Neutral Citation Number: [2025] EWHC 1601 (TCC)

Case No: HT-2022-000304

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 June 2025

Before :

MR JUSTICE CONSTABLE

- -

Between :

MUNICÍPIO DE MARIANA
And the Municipality Claimants identified in the Claim Form

Claimants

- and -

(1) BHP GROUP (UK) LIMITED
(formerly BHP BILLITON PLC and thereafter BHP GROUP PLC)

(2) BHP GROUP LIMITED

Defendants

- -
- -

Fiona Horlick KC, Andrew Higgins and Charlotte Elves (instructed by Pogust Goodhead) for the Claimants
Andrew Scott KC and Maximilian Schlote (instructed by Slaughter and May) for the Defendants

Hearing date: 4 June 2025

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Thursday 26th of June 2025.

Mr Justice Constable:

Introduction

1. The Municipality Claimants ('MCs') filed for contempt against the Defendants (together, 'BHP') on 7 October 2024 ('the Contempt Application'). On 12 December 2024, BHP applied to strike out the Contempt Application. This judgment determines that application following a hearing on 5 June 2025.

2. The material background to the underlying dispute is set out in the earlier judgment of the Court of Appeal at [2022] EWCA Civ 951. On 5 November 2015 Brazil suffered its worst ever environmental disaster when the Fundão Dam in southeast Brazil collapsed, releasing around 40 million cubic metres of tailings from iron ore mining. The collapse and flood killed 19 people, destroyed entire villages, and had a widespread impact on numerous individuals and communities, not just locally but as a result of the damage to the River Doce system over its entire course to the sea some 400 miles away. The Brazilian public prosecutor has estimated the cost of remediation and compensation at a minimum of R$155 billion, about £25 billion at today's exchange rates.

3. In these proceedings over 600,000 claimants seek compensation for losses caused by the disaster from the Defendants, jointly and severally ('the Main Proceedings'). The Claimants are all Brazilian and comprise (i) over 580,000 individuals; (ii) over 1,400 businesses, ranging from large companies to sole traders; (iii) 69 churches and faith based institutions; (iv) the MCs; (v) 7 utility companies; and (vi) over 23,000 indigenous and Quilombola individuals. The Defendants joined Vale S.A. ('Vale') to the proceedings as Part 20 Defendants, although they are no longer a part of the litigation.

4. BHP challenged the jurisdiction of the English Court to hear the case. BHP succeeded at first instance but the Court of Appeal allowed the case to proceed against BHP. On 1 June 2023, the Supreme Court refused permission for BHP to appeal. There has been, in addition to various interlocutory matters, one lengthy substantive hearing before O'Farrell J relating to a number of preliminary and liability issues, including whether the MCs have standing to bring their claims. Judgment has not yet been handed down.

5. At the heart of the Contempt Application is a claim brought by the Brazilian Mining Institute ('IBRAM' and 'the IBRAM Claim') in the Brazilian Supreme Court which hears constitutional matters (the 'STF'). IBRAM is a Brazilian private trade organisation whose object amongst other things is to represent and promote the Brazilian mining industry. A subsidiary of BHP, BHP Brasil, is a member of IBRAM. It is said by the MCs that the IBRAM Claim was procured by BHP and was brought pursuant to an agreement by which BHP committed to funding the claim in full. It is said that this was done, together with interim relief sought, with the express intent to block the MCs right of access to justice and legal assistance before this Court.

6. The IBRAM Claim, filed on 11 June 2024, was of a type of suit known in Brazil as an 'Action Against the Violation of a Constitutional Fundamental Right' or an 'ADPF'. It sought:

(a) substantive relief, including declarations that no Brazilian municipality has standing to sue in their own name or to bring actions in jurisdictions other than in Brazil, and should be ordered to discontinue their claims abroad, which would include the Main Proceedings (the "Substantive Relief"); and

(b) interim relief, including

(i) "*the immediate suspension of any interactions between the Brazilian municipalities and law firms, regarding any claims that are already pending or to be filed in foreign jurisdictions, also suspending the provision of information and payments under the contracts executed with the aforementioned law firms*";

(ii) the obligation for the municipalities included in an exhibited list "*to request, before those jurisdictions, the suspension of lawsuits pending abroad to which they are a party, until the final judgment of the motion; as well as…refrain from filing new lawsuits and/or performing new acts in the context of claims already filed in foreign jurisdictions*" (the "Interim Relief").

7. The MCs say that if granted, the Substantive and/or Interim Relief sought would immediately impact their ability to continue in the prosecution of their claims in this jurisdiction. The procurement and funding of the IBRAM Claim by BHP is said by the MCs to be a criminal contempt of Court, as an act of interference in the administration of justice in this country.

8. On 24 June 2024, the MCs filed an anti-suit injunction ('the ASI Application') seeking to prevent BHP and Vale from taking any further steps to promote or encourage the IBRAM Claim. Following various exchanges referred to further below, BHP acceded to the ASI Application on 22 July 2024 and gave undertakings to the Court, incorporated into a consent order (the "Consent Order"). By paragraph 1, BHP undertook to refrain from performing "*any steps to pursue or prosecute or progress or encourage or otherwise assist, including but not limited to the provision of financial assistance, in*" the IBRAM Claim**.** BHP also undertook "*to procure that BHP Brasil will request that IBRAM does not take any further action to pursue the IBRAM Interim Relief Claim.*" Paragraph 2 of the Consent Order provided that, in complying with paragraph 1, BHP were not required to take any action that would cause BHP Brasil to breach its existing contractual obligations to pay IBRAM for the costs in relation to the IBRAM Claim and the IBRAM Interim Relief Claim.

9. It is not alleged by the MCs as part of the Contempt Application that BHP is in breach of the Consent Order.

10. It is common ground that, irrespective of the Consent Order, the IBRAM Claim cannot be withdrawn (even by IBRAM). Indeed, notwithstanding the request

made by BHP Brasil pursuant to the Consent Order, further petitions have been sought by IBRAM from the STF as explained further below.

11. In its strike out application, BHP argue that (1) the Contempt Application is an abuse of process because (i) it is an abusive attempt to relitigate matters that were disposed of by the Consent Order; (ii) it does not serve the public interest; and (iii) the MCs are not appropriate guardians of the public interest; and (2) the Contempt Application discloses no reasonable grounds for bringing criminal contempt proceedings.

Factual and Procedural Background

12. In light of its relevance to the arguments about re-litigation of the compromised ASI Application, it is necessary to set out in more detail the events which took place upon bringing the ASI Application, up to and following the Consent Order.

13. Prior to filing the ASI Application, Pogust Goodhead ('PG'), on behalf of the MCs, wrote to Slaughter and May ('SM'), representing BHP, on 15 June 2024. The letter asserted that, '*the plain and obvious purpose of the wide-ranging interim relief sought in the IBRAM Claim is to disrupt, if not halt entirely, our Municipality Clients' participation in the Proceedings and the exercise of their rights of access to justice in the English courts… That being so, there is a clear prima facie inference to be drawn in our view that your clients, as the primary beneficiaries of the interim relief being sought from the STF, must have been instrumental in the commencement of the IBRAM Claim.'* The letter went on to note that Mattos Filho, a firm instructed by BHP as Brazilian co-counsel to Slaughter and May in the Main Proceedings had conduct of the IBRAM Claim. It also pointed out that some of the documents appended to the IBRAM Claim had not been in the public domain and could only have been made available to IBRAM by BHP. It then asserted, '*It is equally obvious that it has been brought in order to pressure the Municipalities into accepting the offer that BHP… have made as part of the repactuation negotiations in Brazil'.* The letter then set out a series of questions seeking, in different ways, an explanation of the extent to which BHP was involved in the bringing of the IBRAM Claim.

14. BHP's initial response was by letter dated 20 June 2024. SM did not directly answer PG's questions but at the heart of such answer as was given was the following statement at paragraph 3(e): '*Our clients do not have a representative on the Executive Board or the Administrative Board or the Legal Committee of IBRAM. For the avoidance of doubt, our clients have not participated in IBRAM's decision to initiate the IBRAM claim, nor has BHP Brasil*'.

15. Thereafter, the MCs obtained minutes of an IBRAM Board meeting dated 23 May 2024. In these, it was stated that '*The Institutional Relations Advisor, Renata Santana, informed that BHP asked IBRAM to file an ADPF with the* [STF] *to challenge the possibility of Brazilian municipalities litigating abroad, in cases occurring in Brazil, mainly in the case of the Fundão dam collapse. There are at least 50 affected municipalities that are trying to file lawsuits with the Law Firm P&G'.*

16. The ASI Application was launched on 24 June 2024. Two days later, PG wrote seeking various undertakings pending determination of the ASI Application, and additionally seeking an explanation for the apparent contradiction between the answers, such as they were, in SM's letter of 20 June 2024 and the 23 May 2024 Minutes. It sought a response by 28 June 2024. Meanwhile, the ASI Application was listed to be heard at the PTR before O'Farrell J, on 22 July 2024.

