Neutral Citation Number: [2025] EWHC 3153 (TCC)

Claim No: HT-2025-000178

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

Date: 3 December 2025

B e f o r e :

MR JUSTICE WAKSMAN

(1) BHP GROUP (UK) LTD
(2) BHP GROUP LIMITED

Claimants

- and -

PGMBM LAW LTD
(trading as Pogust Goodhead)

Defendant

ANDREW SCOTT KC and **ANDREW TROTTER** (instructed by Slaughter and May Solicitors) for the Claimants
OLIVER CAPLIN KC and **ALICIA LAWSON** (instructed by Orrick, Herrington & Sutcliffe (UK) LLP, Solicitors) for the Defendant

JUDGMENT

Hearing date: 22 October 2025

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INTRODUCTION

1. This is a Part 8 Claim made by the Claimants, BHP Group (UK) Ltd and BHP Group Limited (collectively "BHP") for an anti-suit injunction ("ASI") against the Defendant firm of solicitors, PGMBM Law Ltd (trading as Pogust Goodhead) ("PG"). The claim was made on 13 June 2025. The injunction sought is (a) to restrain PG from taking any further steps (including by way of enforcement) in respect of the application it made on 13 November 2024 to the United States District Court for the Eastern District of Arkansas ("the Arkansas Court") under Case No. 4:24-mc-00011-KGB, for subpoenas against Mr André de Freitas to obtain discovery and a deposition from him pursuant to Section 1782 of Title 28 of the United States Code ("the 1782 Application") and (b) to withdraw the 1782 Application.

2. BHP's claim for the ASI is supported by a witness statement ("WS") from Efstathios Michael, a partner in Slaughter and May, BHP's solicitors, dated 13 June 2025. This is responded to on behalf of PG by Anna Varga, an employed barrister and partner in PG, in her WS dated 25 July 2025.

3. Section 1782 ("1782") is a well-known and well-used federal provision which enables evidence to be taken in the US to assist proceedings in other jurisdictions. It provides that:

> "…The district court of the district in which a person resides or is found may order him to give his testimony or statement ... for use in a foreign or international tribunal. The order may be made ... upon the application of any interested person and may direct that the testimony or statement be given ... before a person appointed by the Court... To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken ... in accordance with the Federal Rules of Civil Procedure…"

4. It is common ground that 1782 can be invoked either in relation to proceedings outside the US which are actually underway or those which are contemplated and intended to be commenced at some time in the future.

5. The present position is that (as permitted) PG, through its US lawyers, made the 1782 Application *ex parte* and following an 8-page reasoned judgment and order dated 13 January 2025 from Chief United States District Judge Kristine G Baker ("Judge Baker"), two subpoenas were served on Mr de Freitas on 24 February 2025. However, as the result of an administrative error by the Arkansas Court, the court file was sealed, which meant that the grant of the order was not made public. PG asked the Arkansas Court to unseal the court file, which it did on 21 February 2025. BHP says that it became aware of the 1782 Order in late February 2025.

6. On 14 March 2025, BHP filed a motion to intervene in the proceedings relating to the 1782 Application. This was unopposed and later granted. On 4 April 2025, Mr de Freitas filed a motion to quash ("MTQ") the subpoenas, as did BHP. Further evidence and submissions were filed by them in relation to the MTQs, and then, on 25 April, PG filed its opposition to the MTQs, with responses thereto being filed by BHP and Mr de Freitas on 9 May. PG filed a surreply on 15 May.

7. On 6 June 2025 there was a (remote) oral hearing before Judge Baker. In the course of that hearing, she was made aware of BHP's claim here, but did not pause her consideration of the MTQs to await its outcome. However, the subpoenas issued pursuant to her order have been put on hold, pending her judgment, which is awaited. It is expected by the end of this year.

8. Mr de Freitas has said that he has no relevant documents and so the evidence-taking will be limited to the taking of a deposition from him over the course of one day in Little Rock, Arkansas where he presently lives.

BACKGROUND

The Main Claim

9. The background to these events is the litigation in the TCC in relation to the collapse of the Fundão tailings dam in Brazil on 5 November 2015. In action numbered HT-2022-000304, around 613,000 Claimants have sued BHP for billions of pounds of losses which they claim to have suffered as a result of the collapse of the dam, which had been owned and operated by Samarco Mineração SA ("Samarco"), a joint venture between Vale SA ("Vale") and BHP Billiton Brasil Ltda ("BHP Brasil"). BHP Australia is the ultimate owner of BHP Brasil. The Claimants are represented by PG. There is litigation funding in place. I refer to this as "the Main Claim".

10. At an early stage in the proceedings, BHP challenged the court's jurisdiction and sought to have the proceedings struck out as an abuse of process. At first instance, Turner J agreed, but his decision was reversed by the Court of Appeal on 8 July 2022 ([2022] EWCA Civ 951).

11. The first trial of these claims, dealing with various aspects of liability (the Stage One Trial") took place between October 2024 and March 2025. The judgment of the trial judge, O'Farrell J, was handed down on Friday, 14 November 2025.

Mr de Freitas

12. Mr de Freitas is a Brazilian national. His relevance is that between January 2019 and July 2023 he was a director and then CEO of a Brazilian non-profit legal entity known as the Renova Foundation ("Renova"). This had been set up on 30 June 2016 pursuant to a settlement agreement known as the "TTAC" and which was made in order to provide compensation for losses arising from the collapse of the dam. The TTAC was entered into between Samarco, BHP Brasil, Vale and others, including the Brazilian Federal Government. Renova's purpose was to administer the various compensation schemes which had been created pursuant to the TTAC. Those schemes were (a) the Programme for Mediation Compensation ("PIM") which operated between 2017 and 2021, (b) the Extraordinary Expenses programme, (c) the Novel System, which was created by the 4th Federal Court in Brazil in July 2020 and (d) the Repactuation Agreement ("the Repactuation") made on 25 October 2024 between BHP Brasil, Samarco, Vale and various Brazilian public authorities. I refer to the first three of these settlement schemes as "the Historic Settlement Schemes".

13. Pursuant to the Repactuation, Renova was dissolved. Although Mr de Freitas had left Renova in 2023, PG contends that the Repactuation had been under discussion and negotiation for 2 years before his departure.

14. One issue which arose in the jurisdiction/strike-out application made by BHP was the adequacy or otherwise of the Historic Settlement Schemes in Brazil. BHP contended that a system of full redress for the claimants here was already in operation there. To that end, BHP filed an 87-page WS from Mr de Freitas on 28 November 2019 and a further, 110-page WS on 10 June 2020 ahead of the hearing of the application before Turner J in July 2020. The third WS was served after his judgment had been given and in the context of the appeal from that judgment, on 10 December 2021. This evidence did not deal with the Repactuation at all. As is usual in relation to interlocutory applications of this kind, Mr de Freitas was not cross-examined on any of his WSs.

15. In reversing the decision of Turner J, the Court of Appeal rejected the notion that it was clear that full redress was being provided by the Historic Settlement Schemes and took issue with some of the statements made by Mr de Freitas which had suggested that it was.

PG's Lien Claim

16. Since November 2018, PG has threatened claims in its own right against BHP in respect of the settlements made in Brazil, insofar as made by its clients who are claimants in the Main Claim here. At this early stage, there were few details of the basis of the claims, save that PG contended that it had a lien over settlement monies received in Brazil, and that those settlements had been wrongfully procured by BHP to the detriment of PG. On 29 November 2018, BHP sought to clarify how an equitable lien was said to arise where the settlement payments were said to have been made by Renova, not BHP, and where PG had not suggested that the terms of its retainers entitled it to any part of the payment by Renova to its clients. No response was received for nearly four years, when correspondence resumed on 29 September 2022 in the form of a letter from PG. This stated that PG had an interest in any funds paid to its clients on terms which compromised the proceedings here, by virtue of its retainers. It said that BHP was aware of this interest from at least November 2019 when its solicitor made reference in a witness statement to PG's conditional fee agreement by which it could recover up to 30% of any damages awarded or settlement amount. PG went on to say that it had a solicitor's equitable lien against the assets of BHP or third parties associated with them to the value of amounts which would have been recoverable by it under the retainers, had such funds been paid by way of damages or settlement in the normal way. In the event that any amount was or was to be paid to any of its clients out of funds originating with BHP on the condition that such clients withdraw from or discontinue any of their claims here, PG reserved the right to assert its equitable lien against BHP's assets. There then followed some further correspondence in which BHP sought copies of the retainers between PG and the relevant clients, whose terms, it alleged, had been broken as a result of the relevant settlements, at the instance of BHP. PG did not provide copies of those retainers and did not expand further on the nature of the claim.

17. The way that PG described the Lien Claim (as it was then called) in its initial memorandum for the 1782 Application was as follows:

II. BHP Is Surreptitiously Negotiating Settlements Directly with Pogust Goodhead Clients in Brazil without Applicant's Involvement.

The English Dam Litigation was instigated partly because of Renova's failures to provide redress. And while Applicant has spent the past six years litigating that case against BHP on behalf of Pogust Goodhead Clients, BHP was covertly negotiating settlements in Brazil directly with Pogust Goodhead Clients without Applicant's knowledge or involvement. *Id.* ¶ 24. Applicant understands that settlements have been and are being negotiated directly with Pogust Goodhead Clients in Brazil by BHP, Renova, and Samarco, to be paid under the auspices of Renova. *Id.* ¶ 25. These negotiations and settlements are contrary to Applicant's retainer agreements with Pogust Goodhead Clients and contrary to English law. *Id.* ¶¶ 26-27; *see also* Discussion, *supra*, at 1-2.

