



Neutral Citation Number: [2009] EWHC 2475 (QB)

Case No: HQ09X02331

**IN THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 16 October 2009

Before :

**MRS JUSTICE GLOSTER, DBE**

Between :

**MARIO ALBERTO TABRA GUERRERO  
& OTHERS**

**Claimants**

- and -

(1) **MONTERRICO METALS PLC**  
(2) **RIO BLANCO COPPER SA**

**Defendants**

**Ms. Catharine Otton-Goulder QC, Richard Hermer Esq, QC & Guy Vassall-Adams Esq**  
(instructed by **Leigh Day & Co**) for the **Claimants**  
**Stephen Phillips Esq, QC and David Simpson Esq**  
(instructed by **Lawrence Graham LLP**) for the **Defendants**

Hearing dates: 8<sup>th</sup> and 9<sup>th</sup> July 2009;  
Further written submissions: 24<sup>th</sup> July 2009 and 27<sup>th</sup> July 2009

**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....  
MRS JUSTICE GLOSTER, DBE

## **Mrs Justice Gloster, DBE:**

### **Introduction**

1. This is my judgment in relation to the Claimants' application for the continuation of a worldwide freezing injunction and other injunctions ordered by Burton J on 2 June 2009, and continued by Irwin J on 16 June 2009, and for an order for disclosure in accordance with those orders, against the first Defendant, Monterrico Metals plc, a company incorporated in England in 2001 ("Monterrico"). There is also an application for the joinder of further Claimants and for a timetable for the service of statements of case in this action.
2. When the injunction was originally granted on 2 June, there were eight Claimants. Solicitors acting on behalf of the Claimants, Leigh Day & Co., intimated to Monterrico that more individuals, who had been involved in the events which are the subject matter of the dispute (namely events which took place during the period 28 July to 4 August 2005), would probably wish to be joined as Claimants in this action. Monterrico agreed in principle not to oppose the addition of further Claimants. By the hearing on 16 June, there were five more would-be Claimants, and Mr. Justice Irwin ordered that they serve draft Particulars of Claim in respect of those thirteen, although more would join. At present there are thirty-one individuals (i.e. eighteen more) who wish to pursue claims against Monterrico and its indirect subsidiary, Rio Blanco S.A., the Second Defendant ("Rio Blanco"), whose former name was Minera Majaz SA.
3. Through wholly owned subsidiaries, Monterrico owns the Rio Blanco copper/molybdenum deposit in Piura, northern Peru, which is its only substantial asset. According to the Claimants, this is one of the largest undeveloped copper resources in the world, and Monterrico proposes to develop it as a conventional open pit mine, producing copper and molybdenum concentrates, with a view to its becoming one of the twenty largest copper mines in the world. I shall refer, where appropriate, to the site where the proposed mine is situated as "the mining site", notwithstanding that the mine had not been developed as such, at the time of the events to which the claim refers. The reference to the mining site includes the land, the campsite and buildings, around and on the surface of, the underlying mineral deposits.
4. The actual shareholding structure is as follows: Monterrico owns 100% of Copper Corp Limited, a company incorporated in the Cayman Islands, which owns 100% of Rio Blanco Copper Limited, also a company incorporated in the Cayman Islands, which in turn owns 99.98% of Rio Blanco, which owns the mining site. On 27 April 2007, the share capital of Monterrico was sold to a Chinese conglomerate, the Xiamen Zijin Tongguan Investment Development Co Ltd ("Zijin"), which was formed in 2006 for the purpose of making an offer for Monterrico. Zijin is in effect the vehicle for a consortium of three companies which own Zijin in the following proportions: 45% Zijin Mining Group Co Ltd; 35% Tongling Nonferrous Metals Group Holdings Co Ltd; and 20% Xiamen C&D Inc.
5. According to its latest accounts for the year ended 31 December 2008 Monterrico is worth some US\$55m.

6. By his order dated 2 June 2009, Burton J restrained Monterrico from removing from England and Wales any of its assets within the jurisdiction up to the value of £7,200,000, and in any way disposing of, dealing with, or diminishing the value of any of its assets whether within or outside the jurisdiction up to the same value. An exception to the order, in standard terms, provided that Monterrico was not prohibited from dealing with or disposing of any of its assets in the proper course of business. However the order also effectively required Monterrico to ensure that none of its subsidiaries sold, dealt with, or otherwise disposed of, any shares in Rio Blanco and that the latter did not sell, deal or otherwise dispose of any of its assets including its interests in the mine at Rio Blanco. The Claimants seek the continuation of that injunctive relief against Monterrico.

