Neutral Citation Number: [2026] EWCA Civ 294

Case No: CA-2025-001750

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (KBD)
MR JUSTICE CONSTABLE

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/03/2026

Before :

THE LADY CARR OF WALTON-ON-THE HILL,
THE LADY CHIEF JUSTICE OF ENGLAND AND WALES
LORD JUSTICE POPPLEWELL
and
LORD JUSTICE PHILLIPS

- -

Between :

(1) BHP GROUP (UK) LTD (formerly BHP Billiton Plc and thereafter BHP Group Plc) **(2) BHP GROUP LIMITED**	**Appellants**
- and -	
(1) MUNICÍPIO DE MARIANA (AND THE MUNICIPALITY CLAIMANTS IDENTIFIED IN THE SCHEDULES TO THE CLAIM FORMS	**Respondents**

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Andrew Scott KC and Daniel Burgess (instructed by **Herbert Smith Freehills Kramer LLP**) for the **Appellants**
Oliver Caplin KC, Professor Andrew Higgins, Charlotte Elves and Alicia Lawson (instructed by **PGMBM Law Ltd**) for the **Respondents**

Hearing date: Tuesday 20 January 2026

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Approved Judgment

This judgment was handed down remotely at 10.30am on 16 March 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lord Justice Popplewell:

Introduction

1. The issue raised by this appeal is whether, and if so when, procuring an anti-suit injunction ('ASI') or anti-anti-suit injunction ('AASI') from a foreign court, which is intended to restrain or hinder the pursuit of claims in England and Wales, can amount to a criminal contempt of court.

2. The appeal is from an order of Mr Justice Constable ('the Judge') who dismissed an application to strike out a criminal contempt application for reasons given in his judgment of 26 June 2025 ('the Judgment'). It arises in the context of proceedings brought in the Technology and Construction Court ('the TCC proceedings') by, amongst others, the Respondents (the 'Municipality Claimants' or 'MCs') against the Appellants (together 'BHP') following the collapse of the Fundão Dam in southeast Brazil on 5 November 2015.

3. There is a full account of the circumstances of the disaster, and the consequent claims, in the judgment of this court rejecting BHP's challenge to jurisdiction: [2022] EWCA Civ 951 [2022] 1 W.L.R. 4691; and in the recent judgment of Mrs Justice O'Farrell in the first stage trial in the proceedings: [2025] EWHC 3001 (TCC). In briefest summary, the collapse released in excess of 40 million cubic metres of liquified iron ore tailings. The dam collapse and ensuing flow of tailings killed 19 people and caused extensive environmental and socio-economic damage destroying local villages and polluting the Doce River system and surrounds over its entire course to the sea, some 400 miles from the dam. The cost of remediation and compensation is estimated to exceed US$30 billion. There were various legal proceedings in Brazil as well as remediation schemes including those under the auspices of the Renova Foundation.

4. There are well over 600,000 claimants in the TCC proceedings. They comprise about 600,000 individuals; over 1400 businesses ranging from large companies to sole traders; 69 churches and faith based institutions; 7 utility companies; and, of immediate relevance, the 46 Brazilian municipalities who are the MCs.

5. The two Appellants are the defendants in the proceedings. They are subject to the jurisdiction of the TCC, being, respectively, a company incorporated in England and Wales, and domiciled here; and an Australian company registered here. The First Appellant sits at the head of the BHP Group which includes a Brazilian company ('BHP Brasil') which was a 50% owner, with Vale, of the joint venture vehicle which owned and operated the dam ('Samarco').

The Contempt Application

6. Following commencement of the proceedings in November 2018, BHP challenged jurisdiction. It was successful at first instance but failed on appeal, the judgment of this court being given on 8 July 2022. Since then the proceedings have been managed as complex group litigation with a number of key liability issues being selected to be determined in a first stage trial, which took place before O'Farrell J between October 2024 and March 2025. They included an issue raised by BHP in its defence to the claim by the MCs that the MCs had no standing or capacity to pursue the claims under Brazilian law. BHP's case on this issue was that the MCs were precluded from bringing

proceedings outside Brazil because to do so would amount to a waiver of immunity from foreign suit which only the Federal Government could grant; and/or that they lacked standing to bring foreign proceedings because their interest could only be represented in such proceedings by the Federal Government and/or because they could only submit to the jurisdiction of a foreign court with the prior authorisation of the Federal Government. I will refer to this as 'the Standing Issue'. The Standing Issue was formulated in the agreed list of issues for the stage 1 trial from its initial drafting and agreement in 2023. From that moment on, BHP was asking the TCC to determine the Standing Issue in the stage 1 trial.

7. BHP procured the commencement of a claim in the Brazilian Supreme Federal Court ('the STF') which was filed on 11 June 2024, about four months before the stage 1 trial was due to be heard, and without notice to the MCs or the TC. The claim was brought not by BHP itself, or any of its subsidiaries, but by the Brazilian Mining Association of which BHP Brasil was a member, Instituto Brasileiro de Mineração ('IBRAM'). For the purposes of the present appeal it is accepted that the claim was procured by BHP and that BHP agreed to fund IBRAM's costs of pursuing the claim. The claim ('the IBRAM Claim') was a type of constitutional law claim known as an Arguição de Descruprimento de Preceito Fundamental ('ADPF'), seeking a declaration that the position adopted by the MCs was a breach of fundamental constitutional precepts in the ways articulated in BHP's defence and the Standing Issue. It is a feature of ADPF proceedings that they do not name defendants or respondents as such, but the MCs were specifically identified in the IBRAM claim, as were the TCC proceedings. It is also a feature of ADPF proceedings that a claim cannot be withdrawn by the person commencing the proceedings. Once launched, the constitutional issue and the relief sought will be decided by the STF unless it chooses not to do so of its own motion.

8. The IBRAM Claim sought both final relief and urgent interim relief. The final relief was for a declaration that no Brazilian municipality has standing to sue in their own name or to bring actions in jurisdictions other than in Brazil; and further for an order that the MCs should be ordered to discontinue their claims abroad, including the TCC proceedings; and refrain from issuing new proceedings abroad.

9. The interim relief sought included:

> "(i) the immediate suspension of any dealings of Brazilian municipalities with law firms, which have as their object lawsuits in progress or to be filed before foreign jurisdictions, also interrupting the provision of information and payments under the contracts entered into with said firms"; and
>
> (ii) [the MCs] to request, before those jurisdictions, the suspension of ongoing lawsuits abroad …. as well as to refrain from filing new lawsuits and/or carrying out new acts in the context of lawsuits already filed in foreign jurisdictions."

10. It can be seen that the final order which IBRAM was seeking includes an injunction with the effect of restraining the MCs from pursuing their claims against BHP on their merits in the TCC by discontinuance; and that the interim relief seeks the equivalent cessation on a temporary basis by suspension of pursuit of the claim in the TCC. I note that it is not alleged in the Contempt Application that BHP's intention was to procure that the Standing Issue should be determined at the stage 1 hearing but without any participation by the MCs and on the basis of the expert evidence from BHP alone, so

as to give BHP that forensic advantage. That would not be consistent with the relief sought from the STF.

11. On 24 June 2024, the MCs issued an application in the TCC for an ASI ('the ASI Application') seeking to prevent BHP from taking any further steps to promote or encourage the IBRAM Claim.

12. On the same day, 24 June 2024, Justice Dino of the STF made an order that the substantive relief in the IBRAM Claim be determined by summary procedure. No interim relief was granted at that stage.