17. On 10 July 2024, Vale submitted its responsive evidence to the ASI Application, through the witness statement of Alexandre D'Ambrosio. This evidence included the following passage in a section dealing with the decision to bring the IBRAM Claim:

> '*During a telephone call with Emir Calluf Filho (BHP Brasil's in-house counsel) in around April 2024, Mr Filho informed me in high-level terms about the type of claim that BHP were considering asking IBRAM to bring….*'

18. On 13 July 2024, nearly three weeks after PG's requests, SM wrote providing some further information. First, it was admitted that, contrary to the terms of the letter (albeit consistent, it was said, with the understanding of SM and BHP at the date of the letter), BHP Brasil did in fact have a representative on the Legal Committee of IBRAM. In relation to the second sentence of paragraph 3(e) of the 20 June 2024 letter, SM said that this was '*intended to convey that neither BHP nor BHP Brasil have a representative on the Executive Board or the Administrative Board of IBRAM, being bodies BHP understands made the decision for IBRAM to initiate the IBRAM Claim, nor did they attend any meetings of those bodies during which the IBRAM Claim was discussed and/or in which the decision to bring a claim was made*'.

19. In the absence of evidence as to the state of knowledge of either those at SM or those individuals providing instructions to SM, it is plainly necessary to use cautious language when characterising this response and paragraph 3(e) to which it referred. Putting it at its lowest, in circumstances where BHP had in fact asked IBRAM to bring the IBRAM Claim, and agreed to fully fund it, the statement that '*[BHP] have not participated in IBRAM's decision to initiate the IBRAM claim, nor has BHP Brasil*', in fact conveyed, read by the reasonable recipient in light of the questions this statement was responding to, a misleading impression. Indeed, even if strictly true when construed as SM suggested had been intended, it fell short of communicating the whole truth, and was plainly aimed at distancing BHP from the IBRAM Claim.

20. In the same letter, SM went on to inform PG at paragraph 5 that:

> *"(a) Prior to the filing of the IBRAM Claim, BHP Brasil was asked by IBRAM to cover all costs associated with the IBRAM Claim and agreed with IBRAM that it would do so. IBRAM incurred costs on this basis.*
>
> *(b) BHP Brasil and IBRAM subsequently agreed to enter into a sponsorship agreement that would cover the costs of the IBRAM Claim and potentially*

costs associated with other initiatives relating to the mining industry (the "Sponsorship Agreement").

(c) The Sponsorship Agreement provides for an initial amount of R$1,000,000, which can be increased to a total amount of R$6,000,000. Prior to the parties agreeing the Sponsorship Agreement, BHP Brasil was informed by IBRAM of the costs being agreed and incurred in relation to the IBRAM Claim and it was clear by the time of the Sponsorship Agreement that the costs in relation to the IBRAM Claim would exceed the initial amount of R$1,000,000 such that (in line with the agreement to cover the costs of the claim) the further amounts available under the Sponsorship Agreement would be required.

(d) BHP understands that IBRAM has incurred costs of approximately R$4,100,000 in relation to the IBRAM Claim, and that BHP Brasil is contractually bound to pay those costs.

(e) As such, the proposed Paragraph 1 Undertakings contain a carve-out permitting BHP Brasil to provide funding to IBRAM in accordance with BHP Brasil's agreement to fund the costs of the IBRAM Claim. In this regard we note that BHP Brasil has not made any payments to IBRAM to date to fund the costs of the IBRAM Claim.

(f) BHP will procure that BHP Brasil will use best endeavours to agree with IBRAM that the funding to be provided by BHP Brasil in respect of the costs of the IBRAM Claim will be capped at R$6,000,000 and that no further funds will be provided beyond those provided under the Sponsorship Agreement."

21. In evidence served on behalf of BHP from Efstathios Michael on the same date, it was confirmed, in addition, that once an ADPF is filed, it could not be withdrawn.

22. The Sponsorship Agreement was not disclosed at this time, notwithstanding a number of requests, as referred to in the first affidavit of Mr Christoper Neill, a Partner of PG.

23. On 22 July 2024, the Consent Order was agreed, containing the undertakings and carve out set out above.

24. It is common ground that as at the date of the Consent Order, the MCs had not intimated the possibility of a contempt application in relation to BHP's involvement with the IBRAM Claim.

25. Correspondence continued, some of which is referred to later in this judgment. PG continued to seek sight of the Sponsorship Agreement. On 20 August 2024, solicitors for BHP confirmed that BHP had complied with the undertaking and that BHP Brasil had requested that IBRAM does not take any further action to pursue the IBRAM Interim Relief Claim.

26. In the same letter, BHP's solicitors provided the following information:

> *'…on 3 April 2024, Emir Calluf, Vice President, Legal, Americas at BHP Brasil, met with Raul Jungmann, IBRAM's CEO, and Rinaldo Mancin, IBRAM's Director of Institutional Relations. At this meeting, Mr Calluf and Mr Jungmann and Mr Mancin discussed the possibility of IBRAM bringing the IBRAM Claim and, at Mr Jungmann's request, Mr Calluf agreed that BHP Brasil would pay for all costs incurred by IBRAM in relation to the IBRAM Claim (if IBRAM decided to bring the claim). Therefore, as and from 3 April 2024, BHP Brasil was contractually bound to provide the funding to pay all of IBRAM's legal fees incurred in connection with the IBRAM Claim, including in circumstances where IBRAM's costs for the IBRAM Claim exceed the total amount of R$ 6,000,000.00 provided for under the Sponsorship Agreement*.'

27. This agreement has been referred to in submissions as the 'Oral Agreement'. Pursuant to this, the obligation to fund the IBRAM claim was, effectively, said by BHP to be unlimited.

28. On 23 August 2024, BHP then disclosed the Sponsorship Agreement. Clauses 1.1 and 2.1 set out the following:

> '*1.1 The object of the present instrument is to sponsor IBRAM for the development of a strategy to strengthen the sector in support of mining companies in Brazil and with responsible and sustainable activity. This includes the mapping of external stakeholders, sponsorship of events, meetings and participation in events with the aim of defending investments by the mining industry in Brazil.*
>
> *2.1 The sponsorship value of this AGREEMENT is initially R$1,000,000.00 (one million Reais), which may be increased by mutual agreement until reaching the total value of R$ 6,000,000.00 (six million Reais), provided that such increase is pertinent to the development of the activities described in the First Clause.*'

29. Nowhere does the Sponsorship Agreement refer to the IBRAM Claim. If the specific purpose of the Sponsorship Agreement was to fund the IBRAM Claim, the document was, it may reasonably be inferred, drafted in such a way as to disguise that purpose.

30. Moreover, in light of the Oral Agreement, the Sponsorship Agreement did not encompass the totality of the obligations BHP says that it has in respect of the IBRAM Claim. Indeed, it is not obvious what practical purpose the Sponsorship Agreement was intended to serve in respect of funding the IBRAM Claim if the cap stated in it was effectively subjugated to the overarching Oral Agreement by which BHP committed to fund the entire proceedings to an unlimited extent. To the extent the Oral Agreement is as BHP contends, it also follows that, pursuant to the carve out within the Consent Order, BHP would be permitted to continue to fund the IBRAM Claim – which itself cannot be stopped - to an unlimited extent.

31. Meanwhile, and notwithstanding BHP Brasil's request that IBRAM does not take any further action to pursue the IBRAM Interim Relief Claim, IBRAM has in fact gone on to seek further interim relief in connection with the IBRAM Claim.

32. On 9 October 2024, IBRAM filed a petition, which sought: (i) the immediate suspension of any contracts between Brazilian Municipalities and any other entity in connection with any lawsuits in foreign jurisdictions, including suspension of the supply of information and payments under such contracts; (ii) that certain Brazilian Municipalities be compelled to apply to suspend any foreign proceedings pending the outcome of the IBRAM Claim, (iii) orders preventing them from bringing any new proceedings or claims, or performing new acts within existing claims, and (iv) that certain Brazilian Municipalities disclose all contracts with third parties in connection with foreign proceedings (the "October Petition"). This developed an argument that "*success fee*" contracts are illegal under Brazilian law.

33. On 12 October 2024, and on the basis of the success fee argument, Justice Dino ordered that the Municipalities: (i) disclose contracts with foreign law firms; and (ii) refrain from paying any fees to them, pending a decision on the merits of the IBRAM Claim (the **"**October STF Order"). The STF ratified that order on 5 November 2024. No other orders on the October Petition were made.

34. On 25 October 2024, the 'Repactuation Agreement' was signed in Brazil and ratified on 6 November 2024. This is a compensation scheme made between Samarco, Vale, BHP Brasil and the Renova Foundation (the "Brazilian Companies"), the governments of Minas Gerais and Espírito Santo, the Federal Government, and several Brazilian justice institutions. It renegotiated the settlement terms of prior agreements in relation to various Brazilian proceedings. The MCs were not parties to the Repactuation Agreement and were not involved in its negotiation.

35. If any MC which was eligible wished to apply for compensation under the Repactuation Agreement, this was made contingent upon signing an adherence agreement, which required the withdrawal and discontinuance from any proceedings relating to the Fundão Dam collapse, including the Main Proceedings within 5 days, and the waiver of any other claims. 31 of the 46 MCs have chosen not to adhere to the Repactuation Agreement.

36. On 22 February 2025, IBRAM filed a further petition for interim relief with the STF (the "February Petition"). IBRAM sought orders to: (i) stay the effectiveness of the contracts between the Brazilian Municipalities and their foreign lawyers; and (ii) suspend clauses in those contracts that authorise the collection of funds from the municipalities in the event of a settlement. BHP contend that, according to IBRAM, the February Petition was made because the municipalities' contractual obligations to pay their foreign lawyers on entering into a settlement deterred them from signing up to the terms of the Repactuation Agreement which contains a clause prohibiting the use of compensation to pay lawyers. The MCs say that if the interim relief in the February Petition was (or is) granted, this would also leave the MCs without a retainer through which they could give instructions in the Main Proceedings.

