assembly. It does not prevent the defenders from criticising the conduct of the pursuer in relation to decommissioning the installations. It does not prevent protest at a very wide variety of other locations. It does not prevent protest at sea at 500 metres from an installation.

[51] I accept also that large international companies must expect their actions to be scrutinised. The authorities to which Mr Mure referred in relation to his eighth proposition related to criticism in written form. They did not relate to direct action on an offshore installation. The focus of this case is not on the nature or terms of the criticism of Shell's policy in seeking to leave parts of offshore installations in the marine environment. It is on whether a restriction should be placed on protest on or within 500 metres of such installations.

[52] The question of disruption brings me to the second factor that I regard as of significance in this case. The potential for disruption arises particularly in the context of a protest in a dangerous environment. I have no reason to doubt that that the defenders aspire to keep their activists safe, or that they undertake the training and other activities referred to in the affidavits. There is no dispute that they withdrew when the weather worsened. Mr Mure did, however, accept that the protesters on 14 October 2019 accessed the spider deck. He said that there was no warning to indicate to them that it was thought to be unsafe. They had themselves assessed that they could remain on it safely.

[53] I accept for present purposes that what Mr Barne said regarding the status of the spider deck, as regards the prohibition of access to it for workers, as correct. It is reflected in 6/21 of process, which recorded various hazards said to have arisen during the course of the protest at Alpha. That document recorded that the grating on the spider deck was in poor condition, heavily corroded and not deemed safe for walking on. Without reaching any concluded view as to the precise condition of the spider deck, this passage of submission highlights that there may be risks that are known to those on the installation which cannot be recognised or assessed in advance by protesters. It undermines the notion that the precautions which the defenders say they employ will be effective in preventing accidents. I note that the document records that a support vessel was in fact positioned between Alpha and Bravo as a control, and that in the event of a fall to sea, the pursuer's man-overboard procedure would be used.

[54] *Csorba*, to which Mr Mure referred, related to a protest on the hard shoulder of an airport road. The court regarded the safety concerns relied on by the state as speculative. The safety risks in the present case are not speculative. The defenders acknowledge that the installations are in a dangerous marine environment, in that they lay some emphasis on the steps that they take to try to mitigate the dangers. Their position is not that the safety risks are speculative, but that they have sought to prepare for them, and ought to be allowed to take them. They have in effect acknowledged also, by reference to their state of knowledge about the spider deck, that they cannot expect in advance to identify all the relevant risks.

[55] Although I do not place much weight on it, I consider I am entitled to take into account the circumstance that activists on the Paul B Loyd Jnr pled guilty to breach of the peace by endangering themselves and others. I accept that the protest was of a different nature and in a different location and that is why I accord it relatively little weight.

Mr Mure submitted also that it involved an emanation of Greenpeace other than either of the defenders, namely Greenpeace UK, and that I should not assess the attitude of the defenders to safety by reference to the actions carried out on the Paul B Loyd Jnr. I note, however, that it is a matter of admission in the defences (Answer 3) that the first defender employs the crew of the ships Artic Sunrise, Rainbow Warrior and Esperanza. I was told that the Artic Sunrise had been involved in the action in the Cromarty Firth. Against that background there is a basis for taking the view that the first defenders were associated with the protest in question. The information is relevant because it is an example of conduct which appears to have placed protesters and others in danger. Some of the protesters pled guilty, apparently on that basis.

[56] Third, I regard the existing statutory provisions as of significance in demonstrating that the interference imposed by way of interim interdict is proportionate. I accept that not every breach of a legal rule by someone seeking to exercise A10 and/or A11 rights will indicate that interference is proportionate. The passage relied on by the defenders, however, in *Kudrevičius* at paragraph 150 related to rules governing public assemblies. The proportionality of restrictions on peaceful assemblies held in breach of rules requiring notification of public assemblies will require to be scrutinised with care. In this case, the pursuer relies on sections 21 and 23 of the 1987 Act. These are not provisions which regulate the content of protest or of expression of view. They are not, on their face, designed to regulate the holding of public assemblies, or to proscribe particular locations as sites where protests may be held. Their purpose is safety on and of offshore installations. Both parties referred to HSE guidance as to their purpose, namely to protect the safety of people working on, or in the immediate vicinity of, the installation, and the installation itself against damage. I consider that in relation to a measure with this purpose, the state has a wide margin of

appreciation in relation to any restriction that it imposes on the exercise of Article 10 and/or 11 rights.

[57] I did not regard the provision for exemption from the requirement to observe the zone as of any assistance. Mr Barne submitted that that constituted a route by which the defenders could have sought permission to protest within the zone. Mr Mure submitted that the potential for exemption demonstrated that there was no absolute requirement not to enter the zone. I do not know in what circumstances or on what conditions an exemption might be granted. I do not see how it could assist the defenders so far as occupation of an installation itself is concerned.

[58] The 500 metre zone is the subject of primary legislation. It is not open to challenge in this court on the basis of any purported incompatibility with UNCLOS. Article 60(4) and (5) UNCLOS contemplates the creation of safety zones of up to 500 metres. I proceed on the basis that any exercise of the relevant Convention rights within the 500 metre zone is likely to constitute a criminal offence. I am not determining whether in any particular circumstances a person will fall to be convicted of that offence, but regard it as significance that Parliament has created the offence. It is relevant to the question, focused in *Samede*, as to the extent to which the conduct is unlawful in domestic law. The offence appears to have been created with a view to protecting the safety of workers and installations. That is far removed from a procedural requirement regarding notification of a proposed demonstration in a public place. I do not regard the decision of the Amsterdam court in the criminal matter as of any assistance. I approach it with caution as I am not informed as to the criminal law of the Netherlands more generally. The *Artic Sunrise* case concerned a dispute about Russia boarding and detaining a Dutch ship after it had ceased to be engaged in actions that could interfere with the exercise of Russia's sovereign rights as a coastal state. I note that the

arbitral tribunal considered that it would be reasonable for a coastal state to act to prevent violations of its laws adopted in conformity with UNCLOS and dangerous situations that could result in injuries to persons and damage to equipment and installations: paragraph 328.

[59] I am satisfied not merely that the pursuer has made out a prima facie case, but that it has demonstrated that its case is likely to succeed. So far as the balance of convenience is concerned, I am satisfied that that favours the pursuer. The defenders have no right or title to occupy the installations, and the pursuer has raised safety concerns of substance. The defenders have a wide variety of other locations open to them at which to protest.

[60] For the foregoing reasons I grant the order sought.