13. Following various exchanges BHP acceded to the ASI Application on 22 July 2024 and gave undertakings to the Court, incorporated into a consent order ('the Consent Order'). By paragraph 1of Appendix A to the Consent Order, BHP undertook to refrain from performing "any steps to pursue or prosecute or progress or encourage or otherwise assist, including, but not limited to, the provision of financial assistance, in [the IBRAM Claim]". BHP also undertook "to procure that BHP Brasil will request that IBRAM does not take any further action to pursue the IBRAM Interim Relief Claim." Paragraph 2 of the order provided that, in complying with paragraph 1, BHP was not required to take any action which would cause BHP Brasil to breach its existing contractual obligations to pay IBRAM costs in relation to the IBRAM Claim including the claim for interim relief.

14. BHP complied with the Consent Order. However, that did not result in the IBRAM Claim being brought to a halt.

15. On 7 October 2024 the MCs issued an application against BHP for criminal contempt of court ('the Contempt Application'), supported by the first affidavit of Mr Neill. The essential allegation, to which I will return in a little more detail, is that by procuring the commencement and funding of the IBRAM Claim, BHP's purpose was to interfere with the administration of justice by preventing or hindering the MCs' pursuit of their claims in the TCC.

16. On 9 October 2024 IBRAM filed a petition in the IBRAM Claim, reiterating the request for interim relief and requesting additional interim relief, including that the MCs be ordered to disclose contracts between them and their foreign lawyers. Justice Dino granted this relief on 12 October 2024, ordering the MCs to disclose their contracts with foreign law firms and to refrain from paying fees to them. It is not suggested that BHP procured that step and it forms no part of the contempt application.

17. On 25 October 2024, shortly after O'Farrell J commenced the hearing of the stage 1 trial, a settlement scheme was agreed in Brazil between Samarco, Vale, BHP Brasil, the Renova Foundation, the State Governments of the two States most heavily affected (Minas Gerais and Espirito Santo) and several justice institutions. This is referred to as 'the Repactuation Agreement'. It is said by the MCs that it had been under negotiation for some time and was under negotiation when the IBRAM Claim was commenced some 4 months earlier. Under its terms those who sign up to it are required to sign releases. The terms of those releases vary depending on the claimant, but the template for municipalities requires them to withdraw their claims in any existing count proceedings (including the TCC proceedings) and further prevents them from using the compensation payable under the scheme for certain purposes, including to pay lawyers.

18. On 12 December 2024 BHP issued an application to strike out the Contempt Application (the "Strike Out Application").

19. On 22 February 2025 IBRAM filed a further petition for interim relief in the IBRAM Claim. IBRAM sought orders (i) to stay the effectiveness of all contracts between municipalities and foreign law firms; and (ii) to suspend clauses in those contracts which authorise the collection of funds from the municipalities in the event of a settlement. It is not suggested that BHP procured that step and it forms no part of the Contempt Application.

20. On 3 March 2025 some of the MCs sought and obtained from the TCC, without notice, an AASI ('the AASI') directly against IBRAM, comprising in particular a mandatory injunction and declaratory relief in respect of the 22 February petition, including an order requiring IBRAM to petition the STF to withdraw its application for the interim relief sought in the February Petition. BHP was not a party to that application.

21. The AASI did not have the desired effect. On 5 March 2025 Justice Dino issued an order in respect of the 22 February petition which appeared to repeat the order he had made on 12 October i.e. that municipalities must refrain from paying any fees to their foreign lawyers, pending the determination of the IBRAM Claim.

22. At the return date on the AASI application, the MCs and IBRAM agreed that the AASI should stay in place pending a full hearing. Ultimately the MCs did not seek to continue the AASI at the full hearing date and obtained permission to discontinue the proceedings against IBRAM.

23. On 5 June 2025 the Strike Out Application came before the Judge, who dismissed it by an order of 26 June 2025. At the time of the hearing before the Judge, and at the date of his Judgment, the decision by O'Farrell J on the stage 1 trial was still awaited. She gave her judgment on 14 November 2025 holding that BHP was liable under Brazilian law for the collapse and resolving the Standing Issue in favour of the MCs.

The Judgment

24. The Strike Out Application was advanced on two alternative bases namely (i) that the Contempt Application was an abuse of process; and (ii) pursuant to CPR 3.4(2)(a) on the ground that there were no reasonable grounds for bringing the claim. The Judge determined the abuse argument against BHP and there is no appeal from that aspect of his decision.

25. The Judge set out the principles by which a CPR 3.4(2)(a) application falls to be determined at Judgment [41], noting that the facts pleaded in the application must be assumed to be true, and that it might be inappropriate to strike out a claim which raises complex and novel issues of law which are best determined in the light of findings of fact at trial. He then addressed a pleading point taken by BHP that the Contempt Application was deficient because the application notice referred to a "contempt *in the face of the Court* by funding and procuring the initiation of the [IBRAM Claim]". The Judge held that the words "in the face of the Court" could be removed without altering the nature of the contempt alleged and formed no bar to the Contempt Application being pursued. There is no appeal from that aspect of his decision. BHP also argued that the application notice did not allege the specific intent necessary to support a contempt

because it did not allege the purpose of the IBRAM Claim. BHP relied on the terms of CPR 81.4(2)(a) which require the application notice to set out the nature of the alleged contempt and a brief summary of the facts alleged to constitute the contempt; and the authorities which make clear the importance of an applicant identifying precisely the particulars of contempt which it is alleging, and that the court is not concerned with an issue in general of whether a respondent is guilty of contempt but rather the issue of whether they are guilty of the contempt in the specific respects set out in the application notice (see *Re L (A Child)* [2016] EWCA Civ 173 [2017] 1 FLR 1135 per Vos LJ (as he then was) at [73]-[75] and *Navigator Equities Ltd v Deripaska* [2024] EWCA Civ 268 [2024] BCC 526 per Carr LJ (as she then was) at [48]. The Judge held that the mental element of the application was made clear in the supporting affidavit of Mr Neill, which alleged in terms that the IBRAM Claim was brought for the purpose of blocking the MCs' claims in the TCC, and that this was sufficient as a matter of form to identify the intent being alleged; and that even if it were not, the Strike Out Application would fail because the application notice could be amended. There is no appeal from that aspect of his decision.

26. The Judge next addressed BHP's argument that the conduct complained of was not within any recognised category of criminal contempt. He identified, by reference to the authorities, that the overarching category was interference with the due administration of justice and that the forms which such interference might take were many and various. He expressed the view that the fact that the conduct in this case was novel as a basis for an allegation of contempt, did not of itself justify a conclusion that there were no reasonable grounds for the Contempt Application.

27. The Judge then addressed a number of aspects of the conduct relied on which BHP argued were fatal to the IBRAM Claim being a criminal contempt. He rejected the argument that exercising a lawful right to institute legal proceedings cannot be a method of committing a criminal contempt, referring in this respect to *R v Kellet* [1976] 1 QB 372 and to an Australian case *Dagi v BHP* (18 September 1995, unreported). These were examples of the well-established principle that acts which are otherwise lawful in themselves can be a criminal contempt if done or threatened with the purpose of interfering with the administration of justice.

28. The Judge next addressed what he described as BHP's central argument that the conduct complained of was properly the concern of the ASI jurisdiction; and that there was no room for the criminal contempt jurisdiction in circumstances where the English ASI and AASI jurisdiction was available, which carefully calibrated the English Court's response to foreign proceedings including foreign ASI proceedings. The Judge rejected the argument, saying that the availability of ASI relief did not oust the criminal contempt jurisdiction; and the fact that the court may have more than one means of dealing with a particular course of conduct should not, as a matter of policy, remove it from the ambit of criminal contempt which would otherwise fall within it. Moreover there may be cases, of which the present case was an example, in which ASI or AASI relief was not in practice effective to deal with an act of interference.

29. Having concluded that this was not a fatal objection to the Contempt Application, he observed that if he were wrong, the extent to which as a matter of policy the existence of ASI powers should preclude a criminal contempt jurisdiction was not the sort of issue which should be determined on a strike out application.