37. As a result of these concerns, on 3 March 2025, 9 of the MCs sought and obtained from the High Court without notice relief against IBRAM comprising in particular: a mandatory injunction and declaratory relief, in respect of the February Petition, including an order requiring IBRAM to withdraw it. BHP was not a party to that application. The return date was listed for 15 April 2025. At that hearing, the parties agreed that the mandatory injunction should stay in place pending a full hearing, listed for November 2025. IBRAM (through Leading Counsel) at that time indicated that it did not intend to issue further petitions because the relief that Justice Dino had granted to date was sufficient.

38. On 5 March 2025, Justice Dino issued an order, or a statement, following the February Petition. The MCs and IBRAM do not agree the nature and legal effect of the communication, including whether it resolved the February Petition. Whilst it is not suggested by the MCs, at least in the context of this application, that BHP have been actively involved in the further petitions advanced by IBRAM, such that BHP are in breach of the Consent Order, it would seem to follow from the Oral Agreement that they have been funded (or at least underwritten) by BHP.

Does the Contempt Application Disclose a Reasonable Ground?

39. Although this is BHP's secondary argument, it seems logical to consider this first.

40. Under CPR 3.4(2)(a), the Court may strike out a statement of case if it appears that it discloses no reasonable grounds for bringing the claim. The burden rests on the applicant to satisfy the Court that the respondent's statement of case discloses no reasonable grounds.

41. When considering an application to strike out, the facts pleaded must be assumed to be true and evidence regarding the claims advanced in the statement of case is inadmissible (see Arcelormittal USA LLC v Ruia [2022] EWHC 1378 (Comm) at [29] and the cases cited therein). Consideration of the application will be *"confined to the coherence and validity of the claim as pleaded"* (Josiya v British American Tobacco plc [2021] EWHC 1743 (QB)). Notwithstanding, the Court retains its inherent power to examine the underlying facts (Ministry of Defence v AB [2012] UKSC 9; [2012] 2 WLR 643 at [149]). As pointed out at [9.48] of Zuckerman on Civil Procedure, justification of dismissal under this rule rests on the concept that no further investigation could provide any appreciable assistance to the task of reaching a correct outcome. It would be wrong to strike out a statement of case that presents an arguable claim or, as made clear in Three Rivers District Council v Governors and Company of the Bank of England (No.3) [2001] UKHL 16; [2001] 2 All ER 513, at [95], the case raises complex issues of fact or law. Accordingly, as the editors note, a statement of case should not be struck out if it raises an issue in an area of the law that is in a state of uncertainty or development or requires evaluations of public policy or the public interest. This reflects Chief Master Marsh's observations in Saeed v Ibrahim [2018] EWHC 3 (Ch), [48] where he indicated that '*a strike out application…is unlikely to be a suitable occasion for… delicate policy issues to be explored and determined*.'

42. BHP's first point is, effectively, a pleading point. Box 5 of the Contempt Application states that BHP '*have committed contempt in the face of the Court by funding and procuring the initiation of a [the IBRAM Claim]*'. The facts relied upon in Box 12 amplify the circumstances of the initiation and funding of the IBRAM claim, largely based upon the chronology set out above.

43. BHP argue, first, that the conduct complained of does not amount to '*contempt in the face of the Court*'. Irrespective of whether the substance of the matters alleged may nevertheless constitute a criminal contempt (which BHP also deny), it is therefore said simply that the pleaded case is unviable.

44. BHP is correct that the facts alleged do not, in substance, constitute contempt of a type which is properly described as contempt '*in the face of the Court*'. The distinction between contempt which is 'in the face' of Court and that which is not is an important one, at least in some circumstances, because the former is a type of contempt which permits a Court to exercise great powers if necessary – for example the power instantly to imprison a person without trial. It is not necessary in this case to dwell on the precise distinction (not least as noted by the editors of *Arlidge, Eady & Smith on Contempt* (5th Edn) at 10-5 that '*it is inevitably somewhat indistinct*'). However, it appears from the authorities discussed at [10-11] to [10-28] of the text referred to above that the key distinction is one of actual or constructive knowledge on the part of the Court of the offending behaviour. As it was put by Laskin J of the Supreme Court of Canada in McKeown v The Queen (1971) 16 DLR (3d) 390, '*Contempt in the face of the court is, in my view, distinguished from contempt not in its face on the footing that all the circumstances are in the personal knowledge of the court. The presiding judge can then deal summarily with the matter without the embarrassment of having to be a witness to issues of fact…*'. Whilst there may be a degree of elasticity as to what might be regarded as being 'in the personal knowledge of the Court', the facts alleged against BHP are, if contemptuous at all, clearly not '*in the face of the Court*'.

45. Whilst BHP are therefore correct in this regard, it is not an answer in circumstances where, in order to meet the complaint, the words '*in the face of the Court*' should simply be struck out, with the remaining substantive complaint left intact. The question is one of substance. The erroneous adoption of the phrase '*in the face of the Court*' in the application does not prevent the Court, on this application, from looking to the substance of the application.

46. A further pleading point, as developed orally, is that even if the words '*in the face of the Court'* were removed by amendment, the application notice does not allege the specific intent required to find a proper plea of contempt constituting interference in the due administration of justice. Relying upon CPR r.81.4(2)(a) and (h) Mr Scott KC, for BHP, submitted that a person charging contempt must set out in the application notice itself "*the nature of the alleged contempt*" and "*a brief summary of the facts alleged to constitute the contempt, set out numerically in chronological order*". He is undoubtedly right that CPR r.81.4(2) reflects the long-standing recognition in the authorities that the charge should be disclosed with sufficient particularity.

47. The submission advanced is that this particularity must be found "*within the four corners of the notice itself*". For this proposition, Mr Scott KC relies upon Harmsworth v Harmsworth [1987] 1 WLR 1676 (CA) 1683A-D. This pre-CPR case involved an alleged contempt of breach of a non-molestation order. The judge at first instance rejected the submission that particulars of the breach were required to be in the application notice, rather than the supporting affidavit, and concluded that the affidavit provided sufficient particularity of the contempt. The appeal was allowed. Nicholls LJ said:

> "*So the test is, does the notice give the person alleged to be in contempt enough information to enable him to meet the charge? In satisfying this test it is clear that in a suitable case if lengthy particulars are needed, they may be included in a schedule or other addendum either at the foot of the notice or attached to the notice so as to form part of the notice rather than being set out in the body of the notice itself. But a reference in the notice to a wholly separate document for particulars that ought to be in the notice seems to me to be a quite different matter. I do not see how such a reference can cure what otherwise would be a deficiency in the notice. As I read the Rules and as I understand the decision in Chiltern District Council v. Keane, the Rules require that the notice itself must contain certain basic information. That information is required to be available to the respondent to the application from within the four corners of the notice itself. From the notice itself the person alleged to be in contempt should know with sufficient particularity what are the breaches alleged. A fortiori, in my view, where the document referred to is an affidavit, which does not set out particulars in an itemised form, but which leaves the respondent to the committal application to extract and cull for himself from an historical narrative in the affidavit relevant dates and times and so forth, and to work out for himself the precise number of breaches being alleged and the occasions on which they took place.*
>
> *I do not think, therefore, that if there are deficiencies in the notice issued on 22 June 1987, those deficiencies should be regarded as having been cured by reason of the references in paragraph (1) to the affidavit attached to the notice and, in paragraph (2), to the affidavit accompanying the notice.*"

48. Mr Scott KC also relies upon Re L (A Child) [2017] 1 FLR 1135 (CA), at [73]-[75] in which Vos LJ could not over-emphasise '*the importance of any court dealing with an alleged contempt of court….identifying or requiring the party bringing the contempt proceedings to identify precisely the particulars of the contempt with which it is dealing. This is a basic but crucial point*'. Consistently, in Navigator Equities Limited v Deripaska [2024] BCC 526 at [48] Carr LJ (as she was then) observed that "…*the issue on a committal application is not whether the defendant is guilty of contempt, but whether it is proved to the criminal standard that the defendant is guilty of contempt in the respects set out in the application notice*".

49. In the present case, Box 5 of the Application Notice (Form N600), sets out that the substantive and interim relief sought in the IBRAM Claim would variously breach the MCs right to a fair trial and/or obstruct the due course of justice or

lawful process of the Court, but does not state that this was the intent or purpose of bringing the IBRAM Claim on the part of BHP (or Vale). Similarly, the summary of facts at section 12 of Form N600 does not refer to the purpose or intent of BHP. However, the accompanying Affidavit from Mr Neill does. Following various introductory and background matters paragraph 32 of the Affidavit is preceded by the capitalised heading, 'GROUNDS FOR CONTEMPT'. There then follows 51 paragraphs, consistent with but in greater detail than, Box 12 of the Form N600. Paragraph 58 describes '*The Defendant's purpose in procuring the IBRAM Claim*', and summarises its allegation at paragraph 64 as being, '*for the purpose of blocking the Municipality Claimants' right of access to court'* and concludes at paragraph [83], '*Based on the above evidence it is clear the Defendants have procured the IBRAM Claim, which includes attempts at stopping the Municipality Claimants from speaking with their lawyers (or any lawyer) in relation to these Proceedings, committed to funding it in full, and are still funding and promoting it for the specific purpose of interfering with the administration of justice by this Court.'*

50. Taking the N600 Form with supporting evidence together, it is absolutely clear what actions the MCs allege were carried out by BHP, as is the MC's contention that these acts were carried out with the specific purpose of interfering with the administration of justice by this Court. True it is that the allegation of intent is found within the 'GROUNDS FOR CONTEMPT' section of the accompanying Affidavit. But this is a long way from a case such as Harmsworth in which the alleged contemnor was left to work out for himself the precise number of breaches of a non-molestation order being alleged and the occasions on which they took place. The basic but crucial point of clarity in the allegation to be faced is, at least post-CPR, a point of substance rather than form.