On October 25, 2024, Samarco, BHP Brasil, Vale, Renova, the Federal Union, the governments of Minas Gerais and Espírito Santo, and several Brazilian justice institutions reached an agreement (the "**Repactuation Agreement**") to resolve multiple actions in Brazil arising from the Dam collapse. Varga Decl. ¶ 23. The Repactuation Agreement introduces various compensation schemes intended to compensate those affected by the Dam collapse, many of whom are Pogust Goodhead Clients. Many of the standard compensation agreements provided for by the Repactuation Agreement include provisions that purport to waive Pogust Goodhead Clients' right to pursue claims in the English Dam Litigation. *Id.*

Applicant claims an equitable lien and charge over any settlements negotiated with Pogust Goodhead Clients without Applicant's involvement, which may compromise Pogust Goodhead Clients' right to pursue their claims in the English Dam Litigation. *Id.* ¶ 31. Accordingly, Applicant intends to file a case in the High Court of Justice in London, England, seeking an equitable lien and charge against BHP for its role in negotiating settlement agreements directly with Pogust Goodhead Clients without Applicant's knowledge or involvement. *Id.* ¶ 32. Applicant intends to

show that it is entitled to an equitable lien because, among other reasons, its services to the Pogust Goodhead Clients, in particular, in the English Dam Litigation have significantly contributed to their recovery of settlements negotiated directly with BHP, Renova, and Samarco, and to any recovery under the Repactuation Agreement or other related settlements. *Id.* ¶ 33.

III. Applicant Seeks Testimony from Mr. de Freitas Relevant to Its Lien Claim.

Mr. de Freitas resides or is found in the Eastern District of Arkansas. *Id.* ¶ 34. Applicant seeks testimony from him relating directly to its Lien Claim against BHP. *Id.* ¶¶ 39, 50. This evidence will assist Applicant in filing and proving its claim. *Id.* ¶ 50.

Mr. de Freitas is an important witness and uniquely well positioned to address several key issues in the Lien Claim. *Id.* ¶ 35. He held senior positions with Renova and was on its board for four years. He was Renova's CEO for the last three of those years. *Id.* ¶ 36.

While Mr. de Freitas was CEO of Renova, the foundation inserted requirements into settlement agreements with Pogust Goodhead Clients and others that they withdraw from the English Dam Litigation or waive their right to participate in the English Dam Litigation. *Id.* ¶ 37. Renova also set up client centers in an attempt to lure Pogust Goodhead Clients and others to settle directly with Renova. *Id.* ¶ 38.

Accordingly, Applicant wishes to depose Mr. de Freitas on his personal knowledge concerning, among other things:

(1) The impact of Applicant's work for the Pogust Goodhead Clients on settlement negotiations in Brazil;

(2) The involvement of BHP in Renova;

(3) The involvement of BHP in Renova's settlement negotiations and, in particular, its settlements with Pogust Goodhead Clients;

(4) The timing and content of Renova's settlement agreements with Pogust Goodhead Clients.

18. Further on in this memorandum, PG stated that:

> Ex. B. Mr. de Freitas's testimony likely will be central to the Applicant's ability to plead, and prove, that BHP improperly intruded on Applicant's attorney-client relationship with the Pogust Goodhead Clients by surreptitiously negotiating settlements with them. *See* Varga Decl. ¶ 50.

19. Page 15 of this memorandum added that PG wished to depose Mr de Freitas "on topics tailored to the Lien Claim, knowledge of which he obtained through his corporate role with Renova… to plead, and prove, that BHP improperly intruded on the applicants attorney-client privilege with the Pogust Goodhead Clients by surreptitiously negotiating settlements with them…"

The Judgment of Judge Baker and the Subpoenas

20. The judgment of Judge Baker on the original 1782 application accepted that the basic requirements for the operation of 1782 were met, namely that discovery was sought from a person found in the court's district (i.e. Mr de Freitas), that it was for use in a proceeding in a foreign tribunal (i.e. PG's putative claim here) and that PG was an "interested person" in such proceedings, in this case, of course, as claimant.

21. Once those basic requirements have been met, it is a matter of discretion whether or not to make the order sought. The decision of the US Supreme Court in *Intel Corp v Advanced Micro Devices Inc* 542 US 241 (2004) states that there are 4 factors to consider at this point. These are whether the person from whom discovery is sought is a participant in the foreign proceedings, the nature of the foreign tribunal and the character of the proceedings underway abroad and the receptivity of the foreign court to US federal-court judicial assistance, whether the 1782 application conceals an attempt to circumvent foreign proof-gathering restrictions of a foreign country or the United States, and whether the discovery sought is unduly intrusive or burdensome.

22. On those discretionary factors, Judge Baker recited that PG would probably not be able to obtain any testimony from Mr de Freitas without the Arkansas Court's help because he would be outside the English courts jurisdiction. Further, there was no indication that the English court would not be receptive to evidence obtained in the United States. Nor was there any attempt to circumvent restrictions on foreign evidence-gathering. Nor, finally, was the discovery sought unduly intrusive or burdensome. The scope of the subpoenas was tailored to information which

Mr de Freitas would likely have known or been in control of while employed as CEO and director of Renova. So all the discretionary factors pointed in favour of granting the order.

23. The subpoenas ordered relate to:

(1) Mr de Freitas's communication with, or among, Renova or its employees, BHP, Vale, and Samarco's employees concerning the oversight or involvement in Renova activities;

(2) his communication with, or among, Renova or its employees, BHP, Vale and Samarco's employees concerning the collapse of the dam, the litigation here, PG, its clients and affiliates;

(3) all documents concerning BHP's and Vale's oversight or involvement with Renova's settlement negotiations with victims of the dam collapse and PG's clients; and

(4) all settlements entered into between Renova and PG's clients and related documents.

PG's Recourse Claim

24. On 24 July 2025, some time after the submissions on the MTQs had been completed, PG's own solicitors here, Orrick, Herrington & Sutcliffe (UK) LLP ("Orrick") sent to BHP a 57-page letter before action ("the LBA"). I can summarise the LBA by reference to how PG has described it at paragraph 14 of its Skeleton Argument:

(1) BHP, and others, have wrongfully instrumentalised the Historic Settlements (as PG described them) and the Repactuation to their own financial benefit, and to the detriment of PG.

(2) With respect to the Historic Settlements and Repactuation, BHP was or should have been on notice that the Retainers precluded a direct settlement by a Fundão Claimant of its claims arising out of the Collapse without (i) PG's knowledge and consent, and (ii) provision for PG's fees. Nevertheless, BHP engaged in conduct which led to just such direct settlements taking place. This has resulted in the whole of the settlement sums being paid to a Fundão Claimant without provision being made for PG's contingency fee share of any settlement sum, to which it would have been entitled under the relevant Retainer (the settlement sum properly to be viewed as a fruit of PG's labour in advancing the Fundão Claimants' claims in the Main Proceedings);

(3) With respect to the Repactuation, in addition to the same conduct as with the Historic Settlements, BHP engaged in conduct which led to the Repactuation effectively requiring adhering Fundão Claimants to dis-instruct PG and, in some instances, explicitly prohibiting any settlement sums paid under it to a Municipality Fundão Claimant from being used to pay a contingency fee to PG;

(4) The Historic Settlements and Repactuation also contain a series of liability waivers in favour of BHP and others to which a Fundão Claimant must agree in order to receive the relevant compensation (the "Waivers"). There is a dispute between the Fundão Claimants and BHP, to be resolved in the Main Proceedings in due course, about the legal effect and/or construction of the Waivers in the Historic Settlements. If BHP's case is correct, the result could be that various Fundão Claimants are no longer able to pursue claims for loss in the Main Proceedings, reducing the overall value of the Main Proceedings claim, and as a corollary the level of contingency fee to which PG would in principle be entitled.

(5) BHP's conduct has injured PG to the extent it has prevented or will prevent PG from being paid, or will diminish the global value of, the contingency fees to which it otherwise would have been entitled under its Retainers;

(6) PG claims £1.3bn from BHP.

25. The monetary claim made arises, according to PG, because if its allegations are proved, then BHP must pay to it the contingency fees that should have been paid out of the Historic Settlement Schemes and the Repactuation or damages representing the diminished value of PG's contingent fee entitlement under its retainers. The LBA refers to various causes of action, including unlawful means conspiracy, inducement of breach of contract (i.e. the Retainers) and enforcement of its claimed lien.

26. The production of the LBA had in fact been presaged by PG in the course of the MTQ submissions. At paragraphs 22 and 23 of Ms Varga's Supplemental Declaration dated 25 April 2025 ("the Supplemental Declaration"), she said that Orrick had been instructed to prepare and file the Lien Claim in October 2024 and they were now in the process of preparing a letter before action. PG intended to send the letter before action within 60 days (ie by the end of June 2025) and file (i.e. issue) the Lien Claim by approximately the end of this year.

27. PG now refers to its putative claim against BHP as its "Recourse Claim".

The Course of the Section 1782 application in Arkansas

28. I have set out the basic chronology at paragraph 5 and the *ex parte* judgment of Judge Baker at paragraphs 20 - 22 above. I now add some further detail. There had in fact been eight earlier occasions on which PG had made 1782 applications in which BHP had successfully intervened. PG did not notify BHP of the instant 1782 application although, as noted, it was not obliged to do so. There are, of course, orders which can be made by the court here which are, at least initially, granted on an *ex parte* basis, subject to the right of the other party concerned to apply to set them aside.