The rival arguments

30. The submissions foreshadowed in the skeleton arguments covered a wide area, but in the course of oral argument the battleground between the parties narrowed very considerably. Mr Scott KC for BHP accepted that there were some circumstances in which ASI or AASI relief sought abroad could amount to a criminal contempt, in particular if brought without a legitimate and good faith invocation of the foreign court's jurisdiction. Conversely, Mr Caplin KC for the MCs conceded in the course of argument that, if the IBRAM Claim had been pursued at the outset and without submitting the same issue to the stage 1 trial, it would not have been a criminal contempt. In the light of this narrowing of the ground I will set out the relevant principles governing the law of criminal contempt before dealing with the rival arguments in that context.

The law

31. The principles governing the law of criminal contempt were considered in detail in *Attorney-General v Times Newspapers Ltd* [1974] AC 273, in which the House of Lords held that an article proposed to be published by the Sunday Times about the Thalidomide litigation, designed to put pressure on the manufacturers to pay more in settlement of claims than previously offered, would be a criminal contempt of court because it risked trial by television and prejudged issues in the litigation. Although the facts are not directly analogous because the case was concerned with the effect or intended effect of press publications, not ASI relief, I consider it helpful to quote at a little length what was said both about the general principles which govern criminal contempt, and about their application to conduct aimed at discouraging or preventing a litigant from pursuing a claim, which are of direct relevance in this appeal.

32. All five law lords gave speeches, expressing the principles and their reasons for the decision in slightly different terms. Lord Reid said at p. 294D:

> " The law on this subject is and must be founded entirely on public policy. It is not there to protect the private rights of parties to a litigation or prosecution. It is there to prevent interference with the administration of justice and it should, in my judgment, be limited to what is reasonably necessary for that purpose. Public policy generally requires a balancing of interests which may conflict. Freedom of speech should not be limited to any greater extent than is necessary but it cannot be allowed where there would be real prejudice to the administration of justice."

And at p. 296C:

> "I think that there is a difference between direct interference with the fair trial of an action and words or conduct which may affect the mind of a litigant. Comment likely to affect the minds of witnesses and of the tribunal must be stopped for otherwise the trial may well be unfair. But the fact that a party refrains from seeking to enforce his full legal rights in no way prejudices a fair trial, whether the decision is or is not influenced by some third party. There are other weighty reasons for preventing improper influence being brought to bear on litigants, but they have little to do with interference with the fairness of a trial. There must be absolute prohibition of interference with a fair trial but beyond that there must be a balancing of relevant considerations."

And at p. 297H:

> "So I would hold that as a general rule where the only matter to be considered is pressure put on a litigant, fair and temperate criticism is legitimate, but anything which goes beyond that may well involve contempt of court. But in a case involving witnesses, jury or magistrates, other considerations are involved: there even fair and temperate criticism might be likely to affect the minds of some of them so as to involve contempt. But it can be assumed that it would not affect the mind of a professional judge."

33. Lord Morris said that he doubted whether it was either desirable or possible to frame any exact or comprehensive definition or to formulate exact classifications (p. 302F). At p. 302H he recognised that contempt might consist of:

> "conduct which was calculated so to abuse or pillory a party to litigation or to subject him to such obloquy as to shame or dissuade him from obtaining the adjudication of a court to which he was entitled"

34. Lord Diplock, having referred to civil contempts, said at p. 308B:

> "All other contempts of course are classified as "criminal contempts," whether the particular proceedings to which the conduct of the contemnor relates are themselves criminal proceedings or are civil litigation between individual citizens. This is because it is the public interest in the due administration of justice, civil as well as criminal, in the established courts of law that it is sought to protect by making those who commit criminal contempts of court subject to summary punishment. To constitute a contempt of court that attracts the summary remedy, the conduct complained of must relate to some specific case in which litigation in a court of law is actually proceeding or is known to be imminent. Conduct in relation to that case which tends to undermine the due administration of justice by the court in which the case will be disposed of, or which tends to inhibit litigants in general from seeking adjudication by the court as to their legal rights or obligations, will affect not only the public interest but also - and this more immediately - the particular interests of the parties to the case. In this respect criminal contempt of court resembles many ordinary criminal offences, such as theft or offences against the person or property, by which the interests of the victim himself are prejudiced more immediately than those of the public at large."

And in an oft-cited summary at p. 309B:

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

> any of these three requirements or to undermine the public confidence that they will be observed is contempt of court."

And at p. 310G that contempt extends to:

> "conduct that is calculated to inhibit suitors generally from availing themselves of their constitutional right to have their legal rights and obligations ascertained and enforced in courts of law, by holding up any suitor to public obloquy for doing so or by exposing him to public and prejudicial discussion of the merits or the facts of his case before they have been determined by the court or the action has been otherwise disposed of in due course of law."

And at p. 313D:

> "In my opinion, a distinction is to be drawn between private persuasion of a party not to insist on relying in pending litigation on claims or defences to which he is entitled under the existing law, and public abuse of him for doing so. The former, so long as it is unaccompanied by unlawful threats, is not, in my opinion, contempt of court; the latter is at least a technical contempt, and this whether or not the abuse is likely to have any effect upon the conduct of that particular litigation by the party publicly abused."

35. Lord Simon agreed with Lord Diplock's elucidation of the basis of the law of contempt and his analysis of its precepts, but differed as to whether private pressure on a party can constitute contempt. In opining that it could, he observed at p.318C that "it is the fact of interference, not the particular form that it may take, that infringes the public interest." He referred to a number of cases including *In Re Mulock ex pte Chetwynd* (1864) 3 SW & TR 599, 164 ER 1407, in which a petitioner for dissolution of marriage was sent a letter by a person having no direct interest in the suit, threatening to publish the "full truth of the case" if the petition were not withdrawn. The letter writer was held to have committed a criminal contempt. Sir James Wilde, Judge Ordinary, said:

> "From the pressure of this threat [the petitioner] seeks protection and she claims the right to approach this court free from all restraint or intimidation. It is a right that belongs to all suitors…..No one can doubt that the very offering of such a threat to a suitor in this Court, for such a purpose, is in itself, and quite independently of its subsequent fulfilment a contempt of Court."

36. Lord Simon went on to say at p. 319A that the only difference between private pressure on a litigant, on the one hand, and on a witness or the tribunal on the other, is that

> "private pressure on a litigant (in contradistinction to violence or bribery or public execration) might sometimes be justifiable, while private pressure on the tribunal or witness never would be so. The justification for private pressure on a litigant might be such a common interest that fair, reasonable and moderate personal representations would be appropriate."

37. Lord Cross agreed with Lord Reid, and expressed himself in broadly similar terms. At p. 325G he doubted that it was either logical or easy to draw a distinction between public and private pressure put on a litigant. As to the latter he said at p. 326B-D:

> "To seek to dissuade a litigant from prosecuting or defending proceedings by threats of unlawful action, by abuse, by misrepresentation of the nature of the proceedings or the circumstances out of which they arose and such like, is no doubt a contempt of court; but if the writer states the facts fairly and accurately, and expresses his view in temperate language the fact that the publication may bring pressure - possibly great pressure - to bear on the litigant should not make it a contempt of court."

38. As the language used in all the speeches recognises, it is not a necessary ingredient of criminal contempt that the interference has occurred or will necessarily occur. It is enough if the conduct carries with it a sufficient risk or prospect of interference with the administration of justice (see also to the same effect *Raymond v Honey* [1983] AC 1 at p.10 and *Attorney General v Crosland* [2021] UKSC 15 [2021] 4 WLR 103 at [22]). A litigant who seeks to dissuade a witness from giving evidence by threats or bribery is no less in contempt if the witness is impervious to the coercion.