51. That it is permissible to look to the accompanying Affidavit for particulars of contempt is consistent with CPR Rule 81 itself. The procedural requirements are contained in Rules 81.3 and 81.4. CPR81.3 deals principally with the circumstances in which permission is required, and includes no procedural requirements as to what must be contained within the four corners of Form N600. CPR81.4 is headed, '*Requirements of a contempt application*'. CPR 81.4(1) states that '*Unless and to the extent that the court directs otherwise, every contempt application must be supported by written evidence given by affidavit or affirmation*.' CPR81.4(2) then provides, '*A contempt application must include statements of all the following unless (in the case of (b) to (g)) wholly inapplicable*.' The evidence is part of the application, and it would be artificial to ignore it when considering whether the substantive requirement to precisely identify the contempt with which the Court is dealing. No part of the CPR necessitates such an artificial distinction.

52. Moreover, even if I were wrong in this conclusion, this again would not – at the strike out stage – be fatal to the claim. If the allegation of specific intent must formally be included within the body of N600 rather than in the accompanying affidavit, then any order dismissing the Strike Out Application (if that were otherwise the appropriate order had the Form N600 not been deficient) can be made on terms that the Form is amended. This is not a case where BHP could

remotely argue that it has been prejudiced by the location of the relevant information as between Form N600 and the Affidavit.

53. The next point advanced by BHP is that the conduct complained of is not within any recognised category of criminal contempt. The MCs contend that the relevant category of contempt is the interference with the due administration of justice. This is, without doubt, an 'overarching' category of contempt. In Attorney General v Times Newspapers [1974] AC 273, Lord Diplock said:

> *'The due administration of justice requires first that all citizens should have unhindered access to the constitutionally established courts of criminal or civil jurisdiction for the determination of disputes as to their legal rights and liabilities; secondly, that they should be able to rely upon obtaining in the courts the arbitrament of a tribunal which is free from bias against any party and whose decision will be based upon those facts only that have been proved in evidence adduced before it in accordance with the procedure adopted in courts of law; and thirdly that, once the dispute has been submitted to a court of law, they should be able to rely upon there being no usurpation by any other person of the function of that court to decide it according to law. Conduct which is calculated to prejudice any of these three requirements or to undermine the public confidence that they will be observed is contempt of court.'*

54. Four years later, in Attorney General v Leveller magazine Ltd [1979] AC 440 Lord Diplock, again, said:

> '*My Lords, although criminal contempt of court may take a variety of forms they all share a common characteristic: they involve an interference with the due administration of justice either in a particular case or more generally as a continuing process. It is justice itself that is flouted by contempt of court, not the individual court or judge who is attempting to administer it.*'

55. As recognised in the White Book at 81CC.8, a significant proportion of the case law on contempt of court is concerned with questions as to whether a particular conduct falls within or without what would be called 'the interference principle' because it does or does not involve an interference with the due administration of justice in a particular case. The editors go on: '*Obviously the forms of conduct that may arguably constitute 'interference' and which therefore make up that 'variety of forms' of contempt referred to by Lord Diplock must be many and various.*'

56. BHP place reliance upon the observation of the editors that, '*Nowadays, it seems that judicial sentiment is against the widening of contempt liability. Submissions that the 'interference' principle should be applied to circumstances not illustrated in previously decided cases (and therefore not found among the 'variety of forms'), on the ground that the novel circumstances are but new examples of conduct covered by the principle, are likely to be met by the argument that they would constitute widening of the contempt liability that should not be countenanced*'. Mr Scott KC argues that, in the context of criminal liability, mere reference to interference in the administration of justice

is too vague a concept to provide necessary certainty. It is accepted by the MCs that there is no English authority that procuring or funding foreign proceedings with the intent of impacting adversely a party's ability to pursue claims unhindered in this jurisdiction can amount to criminal contempt.

57. However, the comment in the White Book falls far short of suggesting that any claim for criminal contempt that does not fall within a specific type of conduct previously classed as such must fail as a matter of principle. Any such suggestion would be wrong in law. Lord Diplock's reference to a 'variety of forms' was not, in my view, a reference to a fixed catalogue of misdemeanours: quite the reverse, it was a statement of the obvious fact that the ways in which the administration of justice may be interfered with in such a way as to constitute a criminal contempt are many and varied. Whilst a Court will inevitably be cautious in concluding that the administration of justice has been interfered with in a contemptuous way where the circumstances are unprecedented, the unprecedented nature of the conduct of itself plainly cannot constitute a legal defence to an application for contempt.

58. Therefore, the fact that the present set of facts is (relatively) novel does not of itself provide a basis for contending that there are no reasonable grounds advanced by the MCs. Moreover, to the extent that the MCs' argument is (a) novel and (b) potentially a matter of public policy/importance, this would be a reason, even if questionable, not to dispose of the matter summarily by way of strike out application.

59. It is convenient to consider next the final point made by Mr Scott KC under the heading of whether the application discloses any reasonable grounds (before turning to his third argument). Whilst, in writing, Mr Scott KC contended that exercising a legal right to institute legal proceedings can never amount to a contempt, he did not put it quite as high orally. Nevertheless, he emphasised a party's rights of access to court, guaranteed under Article 6 ECHR, and argued that the IBRAM Claim itself cannot interfere with the administration of justice: it would only be upon the making of determinations or orders by the STF that such interference could take place. All the STF would be declaring is the true position under Brazilian constitutional law, and granting final relief to reflect its determination. Seeking this outcome cannot of itself be contemptuous. A third limb to the argument effectively reiterated the lack of room for the contempt jurisdiction where anti-suit injunctive relief is available, which I consider separately below. Mr Scott KC contended that even if, contrary to the foregoing, the institution of proceedings can, in principle, be capable of being a criminal contempt, this would only be in a case where those proceedings imposed an improper pressure on a litigant as regards their conduct of the English proceedings and that no such improper pressure exists, even arguably.

60. The starting point is that the suggestion that exercising a legal right to institute legal proceedings cannot, of itself, constitute a criminal contempt is not supported by authority. To the contrary, it is clear that, if done for the purposes of interfering with existing proceedings, exercising or threatening to exercise lawful rights can amount to criminal contempt.

61. In the case of R v Kellet (1976) 1 QB 372, Mr Kellet became aware that his neighbours intended to give disparaging witness evidence about him in divorce proceedings. He then sent a friend, armed with a tape recorder in her shopping bag and pretending to be a prospective tenant, to question the neighbours about him. Notwithstanding the fact the tape recordings were, apparently, unintelligible, Mr Kellet wrote to the neighbours alleging that they had been slanderous and malicious, that he had a recording of it, and threatening to sue for damages. The letter concluded, '*The amount of damages etc, I will discuss with my solicitor, but firstly you might like to withdraw your statements made….*' It was held that the defendant committed the offence of attempting to pervert the course of justice when, in threatening to bring a slander action against the neighbours, he intended to induce them not to give evidence against him in the divorce proceedings, notwithstanding the fact that the institution of slander proceedings would have been entirely lawful. Whilst undoubtedly very different on its facts, it undermines the contention that as a matter of principle, the lawful institution of legal proceedings can never amount to a contempt. Mr Scott KC sought to draw a distinction by emphasising that Kellet was a case involving the threat of legal proceedings, rather than the bringing of proceedings. Whilst true, this is not analytically relevant. If Mr Kellet had in fact lawfully started such proceedings, rather than merely threatening to do so, the outcome of the case would have been the same providing the necessary intention or purpose for doing so (interfering with the course of justice by placing pressure on prospective witnesses) was established.

62. Ms Horlick KC, for the MCs, also relies upon Dagi & Ors v BHP & Ors (Supreme Court of Victoria, 18 Sep 1995, unreported). The plaintiffs alleged that BHP (here, referring to the Broken Hill Proprietary Company Ltd, an ancestor of, but with a different company structure to, the Defendants in these proceedings), in contempt of the integrity of the Court's process, sought to deny the plaintiff's access to the Court. The plaintiffs were claiming that their lives and occupations had been grievously injured by devastating pollution from the Ok Tedi copper mine at Mt Publian in Papua New Guinea. The contempt was alleged to have taken the form of, first, procuring and agreeing to what was called 'the Eighth Supplemental Agreement', and second, in drafting, preparing and advising upon the Mining (Ok Tedi Eighth Supplemental Agreement) Bill. The Eight Supplemental Agreement was between the operators of the Ok Tedi Mine and the Papua New Guinea Government, which was to be ratified by legislation if the Bill passed. It would have made it an offence for Papua New Guinea landowners to pursue or maintain legal proceedings in respect of damage caused by the Ok Tedi Mine. Having considered the evidence, Cummins J found, '*I am satisfied beyond reasonable doubt that* [BHP] *has sought to block the actions of these plaintiffs presently before this Court*.' The plaintiffs categorised the contempt as hindering or seeking to hinder access to law, in reliance upon the principle set out by Lord Diplock in Times Newspapers and quoted at [53] above. In his judgment, having quoted the same passage, the judge continued:

> '*There are numerous statements of like principle, Most relevantly, it is established by clear authority, including the decision I have cited together with R v Kellet (1976) 1 QB 372, R v Lovelady* (1982) W.A.R. *65 and*

> *Raymond v Honey (1983) AC 1, that conduct which has the prohibited tendency will constitute contempt irrespective of whether the conduct itself may otherwise be lawful or in exercise of an otherwise legal right.*'

63. BHP argued in Dagi that the proceedings for contempt were fundamentally misconceived because they sought to interfere with its lawful right to have access to Parliament and the sovereign right of Parliament to have the benefit of access to it by citizens. There is a parallel with, in this case, the undoubtedly lawful right to have a constitutional question of law tested in the STF.