### **Summary of the Claimants' pleaded claim in the action**

7. The Claimants are Peruvians who were involved in a protest in late July-early August 2005 against the proposed development of the Rio Blanco mine ("the protest"). With the exception of three Claimants, two of whom are journalists, and one of whom is a teacher, the Claimants are barely literate and are penniless rural farmers or peasants, living in a remote region of Peru. It is the Claimants' case that, during the protest, some twenty-eight of these protesters were handcuffed and taken blindfold into the mining site, detained and tortured for three days; that there was sexual abuse of certain of the women; and that, as a result of the wrongful treatment which he received, one man died. The Defendants did not dispute that there was evidence that, during the course of the protest, there had been brutality and abuse on the part of the police towards the protesters and that a number of them had been detained.
8. The Claimants claim damages from Monterrico and Rio Blanco for the personal injuries allegedly inflicted on them by police officers during the protest. The Claimants contend that officers of Rio Blanco or of Monterrico ought to have intervened so as to have prevented the abuse of the Claimants' human rights and/or are otherwise responsible for the injuries which they suffered. The basis upon which the Claimants put their case against the Defendants appears from part 4 of the draft particulars of claim, which is in the following terms:

“4A Basis of Liability

50. The First Defendant's liability to the Claimants' herein arises (notwithstanding that the mine was owned by the Second Defendant) in both English and Peruvian law, on the basis of:
  - a. The direct participation of its personnel, in particular Mr. Eager and Mr. Angus in the running of the mine generally and specifically in the events particularised above
  - b. The specific responsibility for risk management retained by the First

Defendant in respect of the operation and management of the Second Defendant. The Claimant relies not least upon the fact that Risk management policies were expressly reserved to the First Defendant's Board of Directors as stated in the First Defendants' Annual Reports of 2003, 2004 and 2005.

- c. The fact that the First Defendant exercised effective control over the management of the Second Defendant;
  - d. That the two Defendants operated in fact as one body.
51. The liability of both Defendants for intentional acts particularised herein is set out below. The liability of both Defendants for omissions arises not least in the context of their knowledge as to the risk of violence to which environmental protestors could be exposed both generally within the extractive industry in Peru and specifically in respect of the Rio Blanco mining project. In construing the Defendants' knowledge as to the serious risk of violence, ill-treatment and human rights abuses arising from the police's response to the protest planned for late July/early August 2005, the Claimants rely not least upon the following facts and matters:
  - a. The risk of ill-treatment and human rights abuses by police forces and private security firms against civilians protesting against the activities of extractive industries is well-known, for example it has led to the creation of the Voluntary Principles on Security and Human Rights in December 2000 of which the Defendants would have been well aware.
  - b. There was a history of conflicts in Peru in response to activities of companies working in the extractives sector.
  - c. In 2005 the Peruvian Ombudsman's Office recorded 30 separate conflicts relating to mining.
  - d. In 2005 the World Bank noted that at least 15 mining zones in Peru were affected by conflicts.

- e. The Piura region had experienced conflicts in relation to proposed mining activities in the recent past. Between 1998 and 2003 there had been a conflict in Tambogrande between the Manhattan Minerals Corporation and the local community which resulted in the company withdrawing from Peru. The main leader of the opposition to the mine in Tambogrande was murdered.
- f. There was a history of human rights abuses committed by the police and private security firms against protestors who opposed mining activities in Peru.
- g. The Community Assemblies of Santa y Cajas and of Vanta had declared themselves opposed to the proposed mining activities (see paragraph 23 above);
- h. Public opposition to the mine was vocal and well-known to the First Defendant.
- i. In April 2004, a demonstration against the mine was met with violence by the police and one protestor had been killed as particularised above.
- j. The Defendants were aware of the protest planned for end July/early August 2005 in advance and had evacuated the majority of their employees from the mine in advance of the demonstration.
- k. The Defendants had liaised with the police to ensure their presence at the mine in response to the demonstration and were aware that approximately 200 police officers were present at the mine before the arrival of the demonstrators.
- l. The First Defendant's founder and Chief Executive Officer, Chris Eager, was in the locality of the Rio Blanco site and its surrounding villages during the week immediately before the protests (the week commencing Monday 25 July).
- m. The First Defendant's founder and Chief Operating Officer Raymond Angus was in Peru in the week before the protests and

throughout the period of the Claimants' detention and ill-treatment.

- n. The First Defendant was informed that 28 persons had been detained at the Rio Blanco mining camp from the moment of their arrival at the camp on 1 August.
  - o. Between 15 and 17 employees of the Second Defendant were present at the Rio Blanco camp throughout the period of the Claimants' detention there between 1 and 3 August.
  - p. Eight Forza security employees in the employ of the Second Defendant were at the mine at the time of the Claimants' detention on 1 August.
  - q. The First Defendant's Raymond Angus was directly involved in negotiations and discussions about the detainees and their welfare between 1 and 3 August. 151
  - r. The First Defendant's Raymond Angus requested the Ministry of the Interior and the Directorate General of the Police to provide an additional 25 police officers after he became aware of the detention of the Claimants at the camp."
9. The Claimants contend that, in accordance with the provisions of Part III of the Private International Law (Miscellaneous Provisions) Act 1995 ("the 1995 Act"), the applicable law in relation to the Defendants' liability is as follows:
- i) in relation to Monterrico's liability, English law, in so far as its liability arises "out of responsibility for risk management"; but may be either English law or Peruvian law in respect of the "remaining basis" of its liability, but any determination of the appropriate law should await completion of disclosure;
  - ii) in relation to Rio Blanco's liability, Peruvian law.
10. In so far as the claim arises under Peruvian law, the Claimants rely on Article 1969 of the Peruvian Civil Code – "Compensation for culpable or intentional damage", and on Article 1981 - "Liability for damage of subordinate". At paragraphs 54-56 of the draft Particulars of Claim the Claimants plead as follows:
- "54. By their wilful misconduct the Defendants caused damage to the Claimants contrary to Article 1969 of the Civil Code. The Claimants rely upon the following:

- a. The Defendants were aware of the plans for the demonstration in advance and requested the Peruvian police to attend the Rio Blanco Mining Camp in response to the demonstration;
- b. The Defendants knew that there was a serious risk of ill-treatment by the Peruvian police of the demonstrators, not least because of the violence at previous demonstrations particularised above and the documented use of excessive force against protestors and its use of torture against detainees.
- c. The Defendants helped the police to identify the First Claimant who was singled out for mistreatment and/or detention;
- d. The detention of the Claimants was a joint operation between the Defendants, the police and the Forza mine security guards. The Defendants authorised the police and their security guards to detain the Claimants on the Defendants' property over the course of three days.
- e. Employees of the Defendants assaulted the Claimants including beating them and kicking them.
- f. The Defendants were aware that the Claimants were being detained and tortured and did not voice any objection to their torture;
- g. The Defendants provided and cooked food for the police during their operation at the Rio Blanco mining camp;
- h. The Defendants provided logistical support to officers of the Peruvian police during their operation;
- i. The Defendants allowed the police to use the Defendants' telecommunication facilities during the course of their operation;
- j. Employees of the Defendants recorded telephone conversations between the Eighth Claimant and General Benavides;

- k. Forza security guards assisted in the transfer of the Claimants from the Rio Blanco mining camp to the helicopters.
  - l. The Defendants provided the police with the materials that were used in the torture of the Claimants including ropes, heavy metal objects, black bags and sticks.
  - m. The Defendants refused the request of the Bishop of Chulucanas to allow the Dialogue Commission to sue the Defendants' helicopter to bring medicine and medical staff to the camp to assist the injured.
55. Further or alternatively by their fault the Defendants caused damage to the Claimants, contrary to Article 1969 of the Civil Code. The Defendants bear the burden of proving that their fault did not cause damage to the Claimants.
- a. The Claimants repeat the averments set out in the preceding sub-paragraphs;
  - b. The Defendants were aware of the risk of violence if the police were called to the mining camp and took no adequate steps to reduce such risks;
  - c. The Defendants failed to ensure that their own employees prevented the mistreatment of the Claimants;
  - d. The Defendants failed to ensure that its own private security guards prevented the mistreatment of the Claimants;
  - e. The Defendants failed to take adequate steps to bring the mistreatment of the Claimants to a halt;
  - f. The Defendants failed to take any, or any adequate, steps to prevent the police from using the Defendants' property including ropes, heavy metal objects, black bags and sticks in their torture of the Claimants.
56. Further or alternatively, pursuant to Article 1981 of the Code the Defendants are vicariously liable as follows:



- (1) Both Defendants are vicariously liable for the actions of their employees;
  - (2) The First Defendant is vicariously liable for the action of the Second Defendant, a company that it controlled and managed and was the constituent of the First Defendant's economic enterprise for which the First Defendant assumed the risk.
  - (3) Both Defendants are vicariously liable for the actions of the Forza security guards who were at all material times their subordinates and who caused harm in the exercise of their functions in fulfilment of their services as security guards. The Claimants repeat the facts and matters at paragraph 54, alternatively paragraph 55, above."
11. In so far as the claim against Monterrico arises under English law "in respect of the intentional acts set out above" the Claimants plead that Monterrico:

"... instigated and/or aided and/or counselled the trespass to the persons of the Claimants and/or conspired to cause them injury and/or conspired to use unlawful means"; see paragraph 57 of the draft Particulars of Claim.

They also plead a case in negligence against Monterrico as follows:

"58. Further and in any event, the Defendant for the reasons set out herein owed the Claimants a duty of care to take reasonable care to avoid foreseeable harm to them and is liable in negligence in respect of its own failures to ensure adequate risk management of the mines operation.

#### **Particulars of Breach**

- a. Failed to ensure that there were adequate risk management procedures and systems in place to identify the risk of serious violence as environmental protests, not least in respect of local police and private security companies, and to ensure that there would be adequate systems in place to reduce the same;
- b. Failed to ensure that there were adequate risk management procedures and systems in place to manage the risk of violence during environmental protests;

- c. Failed to ensure that suitable and reliable private security companies were contracted;
- d. Failed to give the Second Defendant advice guidance and direction of such a nature as might reasonably be expected to ensure that protestors against the mine, including the Claimants, would not be ill-treated by the police, the Forza mine security guards and the Second Defendant's employees;
- e. Failed to take adequate steps to stop the ill-treatment of the Claimants."