29. Prior to May 2025, Mr de Freitas' key points made in his MTQ were that the scope of the discovery and depositions sought was far too wide, they were not necessary in order for PG to be able to articulate its claim against BHP here, and in any event he had already supplied three WSs. He also said in his Declaration that during his time at Renova, he did not have any direct involvement in its negotiation of individual settlements including any involvement in the negotiation of provisions restricting the ability of certain of PG's clients to pay legal fees out of its settlement funds, and that given his departure in July 2023, he was also not involved in negotiating the Repactuation.

30. While PG had said that it probably would not be able to obtain the testimony of Mr de Freitas, save through the subpoenas, it had not in fact asked him whether he would testify voluntarily in England.

31. However, on 7 May 2025 and by an email from his lawyer, Mr de Freitas offered to appear voluntarily in the UK and testify in connection with the Lien Claim, provided that he gave testimony only once on those issues. So his voluntary appearance in England would be subject to PG's agreement to stay the current 1782 proceedings and forego the depositions at this stage. Once Mr de Freitas appeared in England and gave his evidence, the 1782 proceedings would be dismissed. That proposal was supported by BHP, but was rejected PG's lawyers on the basis that this would not allow PG to have its pre-suit discovery and Mr de Freitas' testimony would not be available to PG to plead out the Lien Claim. Further, the English court could not enforce his promise. All of this was recounted in a Declaration filed by Mr de Freitas' lawyer on 9 May. On the same day, his lawyer filed Mr de Freitas' Reply submission referring to this offer. It also said that Mr de Freitas had never argued that sitting for a deposition in an Arkansas conference

room would itself be unduly burdensome. Rather it was a question of the wide scope of the subpoenas. This submission sought the quashing of the subpoenas, or at least the stay of proceedings pending the giving of evidence in England by Mr de Freitas, or, as a further alternative, that the scope of the subpoenas should be significantly narrowed by the court.

32. According to paragraph 52 of Mr Michael's WS, in a conference call on 26 May 2025 with Mr de Freitas' lawyers, the latter explained (again) that Mr de Freitas was only prepared to give evidence once and his preference was for this to be by way of witness statement and oral evidence at trial here. They also said that he had no intention of moving outside the reach of the Arkansas District Court.

33. On 3 June 2025, PG's US lawyers wrote to BHP's US and English lawyers in relation to the offer by now made by BHP to use its best endeavours to obtain his testimony at a trial of the Lien Claim here. Such best efforts would involve BHP calling him as a witness and offering to pay him for his time and expense in testifying, with him voluntarily flying to London so to do. BHP's offer was refused on the basis that it would mean that PG could not use his testimony to plead its Lien Claim and no English court would be able to compel his attendance here if he chose not to attend.

34. Through the extensive written and oral submissions made before Judge Baker, BHP effectively made the same sort of points as have been made before me in the ASI claim, in the context of saying why the 1782 subpoenas should be quashed, to which PG then had to respond. Indeed, BHP made reference to the English law position on ASIs and cited, for example, *Omega Group Holdings Ltd & Ors v Kozeny & Ors.* [2002] CLC 132 (to which I refer in detail below), in its original MTQ dated 4 April. See, in particular, paragraphs 39-42 of Mr Michael's Declaration in support.

35. In the course of the hearing before Judge Baker on 6 June, BHP's lawyers informed her that a claim for the ASI was about to be made here, again referring to *Omega*, among other things. Although she queried initially whether she should wait for the outcome of that claim before ruling on the MTQs, she concluded that she should determine the MTQs on the basis of the materials before her, observing that they were "ripe" for her to rule on. She did, however, ask to be kept informed of the progress here of any ASI claim.

Background to the making of the ASI Claim

36. On 12 March 2025, Slaughter and May wrote to PG about its 1782 Application, stating that it was defective in many ways, and that pursuit of it was unconscionable. One of the points made was that the Declaration of Ms Varga which accompanied the application had stated that:

> "While Applicant has been actively litigating the English Dam Litigation in the United Kingdom, BHP has been surreptitiously negotiating settlement in Brazil directly with Pogust Goodhead Clients without Applicant's knowledge or involvement and contrary to the retainer agreements between Pogust Goodhead and Pogust Goodhead Clients."

37. This was said to have been misleading because at all times, PG was in fact aware of the existence and operation of the settlements in Brazil.

38. The letter concluded by inviting PG to withdraw the subpoenas by 19 March and that BHP's rights were reserved. There was no express reference to applying for an ASI but this must have been what Slaughter and May was intending to refer to, because in this jurisdiction, that would be the only way to prevent PG from relying on the subpoenas if it did not agree to withdraw them. Further, there was express reference to Ms Varga contending in her Declaration that the authority relating to double cross-examination (i.e. *Omega*) was distinguishable.

39. By its letter in reply dated 19 March 2025, PG took issue with all the points made about the 1782 Application. In particular, it said that Ms Varga had been justified to use the word "surreptitiously" because while PG was aware of the settlement negotiations (and indeed had complained about them) they were being undertaken with PG's clients but without PG's consent and involvement. The latter is obviously correct, but to my mind, the way Ms Varga first put it was somewhat misleading, because it suggested that PG did not know about the settlements at all. That said, it was also plain to the reader of her Declaration that PG was by then aware of the settlements, otherwise Ms Varga could not have referred to them. Further, in her Supplemental Declaration, Ms Varga explained precisely what PG did and did not know about the settlements and the extent to which it had sought information about them from BHP which was not forthcoming. See paragraphs 25-32.

40. PG's letter invited BHP to withdraw its criticisms of the 1782 application and did not confirm that PG would withdraw it. Notwithstanding PG's refusal to withdraw the subpoenas, BHP took no steps here to apply for an ASI until 13 June. Instead, what BHP did on 14 March (and thus in advance of the deadline given to PG of 19 March) was to apply to intervene in Arkansas as already noted, and thereafter engaged fully there by issuing its own MTQ. Indeed, the

arguments made by BHP in its submissions on its MTQ covered very much the same ground as it now covers in its ASI claim – see paragraphs 90-92 of Ms Varga's WS here.

41. On 31 March, BHP's US lawyers, Jones Day, wrote to PG's lawyers, Weisbrod, Matteis & Copley, saying that Mr Matteis of the latter firm had violated Rule 11 (of the Arkansas Civil Procedure Rules) in that the 1782 application was frivolous because of the three WSs already supplied by Mr de Freitas and the reference to BHP's "surreptitious" conduct referred to above. This elicited a firm response from Mr Matteis on 21 April, denying this, and it does not appear as if the Rule 11 point was taken any further.

42. I do not think anything turns on the suggestion of misrepresentation for present purposes. If there is, it is a matter for Judge Baker, having been ventilated fully in the MTQ submissions.

43. On 9 May, Slaughter and May wrote to PG's US lawyers, saying that they should now agree to stay the 1782 Application, pending the giving of evidence by Mr de Freitas at any trial here, following which it should be withdrawn. If PG did not agree by 16 May, then BHP intended to apply here for an ASI. PG did not agree. Hence the intimation to Judge Baker on 6 June that it would be seeking an ASI.

44. On any view there was a delay of just under four months between BHP learning of the subpoenas and applying here for the ASI. There was no good reason for that delay. Indeed, BHP effectively threatened an application for an ASI in its letter of 12 March but then did nothing about it. Paragraph 48 of Mr Michael's WS seeks to explain why an ASI now is appropriate but it does not explain the delay in seeking it. In argument it was suggested that there was no point in applying prior to becoming aware in early May that Mr de Freitas was offering to testify here if the subpoenas were stayed. There is nothing in this point. Back in March, Slaughter and May was making the point that PG had not investigated whether Mr de Freitas would in fact be prepared to testify in England. To the extent it did not do so, BHP could have made the same enquiry then, and discussed in detail with Mr de Freitas the basis on which he might be prepared to testify later, in England, and making the offers which were in fact made much later. It is not suggested that BHP had no means of contacting Mr de Freitas once it had learned of the subpoenas, and of course he and they had a previous line of communication and he had produced three WSs for BHP.

45. Another point made by BHP is that it was reasonable to wait until it had PG's response (given on 3 June) to its offer to undertake to use its best endeavours to have Mr de Freitas give evidence here. As to that, PG suggested that there was no point in waiting because it would obviously refuse. I do not set much store by that; however, the real answer is that, again, all of that could have been considered with Mr de Freitas at a much earlier stage. Once more, it is important to note that *Omega* featured in BHP's MTQ submissions from the outset, this of, course, being the case where an undertaking was offered (see below).

46. In truth, there was nothing stopping BHP from seeking an ASI on an urgent basis in March 2025. It could have done so without seeking to intervene in Arkansas or making its own MTQ. Mr de Freitas' own MTQ was not made until 4 April, by which time the Court here would certainly have been able to hear an urgent ASI application or claim.

47. I should add that even if PG should have informed BHP at the outset that it was making the 1782 application, all that would mean is that, BHP could and should have (on its case) sought an ASI here even earlier. It certainly does not assist it on the question of delay.