39. All the speeches considered the concept of a "technical contempt" and in different ways emphasised that the risk of interference with the administration of justice must be sufficiently serious to justify restraining or punishing the perpetrator, to a standard variously expressed as a real or substantial or serious risk or likelihood (pp. 298G-299A, 303B-C, 312B, 321E, 322H). Lords Reid and Diplock regarded the threshold for the existence of contempt as being merely real risk, which might be passed by a small degree of likelihood, but that the extent of the likelihood beyond that threshold was a factor in the discretion as to whether the contempt should or should not be punished or restrained.

40. I should refer to three further cases which cast light on taking or threatening legal action or legal proceedings as a means of committing criminal contempt.

41. In *Webster v Bakewell Rural District Council* [1916] 1 Ch 300 a yearly tenant of a cottage issued a writ against the local authority for an injunction to restrain an alleged trespass on his land. His landlord, who was seeking to settle the dispute with the local authority, sent a letter by his solicitors to the tenant, in which she threatened to determine his tenancy, lawfully, if he did not withdraw the writ. Neville J held that this did not constitute a criminal contempt. He reasoned that the letter involved no more than saying that if the tenant exercised his legal rights in a way which was injurious to the landlord, the landlord would exercise her legal rights to determine the tenancy, and that there was nothing "to prevent a landlord exercising his legal rights in that way, if he does it honestly to protect the rights he has in the property."

42. In *R v Kellett* [1976] 1 QB 372 this court was concerned with an appeal against conviction for the common law offence of attempting to pervert the course of justice. Although the case was not directly concerned with the criminal contempt jurisdiction (and indeed counsel for the appellant conceded that he would have been guilty of criminal contempt, but not the offence of attempting to pervert the course of justice), Stephenson LJ, giving the leading judgment, observed that the offence had its origins in the law of criminal contempt and drew heavily on the contempt jurisprudence in

expressing his reasoning and conclusions. In that case the appellant was the defendant in divorce proceedings brought by his wife, in which his neighbours were potential witnesses. He threatened to sue the neighbours for slander if they gave evidence in support of the wife, with the intention of causing them to refrain from doing so. The convictions were upheld. The court expressed the following views. It was not the case that *any* interference with a witness was criminal. A person might by reasoned argument seek to dissuade a witness from giving perjured evidence. However it was criminal to do so by unlawful means, such as intimidation or bribery however well-justified might be the end sought in preventing perjury. Conversely, a threat to take lawful action with the intention of dissuading a witness from giving evidence could amount to a contempt. *Webster* was distinguished on the grounds it was concerned with a threat to a party, not a witness, with Stephenson LJ expressly citing the distinction drawn by Lord Simon in *A-G v Times Newspapers* quoted above. It was said that had the neighbours been tenants of the appellant whose tenancy the appellant lawfully threatened to terminate, it would have amounted to contempt if done with the intention of dissuading them from giving evidence.

43. Stephenson LJ also said that it would be sufficient if that was only part of the purpose, notwithstanding that the jury direction had been that they should acquit unless satisfied that it was the sole purpose (p. 392B-D). This reflects what was said in *Attorney General v Butterworth* [1963] 1 QB 696 by Lord Denning MR at p. 723 that where the alleged contemnor acts from mixed motives, it is sufficient if one of them forms the mens rea of contempt, with which Donovan LJ agreed at p. 727; and is in turn reflected in the statement of Lloyd LJ in *A-G v Newspaper Publishing Plc* [1988] 1 Ch 333 at p. 383B that the intent need not be the sole intent.

44. In *Attorney-General v Martin* (The Times 23 April 1986, [1986] Lexis citation 1634) a Queen's Bench Divisional Court comprising Glidewell LJ, McNeill and Schieman JJ determined a criminal contempt application brought against Mr Martin. The background was that a barrister, Mr Ashton commenced a private prosecution against the pilot and operators of a heliport close to where he lived, complaining that a helicopter had been flying at a low level and close to buildings in breach of the relevant statutory regulations. Mr Martin was a solicitor acting for the operator and the pilot. In the course of correspondence with Mr Ashton he made two threats designed to dissuade the latter from continuing the prosecution. The first was to refer him to the Inner Temple authorities. The second was to bring an action for malicious prosecution if and when Mr Ashton's private prosecution failed. The Court held that the first was a contempt and the second, although "near the boundary between what is and is not proper pressure", was not.

45. Glidewell LJ, giving the judgment of the court, stated that it was accepted on behalf of the defence that conduct of that sort could comprise criminal contempt, for which the old case of *Smith v Lakeman* (1856) 26 LJ Ch 305 (1856) 2 Jur (NS) 1202 was authority. In *Smith v Lakeman*, the plaintiff was suing the defendant in proceedings involving an investigation of accounts between the parties and had written a letter to the defendant, anonymously and in a disguised hand, referring to him being indicted for swindling perjury and forgery. Sir John Stuart V-C said that it was a threat for the purpose of intimidating the defendant as a suitor and was a contempt, whether it had that effect or not.

46. Glidewell LJ cited extensively from the speeches in *A-G v Times Newspapers*, and from the judgment of Stephenson LJ in *R v Kellett*. He treated those authorities, and others to which the court was referred, including *Raymond v Honey*, as establishing four propositions. The first and second related to the burden and standard of proof. He went on:

> "Thirdly there must be a real risk that the conduct of the proceedings, that is to say the proceedings in the Guildhall Magistrates' Court, would have been prejudiced. But here the attempted object was to have the proceedings withdrawn or terminated and so there is no real issue about that. It must be the case that the conduct of the proceedings would be prejudiced if the pressure achieved its objective.
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> Fourthly, to put pressure on a party to litigation or a prosecutor to withdraw his action, prosecution or defence may be, but is not always, a contempt of court. A party is entitled to take proper steps to represent himself and to seek to defeat his opponent or his client's opponent if, as in this case, he is a solicitor acting for a client. To be justifiable, in Lord Simon's phrase, the pressure must be fair, reasonable and moderate.
>
> Lord Diplock in a passage I have read in Att Gen v Times Newspapers [1974] AC 273, [1973] 3 All ER 54, used the words "private persuasion . . so long as it is unaccompanied by unlawful threats is not in my opinion contempt of court". Mr Littman submits that this means that it will only be contempt of court if the threat is to do something which is unlawful, that is to say illegal. Nothing less, he submits, will suffice. If Lord Diplock did mean this then he was alone amongst their Lordships in Att Gen v Times Newspapers [1974] AC 273, [1973] 3 All ER 54, in that opinion. With respect to him and since in other respects he was in agreement with the remainder of their Lordships' House it seems to us that he is not to be understood as meaning that but as using the words 'unlawful threats' as meaning improper threats.
>
> The problem for us therefore is to decide were the steps taken by Mr Martin, were the threats made by Mr Martin, proper, fair, reasonable or moderate?....So the question is, are these threats beyond the line which separates that which is proper from that which is improper?..."

47. Applying those principles, the court determined that the threat to report Mr Ashton to the Inner Temple authorities was intended as a threat of disciplinary proceedings and was wholly "improper, unfair and immoderate". As to the threat to bring proceedings for malicious prosecution, the Court recognised that there might be circumstances in which such a threat was not improper, and although in this case close to the dividing line, decided by a majority to treat the charge of contempt as not made out.