### **Monterrico's position in relation to the application**

12. Monterrico opposes the application to continue the injunctive relief granted by Burton J on the grounds that:
  - i) the Claimants made material non-disclosures and/or materially misrepresented matters in their without notice application; and/or
  - ii) the Claimants have not advanced a good arguable case against the First Defendant; and/or
  - iii) the Court ought, in the exercise of its discretion, to refuse to continue the injunction.
13. Monterrico further contends that the quantum of the Claimants' application for a freezing order is extremely overstated and disproportionate to the sums actually claimed.

### **Factual summary**

14. The evidence relating to the protest and what took place at the mining site is highly contentious and in dispute between the parties. It was the subject of extensive evidence on the application. I invited Miss Catharine Otton-Goulder QC, leading counsel for the Claimants, and Mr. Stephen Phillips QC, leading counsel for the Defendants, to agree a written non-contentious summary of what each side accepted as to the number of people involved in the protest at the mining site, the location and time of Mr. Garcia's shooting and death, and dates relating to certain photographs that had been taken. Unfortunately, the parties were unable to comply with this request, as they could not agree.
15. The following summary of the relevant evidence, for the purposes of this application, is taken largely from the Claimants' evidence, which in turn is heavily based on the criminal complaint filed by the Lima-based human rights organisation, Fedepaz, with the Office of the Prosecutor of the District of Piura on 6 June 2008. None of the Claimants themselves have sworn evidence in support of the application. The principal evidence was sworn by a partner in the Claimants' solicitors based on his reading of various documents and information given to him. Although not disputed in

every respect, the Claimants' account of events is nonetheless subject to material challenge by Monterrico.

- i) The Rio Blanco project involved an investment of some US \$1.4 billion, and could lead to exports of US\$1 billion annually for the next 20 years. However, before the protest took place in 2005, there was conflict between the authorities who supported open pit mining as an economic opportunity for the Piura region in northern Peru, on the one hand, and environmental and political activists who denounced the development as a catastrophe for the environment, on ecological grounds. Concerns were also raised about the effect of such mining upon the health of local inhabitants.
- ii) On 26 July 2005 a large group of predominantly indigenous members of the peasant community, began what was referred to as a "sacrifice march" towards Henry's Hill, the mountain where the mining site is situated, and upon which Rio Blanco planned to start its mining activities. The various accounts put the overall number of people involved in the protest march as between 400 and 5,000. The protesters carried no weapons other than sticks, whips and machetes.
- iii) On 27 July 2005 Monterrico issued a press release expressing its concern about the proposed march towards the mine. The release stated:

"It is believed that the march is being organised by left-wing activists, who are political opponents of the Government and its policy to encourage development in rural areas, and is being timed to coincide with Peru's nation Day, 28 July ... It is not possible at this time to estimate the size of the illegal demonstration, although local authorities had been monitoring an influx of people into the Rio Blanco area from outside the region and the authorities have increased police presence as a precaution."

Monterrico evacuated many of its employees from the mining site and stated that any further enquiries should be directed to Mr. Christopher Eager, Monterrico Metals, at English landline and mobile telephone numbers.
- iv) On 28 July 2005 the protest march, which had approached the Rio Blanco mining site, was halted by officers of the Peruvian National Police. The Claimants allege that members of the police threw tear gas from helicopters to the provisional campsites set up by the protesters in the conflict zone. They further alleged that a group of policemen reached the protesters' campsite, entered, destroyed and looted it.
- v) The Claimants allege that, although the protesters tried to establish a direct dialogue with the mining company, and displayed white flags, they were detained by the police who again threw tear gas at them. The latter then decided to leave the mining site and to spend the night in an area located three hours by foot from the mining site, where they stayed until the early morning of 1 August 2005.