THE PARTIES' POSITIONS

48. BHP contends that PG's conduct is vexatious and oppressive ("VO") and the court in its discretion should grant an ASI. This is for the following summary reasons:

    (1) the evidence sought from Mr de Freitas cannot be described as critical to PG's evaluation as to whether it has claims against BHP; whatever the position may have been when the 1782 application was first made, PG has now been able to articulate its putative claim in considerable detail in the LBA;

    (2) as it so happens, Mr de Freitas has already provided three substantial WS, dealing with the settlements in Brazil, as part of BHP's jurisdiction application, which PG has;

    (3) the only proper characterisation of PG's 1782 application is as a speculative fishing expedition;

    (4) the present stance of Mr de Freitas is that he is prepared to give evidence either at the deposition contemplated by the subpoenas issued by Judge Baker or at the trial of any claims, if made, by PG against BHP, not both. As he lives abroad, he is not compellable

by the English Court to attend as a witness and he would refuse to do so, if deposed in Arkansas;

(5) on the basis of that stance, it would be an unfair interference with BHP's litigation interests here in respect of any putative claim for him to be deposed in Arkansas and then not be available to be called as a witness at the trial;

(6) in order to give some assurance that, absent the deposition in Arkansas, Mr de Freitas would indeed attend the trial of any claim made by PG against BHP and give evidence, he is prepared to undertake to this Court that he would attend and BHP is prepared to undertake to use its best endeavours that he does so;

(7) in this particular context, where the foreign court is involved, not because there are substantive proceedings before it which might compete with any proceedings here, but simply because of a facility whereby the foreign court can order evidence to be taken to assist proceedings elsewhere, there are no considerations of comity which would be adverse to the grant of an ASI;

(8) PG, through its lawyers in Arkansas, made misleading statements in its original 1782 Application.

49. PG's position in summary is as follows:

(1) while it is correct that it has now been able to set out details of its putative claim in the LBA, Mr de Freitas is likely to have useful evidence to give which bears upon how PG may plead and prove its claim;

(2) the matters on which he is to be deposed are within a relatively narrow compass, as indicated by the fact that the deposition is not to take longer than one day; if Judge Baker considers, having heard the MTQ, that the areas on which he is to be disposed need to be more tightly drawn, that is classically a matter for her; it certainly cannot be said that the deposition process is itself inherently burdensome or inconvenient for Mr de Freitas;

(3) the three WSs already provided by Mr de Freitas do not go to the issues for the deposition now raised; rather, they deal with more general features of the various settlement schemes managed by Renova;

(4) it is not in fact certain that if deposed in Arkansas, and then BHP wanted to call Mr de Freitas as a witness, that he would refuse to attend the trial here of any putative claim brought by PG;

(5) while Mr de Freitas has offered an undertaking it is effectively unenforceable unless he was in breach of it and then entered this jurisdiction; as for BHP, its undertaking adds little, because in practice there can be no breach unless it has failed to use its best endeavours to secure Mr de Freitas' attendance and it would be difficult for PG to show this; in any event, PG wants to have evidence from Mr de Freitas now, not at some later trial, so that it can assist with its pleading and proving its case (or not, as the case may be);

(6) there has in fact been a substantial delay on the part of BHP in making its claim for the ASI, which occurred only recently, given when it first knew of the making of the order by Judge Baker early this year; over the period of the delay, what BHP did was to engage substantively with the court in Arkansas by bringing its own MTQ which in practice, even if not as a matter of strict law, means that it has effectively submitted to the jurisdiction of the Arkansas court as a forum for complaining about the orders made there;

(7) PG did not make any misleading statements to the court in Arkansas but in any event if there was any question of misleading that court, a point which has been raised with Judge Baker, this is a matter for her, not for this Court.

THE LAW

50. It is common ground that the species of ASI with which we are concerned is where the respondent's pursuit of the foreign proceedings sought to be restrained is unconscionable because it is VO. We are not concerned with the other main manifestation of the ASI which is where the foreign proceedings have been brought in breach of an exclusive jurisdiction clause.

South Carolina

51. The leading case which expresses the VO principle is *South Carolina Insurance Co v Assurantie Maatschappij "De Zeven Provincien" NV* [1987] 1 AC 24. In this case, the claimant reinsurer claimed against its three re-reinsurers in the Commercial Court. After those proceedings commenced and before the re-reinsurers had served their points of defence, they applied by

motion to the United States district court, being Western District of Washington, Seattle for orders under 1782. They sought depositions and discovery from the relevant underwriting agent and loss adjusters both of whose businesses were located in Washington State. South Carolina then applied in the Commercial Court here for an ASI to restrain the re-reinsurers from proceeding with the 1782 application.

52. The first instance Judge granted the ASI and this was confirmed by the Court of Appeal. The matter then went to the House of Lords. The leading judgment was given by Lord Brandon. Here, at page 40D, and as to the basis for such an ASI, he referred, among other things, to the situation where one party to an action had behaved or threatened to behave in a manner which was unconscionable. At page 41C, he said that it would probably be unwise to define the expression "unconscionable conduct" in anything like an exhaustive manner but it included at any rate "conduct which is oppressive or vexatious or which interferes with the due process of the court."

53. Lord Brandon considered that in the instant case, the conduct of the re-reinsurers in making their 1782 application was not thereby interfering with the English court's control of its own process. This was in a context where he recognised that in general, the English High Court did not have an equivalent of the procedure in courts of the USA where there is pre-trial discovery and depositions at an early stage. Nonetheless, the High Court does not generally exercise any control over the manner in which a party obtains the evidence needed to support his case. It is up to that party how it obtained such evidence provided that its use in litigation here is lawful. As he put it at page 43A-E:

> "all they have done is what any party preparing his case and the High Court here is entitled to do, namely to try and obtain in a foreign country, by means lawful in that country, documentary evidence which they believe that they need in order to prepare and present their case."

54. Nor did Lord Brandon see that the 1782 application would cause hardship to South Carolina by reason of inconvenience or the incurring of additional costs. This was a case where neither the underwriter nor the loss adjuster themselves objected to the order being sought in the Washington court.

55. In the event, the House of Lords reversed the earlier decisions and declined to grant the ASI. It should be pointed out that by the time the case had reached the House of Lords, the re-reinsurers were no longer seeking depositions but only discovery of documents. So far as the documents were concerned, they would not have been disclosable by South Carolina as they were in the

possession of the loss adjuster and the underwriter, who were foreign non-parties to the litigation here. That said, it seems to me that Lord Brandon was disagreeing in principle with the views expressed by the first instance Judge and by the Court of Appeal at pages 41-43. The only slight caveat to this is that Lord Brandon, while awarding the re-reinsurers their costs of the appeal before the House of Lords, was not prepared without further argument to awards their costs below because different considerations might apply because of the breadth of their application under 1782 as originally framed, and because they had made misleading statements about the position under English law in their original memorandum for which they now apologised.

56. Numerous subsequent cases have referred to the statements of principle enunciated by Lord Brandon set out above. It is further common ground between the parties that even if the course of action under 1782 is regarded as VO, it is then a matter for the discretion of the court whether or not to grant the ASI sought.

57. Finally, PG seeks to make a distinction between an ASI, properly so called, and what it refers to as an Anti-Enforcement Injunction ("AEI") which has to be sought when there is already a concluded judgment ready for enforcement locally, in the foreign jurisdiction. Again, I will deal with this in context below, but for present purposes my reference to an ASI cover both situations.

58. There are only three cases where an ASI has been granted by the English Court in the context of 1782. In other cases, it did not. As both sides have made references to such cases in some detail it is worth setting them out at this stage. I have added one case, also referred to, which is on the subject of delay in the context of ASIs though not in relation to 1782 applications.

Bankers Trust

59. In *Bankers Trust International plc v PT Dharmala Sakti Sejahtera* [1996] C.L.C. 252, the trial in England had taken place in July 1995 and judgment was reserved. In the course of these proceedings, the defendant had made a number of largely unsuccessful applications for discovery in relation to the claimant's transactions with other clients. In August 1995, it sought to amend its pleadings to allege systematic fraud on the part of the claimant on the basis of an article published in the Washington Post relating to a different action in the USA which the defendant suggested showed that the claimant had been operating a fraudulent system of conduct in relation to other clients. That application to amend was refused here. The defendant

then applied to the US District Court under 1782 for an order for disclosure against the claimant and its parent and associated companies, and the order was granted. The defendant hoped that, as a result of that order, further relevant information would emerge which would enable it to re-apply to the English Judge to amend its case. This then prompted the claimant's claim for an ASI to stop the 1782 process.

60. In his judgment, granting the ASI, Mance J referred to *South Carolina*. While accepting the principles set out by Lord Brandon, he distinguished the case before him on the basis that the discovery sought in South Carolina was against non-parties to the English proceedings and although some disclosure had been given, the issue was whether it was sufficient without the execution of the 1782 order which the two entities did not now resist. The discovery sought by the defendant in the instant case was against the claimant as opposed to a non-party. Second, the application in South Carolina was at an early stage with a view to providing evidence at the eventual trial. In his case, however, the trial was over and judgment was awaited. Third, many of the precise categories of documents sought to be obtained under 1782 had already been sought, unsuccessfully, in discovery applications in the English case. The overlap was very considerable.

61. Further, the ambit of the proposed exercise under the 1782 order in New York would extend potentially to the whole subject matter of numerous transactions and many other customers. Mere matters of disposition or credit disclosed by those exercises were unlikely to be admissible at all in the English case and some of the evidence to be obtained appeared to be of no real significance. Also, it would not be appropriate to burden this case with a full investigation involving discovery in relation to the American problems affecting Bankers Trust companies. The case would become unmanageable if there had to be such further investigation. Finally, there had to be an end to the litigation and there was a legitimate expectation that the trial already concluded would be an end of the matter.