64. BHP's argument failed. The judge said:

> '[BHP] *is quite right in saying that it has a right to access to Parliament but that is not the end of the matter.* [BHP] *is also a litigant before this court. Nothing I say is directed to* [BHP's] *access to a sovereign Parliament…What I say is directed to access by the plaintiffs to this court. It is this court in which I am sitting and it is this court to which the plaintiffs have come for justice. The circumstance that also* [BHP] *has the right of access to a foreign Parliament does not meet the question that the plaintiffs have a right to access to law in this court. It is that latter question which is before me….it is entirely within this court's competence to deal with interference in this court's administration of justice.'*

65. I consider that it is reasonably arguable (in the context of a strike out application) that, as the MCs submit, the same analysis applies. Insofar as it is established that the IBRAM Claim, with accompanying Interim Relief sought, was intentionally procured and funded by BHP for the purpose of blocking the MCs' access to this Court in the Main Proceedings, that is (subject to Mr Scott KC's further argument about the existence of the anti-suit jurisdiction) in principle capable of constituting a criminal contempt of court, irrespective of the lawfulness of the arrangement by which the IBRAM Claim was procured and has been funded, and the lawfulness of the IBRAM Claim itself. There are reasonable grounds to argue that BHP's strategy in procuring and funding the (unstoppable) IBRAM Claim, together with interim relief seeking to block access between the MCs and their lawyers, was specifically designed with the purpose, as alleged, of interfering with the administration of justice in these Courts.

66. There are also reasonable grounds to argue that such a finding would not offend against Article 6 ECHR. The right claimed by BHP needs to be balanced against the right of the MCs to have access to this Court which, as has been determined, has jurisdiction to hear the case. In short, it would be surprising if an act which is itself designed to interfere with the administration of justice is protected by Article 6. Whilst it is right that, in determining the IBRAM Claim, the STF would be doing no more than declaring the constitutional position in Brazil, this is, at least arguably, no different in principle to the other lawful acts considered in the cases above which, though lawful in themselves, may constitute contempt if the purpose of those acts is to interfere with the administration of justice. Moreover, an important part of the focus of the Contempt Application is the procurement and funding of the attempts to obtain the Interim Relief, which (it

can reasonably be argued) went far beyond the mere declaration of constitutional rights.

67. I turn then to Mr Scott KC's central argument that the conduct complained of is properly the concern of the anti-suit injunction jurisdiction. It is argued that the English Court has for many centuries recognised that it has broad powers to grant anti-suit injunctions where the ends of justice require. Principles have been developed by which to assess the conduct complained of and the appropriateness of granting relief in all the circumstances. Against this background, Mr Scott KC argues that, had BHP contested the ASI Application, the Court would have been able to draw on these well-established principles to ascertain whether an injunction was necessary to protect its jurisdiction or to protect the MCs from unconscionable conduct. The Court would have needed to bear in mind the nature of the jurisdiction invoked in Brazil and its connections to the dispute, as well as the comity implications of the English Court involving itself in constitutional law proceedings before the STF, pertaining to Brazilian Municipalities. Ultimately, had the Court been satisfied that the conduct complained of justified an anti-suit injunction, the Court would then have fashioned the appropriate injunction to meet the ends of justice. The Court's injunction would then have been enforceable in the usual way, including through civil contempt proceedings if that proved to be necessary.

68. It is therefore said that there is simply no need or room for the criminal contempt jurisdiction, and that to extend criminal contempt to a party's conduct in foreign proceedings would 'open the floodgates', because it may often be said that the foreign proceedings were intended to obstruct or interfere with the English litigation. Such a rash of applications would not be in the public interest or consistent with the CPR's overriding objective. Mr Scott KC did not demur from the proposition that the existence of the anti-suit jurisdiction completely ousted, as a matter of principle, the power of the Court with respect to criminal contempt proceedings. Whilst he accepted, orally, the general proposition that bringing lawful proceedings in the Courts of England and Wales could, as a matter of principle, be criminally contemptuous (as considered above), he contended that the same action in foreign courts, with the same motive, could not be as a matter of principle because the powers of the Court within the anti-suit jurisdiction, with collateral civil contempt powers, make such power unnecessary.

69. Notwithstanding Mr Scott KC's attractive advocacy, it simply cannot be right that the Court's inherent power to police acts of interference in the proper administration of justice through criminal contempt proceedings has been ousted by reason of the existence of the anti-suit injunctive powers and associated civil contempt jurisdiction. The cases considered above make it clear that lawful activities (or the threat of lawful activities) can themselves be, in certain circumstances, criminally contemptuous. There is no reason why, as a matter of principle or policy, the fact that that lawful activity may be taking place in a foreign jurisdiction, rather than this jurisdiction, means that it is incapable of constituting a criminal contempt. The fact that the Court may have more than one means of dealing with a particular course of conduct cannot and

– as a matter of policy – should not remove from the ambit of criminal contempt that which would otherwise fall within it.

70. Moreover, as the facts of this case at least arguably demonstrate, there may be cases where the anti-suit jurisdiction may be inadequate properly to deal with an act of interference. In the present case, the setting in train of a fully funded constitutional challenge which cannot itself then be stopped by withdrawing the foreign proceedings, and which BHP have bound itself to fund, are matters in respect of which an anti-suit injunction is, at least potentially, toothless. The fact that there are circumstances in which an anti-suit injunction may be ineffective demonstrates the fallacy that the mere existence of the anti-suit jurisdiction is, in and of itself, sufficient to oust the ability of a Court to consider whether a criminal contempt has been committed by commencing foreign proceedings with the specific purpose of interfering with the due administration of justice in this jurisdiction.

71. Moreover, I would add that even if I am wrong about this, the extent to which as a matter of policy the existence of anti-suit injunctive powers should preclude a criminal contempt jurisdiction is not the sort of proposition that should be determined on a strike out application.

72. Finally, a determination that the bringing of foreign proceedings can, as a matter of principle in certain (limited) circumstances amount to a criminal contempt is unlikely to open any floodgates. Most cases involving proceedings brought in different jurisdictions, where anti-suit injunctions may be relevant, do not involve (for example) an attempt actively to block a party's abilities to instruct lawyers, as alleged here, and the circumstances are usually such that, when coupled with the civil contempt jurisdiction, the interference can adequately be policed by an anti-suit jurisdiction.

73. In these circumstances, BHP's argument that the Contempt Application contains no reasonable grounds fails.

Is the bringing of the Contempt Application abusive re-litigation?

The principles

74. There is no dispute between the parties that, in principle, the concept of abusive re-litigation may be applicable to bringing criminal contempt proceedings.

75. The "*bringing of a claim … in later proceedings may, without more, amount to abuse if the court is satisfied … that the claim … should have been raised in the earlier proceedings if it was to be raised at all*": Johnson v Gore Wood [2002] 2 AC 1 p31B. When applied to matters which have been compromised, the purpose is to "*prevent… the defendant from being misled into believing that he was achieving a complete settlement of the matter in dispute when an unsuspected part remained outstanding*" (Johnson, p59).

76. Both parties also rightly accept that the Court is required to adopt a broad merits-based judgment, taking account of the public and private interests involved and the relevant facts. It is convenient to refer to the recent guidance provided by

Coulson LJ in Outotec (USA) Inc & Ors v MW High Tech Projects UK Limited [2024] EWCA Civ 844, [2024] 4 WLR 85. The following paragraphs of his summary of principles of law are of particular relevance:

> "*.1 Although historically it was said that, absent special circumstances, a second claim could not be brought if it could have been brought in earlier proceedings (Henderson v Henderson), that is too dogmatic an approach (Johnson v Gore Wood).*
>
> *.2 Instead, what is required is "a broad merits-based judgment which takes account of the public and private interests involved and all the facts of the case, focussing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before" (Johnson v Gore Wood).*
>
> *.3 The burden rests on the defendant to establish that it is an abuse of process for them to be subjected to the second action (Johnson v Gore Wood, Michael Wilson). Because the focus is on abuse, it will be rare for a court to find that a subsequent action is an abuse unless it involves "unjust harassment or oppression" (Lord Clarke MR in Dexter and Lloyd LJ in Stuart v Goldberg Linde). Putting the same point another way, the courts will not lightly shut out a genuine claim unless abuse of process can clearly be made out (Lloyd LJ in Stuart v Goldberg Linde, and Simon LJ in Michael Wilson).*
>
> *...*
>
> *.6 A decision as to whether a claim is an abuse of process is not a matter of discretion, but the decision will turn on an evaluation which is "very similar" to the balancing exercise undertaken when a judge exercises his or her discretion (Aldi, Stuart v Goldberg Linde).*
>
> *.7 That evaluation must consider, not only whether there has been a misuse of the court's process, oppression or harassment (Dexter), but also the causative effect of the failure to follow the Aldi guidelines (Otkritie). This may involve, for example, consideration of hypothetical consequences and possible case management outcomes (Barrow, Otkritie).*
>
> *.8 The evaluation will also consider the public interest, as set out in Johnson v Gore Wood and Aldi, which is unchanging from case to case (the efficient use of court resources, the needs of other users, finality etc.), and the legitimate private interests involved, which will always vary, depending on the particular facts. This may therefore involve a consideration of the consequences of striking out or not, in a broadly similar way to the third part of the test in Denton.*
>
> *.9 This court will be reluctant to interfere in the evaluation carried out by the judge at first instance, and will only do so if the judge took account of something he or she should not have done, failed to take into account something he or she should have done, erred in principle, or reached a*

> *conclusion that was so perverse as to be "plainly wrong" (Aldi, Stuart v Goldberg Linde).*"

Application of the Facts to the Principles

77. At the heart of BHP's argument is the assertion that the facts, and grounds, which underlay the compromised ASI Application and the Contempt Application are the same. At the heart of both lies the existence of the IBRAM Claim.