48. These cases show that steps taken in what would otherwise be lawful conduct can amount to criminal contempt by reason of the purpose for which they are taken. The threatened proceedings in *R v Kellet* provide an example. The defamation proceedings in that case would not have been unlawful, but the purpose of the threat being to interfere with the neighbour giving evidence rendered it a contempt. Similarly, in *Martin*, the reporting of the barrister to the Inner Temple authorities was not of itself an unlawful act. Another example would be that which often characterises blackmail: the defendant threatens to reveal information about the victim, which it would be lawful

for him to publish but for the fact that the threat is used to reinforce a demand. As it is pithily expressed in Blackstone's Criminal Practice 2026 at B5.56 "A menace may be improper without necessarily being a threat to do anything improper. Publishing V's scandalous behaviour may in itself be perfectly legitimate: threatening V with such publicity in order to extract money would be a classic case of blackmail." If the demand were not for money but for the victim to drop their claim, that would amount to a criminal contempt, notwithstanding that the publication would otherwise be lawful and a threat to publish that information could not otherwise be restrained. It is the purpose for which the threat is issued, rather than the nature of the threat itself, which renders the conduct improper and capable of amounting to a contempt. I would agree with Glidewell LJ's analysis in *A-G v Martin* that what Lord Diplock said in *A-G v Times Newspapers* was not intended be understood as confining conduct capable of amounting to criminal contempt to inherently unlawful conduct, and such a proposition does not represent the law. The same is true of perverting the course of justice: see *R v Toney* [1993] 1 WLR 364 at 370.

49. Drawing the strands together I would state the relevant principles as follow:

(1) A criminal contempt involves an interference with the public interest in the administration of justice. Such interference will typically take one of the three forms identified by Lord Diplock in *A-G v Times Newspapers*.

(2) Save in cases where the strict liability rule in the common law is preserved by the Contempt of Court Act 1981, or may continue to apply in exceptional cases, which are not here relevant, it may well be necessary to show that the alleged contemnor intended to interfere with the interests of justice (see *A-G v Newspaper Publishing Plc*, at pp. 374H, 383B-C), although the point is not free from controversy (see Arlidge, Eady & Smith on Contempt 5th edn at 11-23 to 11-35) and since it does not affect the outcome in this case I would not want to be taken to be deciding it.

(3) The conduct need not have the effect of interfering in the administration of justice so long as it gives rise to a sufficient risk that it will do so; it is no answer to a charge of contempt to say that the intended interference has not succeeded: see *Attorney General v English* [1983] 1 AC 116 at p.141F; *Raymond v Honey* at p.10; and *Attorney General v Crosland* at [22]. Witness intimidation is a contempt even if the witness is not in fact deterred from giving evidence. Here, on the Strike Out Application, the IBRAM Claim must be treated as being for the purpose alleged, namely for the purpose of preventing the MCs from pursuing their claims against BHP at all in the TCC proceedings. Had the interim or final relief been granted and complied with, which is what BHP was seeking to achieve, the MCs' claim against BHP in this jurisdiction would have come to an end. That was the intended effect of the conduct alleged to constitute the contempt, of which there was at the lowest a serious risk and substantial possibility.

(4) One type of conduct which falls within the scope of the contempt jurisdiction is the taking of steps to hinder or prevent a litigant from pursuing their claim: *A-G v Times Newspapers* in the passages cited above; *Raymond v Honey* at p. 10E. So it is a criminal contempt physically to restrain a litigant from attending court to vindicate their right, to take the example given by Lord Simon in *A-G v Times Newspapers* at

p. 317D. So too it is a contempt to do so by threats, intimidation or bribery or other unlawful means (*Smith v Lakeman*, *Re Mulock*, *A-G v Times Newspapers*). The decision of the Court of Appeal in *Attorney General v Hislop* [1991] 1 QB 514 affords a modern example of a case in which conduct of defendants intended to deter the claimant from pursuing her claim against them was held to amount to a criminal contempt.

(5) However not all steps aimed at hindering or preventing a claimant from pursuing a claim will amount to a contempt. A defendant or non-party may properly seek to deter a litigant from commencing or pursuing a claim by forms of coercive pressure (*A-G v Times Newspapers*). Mediation and settlement discussions provide an obvious example of conduct which would not ordinarily amount to contempt, and other aspects of the normal conduct of litigation are given as examples in *A-G v Hislop* at p. 233G.

(6) The dividing line is not to be drawn by a distinction between conduct which is intrinsically lawful and that which is intrinsically unlawful: *R v Kellett* and *A-G v Martin*.

(7) The dividing line is to be drawn by determining whether the conduct is improper even if it would otherwise be lawful. Conduct which is improper and carries a sufficient risk of interference with the administration of justice is a criminal contempt, and can be rendered a contempt by the purpose being improper even if it would be lawful but for that purpose. The test is best stated by use of a single adjective 'improper', shorn of the language of what is fair, reasonable or moderate. Improper is a word which suits a characterisation of the boundary between what is and is not criminalised, and this was one way in which the test was expressed and applied in *A-G v Martin*. It is the test in s. 21(1)(b) of the Theft Act 1968 as to when threats are criminal for the purposes of the law of blackmail, where it is not confined to that which is unlawful: see *R v Harvey* (1981) 72 Cr. App. R. 139. It was the word used to characterise the offending conduct in *A-G v Hislop* at p. 230B.

(8) Conduct may be undertaken for mixed motives or purposes. The *mens rea* of intent to interfere with the administration of justice is made out if that is *an* intent; it need not be the sole intent. So in determining whether the purpose of conduct is such as to render it sufficiently improper to give rise to a criminal contempt, it is sufficient if one of its purposes does so. It is not necessary that the improper purpose be the sole or dominant purpose or motive for undertaking the conduct in question: *Attorney General v Butterworth, R v Kellett* and *A-G v Newspaper Publishing* supra.

ASI and AASI jurisprudence in the courts of England and Wales

50. The international dimension to the present dispute renders it necessary to say something about the domestic jurisprudence which is applied in granting or refusing ASI and AASI relief in relation to proceedings brought abroad. We are, of course, directly concerned in this case with the obverse, namely ASI or AASI proceedings brought abroad, not here; and there may be a wide variety of differences in the jurisprudential principles applied by foreign countries in their grant of ASI or AASI relief from those which we apply. Nevertheless the domestic ASI and AASI jurisprudence is relevant and important in the ways I identify below.

51. The power to grant ASI and AASI relief is found in s. 37 of the Senior Courts Act 1981 which confers the power whenever it is just and convenient to exercise it. The basic principle is that the jurisdiction is to be exercised when the ends of justice require it: *Societe Nationale Industrielle Aerospatiale v Lee Kui Jack* [1987] AC 871, 892A-B; *Airbus Industrie GIE v Patel* [1999] 1 A.C. 119, 133.

52. Two main grounds have been identified as justifying the grant of ASI relief, although the jurisdiction is a flexible one and judges have been at pains not to undermine the flexibility by rigid categorisation (see *Castanho v Brown & Root (UK) Ltd* [1981] AC 557, 573 and *Aerospatiale* at p. 892G). The first is in support of a contractual right, such as that conferred by an exclusive jurisdiction clause or arbitration clause, in which cases the court will ordinarily grant ASI relief unless there is a strong reason not to do so (see e.g. *Donohue v Armco Inc* [2001] UKHL 64 [2002] CLC 440 at [24]). The second is where the foreign proceedings can be characterised as vexatious and oppressive. It is not necessary to venture into the potentially controversial debate as to whether this is or should be analysed juridically as the protection of a substantive equitable right held by the applicant not to be vexatiously oppressed, or rather merely the exercise of an equitable power to protect an interest in not being subjected to unconscionable behaviour, on which the authorities do not all speak with one voice (see Raphael The Anti-suit Injunction 2nd ed at 3.09 to 3.23). What matters for present purposes is that the remedy is founded on the protection of the private interest of litigants, not the court's public interest in the administration of justice.

53. What has been described as a golden thread running through the jurisprudence in cases other than those involving contractual rights is that comity requires that the English court must have a sufficient interest in the matter in question to justify interfering at least indirectly with the processes of a foreign court: *Aerospatiale* at p. 895, *Airbus* at p. 133. That interest is typically an interest in protecting its own jurisdiction, because it is, for example, the natural forum: see *Airbus* at p. 712H-713A and *SAS Institute Inc v World Programming Ltd* [2020] EWCA Civ 599 [2020] 1 CLC 816 at [108]-[109] and the cases there cited).