Omega

62. In *Omega*, Peter Gross QC (as he then was), sitting as a deputy High Court Judge, granted an ASI in the following circumstances: there were extant proceedings in the Commercial Court where damages were claimed by the claimants against the defendants for breach of fiduciary duty, breach of contract and conspiracy relating to an investment in the privatisation process in Azerbaijan. Worldwide freezing orders had been granted here and there was satellite litigation

in other jurisdictions concerning assets which were the subject of those orders. The defendants alleged, among other things, that the claimant's investments were accompanied by substantial corrupt payments so that the claims made were tainted by illegality.

63. Ahead of the trial of the action here, the first defendant obtained orders from various US District Courts under 1782 in relation to 10 employees and former employees of and investors in the claimant, to make witness statements by way of depositions. These were all witnesses who were due to give evidence for the claimant at the trial in any event. The relevant applications had been made without notice to the various witnesses or to the claimants. There was also a question of documentary disclosure but that was stood over, so that the Judge here was dealing only with the depositions. The relevant witnesses had all confirmed in writing their willingness to submit witness statements in the English proceedings and attend trial to give evidence. In those circumstances, the claimant said that the use of 1782 so as to depose those same witnesses ahead of trial was unconscionable and an abuse of process.

64. The Judge considered that the first question was whether the first defendant's conduct was unconscionable; if it was, the question was then whether the Judge should grant an ASI as a matter of discretion. As to the first question he made extensive reference to *South Carolina*. Notwithstanding what Lord Brandon said, the Judge did not read *South Carolina* as authority for the proposition that it can never be unconscionable for a party to English litigation to apply for orders under Section 1782. I would add that PG does not advance such a proposition here. Rather it says that there is no unconscionability on the facts of this case.

65. The Judge noted that *South Carolina*, in the event, did not address the question of pre-trial depositions although he did not think it was permissible to read into that decision an inference that the result in the House of Lords would have been different if the depositions part of the Section 1782 application there had not been abandoned.

66. The Judge concluded that it would be unconscionable, in the sense of being oppressive, vexatious and an interference with the due process of the English court for the first defendant to pursue the 1782 applications in respect of witnesses who were going to be called to give oral evidence at the trial here. In particular, he said this at paragraph 23:

> "…As it seems to me, in the case of such witnesses and as a matter of practical justice and good sense, the hybrid procedure produces the worst of all worlds:
> (1) If the relevant witnesses (i) give English witness statements, (ii) are then deposed in the US, (iii) thereafter attend to be cross-examined in the English trial, they will have been subjected to unwarranted

> double cross-examination and the trial will suffer from unnecessary duplication. I am not persuaded to reach a contrary view by the fact that the witnesses are or may be familiar with US deposition procedures in the context of US litigation. In any event, I accept Mr Mortimore's submission in this regard that, here, oppression must be judged by English standards.
> (2) Conversely, accepting as I do that there is a real, if unquantifiable, risk that a witness once deposed in the US may be discouraged from attending the trial in England in order to be cross- examined a second time, the S. 1782 applications pose a risk of interference with the trial itself. It would be most unsatisfactory for the trial court to be left with depositions from witnesses in such circumstances and to be deprived of their live testimony at the trial itself.
> (3) For the reasons already discussed, I do not think that South Carolina precludes the conclusion which I have reached. In this case and in respect of witnesses who are intended to come and give oral evidence at trial here, depositions are different and unconscionable. I should add that each party addressed me on the apprehended consequences of a ruling adverse to its case; the claimants submitted that if I was against them, the use of pre-trial depositions would become commonplace whenever witnesses were located in the US; for Mr Kozeny, it was argued that an unfavourable decision would render S. 1782 of little use. I am not sure that it is right to view the matter in this way; individual cases ultimately turn on their own facts. So far, however, as a decision of this court, necessarily subject to South Carolina, may have wider policy ramifications, then I do not shrink from saying that the use of S.1782 to depose the selfsame witnesses who will give witness statements and attend to give oral evidence here, has, in general, little to commend it.
> (4) The conclusion that the pursuit of the S. 1782 applications is unconscionable is not displaced by Mr Kozeny's concerns, to which I have given anxious consideration. These concerns are addressed more fully in para. 24 below; to the extent that they go to the threshold inquiry of unconscionability rather than the balance of convenience, then my reasoning in para. 24 is applicable here. I accordingly conclude that there is jurisdiction to grant the injunction sought by the claimants."

67. Having thus concluded, the Judge then went on to say that as a matter of discretion, the ASI should indeed be granted. This was partly because of the reasons which rendered the first defendant's conduct unconscionable, but also because, since the relevant witnesses would be giving evidence at trial here anyway, the first defendant would not gain any legitimate advantage by using the depositions procedure. Nor could the first defendant point to any specific concrete matter which would be covered by the depositions but which would not also be covered at trial. If in fact one or more of the putative witnesses did not attend trial, then the first defendant could apply to lift the injunction. There was presently a genuine intention on the part of the claimant' solicitors and the witnesses themselves to produce witness statements and attend trial to give oral evidence.

68. The ASI would be accompanied by an undertaking from the claimants to use best endeavours to produce the relevant witness statements and call them to give evidence at trial and to notify the first defendant if there was any reason to believe that this could not be achieved.

69. BHP here says that the case before me is on all fours with *Omega*, and of course it has offered undertakings which in fact go beyond the undertaking from the claimants in that case because there is an undertaking from Mr de Freitas as well. PG says that the position in *Omega* is different from that pertaining here and does not support BHP's case for an ASI.

Nokia

70. *Nokia v Interdigital Technology* [2004] EWHC 2920 (Pat) involved patent proceedings here. The claimants made a 1782 application in a US District Court for another telecoms company to produce one or more of its officers to be deposed with regard to a number of matters which were expressed very broadly. Having referred to the case law (including *South Carolina* and *Omega*) Pumphrey J first said that it could not be said that material obtained pursuant to the 1782 order sought could not be deployed in the proceedings here. Second, the English court should not seek to circumscribe the discretion by imposing its own view as to the appropriateness of the classes of documents sought. The question of whether the 1782 order should be made was a matter for the District Court alone and the English Court should only interfere, among other things, where the invocation of that jurisdiction is oppressive or vexatious or tends to interfere with the due process of the English court. As for depositions, he said that cases suggest that if the deposition evidence was not focused on the issues in the English proceedings it would not be of any practical utility at all. However, the possibility that the material obtained under the 1782 order sought would be useful in the action here could not be excluded. What would have to be shown is that obtaining the material amounted to an abuse of process. But he could not find that there was abusive behaviour in the sense that the order sought was intended to or at least would have the effect of causing unfair prejudice to the opposing party in the present proceedings. So he declined to grant the ASI.

71. I should add that it is said by BHP (but not accepted by PG) that in *Nokia* it must have been the case that the relevant witness was not otherwise going to be giving evidence here, otherwise Pumphrey J would have granted the injunction. I am not in a position to read that into his decision, whose significance lies in the fact that he considered that the English Court should not circumscribe the discretion of the US court, as noted above.

Benfield

72. In *Benfield v Richardson* [2007] EWHC 171 (QB), certain companies in the Benfield insurance group brought proceedings against companies in the Aon insurance group along with a Mr Richardson. The allegation was that the Aon companies and Mr Richardson conspired to poach a specialist reinsurance group, Mr Richardson being based and working in London. The trial of the English proceedings was expedited and at the date of the hearing before Langley J was about six weeks away. There were also similar, but narrower, proceedings commenced by different Benfield companies against different Aon companies in New York. These had started a month

earlier than the English proceedings but were now at a much less advanced stage, with no trial date yet having been fixed. Various pre-trial steps had been taken including discovery and depositions but one of the Benfield claimants in England now sought an order from the New York District Court to depose four Aon executives, ostensibly for the purpose of the proceedings in New York. All of those individuals were based in London and worked out of Aon's office there. No order for their deposition had yet been made by the New York court.

73. The evidence from Aon was that it was "practically certain" that two of the individuals would be called to give evidence at the English trial and would give witness statements. In the case of the other two, they were "practically assured" to be produced as witnesses and would also give witness statements. All of them confirm their ability for the trial here and their willingness to give evidence at it.

74. In upholding the original *ex parte* order for an ASI, which only prevented the taking of the depositions in New York pending the English Trial, Langley J observed as follows:

> "19. Plainly, the jurisdiction has to be exercised with caution. Although any injunction is directed only against the party restrained, it cannot be ignored that it may interfere with the due processes of the overseas court and particularly so where, as here, it is the procedure of that court which may be affected. No doubt the New York court had just such considerations in mind when Mr Richardson was restrained from pursuing his application in these courts. There are many warnings in the authorities against a prescriptive approach to these questions. Each case provides its own features and factors to be taken into consideration in deciding whether or not conduct is unconscionable such as to justify a restraint."