78. Mr Scott KC points to the statement in support of the Contempt Application (at paragraphs 6 and 7 of the First Affidavit of Mr Neill), that:

> '*…The Defendants assert that they are legally committed to funding the IBRAM Claim in full.*
>
> *The IBRAM Claim cannot be directly withdrawn or terminated by IBRAM….As such it is now clear that the value of the undertakings provided by the Defendants is necessarily limited as, having been responsible for instigating and (as the Municipality Claimants now know) agreeing to fund the IBRAM Claim, BHP and/or IBRAM are not able to withdraw it.'*

79. Mr Scott KC contends that both those facts – the inability to withdraw the IBRAM Claim and BHP's commitment to funding the IBRAM Claim in full – were known to the MCs at the date of the Consent Order. The word 'now' in the evidence quoted above is, therefore, misplaced.

80. At the time of the filing of the ASI Application, BHP's position in correspondence was its denial of participation in IBRAM's decision to initiate the IBRAM Claim, as set out in SM's letter of 20 June 2024. As initially brought, there was no allegation that BHP were funding the IBRAM Claim. However following receipt of SM's letter of 13 July 2024, this allegation was advanced by the MCs in their skeleton argument served on 19 July 2024, at least to the extent permitted by the Sponsorship Agreement. At paragraph 4 of that document, Mr Oudkerk KC for the MCs relied upon the following factual assertion:

> '*further, BHP agreed to fund the costs of the IBRAM Claim. The BHP costs agreement is, on the Defendants' case, said to provide for an initial amount of R$1m which can be increased to R$6m (see Neill §50 and §32.1). That is approximately £846,000.00, two-thirds of which is understood to already have been incurred by IBRAM as at the date of SM's letter of 13 July 2024*.'

81. In paragraph 50 of the second witness statement served by Mr Neill in support of the ASI Application following the receipt of the letter dated 13 July 2024, Mr Neil referred to its paragraph 5(a), set out at paragraph 20 above. The letter stated that prior to the filing of the IBRAM Claim, BHP Brasil was asked by IBRAM '*to cover all costs*' associated with the IBRAM Claim and that BHP had agreed with IBRAM that it would do so. It said that IBRAM had incurred

costs on this basis. It is this, along with paragraph 5(f) of the letter, that is relied upon by Mr Scott KC to assert that the MCs knew, or should have known, that BHP's funding obligation in respect of the IBRAM Claim was unlimited. As such, it is said that their state of knowledge was materially the same at the date of compromising the ASI Application as it was when launching the Contempt Application.

82. In respect of paragraph 5(a), Mr Neill's evidence was as follows:

> '*Though suggestive of a contractual liability, it is unclear that one was incurred: first, the language suggests both informality of agreement and that the operative legal principle is IBRAM's reliance (so that some form of—unexplained—estoppel is allegedly operative); secondly, the subsequent explanation suggests that this broad 'agreement' is not the source of the difficulty in any event*'.

83. The witness statement then goes on to refer to the Sponsorship Agreement. Mr Neill then reiterated that it was unclear what legal obligation was said to require BHP Brasil as a generality to pay IBRAM for the costs in relation to the IBRAM claim.

84. The agreement '*to cover all costs associated with the IBRAM Claim*' (as per paragraph 5(a) of the 13 July 2024 letter) was also referred to at paragraph 32.1 of the MCs' skeleton argument, as follows:

> '*It is therefore apparent that the IBRAM Claim was not only initiated at BHP's behest, the claim is entirely funded by BHP. It is said that this is pursuant to an (undated and unparticularised) sponsorship agreement, said to provide for an initial amount of R$1m which can be increased to R$6m (the alleged "Sponsorship Agreement"), but, strikingly, the Defendants have not provided this document, despite being requested to do so. Again, this has been stated in correspondence, but, it is not addressed in Michael 25*'.

85. The reference to 'Michael 25' is a reference to Efstathios Michael's twenty-fifth statement, served on behalf of BHP in respect of the ASI Application which was entirely silent on the question of funding, whether through the Oral Agreement, the Sponsorship Agreement or otherwise.

86. Mr Scott KC is right that the letter of 13 July 2024 can be read consistently with the existence of both the Oral Agreement (an agreement to fund all the costs) and the Sponsorship Agreement (a capped agreement to fund the costs), with paragraphs 5(a), (e) and (f) based on the existence of the former and 5(b) to (d) dealing with the latter. However, it is also plain that, as a matter of fact, the letter left the MCs' lawyers with the clear impression that the only substantive or legally enforceable agreement between the parties was the Sponsorship Agreement, a document produced to give effect to a generalised 'agreement' reached earlier, and that the Sponsorship Agreement contained a cap on funding from BHP. This was an entirely understandable conclusion to draw given (a) the failure on the part of BHP to explain clearly the existence of the Oral Agreement in the terms it later came to do; (b) the focus within the letter upon

the Sponsorship Agreement and its terms, including the cap. As observed earlier, in reality, the Sponsorship Agreement was, as BHP now put its position, of complete irrelevance to BHP's apparently overarching obligation, as a result of the Oral Agreement, to fund, to an unlimited extent, the IBRAM Claim. It is right that the precise meaning of paragraph 5(f), in a context where the Sponsorship Agreement governed the extent of funding, is unclear but could be read as a reference to BHP undertaking to deny the existence of some sort of estoppel, which is hinted at by reference to IBRAM's reliance at paragraph 5(a), should the cap within the Sponsorship Agreement be reached.

87. BHP could have chosen, in advance of the hearing of the ASI Application and its compromise shortly before, to provide the information they later provided as to the Oral Agreement, together with a copy of the Sponsorship Agreement, and a clear explanation of their position, as later advanced, that they had a binding, unlimited obligation pursuant to the Oral Agreement to fund the IBRAM Claim. The letter of 13 July 2024 does not transparently convey that position. It certainly does not make it 'obvious', as has been submitted. BHP chose not to state the position unambiguously. The consequence of failing to do so was to leave the MCs with the impression, as clearly articulated in Mr Oudkerk's skeleton argument at paragraphs 4 and 32.1, that the relevant legal obligation upon BHP to fund the IBRAM Claim was capped at a sum of R$6m, of which the majority had already been spent with the initial filing. This impression was not corrected by BHP between the service of the skeleton argument and the Consent Order. On the basis of this impression, the MCs would understand that there was a relatively small amount of remaining legal funding available to IBRAM for future applications or hearings, and the Consent Order would prevent any further or new agreement to provide funding from BHP.

88. Therefore, I do not accept BHP's assertion that the MCs knew, or should reasonably have understood, that BHP had committed fully to fund the IBRAM Claim. BHP's lack of transparency as to the existing arrangements in the 13 July 2024 letter meant that the MCs justifiably considered that it was capped pursuant to the Sponsorship Agreement.

89. It follows, therefore, that the MCs understanding of matters has developed since the Consent Order. However, this does not mean that a broadly similar criminal contempt could not have been advanced by the MCs, at least since 13 July 2024 (just over a week before the pending ASI Application hearing at the PTR). The distinction between partial and full funding of the IBRAM Claim and Interim Relief is not of itself likely to be a determinative factor between the existence or non-existence of any alleged contempt. The witness evidence of Anna Varga, served in support of the Contempt Application, states that had the MCs known that BHP were contractually obliged to fund the IBRAM Claim to an unlimited amount, they would not have agreed to the Consent Order in its current form. Given that, as pointed out by Mr Michael in his responsive evidence, Ms Varga does not go to explain what undertakings would have been sought or potentially obtained, I place limited weight on this evidence. Nevertheless, as part of a broad merits-based assessment, it is of some relevance in favour of the MCs that the facts upon which the criminal contempt application is made and those upon which the ASI Application was advanced and compromised are not completely

overlapping, and that this is so as a result of the way in which BHP chose to convey the position during the ASI Application and negotiations around the compromise. Moreover, the ASI Application was, for understandable reasons, being prosecuted with expedition and the information at the heart of the Contempt Application, insofar as it was provided prior to the Consent Order, came late in the day.