54. It is important to emphasise, however, that in non-contractual cases, just as much as contractual cases, it is the protection of the private rights or interests of the litigant, not the protection of the integrity of the court's process, which justifies the grant of relief. The criterion of what is oppressive or vexatious applies to the effect of the proceedings on the party in question, not the court. Whilst it is usually a prerequisite in non-contractual cases that the English Court should have a sufficient interest in the dispute to justify exercising the jurisdiction, the jurisdiction is exercised to protect the private interest of the applicant, either contractual or in not being vexatiously oppressed, not the court's interest in the administration of justice. In *Turner v Grovit* [2001] UKHL 65 [2002] 1 WLR 107 Lord Hobhouse, giving the leading speech, said at [24]:

> "The power to make the order is dependent upon there being wrongful conduct of the party to be restrained of which the applicant is entitled to complain and has a legitimate interest in seeking to prevent. In *British Airways Board v Laker Airways Ltd* [1985] AC 58, 81, Lord Diplock said that it was necessary that the conduct of the party being restrained should fit "the generic description of conduct that is 'unconscionable' in the eye of English law". The use of the word "unconscionable" derives from English equity law. It was the courts of equity that had the power to grant injunctions and the equity jurisdiction was personal and related to matters

> which should affect a person's conscience. But the point being made by the use of the word is that the remedy is a personal remedy for the wrongful conduct of an individual. It is essentially a "fault" based remedial concept. Other phrases have from time to time been used to describe the criticism of the relevant person's conduct, for example, "vexatious" and "oppressive", but these are not to be taken as limiting definitions; it derives from "the basic principle of justice": per Lord Goff, *Societe Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871, 893. Sometimes, as in the present case, the phrase "abuse of process" (borrowed from another context) is used to express the same general ideas but with particular reference to the effect of the unconscionable conduct upon pending English proceedings. As I will explain, policy considerations enter into the decision whether or not to make the restraining order but only as constraints upon the exercise of the power."

And at [27]:

> "The applicant for a restraining order must have a legitimate interest in making his application and the protection of that interest must make it necessary to make the order. Where the applicant is relying upon a contractual right not to be sued in the foreign country (say because of an exclusive jurisdiction clause or an arbitration clause), then, absent some special circumstance, he has by reason of his contract a legitimate interest in enforcing that right against the other party to the contract. But where he is relying upon conduct of the other person which is unconscionable for some non-contractual reason, English law requires that the legitimate interest must be the existence of proceedings in this country which need to be protected by the grant of a restraining order……This [the decision in *Airbus*] is a striking example of the important restriction upon the willingness of the English courts to grant restraining orders in relation to foreign legal proceedings. The applicant for the restraining order must be a party to litigation in this country at which the unconscionable conduct of the party to be restrained is directed. It is not sufficient for the applicant to say that there is another foreign forum which is the appropriate forum."

55. The reasoning is clear: it is only the invasion of the private right or interest of the litigant which confers the power to grant relief. Additionally, and as a constraint on the exercise of the power, the applicant for a restraining order must have a legitimate interest in making his application, and the protection of that private right or interest must make it necessary to make the order. It is to the latter aspect that the existence of proceedings in this country is relevant, and the protection of the integrity of those proceedings is a consideration only insofar as necessary to protect the private interests of the applicant.

56. In *Masri v Consolidated Contractors International Co SAL (No 3)* [2008] EWCA Civ 625 [2009] QB 503 Lawrence Collins LJ expressed the same concept. He held that in jurisdiction cases and single forum cases it was necessary for the person seeking ASI relief to have an independent legal or equitable right not to be sued abroad (see [44]). However all that was required in alternative forum cases was that it was necessary to protect the litigant against the consequences of unconscionable conduct which was oppressive and vexatious (see [46]-[53]). He was not saying anything different at [59] when he said:

> "… As a matter of English law, once the court has jurisdiction over the substance of the case, it has jurisdiction to make ancillary orders, including anti-suit injunctions to protect the integrity of its process."

He was talking there of territorial jurisdiction, not jurisdiction in the sense of the power to make the order. The latter derives from the private right/interest of the applicant as is clear from the remainder of his judgment.

57. It is in this sense that I understand the passing remark in the last sentence of [160] of *Wolverhampton City Council v London Gypsies and Travellers* [2023] UKSC 47 [2024] AC 983, which was not a case concerning ASI relief:

> "…..Anti-suit injunctions preserve the integrity of the appropriate forum from forum shopping by parties preferring without justification to litigate elsewhere."

58. As to interference with the administration of justice in the foreign court, it has repeatedly been said that the order is directed not against the foreign court but against the party: see e.g. *Bushby v Munday* (1821) 5 Madd 297 at 307 (56 ER 908), *Donohue v Armco* at [19(2)], *Aerospatiale* at p. 892 and *Turner v Grovit* [2001] UKHL 65 [2002] 1 WLR 107 at [23] and *Stitching Shell Pensionfonds v Krys* [2014] UKPC 41 [2015]AC 616 at [17]. However, it is recognised that the intended practical effect is indeed an interference with the foreign court, albeit indirectly, and it is such interference which engages notions of comity, as Toulson LJ resaid in his fifth proposition at [50] in *Deutsche Bank AG v Highland Crusader Offshore Partners LP* [2009] EWCA 725 [2010 1 WLR 1023. In *Re Maxwell Communications Corporation plc (No. 2) Barclays Bank plc v Homan* [1992] BCC 757 Glidewell LJ said this at p.773D-G:

> "It has sometimes been said that the granting of an injunction preventing a plaintiff from pursuing an action in a foreign court is a restriction on him personally, and not an interference with the exercise by the foreign court of its own jurisdiction. It will not be surprising, however, if the judge in the foreign court sometimes fails to appreciate the distinction. In *British Airways Board v Laker Airways Ltd*, Lord Scarman commented at p. 95D-E:
>
> > "The approach has to be cautious because an injunction restraining a person within the jurisdiction of the English court from pursuing a remedy in a foreign court where, if he proves the necessary facts, he has a cause of action is, however disguised and indirect, an interference with the process of justice in that foreign court."
>
> And in his judgment in the present case. Hoffmann J quotes Harold Greene J in another of the Laker Airways American antitrust cases, *Laker Airways Ltd v Pan American World Airways* 559 F Supp 1124 (1983), as commenting that an order of the English court restraining Laker Airways from prosecuting the suit in his court was a direct interference with the proceedings of his court. It is of course for that reason that the jurisdiction is to be exercised rarely, and with proper recognition of comity, i.e. of the respect owed to the foreign court."

59. So far as I am aware, there is no appellate authority on the principles applicable to the grant of AASI relief. The first instance authorities rely generally on the ASI jurisprudence, with some additional observations. In general terms, if it would be

appropriate to grant ASI relief to restrain pursuit of foreign proceedings dealing with the substantive dispute, it will often be appropriate to restrain or pre-empt foreign anti-suit proceedings whose purpose is to protect those foreign proceedings. It is not necessary to consider for the purposes of the present appeal any aspects of AASI cases which raise different or additional considerations on their particular facts.

Foreign ASI relief as criminal contempt

60. What does any of this tell us about whether and when foreign anti-suit proceedings should be characterised as a contempt of court? I derive five propositions.

61. First, it would be contrary to principle to treat something done by way of seeking ASI or AASI relief in a foreign court as criminal in this country if our courts would positively sanction such conduct by themselves granting ASI or AASI relief in materially equivalent circumstances were the roles reversed.