75. Then, having referred to *Omega*, Langley J went on to say:

> "23. In my judgment the material factors to be considered on this application are that:
> i) These proceedings are the lead proceedings in which the liability disputes between the parties can expect to be resolved. The parties recognise that England is the natural forum for the resolution of those disputes.
> ii) The trial is to take place on an expedited basis in the near future. Whilst "both" parties are extensively represented there is serious pressure of work for them to be ready for that trial which should not be disrupted save for compelling reasons.
> iii) There is no reason at all to doubt that the four witnesses in question will provide witness statements and give oral evidence at the trial. They are compellable.
> iv) English procedure provides for documentary disclosure which it has not been suggested is any less extensive than New York procedure.
> v) English procedure provides for witness statements (verified by a statement of truth) which must contain "the evidence which that person would be allowed to give orally" CPR 32.4. If the evidence is to be relied upon it must (subject to very limited exceptions) be in the statement. Thus, very shortly, Benfield will know what oral evidence is to be given by the four witnesses at the trial.
> vi) Like any other litigant, Benfield will then be able to prepare what cross-examination is considered appropriate, but in a context in which, as English procedure requires, they have also given documentary disclosure and have also properly performed their own obligation to serve by exchange the witness statements upon which they intend to rely.
> vii) I think Aon has made a compelling case that Benfield do not require the depositions for any immediate or real purpose of the New York proceedings. Moreover, they will have disclosure and witness statements in these proceedings for which, if there is substance in any need to use them in New York, they can apply to this court for an order permitting them to do so.

> viii) It follows that I see no prejudice to Benfield if they are restrained in the limited manner sought by Aon.
> ix) There is a real forensic unfairness both to the witness and to Aon if Benfield is in effect permitted to have a pre-trial cross-examination of witnesses whom Benfield can hardly expect to be helpful to their real cause, when that would not be permitted by English procedures and there is and can be no reciprocity.
>
> Conclusion
> 24. In my judgment the factors to which I have referred all point in the same direction. No good reason has been shown for seeking depositions, certainly not before the March trial, from the four witnesses. To do so would be disruptive of these proceedings and procedurally and forensically unfair and oppressive to Aon… Nor, as stated, is there any urgency. The very fact that Benfield put forward the proposal to delay depositions until after service of witness statements (letter of 18 January) betrays both the lack of urgency and that use of depositions in this jurisdiction is a, if not the real, target."

76. It is plain from his judgment that key factors for Langley J were the disruption which would be caused to the preparation of an imminent trial here by depositions of witnesses who were going to be called here in any event and in circumstances where he considered that the stated purpose of the depositions in New York, that they were to assist the proceedings there, was disingenuous. The real purpose was to have an opportunity to cross-examine those witnesses first by way of deposition prior to their cross-examination in the trial here.

Dreymoor

77. In *Dreymoor Fertilisers Overseas Pte Ltd v EuroChem Trading GmbH & Anor.* [2018] EWHC 2267 (Comm), the defendants to an ASI application here had obtained a 1782 order for discovery and depositions from a former director of the claimant applicant who was now employed by its US affiliate. The 1782 order, which had been confirmed by the relevant court on review, was for the purpose of obtaining documents and evidence for use in the BVI and Cyprus, where there were extant proceedings between the parties in which the defendants alleged that the relevant contracts had been vitiated by substantial bribes paid by the claimant to two of the first defendant's senior employees. In addition, however, the first defendant had brought two London arbitrations dealing with the same matters. It was common ground that the information, once obtained under the 1782 orders could also be used in the arbitrations here and indeed the first defendant intended to use them for that purpose as well.

78. The claimant sought the ASI so as to prevent the discovery and depositions until after the arbitration hearings which were due to take place 7 months hence, because it would be burdensome for the former director to comply with it when he was going to give evidence in the arbitrations. It also submitted that if he was deposed in the meantime, he might then be unwilling to attend as a witness in the arbitrations which would mean that the claimant would

be deprived of the benefit of his live evidence and in any event for him to be cross-examined twice would be oppressive unfair and one-sided.

79. Males J (as he then was) characterised the injunction sought as one to prevent enforcement of an order already made abroad. He referred to *South Carolina* and also *Omega*. As to the latter, he said at paragraph 63 that he did not read this as a decision that in all circumstances the pre-trial deposition of a witness who is intended to produce a witness statement and give live evidence in proceedings in this country will be unconscionable. I agree with that. If *Omega* had so suggested (which was not necessary for the actual decision) it was clearly wrong.

80. Males J also referred to *Benfield*, noting that Langley J had there observed that it was important that in his case, there were no current orders of the New York courts requiring depositions of the witnesses, with the injunction sought being aimed at Benfield's expressed intention to seek such orders. In the light of that, Males J further observed that if there had been any such orders this would appear to be a factor counting against an injunction.

81. He went on to hold that the case before him was different from both *Omega* and *Benfield* for various reasons. First, the 1782 order in his case was essentially obtained for the purpose of evidence in proceedings in third countries not here, i.e. the BVI and Cyprus. Second, that order had been made after a fully reasoned decision had been given by the US Court, and it would be a serious breach of comity if the English court was now effectively to second-guess the correctness of the US Court. Third, although the timing of the enforcement of the 1782 order would have an impact on preparation for the hearing in the London arbitrations this was a problem caused entirely by the claimant which left it very late to seek the injunction. Had it done so much earlier, which it should have done, there would be no timing problem in relation to the arbitrations. Further, lateness was a separate factor against the grant of the injunction, the arbitrations here were not the lead proceedings, and the depositions and discovery may produce information which went further than that which could be produced within the arbitrations which would be useful to the first defendant. The arbitration hearing was 7 months away, compared with the trial in *Benfield* which was 7 weeks from when the injunction was first granted. He then said this:

> "80. Eighth, I accept that there is a risk that if Mr Chauhan is deposed in the United States and finds the experience uncomfortable, he may be discouraged from giving live evidence in the arbitrations. That is a factor which I take into account. However, Mr Chauhan's own evidence is that he intends to make a witness statement in the arbitrations and to attend for cross examination at the hearing. That is, he says, subject to the caveat that he is 'not able to discount wholly the possibility of "walking away"' if the process causes him undue stress. While this is a risk that cannot be discounted wholly, it seems to me that in view of Mr Chauhan's position within the Dreymoor group it is a relatively small one in the circumstances.

> 81. Ninth, I accept that there is an element of potential unfairness in the fact that Dreymoor will have the opportunity to cross-examine Mr Chauhan twice. This was a factor which weighed heavily in the Omega and Benfield cases. It is a factor in favour of the grant of an injunction in this case. However, the weight which it carries is affected by three considerations. The first is that Dreymoor accepts before me that Mr Chauhan will eventually have to be deposed pursuant to the 1782 Order. The only question is whether that should happen in advance of the arbitration hearing. Second, the fact that there are proceedings on the merits in both London and the BVI is likely to mean that witnesses on both sides will face double cross-examination, so that the absence of reciprocity does not apply to the same extent as it did in Benfield. Third, as Mr Fenwick accepted, it will be for the arbitrators to decide whether or to what extent any documents or evidence provided pursuant to the 1782 Order can be used or deployed in the arbitrations. The arbitrators therefore retain control of their procedure, which goes a long way (I accept not the whole way) to mitigate any unfairness caused to Dreymoor."

82. For those reasons, Males J declined to grant an injunction on the VO basis because there was no such conduct, and in addition, had the question of discretion arisen, he would have exercised it against the grant of the injunction.

Jones

83. *Jones v Treasury Wine* [2016] FCAFC 59 is a decision of a Full Court of the Federal Court of Australia exercising original jurisdiction. The context was an ongoing class action in Australia. Without notice to the docket judge in that class action the applicant and another sought depositions under 1782. The court here held that its proceedings and its pre-trial processes were subject to supervision by the Court, especially where one was dealing with a class action which invoked the court's supervisory role. This required that there be notice to the other parties and the prior knowledge and endorsement by the court in Australia, before a party could be permitted to commence proceedings in a US court. The depositions sought would go further than materials which could be obtained under local law in Australia. It would be exceptional for the Australian court to endorse the seeking of such orders abroad. Moreover the recent reforms to the discovery procedure together with the regime of judicial case management would be undermined by the application to the US District Court. The observations made in *South Carolina* that the court does not generally control the manner in which a party lawfully obtains evidence which he needs to support his case were no answer here because any such right could not be exercised in a way designed to circumvent the Australian Court's control and supervision of the proceedings before it. Had it been necessary, the court would also have found that the seeking of the 1782 order was vexatious and oppressive to the respondent to it because of the considerable expense and inconvenience caused to it by the proceedings in the US.

84. I do not accept that English courts take the same view in relation to the control of their processes when it comes to obtaining evidence abroad (notwithstanding BHP's references to the CPR and PD57AD and PD57AC at paragraph 28 of its Skeleton Argument), and in any event, particular

emphasis was given in *Jones* to the role of the supervising judge in a class action. This was a very different case to that before me but in any event, it is not a binding authority.

Soriano

85. *Soriano v Forensic News* [2023] EWCA Civ 223 was a decision of the Court of Appeal in the context of a defamation claim, where the defendants applied to the Southern District of New York court for documents pursuant to 1782. Mr Soriano then claimed an ASI here. The Court of Appeal first held that the general principles applicable to 1782 applications and ASI's applied equally to libel claims, and the judge who had refused the ASI at first instance was entitled to take into account that any party to a High Court action here is entitled to try to obtain in a foreign country by lawful means documentary evidence which they believe they need in order to prepare and present their case. It may be abusive to bring 1782 proceedings or it may not; it all depended on the circumstances, and it may also depend on the purpose for which the 1782 application was brought. Although the breadth of the order sought was of apparently undesirable width, that was a matter for the US court to decide although it was noted that such a broad order was unlikely to be granted here.