90. Also of some importance is the fact that the two applications are different in nature and serve different purposes. The ASI Application was aimed at preventing or limiting the impact of the IBRAM Claim and/or the Interim Relief insofar as was possible and as quickly as possible. However, given the inability to withdraw the claim, once the IBRAM Claim had been set in train, the extent to which any ASI would be possible to limit or reduce the impact of any potential determination by the STF, on an interim or final basis, was (at best) limited. The continuing ability of such proceedings to interfere with matters to be determined in the English High Court could not, therefore, necessarily be effectively managed (as it is in at least the majority of ASIs) by the existence of the civil contempt jurisdiction sitting alongside any ASI. This is amply demonstrated by the fact that, since the Consent Order, two further attempts have been made by IBRAM to impose interim restrictions which would (if successful) have materially affected the MCs' ability to remain effectively represented in the Main Proceedings without BHP being in breach of the terms of its undertakings to the Court. The interference in the administration of justice (for the purposes of this application which I assume to be reasonably arguable) created by procurement and funding of the IBRAM Claim was therefore largely, at least in practical terms, immune to the effects of the first, urgent, manner in which the MCs attempted to deal with BHP's manoeuvring in Brazil. Indeed, there are reasonable grounds to conclude that that may be one of the reasons BHP acted in the way it did. Although based on the same or similar underlying conduct, an application for criminal contempt is of a different nature. It is a vehicle through which the Courts can seek to maintain the integrity of the proper administration of justice. As part of a broad merits-based assessment, this distinction favours the conclusion that the bringing of criminal contempt proceedings is not precluded by the compromise reached following the ASI Application. If BHP's actions were, indeed, such as to constitute a purposeful attempt to interfere with the administration of justice, as I have concluded there are at least reasonable grounds to argue, the Court will not lightly shut out such a claim because the conduct relied upon relates to an underlying civil claim or application which has itself been compromised. Although not a direct analogy, it is, for example, not abusive re-litigation for (as the Court often sees) an insurance company or NHS Trust to bring criminal contempt cases against a dishonest claimant who has lied to the Court in a witness statement after the civil claim has been discontinued or compromised: see Cox J at [36] and [37] of Kirk v Walton [2008] EWHC 1780 (QB). Whether such proceedings are in the public interest is, of course, a separate question to that of abusive re-litigation. Where they are (and I consider this further below), this will plainly weigh against a conclusion that the proceedings are unjust or oppressive.

91. BHP also argues that knowledge of the Oral Agreement cannot explain the timing of the Contempt Application because the further information was

provided on 20 August 2024, yet it took until 7 October 2024 to bring the Contempt Application. It is right that, following 20 August 2024, the MCs did not seek to have the Consent Order varied or discharged, but that may be because by then it had become apparent that the alleged contempt (procuring and legally committing to fund an unstoppable constitutional challenge) was effectively irremediable. Although the timing of the Contempt Application had the potential to disrupt the start of the impending trial, it does not seem to have been pursued in a manner to that end: once the intention to seek to strike out the application was made clear in correspondence (11 days after the date of the application), a 2 day hearing long after the completion of the trial was listed and the Strike Out Application itself was not served until December 2024.

92. As to BHP's contention that it would have wished to have compromised any criminal contempt proceedings as part of the compromise reached in relation to the ASI Application, this is not a factor which, in my judgment, outweighs the conclusion that to bring contempt proceedings following the Consent Order is not, of itself, abusive. It would not have been, necessarily, in BHP's gift to have compromised the contempt proceedings. There is no evidence from BHP suggesting how, in terms, they have been prejudiced in their compromise of the ASI Application other than (a) the distraction prior to first stage trial and (b) being vexed twice by the same effective arguments. As to the first point, this point has to be seen in the context of the timing of the IBRAM Claim itself which could have been procured by BHP, if that is what it wished to do, at any stage since the inception of the Main Proceedings in 2018. There are reasonable grounds to conclude that its timing – in the run up to the first major hearing in the Main Proceedings - was not by chance. I have already dealt with the limited extent to which the substance of the Contempt Application served as a meaningful distraction from the commencement of the October 2024 hearing. As to the second point, this is of course true to an extent but does not amount to a factor which outweighs the other considerations in the balancing exercise.

93. Providing that it is in the public interest to do so, I conclude on the basis of the broad, merits-based assessment set out above that the bringing of the Contempt Application should not be struck out as abusive re-litigation.

Does the Contempt Application serve the Public Interest?

94. In Sovereign Dimensional Survey Ltd v Cooper [2009] SC 382, Lord Reed (for an Extra Division of the Outer House) identified these factors as follows at [32]:

> *"…They will include factors bearing on the gravity of the alleged contempt, including whether it was persisted in to the point at which it was likely to interfere with the course of justice. They will include factors bearing on the extent to which the proceedings would be likely to promote the authority of the court and the administration of justice: whether, for example, the continuation of the proceedings would be likely to have a salutary effect by drawing the attention of the legal profession to a particular problem, or whether the discontinuation of the proceedings would run the risk of encouraging parties to treat the court's orders as being of little importance. They may include the relationship between the contempt proceedings and other proceedings: whether, for example, the contempt proceedings will*

> *disrupt the progress of the substantive proceedings or will involve a duplication of evidence; or whether, as was indicated in the Anton Piller case, the party in contempt may be effectively penalised through the contempt being brought out in the substantive proceedings, with the effect of damaging his credibility. The court will also wish to have regard to whether the proceedings would be likely to justify the public resources that would have to be devoted to them: particularly in a complex case, contempt proceedings may involve a substantial call on court time and resources. These are not considerations which the court can disregard: the proper administration of justice includes ensuring that cases are dealt with expeditiously and without undue demands on the resources of the court*."

95. Mr Scott KC argues, first, that the application serves no practical utility. He points out that there is no suggestion that BHP is not complying with those undertakings made in the Consent Order, and that it has agreed to pay the costs of the ASI Application (said to be very significant). The procurement and funding of the IBRAM Claim has been brought to the Court's attention, at least to the extent admitted in the 13 July 2024 letter. A finding of contempt would not make any difference to the course of IBRAM's proceedings in Brazil or on the Main Proceedings in England. Whilst Mr Scott KC is undoubtedly correct that there is a lack of practical impact on the course of either the foreign or domestic proceedings, this will often be the case in respect of applications for contempt. The practical utility of contempt proceedings is measured principally by reference to the impact on the wider administration of justice. For example, proceedings relating to a dishonest attempt to mislead the Court in witness evidence brought, as is often the way, after the substantive proceedings have been discontinued have no practical utility in the context of the (discontinued) proceedings. However, this does not detract from the potential public interest in contempt proceedings being brought, so as to bring home to litigants that such behaviour, depending on intent and gravity, may have more significant personal consequences than the mere loss of the case in question.

96. Second, Mr Scott KC argues that the fact that the alleged criminal contempt does not entail any direct interference with the administration of justice here, given that the alleged content is the bringing of foreign proceedings. This adds nothing over and above BHP's argument that foreign proceedings can never constitute an act of criminal contempt. If they can, and did in this case, as I considered there are reasonable grounds to argue, the fact that the interference with the administration of justice has been brought about by the instigation of foreign proceedings does not of itself bear on the question of public interest.

97. The third argument is that criminal contempt is unnecessary in light of the ASI jurisdiction and the fact that the Main Proceedings have now concluded without any actual interference (e.g. the MCs actually being denied access to their lawyers). However, a contempt is a contempt, and this is so '*whether the attempt is successful or not' (Re B [1965] Ch 1112'* (see R v Griffin (1989) 88 Cr App R 63 at 68). The fact that the Interim Relief was not granted, as requested, was a matter of happenstance, not some sort of remediation of the contempt (if that is what it was).

98. Fourth, it is said that the circumstances of this case are unique, or unusual at least, so that pursuing contempt proceedings so that they may have a salutary effect for the legal profession or more broadly to solve a particular problem is unnecessary. This rather cuts against Mr Scott KC's argument that to allow the application to proceed would open the floodgates in all anti-suit injunction cases. Either way, it does not seem to me that the allegation that the interference with administration of justice has been intentionally attempted in somewhat unusual circumstances is of itself a good reason that there is no public interest in sanctioning such conduct where otherwise an application, by reason of its seriousness, would be warranted.

99. Finally, it is said that this case has already consumed vast party and public resources. Mr Scott KC asks the Court to consider with care whether it would be proportionate and in line with the overriding objective to devote yet further resources to adjudicate the Contempt Application. In my judgment, if the contempt alleged is proven, it would be a sufficiently serious matter, and a matter of sufficient public importance, to warrant the additional, relatively limited (particularly in the context of that which have so far been committed) judicial resources which a further hearing would entail.

Are the MCs/PG appropriate guardians of the public interest?

100. As a corollary of the public nature of proceedings for criminal contempt, Mr Scott KC contends that the Court must be satisfied that the applicant is an appropriate guardian of the public interest. BHP also submits that the MCs and their solicitors, PG, would not be appropriate guardians of the public interest.