62. Secondly, our courts recognise that there is no universal consensus amongst civilised nations as to the private international law rules governing assumption of jurisdiction over disputes, and comity requires that we respect the different juridical bases adopted by other civilised nations; see for example *Turner v Grovit* at [26]. After all, our own notions on this topic are subject to change which is political as well as legal. When the United Kingdom acceded to the Brussels Convention as a member of the European Economic Community, it changed its jurisdictional private law principles, as it did again with the successor Regulations, and now again with its exit from the European Union. Comity therefore requires respect for the invocation of a foreign court's claim to jurisdiction over a dispute if made in good faith and in accordance with the private international law of that court which we should respect notwithstanding that it differs from ours. It would be wrong in principle to treat as "improper", so as to criminalise by way of criminal contempt, the good faith invocation of such jurisdiction. For similar reasons, foreign anti-suit relief which is invoked in order to support or protect such good faith invocation of the jurisdiction of a foreign court should not generally be characterised as improper for the purpose of criminalising it as a contempt. This approach may, however, yield in what Lord Goff in *Airbus* at p. 140D called "extreme" cases, notably "where the conduct of the foreign state exercising jurisdiction is such as to deprive it of the respect normally required by comity".

63. Thirdly, it is not the case that foreign proceedings should be criminalised as contempt if and because our courts have granted ASI or AASI relief, or would do so if such relief could potentially be effective. In circumstances where our ASI jurisprudence would justify such relief and an ASI or AASI is granted, that is so because the appropriate sanction is civil contempt for disobedience to the order: the differences between the civil and criminal law of contempt (which the Law Commission has recommended abolishing in its recent Report 423, paras 2.38 and 9.2) do not justify both forms of sanction being available. But that is not the only reason. It is also because it would be wrong to equate what is oppressive or vexatious for the purposes of the ASI jurisprudence with what is "improper" for the purposes of criminal contempt, and that applies even where ASI relief may be warranted in principle under our ASI jurisprudence but cannot be effective. ASI relief is based on the protection of the private interests of litigants, not protection of the court's public interest in the administration of justice, and ASI relief is only ever granted on an application by a litigant, who must have a sufficient private interest to justify the relief, whether a

contractual right or a "right" not to be vexatiously oppressed (whether or not the latter is characterised as a freestanding equitable right or merely an interest which equitable relief will protect). That is why the power to grant ASI relief has never been treated as something which may be invoked by the Attorney-General or any public authority solely on the grounds that the public interest in the administration of justice is sufficient to justify an injunction. The important distinction is that the law of criminal contempt is solely concerned with the public interest; whereas ASI relief is only ever granted if justified by reference to the private interests of litigants.

64. Fourthly, it is here relevant to recall what Lord Reid said in *Attorney-General v Times Newspapers* at p. 294D, that the law of criminal contempt is limited to what is reasonably necessary for the purpose of protecting the public interest in the administration of justice; and that in assessing such necessity, public policy generally requires a balancing of interests which may conflict. Jurisdiction battles are common, and arise inevitably from the different juridical bases on which different civilised nations ascribe to themselves jurisdiction over disputes. Comity, which is the term reflecting public policy in this area, will weigh against it being necessary to criminalise as a contempt of court conduct which involves the invocation of the jurisdiction of a civilised nation in accordance with its jurisdictional rules, and the ancillary jurisdiction it may exercise to support such jurisdiction in the form of ASI relief. That is so irrespective of whether the invocation of that jurisdiction operates oppressively or vexatiously in relation to a litigant's private rights or interests.

65. Fifthly, these principles point to the conclusion that seeking foreign ASI could only exceptionally amount to criminal contempt. In circumstances where our ASI jurisprudence would not justify the grant of an ASI or AASI, the foreign proceedings cannot be regarded as improper. In circumstances where our ASI jurisprudence would justify such relief and an ASI or AASI is granted, the appropriate sanction is civil contempt for disobedience to the order. In the rare case where our ASI jurisprudence would justify the grant of relief but it is not available as an effective remedy, criminal contempt will not be an appropriate sanction, save perhaps in exceptional circumstances, because what justifies ASI relief is protection of the interests of litigants, in contradistinction from the law of criminal contempt which is solely concerned with the public interest in protecting the administration of justice; and it will only be in exceptional cases that it is necessary to extend the law of criminal contempt to protect that public interest when comity is taken into account.

Analysis

66. The IBRAM Claim seeks to establish (among other points) that by reason of the constitutional law of Brazil by which the MCs are bound, they can only sue BHP in relation to the consequences of the collapse of the dam in Brazil. The STF is a court of competent jurisdiction and, leaving aside for the moment the stage reached by the TCC proceedings and the Standing Issue in those proceedings, the STF would obviously be the natural forum in which the Standing Issue should be resolved. The IBRAM Claim could be brought in good faith, in the sense that it is not suggested that the claim was not properly arguable or that it was not before a competent court having jurisdiction to determine it. Leaving aside for the moment the stage reached by the TCC proceedings and the Standing Issue in those proceedings, the STF would obviously be the natural forum in which the Standing Issue should be resolved. If BHP had procured the IBRAM Claim to be issued many years ago, it would not only have been the natural

forum in which the issue should be resolved, it would obviously have been appropriate for it to be resolved there in advance of any determination in the TCC proceedings. The decision of the STF would not merely be persuasive of the outcome of the Standing Issue in the TCC proceedings, it would in practice be dispositive, because the function of the English Court in addressing issues of foreign law with expert evidence is generally to determine what the law would be held to be by the relevant foreign court of competent jurisdiction (see e.g. *Dexia Crediop SpA v Comune di Prato* [2017] EWCA Civ 428, [2017] 1 CLC 969 at [34]). In those circumstances, and viewed from the perspective of our own ASI jurisprudence and notions of comity, we would have regarded it as unobjectionable that the STF should if necessary grant ASI relief to ensure that the STF decision was reached in advance of a determination of the same question in England. The right being relied on by BHP through the IBRAM Claim is a right to be sued only in the courts of Brazil as a result of the constitutional position of the MCs. In that respect it is no different in kind from reliance on a right to be sued in a foreign court under an exclusive jurisdiction clause. If the roles were reversed, and in equivalent circumstances a claimant were seeking to establish a right to be sued here, based on the standing of the other party under a provision of English law which the English Court were best placed to decide (for example if it turned on a provision of English insolvency law as to whether the purported representative had authority or power to bring the claim), we would be prepared to grant an ASI to prevent that question being determined first in a foreign court.

67. For these reasons Mr Caplin was right to concede that inclusion in the IBRAM Claim of the requests for final and interim ASI relief could not have amounted to a criminal contempt if sought at the outset. The undoubted fact that they would have been made for the purposes of preventing the MCs from pursuing their claim on its merits against BHP in England, and preventing the English Court from addressing and granting substantive relief to vindicate such a claim on its merits, would not have been sufficient to render it "improper", or to turn such lawful conduct into a criminal contempt. That would involve the English court treating as criminal something which under its own notions of comity and its own ASI jurisprudence it would treat as unobjectionable.

68. What is said by the MCs to make the critical difference are the particular circumstances of the issuing of the IBRAM Claim. This was characterised by Mr Caplin as a "package" of circumstances.

69. The main elements of this "package" relied on by Mr Caplin were the timing of procuring the claim only four months before the Standing Issue was to be determined in the stage 1 trial, after having agreed that that issue should be so determined and after preparations were well underway for its determination which included the preparation of expert evidence. Paragraph 4 of the Contempt Application, which for strike out purposes must be assumed to be true, alleged that BHP was aware that it was initiating a claim before the Brazilian Courts to adjudicate a matter set to be adjudicated by the English courts and that it was "an action strategically initiated at a time which could cause maximum disruption to the Municipality Claimants' claims." A similar formulation is used in para [62] of Mr Neill's affidavit.