- vi) On 1 August 2005 large numbers of protesters arrived at the campsite at the mining site on Henry's Hill, with a view to breaking into the facilities there. The numbers of protesters who were said to have been approaching the mining site, with a view to seizing it forcefully, or attacking it, ranged from 300-400 to "about 3,000 vigilantes". At about 0530, Captain Santilan, who was the Chief of the Henry's Hill detachment of police, communicated that he was taking an advanced post, where he was surrounded and ambushed by "approximately 2,000 peasants". The campsite on the mining site was protected by 400 policemen. The Claimants' case is that only approximately 400 protesters climbed up Henry's Hill to the mining site on that day, not least because the hill was so steep. The protesters managed to walk past one of the police posts. At about 0600 the police threw tear gas and fired gunshots at the protesters and then started chasing them until about 1pm. The police, still firing gunshots, chased fleeing demonstrators all the way back to their previous night's campsite. The Claimants contend that, when the police eventually reached the campsite where the protesters had spent the previous night, some three hours away from the mining site, the police seized their food, clothes and tents and looted their money. The police then arrested 28 of the protesters and took them back to the mining site, where they were detained.
- vii) Although not mentioned to Burton J during the course of the without notice application, the evidence, according to the Defendants, also shows that the arrest and detention of the protesters by the police came about because, during the confrontation at the protesters' campsite on 1 August 2005, one of the protesters shot a policeman, Captain Revollar, in the leg with his own gun, and accordingly the detainees were arrested in connection with this shooting. Thus, say the Defendants, there is every difference between police action to arrest and detain persons suspected of shooting a policeman, and what the Claimants contend was unprovoked and unjustified violence orchestrated by the Defendants, intended to deter the protesters from maintaining their protest against the mine. The Claimants, on the other hand, whilst not denying that this incident occurred, submit that the fact that the violence was initiated by the protesters, rather than by the police, is of no relevance to the Claimants' claims.
- viii) The Claimants also contend that one of the protesters, a Mr. Melanio Garcia, was shot and killed by the police at the mining site at Henry's Hill (i.e. on the Defendants' premises) and that this was supported by eyewitness accounts and photographic evidence. The Defendants on the other hand submit that the evidence suggests that Mr. Garcia was shot about 45 minutes by road away from the Henry's Hill mining site, whilst the police were chasing away the protesters who had advanced on the mining site, and that his corpse was found and brought back to the mining site on either 1 or 2 August 2005. The Claimants contend that someone on the Defendants' behalf falsified the entries on the list recording those entering the mining site by wrongly describing Mr. Garcia as a corpse when he entered the mining site on 1 August 2005.
- ix) On 2 August 2005, the eighth Claimant, Mr. Julio Vasquez, a journalist, as a result of pressure from the journalists' trade union, was separated from the detainees and told by a General Benavides of the police that his rights were

going to be respected. The relevance of this is that the Claimants contend that, while this conversation was taking place, employees of Monterrico recorded everything.

- x) The company helicopter delivered food to the mining site and various of the detainees were brought before the prosecutor and presented to him with bags over their heads and were interrogated about the demonstration. The detainees then spent the night in captivity. During the period of their detention the protesters were handcuffed, threatened and insulted, and subjected to beatings, abuse, and degrading treatment at the hands of their captors.
- xi) On 3 August 2005 Monterrico donated boots to the detainees as most of them were barefoot and half naked. A group of 11 were transferred in a helicopter to a local town and General Benavides told the press that the police were not being paid for by the Defendants but that they were providing food. Monterrico provided a small truck to enable a police colonel to travel to a local town.
- xii) On 4 August 2005 Monterrico issued a press release on its website in which it reported that Monterrico had “a policy of community consultation and participation in the development of the Rio Blanco Copper Project” and that Chris Eager, described as “Monterrico’s CEO”, had said that he had spent several days in the week during which the protest and torture took place “walking to a number of villages in the area”.
- xiii) In September 2005 criminal proceedings were brought by the public prosecutor against the Claimants other than the widow of Mr. Garcia. Although from time to time it was reported that such charges had been abandoned, they were periodically reinstated, and the position in March 2009 was that they were still continuing.
- xiv) On 6 June 2008, Fedepaz filed a criminal complaint in Piura on behalf of the Claimants against the police and against unnamed “security personnel” at the mining site. The complaint amongst other things alleged that on 1 August 2005:

“Company employees also took part in the beating, as one of the arrested persons, journalist [Mr. Vasquez] recognised the voice of the person who was responsible for security in the mining company, Jorge Paucar Luna.”

It also alleged that on 3 August 2005

“The company donates them rubber boots so that they did not travel shoeless, since during the detention many of them were semi-nude and shoeless. This means that the company was aware of the detention and the suppression against the peasants’ protest.”

- xv) Although no complaint was directly made against Monterrico or Rio Blanco, the Fedepaz complaint stated as follows:

“Several victims mention the direct participation of Rio Blanco’s security personnel in torturing victims.

In addition, the investigations performed should explain the level of participation of the company’s functionaries in the aforementioned crimes. Next, we present the facts that indicate responsibility of the company’s managers and security personnel for the events [the] subject matter of the complaint, as it is demonstrated that the[y] were really aware of what was happening, as well as supporting the activities for the performance of police activities.

- General Benavides tells the media that ‘the officers are not paid by Minera Majaz although it does supply them with food ...’.
- The company assigned a truck to Colonel Lazarte on August 3<sup>rd</sup> for its [sic] transfer to Huanacabamba.
- The company donated boots to the detainees prior to their transfer to Piura.
- On the day the Commission was transferred to Huanacabamba, at request of the Police, they went to the mining company’s facilities in that city. Upon their arrival, they communicated by telephone with Andrew Bristol, General Manager of Minera Majaz. Upon his request, they were allowed to talk on the telephone with Mario Tabra who was detained at the mining camp. Subsequently, due to the pressure exerted by the mining company, Monsignor Turley persuaded the peasants to clear the Zumba heliport, as it was going to be supposedly used to transport medicine and food for the peasant who participated in the march. Nevertheless, the helicopter was used for the transport of more police personnel to the zone, and to throw tear gas to the peasant camps.
- Several detainees indicated the presence of mining personnel, in particular cooks and security personnel at the time of their detention. Specifically, Julio Vasquez indicates the direct participation of security personnel in the tortures inside the camp and particularly the Security Chief of Minera Majaz.
- The first day of detention, the peasants were taken pictures [sic] and it has not been possible to determine whether there were policemen dressed as civilians or mining personnel. Similarly, the person in charge of verifying the peasants’ names who got in the helicopter to be transferred to Piura has not been determined.