101. In TBD (Owen Holland) Ltd v Simons & Ors [2020] EWCA Civ 1182, the Court of Appeal endorsed the following observations of Andrew Baker J in Navigator Equities Ltd v Deripaska [2020] EWHC 1798 (Comm):

> "*142. One consequence I have already identified, namely that the court recognises the particular capacity of contempt applications or the threat of contempt applications to be used vexatiously by litigants to further interests that it is not the function of the contempt jurisdiction to serve. That leads to the obvious materiality, at all events if there is some reason to question it on the facts of a given case, of the 'prosecutorial motive' of a claimant/applicant pursuing a contempt charge...*
>
> *143. A further consequence is that the claimant/applicant pursues a contempt charge as much as quasi-prosecutor serving the public interest as it does as private litigant pursuing its own interests in the underlying dispute. The claimant/applicant needs to understand that; and if it is legally represented, as here, the legal representatives need to understand that their role as officers of the court is acutely pertinent, even if (to repeat) the process is not to be equated with a private prosecution in a criminal court. Thus, it appears to have struck Teare J as obvious in the long-running Ablyazov litigation that the quasi-prosecutorial role of the claimant/applicant in pursuing a contempt charge means its proper function is to act generally dispassionately, to present the facts fairly and with balance, and then let those facts speak for themselves, assisting the*

> *court to make a fair quasi-criminal judgment: JSC BTA Bank v Ablyazov [2012] EWHC 237 (Comm) at [15]."*

102. Ms Horlick KC argues that there is no 'guardian of the public interest' test when permission to bring proceedings is not required. She relies upon the judgment of Carr LJ (as she then was) in Navigator Equities Ltd v Deripaska [2021] EWCA Civ 1799 to argue that private applicants bringing criminal contempt proceedings should not be required to don the mantle of a prosecutor acting dispassionately and solely in the public interest. However, this is to overstate the position. In Deripaska, the application was one for civil contempt. Carr LJ (as she then was) explicitly drew a distinction with criminal contempt. At [118], she observed, in relation to KJM Superbikes Ltd v Hinton (Practice Note) [2009] 1 WLR 2406:

> "*KJM confirms that permission to a person to pursue public law proceedings allows that person to act in a public rather than a private role, to pursue the public interest. The court will therefore be concerned to satisfy itself that the case is one in which the public interest requires that the committal proceedings be brought and that the applicant is a proper person to bring them (see paras 9, 11, 16, 28 and 29). Those considerations do not arise in a private application for civil contempt and for which no permission is required.*"

103. The Court also pointed out that TBD, in which the paragraphs from Andrew Baker J's first instance judgment quoted above were approved, was in the context of an application to bring criminal contempt proceedings (during the course of ongoing proceedings), as here.

104. Although no permission is required to bring the application for criminal contempt in the present case, it does not mean that the Court cannot look to the fitness of the applicant given the quasi-prosecutorial nature of the application when considering whether the application should be struck out.

105. Mr Scott KC identifies the fact that the MCs are parties to ongoing proceedings against BHP and there is therefore an inherent risk that the MCs are pursuing the Contempt Application for collateral purposes in the context of their private interests rather than any public interest. Whilst the Court must be astute to guard against vexatious applications, the mere fact that the party bringing the application is a party to proceedings with the other does not mean that the applicant cannot be a proper person. Indeed, in KLM, Moore-Bick LJ observed (at [17]) that the applicant will usually be a party to the proceedings in respect of which the criminal contempt relates (in that case the making of a false statement). It also follows that, similarly, the mere existence of a collateral benefit in the context of those proceedings in bringing the contempt application does not of itself render a party unfit. Neither of these matters precludes a party from acting dispassionately, to present the facts fairly and with balance, and then let those facts speak for themselves, assisting the Court to make a fair quasi-criminal judgment.

106. The second feature relied upon is the timing of the Contempt Application. I have dealt with this above. It was, once issued, dealt with in a manner consistent

with avoiding disruption to, and any distraction to BHP from, the Main Proceedings. The timing was, at least in part, reflective of the timing of the IBRAM Claim and the period of time over which information about BHP's involvement was provided.

107. The third contention relates back to BHP's argument that this application for contempt is abusive in that it is re-litigating the compromised ASI Application. I do not agree for the reasons I have given. Mr Scott KC argues that even if the abusive re-litigation argument fails, as it has done, this Contempt Application should be seen as part and parcel of the MCs' litigation strategy. Providing there is public interest in doing so, which will usually be the position where the alleged contempt is a serious one such as interfering in the administration of justice, and where the application is not vexatious, the existence of other potential remedies in the context of the ongoing proceedings does not preclude an applicant from being a fit one.

108. Fourth, BHP contends that the bringing of the application must be seen against the context of what it says are repeated baseless allegations of contempt against BHP. The matters complained of are set out in Mr Michael's twenty-sixth statement at paragraphs 33-35. As to these:

(1) the first exchange of correspondence relied upon (24/25 July 2024 and 4/15 August 2024) related to public statements made by BHP immediately following the Consent Order about the continuation of the IBRAM Claim and BHP's view that the MCs' litigation in England was unconstitutional. PG alleged that these statements amounted to breach of the undertaking that BHP would not take any further action "to encourage" the IBRAM Claim. That claimed breach has not been pursued, and this fact is perhaps reflective of whether, had it been, it would ultimately have succeeded. However, the request for an explanation as to the compatibility between the public statements and the undertaking not to encourage the IBRAM Claim was not entirely without justification. Indeed, whether strictly compliant with the letter of the Consent Order, PG's contention that the public statements were not in its spirit cannot be said to be entirely baseless.

(2) PG's letter of 30 August 2024 did not allege any actual breach of the Consent Order. Whilst Mr Michael says that the letter identified no grounds upon which to initiate contempt proceedings, that is not right: it explicitly referred to the interference with the administration of justice and the initiation of the IBRAM Claim, the grounds which I consider are reasonably arguable;

(3) PG's letter of 6 September 2024 related to an event organised by IBRAM and described by PG in their letter as being aimed at lobbying powerful stakeholders in support of the IBRAM Claim. Without forming any concluded view, from the description of the topics and speakers, PG's description does not appear entirely unwarranted even if, in SM's view, it was '*a partial account*'. In these circumstances, asking (in the context of the undertaking by BHP not to encourage the IBRAM Claim) about BHP's involvement in or funding of the event was not vexatious. That the matter was not pursued in light of SM's confirmation that BHP was not aware of

any individuals from BHP or BHP Brasil having attended or those entities having funded the event does not mean the enquiry was itself illegitimate;

(4) Similarly, on 9 October 2024, PG stated that from public information obtained, it appeared that Justice Barroso (President of the STF, as well as President of the National Council of Justice ('CNJ')) held a meeting with Mr Mike Henry, CEO of BHP Australia; Ms Caroline Cox, General Counsel of BHP; Mr Emir Calluf Filho, Vice President (Legal), Americas, BHP Brasil; (and Mr Alexandre D'Ambrosio, Executive Vice-President of Corporate and External Affairs, Vale S.A; and Mr Murilo Muller, Controllership Director & Chief Accountant, Vale S.A.). Having identified this, in light of the undertaking, a letter seeking confirmation that the discussions had nothing to do with the substance of the IBRAM Claim was not inappropriate. The letter did not make allegations but sought an explanation, which was provided. The matter was not pursued when SM indicated that the meeting related to the settlement process in Brazil, in respect of which the CNJ has a role. This exchange does not demonstrate a vexatious pursuit of baseless allegations.

(5) PG's letter of 17 October 2024 sought information relating to the Oral Agreement and costs incurred with reference to the IBRAM Claim to date. Whilst perhaps unnecessarily cloaked in reference to ensuring compliance with the Consent Order, the nature of the enquiries were of themselves of an unsurprising nature.

109. I do not therefore consider that this correspondence demonstrates that the MCs or PG have acted in a manner unfit to bring the Contempt Allegation. A party and its lawyers bringing such an application must, when also involved in underlying substantive proceedings, wear two hats. The fact they must, in pursuit of its Contempt Application, present the facts fairly and with balance, and then let those facts speak for themselves, does not of itself mean that they are necessarily neutered when robustly but appropriately protecting their interests in any wider litigation.

110. Next, BHP argue that PG have made public statements about the Consent Order and the Contempt Proceedings which were misleading, inflammatory, partisan and incomplete. It is said that PG are not therefore suitable to represent the MCs in a quasi-prosecutorial and dispassionate manner. To support this submission, at paragraph 51 of Mr Michael's twenty-sixth statement, he identifies three social media posts from PG. He is correct that, in one respect, one of the posts was wrong: it said that the English Courts required BHP to sign the Consent Order, which of course they did not. Otherwise, the posts are not of themselves objectionable, and do not of themselves impinge on the requirement, or ability, of PG to present the facts in the Contempt Application to the Court with appropriate restraint and fairness (as it has done in the evidence served in support of the Contempt Application, and to rebut the Strike Out Application).

111. BHP also rely upon a post by Mr Goodhead said to be 'misleading' by describing IBRAM as a front group engaging in bad faith litigation, and describing BHP as conducting '*lawfare*'. The allegation at the heart of the Contempt Application is that IBRAM was asked by BHP to bring the IBRAM

Claim specifically in the context of the Main Proceedings, was funded solely by BHP, and which sought amongst other things Interim Relief specifically in order to interfere with the MCs' ability to conduct that litigation through lawyers, in this country. I have determined that there are reasonable grounds to make that allegation. The question of whether the allegation is made out beyond reasonable doubt is for another day. Were it to be, however, it would be difficult to conclude that Mr Goodhead's view was a wholly unjustified one. It is a reality that litigation of the nature of the Main Proceedings spills into assertions and counter-assertions played out to some extent outside the Courtroom and as part of a public relations battle. Lawyers certainly need to be conscious that in engaging in dialogue about the merits of a case yet to be heard, they must not cut across their duties to the Court, specifically in the context of bringing criminal contempt proceedings. I do not regard, however, the post from Mr Goodhead, or the fact that Mr Goodhead has gone on record generally to describe the zeal with which he pursues his clients' cases, as sufficient so as to demonstrate that either the MCs or PG are inherently incapable of prosecuting the Contempt Application with the appropriate detachment in Court.

112. In these circumstances, I reject BHP's contention that the Contempt Application should be struck out because the MCs and/or PG are unsuitable as guardians of the public interest.

113. BHP's application to strike out the Contempt Application therefore fails. The Contempt Application will be heard by the Divisional Court.