86. The Court of Appeal said that the injunction in *Omega* was granted there because the witnesses would be subjected to unwarranted double cross-examination and the prospective English trial would suffer from unnecessary duplication. That case, and *Bankers Trust*, demonstrated the factual nature of the evaluation which the English court would undertake on an application or claim of this kind. It reiterated that when considering the 1782 application, it was well open to the US court to narrow the scope of the discovery if it thought this was appropriate, making reference to the *Intel* factors. For those reasons, the Court of Appeal rejected the appeal from the decision of the first instance Judge.

Ecobank

87. Finally, *Ecobank Transnational Inc v Tanoh* [2015] EWCA Civ 1309 was a case where the Judge at first instance refused to grant an injunction to restrain enforcement of two judgments already obtained abroad on the basis that their subject matter was covered by a binding arbitration clause, because of the serious delay in seeking the injunction. This was referred to as an anti-enforcement injunction because the proceedings abroad had already resulted in otherwise enforceable judgments. In upholding the decision of the Judge, the Court of Appeal said that ASI's had to be sought at an early stage and the longer the action abroad continued

without any attempt to restrain it, the less likely a court was to grant an injunction. An application for an injunction after judgment had been given abroad was unlikely to succeed unless it could be shown that the applicant could not have applied for relief before judgment. In this context, the court would have regard to all relevant considerations including the extent to which the respondent had incurred expense prior to any application for the injunction being made, the interests of third parties including the foreign court and the effect of granting an anti-enforcement order.

88. In particular, Christopher Clarke LJ said this:

> "129 Further the tenor of modern authorities is that an applicant should act promptly and claim injunctive relief at an early stage; and should not adopt an attitude of waiting to see what the foreign court decides. In The Angelic Grace [1995] 1 Lloyds Rep 87 Leggatt LJ said that it would be patronising and the reverse of comity for the English court to decline to grant injunctive relief until it was apparent whether the foreign court was going to uphold the objection to its exercising jurisdiction and only do so if and when it failed to do so. Whilst those observations related to the approach of the court it seems to me that they are a guide to what should be the approach of a would-be applicant for anti-suit or anti-enforcement relief.
>
> 130 The proposition that delay in this field is immaterial in the absence of prejudice and that there is necessarily no prejudice if the respondent is aware of the challenge to the jurisdiction of the foreign court which is being pursued there would have curious consequences. Firstly it would revolutionise the approach that has previously been taken in respect of the need for applicants to act promptly. Secondly it would mean that applicants could have two bites at the cherry. They could, without seeking or threatening any injunctive relief in this country, resist the foreign proceedings on the ground that the issue should be arbitrated and, provided they had not submitted to the jurisdiction, they could then, if the challenge failed, seek an anti-enforcement injunction. The impunity which Mance J had thought "never [to have] been the law" or something very like it would have arrived."

89. I appreciate that these observations were made in a context where judgments had already been obtained abroad. Nonetheless, the notion that the applicant for an ASI should not be able to have "two bites at the cherry" has some relevance here.

ANALYSIS: VO

Introduction

90. In my judgment, the core question is whether the relevant English court process would be interfered with, or prejudiced, in some material way if there was no ASI. This is essentially how BHP have framed its case by reference to PG's conduct which it says is VO. I deal with that point, along with others made by the parties on VO, below.

91. Mr Caplin KC made a preliminary submission to the effect that the injunction sought by BHP is in fact an AEI because there already is a reasoned judgment for the original *ex parte* 1782 order. On that basis, he says that there is or should be a significantly higher burden in showing VO. However, for the most part, in the 1782 context the distinction between an ASI and AEI

has not been drawn. Thus, in *Omega*, the deposition orders had been made whereas in *Nokia*, *Benfield* and *Soriano*, they had not. Only in *Dreymoor* did Males J emphasise the fact that the application was to prevent enforcement of the order which had been made after a fully reasoned decision and in that context he referred to a breach of comity. See paragraph 81 above.

92. The situation is not quite the same here because while there was the original *ex parte* decision, albeit reasoned, which by definition BHP could not have known and was not forewarned about, and while there will no doubt be a fully-reasoned judgment on the MTQs, that has not yet been delivered. At least for the purposes of determining VO, I approach the claim on conventional ASI principles. However, when it comes to discretion, I consider that I am fully entitled to consider as part of that exercise if there is, in reality, any question of second-guessing the decision to be made by Judge Baker, the involvement of BHP in the 1782 process in Arkansas, and matters of that kind. In that context, matters of comity can still arise.

The Context

93. As the cases referred to above demonstrate, whether there is VO conduct, is a highly fact-sensitive question. Context, therefore, is highly important.

94. In my judgment, the context here is entirely different from that in *Omega*. In that case, there were existing proceedings which had been fully pleaded out and where it was already intended by one party that the subjects of the depositions were going to provide witness statements and then give evidence for it at trial. There were 10 such subjects in *Omega*. The depositions were being sought by the other party, which, in the normal course of things would be cross-examining such witnesses at the trial. However, that party was now seeking to expose them to depositions as well, leading to the prospect of double cross-examination and effectively giving that party two bites at the cross-examination cherry, as it were, and was not able to point to any particular matter that might arise from the depositions that would not be covered by cross-examination at trial. There was no further justification for having the depositions. That is made plain by the fact that the defendant appears to have simply chosen all of the witnesses which the claimant was going to call, or at least all in a particular group, being employees, ex-employees and investors.

95. Instead, the case before me involves a situation where, albeit that PG has now articulated its claim in detail in the LBA, it wants to depose Mr de Freitas at an early (but not illegitimate) pre-trial stage in order to obtain evidence from him which may assist it in pleading its case and

later proving it. On any view, Mr de Freitas may have useful evidence to give, notwithstanding his departure prior to the making of the Repactuation, which PG says would have been negotiated and considered before he left. I agree with PG that the depositions serve a distinct and legitimate purpose, being to better understand Renova's role in relation to the various settlements and their form. It is not to somehow replicate what his evidence might be at a future trial. So the two putative examinations, a one-day deposition to occur shortly (if the MTQs are dismissed), as against evidence at trial in 2-3 years time are unlikely to be duplicative. Further, given the seriousness of the allegations in the Recourse Claim, it is difficult to see what is objectionable to PG making use of its legitimate right to seek a 1782 order with the prospect of yielding evidence to assist its legal advisers in formulating and making the Recourse Claim. The fact that it has been enunciated in the LBA does not mean that PG's position cannot be improved prior to the issuing of any claim. Beyond that, it is not necessary for me to attempt to assess the precise utility of such evidence. See the observations of Pumphrey J in *Nokia* set out at paragraph 70 above.

96. As things stand, it is not clear that the evidence obtained from Mr de Freitas at his deposition will assist PG's claim, but it may do. If it positively does, then no doubt PG will have an interest in calling him as a witness at trial, including obtaining a detailed WS from him. In that event, if he chose not to assist further, after being deposed, this will be to the disadvantage of PG.

97. On the other hand, if his evidence is positively unhelpful to PG then it will have to consider the merits of proceeding to plead and progress the Recourse Claim, for which endeavour evidence from Mr de Freitas is said to be relevant. If PG decides not to pursue the Recourse Claim in the light of his evidence at the depositions, then that is an end of the matter. On the other hand, if PG decides to pursue the Recourse Claim notwithstanding, BHP has already reserved the right to apply to strike it out. If it does, and if it is successful, then that, again, will be the end of the matter.

98. If the Recourse Claim is able to be and is pursued by PG, however, even though Mr de Freitas's deposition is not favourable to it, the question then is whether BHP would wish to call him in its defence. BHP's present position, of course, is that he has effectively said all that he can say in his three WSs, and there is no further evidence he can give. On that footing, it is hard to see why BHP would call him. However, it is possible that in his depositions, he will give evidence that is positively helpful to BHP in rebutting the Recourse Claim. It is in that circumstance (and

only that circumstance) that the question of possible prejudice to BHP at trial arises if Mr de Freitas chooses, after being deposed, not to assist BHP and in particular not to give it a WS and later appear as a witness for it at trial.

99. The above analysis explains why the position here is much more nuanced and uncertain than that pertaining in *Omega* (and indeed in *Benfield* and *Dreymoor*), where the putative witness was already "lined up" as it were to testify for the party who had not obtained the 1782 order. That is why the reference to "double cross-examination" was made, meaning the cross-examination of a witness by the party who had sought or obtained the 1782 order, and which witness's evidence was adverse to that party's case. This is the context in which one must address the claimed risk of prejudice to BHP in the putative trial process here.

The risk of prejudice to BHP

100. In my judgment, any such risk is either small or speculative. First, it only arises at all in the event that (a) Mr de Freitas provides evidence that positively assists BHP's defence of the Recourse Claim, and (b) that claim is nonetheless pursued.

101. Second, while Mr de Freitas has stated, through his lawyers, his present intention not to give evidence at trial here if he is deposed now, Mr de Freitas has not himself filed a WS setting out his position. He could easily have done so and it could have been filed by BHP. However, even if this is his present position, it is in my view speculative as to whether it would be maintained in the event of a trial 2 or 3 years hence and in circumstances where BHP would want to call him as a witness. After all, BHP has already made it clear that it would be prepared to defray his expenses and pay for his time; see paragraph 33 above. Moreover, he might well give evidence by video-link.