- Julio Vasquez says that on the second day of detention, when he was separated from the other detainees, an employee of the mining company, who is identifiable and has a relevant job in the company, approached him to apologise for the abuses received on behalf of Majaz company.”
- xvi) On 9 March 2009 the prosecutor rejected the Fedepaz complaint. On 16 March 2009 Fedepaz appealed the prosecutor’s decision. On 2 April 2009 the appeal was declared “founded” by the prosecutorial authority, which ordered further investigations, including the taking of statements from identified employees and a legal representative of Rio Blanco.

### **The Claimants’ case as developed during the course of the application**

16. Miss Otton-Goulder conducted a detailed review of the evidence to demonstrate that, at that time of the events in July/August 2005 described above, the Claimants were subjected to torture, threats and inhuman and degrading treatment, in the course of which the husband of one Claimant was killed and the remainder were injured. She submitted that the evidence, on proper analysis, showed that there was a good arguable case that such treatment was at the hands of the Peruvian police, employees of Forza (the security guards employed by Rio Blanco on-site), and Rio Blanco employees; that consequently both Rio Blanco and Monterrico are responsible, and liable in law. She pointed to a number of factors, upon the basis of which she submitted that the Defendants were liable in respect of the injuries and degrading treatment suffered by the Claimants. These, she submitted, included the following factual allegations, in addition to those set out in the particulars of claim:
- i) Monterrico itself knew in advance of the proposed protest; published a press release on 27 July 2005 about it; and evacuated many of its employees from the mining site.
  - ii) The torture and detention went on for three days, with detainees suffering serious injuries and one dying: it was thus inconceivable that either Rio Blanco or Monterrico could have remained unaware of these developments on the mining site of their only asset and only project.
  - iii) Photographs were taken while the victims were detained at the mining site: these, the Claimants contend, include pictures of employees of Monterrico and/or Rio Blanco.
  - iv) In all its annual reports, Monterrico describes itself as owning the Rio Blanco mine, and proclaimed and publicised its direct control of the management of the mine.
  - v) No distinction was ever made in any news release by Monterrico between itself and Rio Blanco, still less to the two intervening Cayman Island holding companies.

- vi) At the time of the incident, Monterrico and Rio Blanco shared the same office address in Peru and the same contact numbers for telephone, fax and email in Peru, the latter being [lima@monterrico.co.uk](mailto:lima@monterrico.co.uk);
- vii) At the time of the protest, Monterrico had not been acquired by Zijin, and still had Australian directors, some of whom were either on site at the time or had been shortly beforehand, one of whom, Andrew Bristow, continued to be investor relations manager at Monterrico Metals in Peru, after the acquisition by the Chinese investors. At the time, he had the power to represent Rio Blanco.
- viii) The founding directors of Monterrico were Raymond Angus and Christopher Eager: Mr. Angus was based in Peru for a decade and was, at the time of the protest, the Chief Operating Officer of Monterrico and also the managing director of Rio Blanco (and also said to have been the Chief Operating Officer and Executive Director of Rio Blanco in 2005). His contract of employment as Chief Operating Officer of Monterrico stipulated that he should be based in Lima. It is to be inferred that that was for the purposes of managing the Rio Blanco project on behalf of Monterrico. In response to a request in the course of the criminal complaint made on the Claimants' behalf for the names of those representatives of Rio Blanco in charge of the company during July and August 2005, he was said to have been in charge. Mr. Eager was CEO of Monterrico and said to have been a director of Rio Blanco in 2005.
- ix) In 2004, Rio Blanco established a Rio Blanco Steering Committee and a Community Relations Team, and Mr. Angus was closely involved with both of those developments.
- x) Mr. Angus was in Peru in the week before the protests and throughout the period of the Claimants' detention and ill-treatment, and was directly involved in negotiations and discussions about the detainees and their welfare between 1 and 3 August 2005. He asked the Ministry of the Interior and the Directorate General of the Police to provide an additional twenty-five police officers after he became aware of the Claimants' detention.
- xi) Bishop Daniel Turley, of Chulucanas, Peru, stated that he was very concerned by the reports of the protest at the end of July 2005, and flew to the area. He said that, on 29 July, he spoke to a man with an Australian accent, said to be a manager of MAJAZ (Rio Blanco's previous name), whom he believed was Mr. Angus, apparently speaking from Lima. The Bishop asked Mr. Angus whether MAJAZ would assist in bringing medicine and medical staff to the camp on the mining site by means of the helicopter that the company was using. According to the bishop, Mr. Angus "answered negatively however and we were not able to obtain any further assistance from MAJAZ".
- xii) This, the Claimants contend, is supported by the fact that at the time of the demonstrations, Mr. Eager (CEO of Monterrico and Director of Rio Blanco) was in London; Mr. Angus was in Lima; and no other director of Rio Blanco or Monterrico was at the mine.