70. I do not consider that that can put it in the exceptional category of cases in which seeking foreign ASI relief can amount to criminal contempt. I readily accept that, rather than taking this course without notice to the MCs or the Court, BHP should have alerted the TCC and sought to have the Standing Issue withdrawn from the stage 1 trial so that

it could first be dealt with by the STF, with the TCC having the benefit of the views of that constitutional court. However, it is clear from the grant of the ASI that the TCC would not have acceded to such request in the light of the history of the proceedings and the preparations for the determination of the issue at the first stage of the trial. Mr Caplin's argument therefore resolves itself into a submission that procuring the IBRAM Claim was a criminal contempt because it was too late to do so from the point of view of the TCC proceedings. But if the procuring of the claim "at the outset" would not be sufficient to involve criminal contempt as a matter of principle, as is correctly conceded, I do not see how the timing can make it so. The alleged purpose of the timing is to impede or disrupt the MC Claimants from establishing BHP's liability at the stage 1 trial. It is no more than a complaint of an attempt to prevent the MCs from pursuing and establishing their claim before the TCC, which is a purpose of all foreign ASI relief, and would have been the purpose if the claim had been procured many years earlier. True it is that had that happened, and the decision of the STF obtained well in advance of the stage 1 trial, the shape of the Standing Issue as part of a stage 1 trial in the TCC would probably have been different, saving some time and cost. But both the nature of the ASI relief (the actus reus of the putative contempt) and the intention to impede or prevent the MCs pursuing their claim in the TCC (the mens rea of the putative contempt) is unaffected by timing. All that the timing affects is the consequential degree of interference in the court's processes which results. If the mens rea and actus reus is the same in the two cases, it is difficult to see how as a matter of principle one can be criminal contempt and the other not.

71. Mr Caplin also relied on the fact that the IBRAM Claim cannot be withdrawn by a party, and that, once commenced, it would inevitably continue unless terminated by the STF at its own discretion. Mr Scott countered that it was often the case in other jurisdictions that a party had to obtain the consent of the court to discontinue proceedings. This did not quite meet Mr Caplin's point. Even in cases where the foreign court's consent to discontinuance is required, an ASI can at least direct the party to apply to discontinue, which may be effective, whereas in this case no relief would be available against the STF itself. Nevertheless, that does not advance the MCs' case on the appeal. It is a feature of the procedure which would properly and lawfully have been invoked by BHP had it procured the IBRAM Claim at the outset. It therefore adds nothing to the timing point, which I have rejected.

72. Mr Caplin also relied upon the aspect of the interim relief which went beyond usual anti-suit measures in seeking to prevent the MCs from communicating with their foreign lawyers, which would prevent them doing so not just generally in pursuit of the claims in the TCC, but would prevent them from taking advice about the effect of the IBRAM Claim and the anti-suit relief sought in it, in relation to its pursuit of those claims. This was characterised as extraordinary relief. It is certainly unusual, but it cannot assist the MCs' argument. The pleaded intent in the Contempt Application is simply the interference in the MCs' pursuit of their claim in the TCC, and to the extent that this contributes to that interference, it adds nothing to the mens rea or actus reus of the alleged contempt.

73. The only other element of the "package" relied on by Mr Caplin was an allegation that the timing of the IBRAM Claim was intended to put pressure on the MCs to sign up to the Repactuation Agreement and thereby to rule themselves out of further pursuit of the TCC proceedings. There are three short answers to this point. It was not pleaded as

part of the intention of BHP in the Contempt Application or in Mr Neill's supporting affidavit; it is difficult to see how it could have been, given that the IBRAM Claim was procured and commenced some four months before the Repactuation Agreement was agreed; and in any event an additional purpose of putting pressure on BHP to sign up to a remediation scheme in Brazil, if such there had been, cannot turn the conduct into a criminal contempt merely because that choice would have the incidental consequence that the claim in the TCC would be abandoned.

Other arguments

74. There remain to be addressed a number of arguments addressed by the parties which I have not found of assistance or determinative in reaching my conclusion.

75. Mr Scott argued that the Judge erred in his approach because the Contempt Application in this case was novel. There was no decided case in this jurisdiction in which seeking ASI abroad had been treated as a criminal contempt. There were not even any dicta suggesting that it might. There was no such suggestion or support to be found in any of the leading commentaries. Moreover so far as the researches of the parties have revealed, it has never been so decided or suggested in any other common law jurisdiction. The Judge was wrong, he submitted, in finding that the overarching criterion of improper interference with the administration of justice was sufficient to bring such conduct within the scope of criminal contempt. That broad approach involved a breach of Article 7 of the European Convention on Human Rights, and/or a breach of BHP's Article 6 rights. In response Mr Caplin suggested a distinction between sub-categories or forms of contempt on the one hand, and conduct on the other hand, and submitted that the present case was novel conduct within an established sub-category or form, so as not to be a development of the law which was itself novel in a relevant sense.

76. I did not find this taxonomy helpful because I agree with the Judge that the novelty of the present Contempt Application is not of itself an objection to its validity. The contempt jurisprudence shows that threatening legal proceedings with the intention of dissuading a claimant from pursuing their claim can amount to contempt if it is improper, and the actual taking of legal proceedings, if improper, would be an a fortiori case. There is nothing contrary to article 7 in such principles, which are sufficiently certain and foreseeable in their application. Nor is there any room for any argument based on article 6, which applies only to the rights and duties in the courts of England and Wales, not the rights of BHP in the courts of Brazil or the obligations of Brazilian Courts. What is novel is the argument that conduct in seeking ASI relief from a foreign court can be categorised as improper for the purposes of the criminal law of contempt. For the principled reasons I have endeavoured to explain, I consider that it would only be in an exceptional case that it could do so. I do not therefore find it surprising that the current proceedings are novel. I agree with the Judge, however, that "Whilst a Court will inevitably be cautious in concluding that the administration of justice has been interfered with in a contemptuous way where the circumstances are unprecedented, the unprecedented nature of the conduct of itsself plainly cannot constitute a legal defence to an application for contempt."

77. Mr Scott also argued that an ASI could not be a criminal contempt because a contempt had to amount to a direct interference with the administration of justice and an ASI was at best only an indirect one. That argument is unsound. There is no such distinction

drawn between direct and indirect interference in the contempt jurisprudence, and as the authorities considered above amply demonstrate, the latter extends to conduct aimed at a party themselves rather than the court. Indeed in *Balogh v St Albans Crown Court* [1975] 1 QB 73, the facts of which have entertained several generations of law students (preparations to introduce laughing gas into the air conditioning system at a Crown Court to enliven proceedings), Stephenson LJ spoke of indirect interference with judicial proceedings as now being the more serious and frequent kind of contempt.

78. Mr Scott also argued in his written skeleton that the Judge's decision was contrary to principle because the conduct in issue is properly the concern of the court's ASI jurisdiction. I have explained why the ASI jurisprudence suggests that it will only be in exceptional circumstances that seeking ASI relief can be a criminal contempt of court, but I do not say that it can never be. Although that was Mr Scott's initial position, in the course of argument he conceded that he did not go that far and that some ASI relief might be capable of constituting criminal contempt, if it was not brought in good faith.

79. Mr Scott also suggested that the Judge erred in treating the question as more appropriately left to the trial of the Contempt Application. However, this was merely a fall-back position for the Judge, and before us both sides invited us to determine the substantive issues and accepted that we could do so on the basis of the facts alleged in the Contempt Application and Mr Neill's affidavit, assuming them to be made out for the purposes of the Strike Out Application. I have felt able to do so because the issue of law can be approached on that basis and without reference to evidence which might emerge at a trial of the Contempt Application.

Conclusion

80. For these reasons, which to some extent address rather different arguments from those addressed to the Judge, I would allow the appeal.

Lord Justice Phillips :

81. I agree.

The Lady Chief Justice :

82. I also agree.