102. I appreciate that in *Omega*, the Judge took into account the risk that the witness may be discouraged from attending trial here, after being deposed. See paragraph 66 above. However, again, that was in the context of what would be duplicative or double-cross-examination in the context of an existing court process. The same point can be made in relation to the fact that Males J in *Dreymoor* also took into account (but not in a way which led to an ASI) a potential risk that the relevant witness would not attend trial; see paragraph 81 above.

103. Furthermore, in a sense, this is a problem of Mr de Freitas' own making. Of course he can decide not to give evidence in England, but it is hard to see why that should act as the

justification for an ASI, without more, and therefore as an effective veto of PG's right to the 1782 Order, even if it is justified in its own terms so far as the US court is concerned. That said, this point is not critical for my reasoning here.

The Undertakings offered

104. These are offered to provide some reassurance to PG that if Mr de Freitas is not deposed, he will give evidence at trial.

105. In my view, the undertakings offered by Mr de Freitas and by BHP that, one way or another, Mr de Freitas would give evidence, or be tendered as a witness, at trial, do not assist. First, as already noted, the (legitimate) purpose of the deposition is to obtain evidence from Mr de Freitas at the pre-action stage. On what is proposed by Mr de Freitas and BHP, this would not be possible.

106. Second, the undertakings are of limited value. That proffered by Mr de Freitas is effectively unenforceable unless he enters this jurisdiction, having declined to give evidence here in breach of his undertaking. As for the undertaking to be given by BHP, I do not accept that a "best endeavours" form here will achieve much, because BHP could quite genuinely and simply say that it has tried to get Mr de Freitas here but has failed, and that will be the end of the matter.

107. Finally, if he does not attend at trial, there is not much utility in PG then being able to return to the Arkansas Court to revive the subpoenas. First, it will be too late by then. Second, it is not clear how long Mr de Freitas may be resident in Arkansas. He only moved there recently for the purposes of working for a Dutch company which itself has offices around the world.

Mr de Freitas's three previous witness statements

108. Although BHP says that these should suffice, they are not directed to the issues which it wishes to ask him about in relation to the ingredients of the Recourse Claim.

The width of the subpoenas

109. To the extent that these are overbroad, that is not a matter for me, but rather, Judge Baker, to whom it has already been expressly stated that they should be narrowed. See *Soriano*, referred to at paragraphs 85 and 86 above.

Misleading statements made by PG to the Arkansas Court

110. I have dealt with the "surreptitiously" point at paragraphs 37 - 39 above. However, in my view it is principally a matter for Judge Baker.

111. It is also said at paragraphs 57 - 59 of BHP's Skeleton Argument that it was misleading for PG to say to the Arkansas Court that because Mr de Freitas is not a UK resident or a party to the Lien Claim, he was "beyond the English court's jurisdiction" and that "[w]ithout this Court's help, [PG] cannot obtain Mr. de Freitas's testimony in preparation for the Lien Claim". It is said that the first of these statements was misleading, because Mr de Freitas had previously supplied 3 WSs. However, that did not mean that he was a compellable witness and it remains the fact that he is beyond the court's jurisdiction. It is then said that the second statement was misleading because there was the possibility that BHP would tender him as a witness and PG had not explored this before moving the Arkansas Court. However, to my mind, that did not make what PG said at the time misleading. On what it knew it was entitled to say that it needed the help of the Arkansas Court. In any event, again this is principally a matter for Judge Baker.

The Use of 1782 to aid English proceedings in principle, and in this case

112. It is not the law that it is VO to take advantage of a facility abroad to depose a witness, pre-action, even if this is not a procedure available here. Parties are entitled to make use of litigation advantages such as this, if available. See, again, *Soriano*, referred to at paragraph 85 above, and *South Carolina* at paragraph 53 above. Further, while the outcome of the deposition is not clear (see above) this does not mean that it is illegitimate to take advantage of 1782, and its utility is essentially a matter for the Arkansas Court. See paragraph 95 above. I do not consider that its very use here by PG is some illegitimate form of fishing, as alleged by BHP. Nor is it rendered such because PG has now produced its LBA. The fact that (as noted by BHP at paragraph 47 of its Skeleton Argument) PG did not suggest to the Arkansas Court that the deposition sought was <u>necessary</u> before it could plead a case against BHP is irrelevant. It did not have to show necessity, and in any event, again, that is a question of its utility, which was a matter for Judge Baker.

Conclusion

113. For all the above reasons, I am clear that PG's making of the 1782 Application and intention to rely upon the 1782 Order (if sustained) is not unconscionable whether by being VO or (if

different) an interference with the English court process. This means that the ASI must be refused.

114. However, even if the conduct of PG was unconscionable, I would not, in my discretion, have granted the ASI. I explain why below.

ANALYSIS: DISCRETION

115. When considering the question of discretion I do not refer back to the arguments made on the question of VO because they have already been taken into account there. What one is looking at here, since discretion only arises if VO is assumed to have been established, is the question whether in practice there are any discretionary factors which militate against the grant of the ASI and their significance.

116. I have already explained why I consider that there has been unjustified delay in BHP seeking the ASI, in paragraphs 44 - 47 above. Of course, this was not delay in a vacuum. Its failure to apply timeously before the ASI meant that the Arkansas court had to be fully engaged on the issue because of the MTQs. It is no answer to say that this would have happened anyway, since Mr de Freitas brought his own MTQ. That is because, if an ASI had been sought and granted here at an early stage, there would have been no need to take any further steps in Arkansas. Indeed, BHP could have sought an initial urgent ASI here simply to stop PG from acting on the subpoenas pending a full hearing, which is what happened in *Benfield*.

117. Second, from the outset, BHP relied in its MTQ on the English ASI process invoking *Omega* as a reason why the Arkansas court should quash the subpoenas, as noted above. Yet it had not invoked that ASI procedure here, which was an extremely odd position to take, in my view. In my judgment, this is a classic case of "having two bites at the cherry". Although BHP has submitted (and I have rejected) that it was not in a position anyway to seek an ASI in early 2025, that submission makes no sense where it was effectively telling the Arkansas Court that an English court would, if asked at that time, grant an ASI and thus the 1782 order should be quashed. It is no answer to that point to say that the reference to ASIs and *Omega* by BHP in its MTQ were simply to show that the English court was not receptive to the use of 1782 as matter of gathering evidence, being one of the *Intel* factors. That is because in principle, the English court is so receptive. Judge Baker noted this in her original judgment and that a number of District Courts have so stated. The English Court, in a particular case, might not be so

receptive should it be asked to grant an ASI, but of course that is precisely what was not done originally, here.

118. I appreciate that the position here is not the same as in *Ecobank* which involved a judgment given abroad and attempts to set it aside for want of jurisdiction etc, and there are no substantive proceedings in Arkansas. Nonetheless, BHP's actions did in my view offend the principles expressed in that case.

119. The consequence of all of this was to involve the Arkansas court in a protracted interlocutory process which lasted for two months. Of course, this principally involved written declarations and submission and the ultimate hearing lasted for only half a day. However, there obviously would have been court time involved in reading and assessing the written submissions and preparing for the hearing, and the same is true for all of the parties and their lawyers where considerable fees must have been incurred. The matter does not end with the remote hearing because there will no doubt be a substantial amount of time incurred and to be incurred by Judge Baker in writing her judgment. All of this could have been avoided. Instead, in reality, BHP decided to run all of its arguments as to why it would be wrong to permit PG to use the 1782 procedure, in Arkansas, rather than here, until it had exhausted all of its submissions there. PG characterised this as BHP voluntarily submitting to the jurisdiction of the Arkansas Court for these purposes. That may not be quite the correct label to use, but it does not matter; it is the substance of what has occurred which is important.

120. While the Arkansas court has no "selfish interest" its role relating to orders under 1782 because this is all about evidence for use elsewhere (cf cases on competing *fora* which I accept are different), I do consider that there is at least a limited comity interest engaged here. When the intended claim for an ASI was made known to Judge Baker on 6 June, she at least had to pause for thought and consider what should be done in the light of it. Indeed, one of BHP's oral submissions before me was that it is to be inferred that Judge Baker has not issued her judgment thus far because she is in fact awaiting the outcome of my judgment, being conscious of comity implications. Actually, there is no evidence of that but if it were the case, it only goes to show the added distraction to the Arkansas court process caused by making the ASI now, and not much earlier. I think there is also an element here of BHP effectively asking this Court to say that the grant of the subpoenas in their own terms was wrong and that any judgment on the

MTQs which maintain them would also be wrong, which ties in with the notion that Judge Baker is awaiting my judgment in order, presumably, to take account of it in hers.

121. That questions of comity can arise in 1782 cases is shown by the reference to it in *Dreymoor*. I do not accept that it can only arise if there has been a concluded judgment given. Of course, the facts here are different to those in *Dreymoor*, but I do not consider that the case-law shows that questions of comity cannot, as a matter of principle, arise in respect of 1782 cases were what has happened abroad falls short of a concluded judgment; it all depends on the circumstances.

122. In my judgment, a question of comity does arise and it is a point adverse to BHP.

123. In my view, there are significant discretionary factors which point against the ASI. When weighing them against the fact that PG's conduct is for these purposes assumed to have been VO, I consider that they outweigh it. In the event, of course, discretion does not arise.

CONCLUSION

124. It follows that the claim for the ASI must be dismissed. I am very grateful to counsel for their helpful and lucid submissions.