- xiii) In the Fedepaz criminal complaint issued on their behalf in 2008, the Claimants said that the company's representatives:

“... showed a high level of awareness of what was happening, having even assisted with the performance of police activities, such as supplying food to the police officers, lending the company van to Colonel Lazarte Dextre, giving boots to the detainees before they were transferred to this city; indeed staff of the mine even took part in the beatings and acts of aggression committed against the peasant farmers”.

- xiv) On 1 August 2005, Mr. Angus and Mr. Bristow both attended a government sponsored meeting in Chulucanas, some 300km from the mine.

- xv) On 3 August 2005, Mr. Angus was photographed with a journalist reporting on a second governmental meeting held in San Ignacio (a mere 100 km from the mine), which was reported in a local newspaper on 4 August 2005.

- xvi) On 4 August 2005, Monterrico issued the press release on its website about the protest, referred to above. On 11 September 2006, Rio Blanco issued a public apology for its role in the protests. This was expressly addressed to

“... the public opinion of the provinces of Ayabaca, Huancabamba, Jaén and San Ignacio, belonging to the regions of Piura and Cajamarca; and in particular the families of the communities of Segunda y Cajas and Yanta as well as to organisations of rondas campesinas and social leaders”

and stated that it wished to express the following:

- “1. Minera Majaz S.A. is ... currently undergoing a sincere period of change and substantial improvement in its attitude towards engagement and dialogue with all those who are located in the area of influence of the Rio Blanco Project.
2. ... it wishes to express its public censure and its most deeply felt apologies for attitudes and conflicts that in the past have occurred between certain of its staff and workers, and some families, and organisations and community leaders of the provinces of Huancabamba and Ayabaca.
3. The people associated with these conflicts have been seriously reprimanded and permanently separated from our company, as an expression of the desire among the Directors of Minera Majaz [that] such attitudes are never again repeated in the future

...

5. As an expression of our good will ... from here on Minera Majaz S.A. will initiate no more legal proceedings; this will be the role solely of the Public prosecutor.”
- xvii) In November 2007, Monterrico’s then Chief Director publicly stated, in answer to the question “What are the mistakes recognised by Majaz?” - “We are very sorry for the incidents that took place in the zone in 2005”. This statement was subsequently removed from Monterrico’s website.
- xviii) When what the Claimants contend were the allegedly damning photographs taken of the protest and torture victims at the time of the torture were published in January 2009, Monterrico remained silent on the accusations for more than a week before issuing a statement on 16 January 2009 stating that “the mining project was a wholly owned British venture at the time of the alleged incidents”.
- xix) On the same day, Rio Blanco stated  
“regrettably, our managers and employees were not innocent in this violent aggression”; (emphasis added).
- xx) According to a report by the Peru Support Group of December 2008/January 2009:  
“Andrew Bristow ... declined to comment on the accusations, but according to Reuters he did say that the case was ‘one of an enormous number of things that have happened in terms of opposition activity to the project’”.
- xxi) One of the Claimants, Julio Vasquez, a journalist, has said that, while he and the protesters were hooded, he heard a civilian say that they were tortured “by order of (Andrew) Bristow: he was the mining Operations Manager”.
- xxii) On 6 February 2009, Oxfam America called on the government of Peru and Rio Blanco Copper SA to “respect community rights and the results of the 2007 referendum; [to] investigate human rights violations against community members, clarify exactly what happened, identify those who [were] responsible, and bring them to justice; [to] stop the persecution of community members under investigation for terrorism; [and to] acknowledge the company has operated illegally while exploring without community permission, and compensate the communities”.

## Issues

17. The principal issues which were argued before me were:
- i) whether there had been material non-disclosure by the Claimants in making their application without notice and, if so, whether the injunctions should be continued;

- ii) whether the Claimants had demonstrated that they had a good arguable case so as to justify the granting of an injunction;
- iii) whether, as a matter of discretion, the court should in all the circumstances continue the injunctions.

### **Non-disclosure**

18. The principles relating to the duty of an applicant in applying for a freezing injunction on a without notice basis are well established and were not in dispute.

19. Mr. Phillips submitted that the Claimants were in breach of their obligation to give a full fair and accurate disclosure of material information and to draw the court's attention to "significant factual legal and procedural aspects of the case"; see *Memory Corporation Plc v Sidhu* [2000] 1 W.L.R. 1443, CA per Mummery L.J. at 1459. He submitted that, in circumstances where the applicant was seeking to freeze over £7 million of the Defendants' assets, the duty on the applicant to present a fair and even-handed account of its case was all the higher. He submitted that, for example:

- i) The Claimants failed to give Burton J a fair account of the events at the mining site in August 2005, these complaints of non-disclosure included, but were not limited to, allegations that the Claimants failed:
  - a) to disclose that their arrest and detention by the police came about because, during the confrontation at their campsite on 1 August 2005, one of the protesters shot Captain Revollar in the leg with his own gun, and that the police arrested and detained the detainees in connection with the shooting; and that, accordingly, the violence was initiated by the protesters, some three hours away from the mining site, rather than by the police, at the mining site; and accordingly that there was no basis for suggesting that there had been unprovoked and unjustified violence orchestrated by the Defendants at the mining site, intended to deter the protesters from maintaining their protest against the mine;
  - b) to disclose that, by the time the protesters arrived at the mining site, they were in the custody or under the protection of the police;
  - c) to explain that Mr. Bristow was merely a subcontractor performing geological services at the mine, and that he was not actually at the mining site at the time of the protests;
  - d) to disclose that Mr. Vasquez's claims should be viewed in the context that he subsequently, six months after the protest, accepted employment with Rio Blanco's Social Division, helping the company to gain acceptance in the Piura region.
- ii) The Claimants failed to translate and draw to the Court's attention the documents they themselves exhibited and which contained highly relevant material; in particular, the Claimants provided misleading translations of selected passages of those documents, particularly the three statements made by Monterrico/RBC which were presented to the court as admissions of

liability when they were nothing of the sort: for example, he pointed out that the statement released by Rio Blanco on 16 January 2009 remained on Rio Blanco's website and that, when properly translated, reads:

“Unfortunately, our own managers and staff have also not been immune to this kind of violence and aggression in the past.”  
(Emphasis supplied.)

He also referred to the fact that it had been published, in English, using the above words, shortly after it was published in Spanish and that it in no way amounted to an acknowledgement of involvement in, or responsibility for, the violence.

- iii) The Claimants failed to refer to the fact that, on 1 August 2005, only fifteen or sixteen Rio Blanco personnel were at the mining site (all non-executive operational staff), along with 8 employees of Forza and over 200 policemen. No executive staff of RBC or Monterrico were at or near the mining site during the protests. For example, Mr. Eager's passport showed that he was not in Peru at the time of the demonstrations.
- iv) Even if (which was not admitted) an unidentified Rio Blanco or Monterrico employee identified the First Claimant, Mario Tabra, to the police, it would appear, from Fedepaz's response to the Public Prosecutor's decision, that Mr. Tabra was specifically being sought by the police at that stage because he was suspected of having shot Captain Revollar. Thus, even Fedepaz did not suggest that Mr. Tabra was singled out because he was a well known critic of the Mine. In any case, if Mr. Tabra was identified by an RBC or Monterrico employee, there was no suggestion that such employee was involved in mistreating him or any other of the detainees.
- v) The Claimants failed to point out that Rio Blanco's response, on hearing of the incident at the mining site on 1 August 2005, was to supply, by means of a helicopter, food, medicines, warm clothing and footwear to the demonstrators at the mining site and to transport the injured to health clinics. In reality, the despatch of 25 police officers, following contact between Rio Blanco and the Ministry of the Interior came after the violence had already broken out at the Mine and could not, therefore, have caused it. The policemen despatched were, it would appear, ordinary members of the Peruvian National Police Force rather than the “DINOES”, or special operations police, already deployed by the authorities (rather than Rio Blanco) at the mine. Moreover, the phone call, referred to in the evidence, from the Rio Blanco site security manager to the local head of the Police, General Benavides, could not be fairly characterised as evidence, as the Claimants suggested in their evidence, sworn by Mr. Meeran, of Leigh Day, of the Defendants' “detailed involvement in the handling of the incident”.
- vi) The Claimants failed to point out that, so far as the photographs were concerned, every person involved in handling the detainees appeared to be wearing the uniform of the Peruvian National Police Special Operations Division (the “DINOES”); that the only photograph showing an employee of Forza shows him sitting alone in a tent wearing a high visibility orange jacket

marked “Forza”; that none of the detainees appears in that photograph; and that no employees of Rio Blanco or Monterrico appeared in any of the photographs.

- vii) As to the practicalities and quantum of the Claimants’ claim, the Claimant misstated the position in that:
- a) the Claimants failed to disclose that Conditional Fee Agreements are well known to the Peruvian courts, are known as “Cuota Litis” agreements and were discussed in the Ethics Code of the Lima Bar;
  - b) the Claimants also failed to disclose that a large number of Peruvian law firms promote and undertake pro bono work;
  - c) the proposed level of costs for the Claimants (£3 million) was totally unrealistic;
  - d) the erroneous suggestion that Monterrico’s costs would be at the same level as the Claimants’ costs, overlooked the existence of the conditional fee agreements upon the basis of which the Claimants were legally represented; and
  - e) Mr. Meeran’s submissions in relation to costs by reference to three cases relating to poisoning (by asbestos, mercury and uranium respectively) did not take account of the fact that the technical and expert issues in such cases would inevitably be far more complicated than a case such as this, where the real issues are who did what and when.

20. Accordingly Mr. Phillips submitted that the true position was that:

- i) there was no evidence that Rio Blanco or Monterrico were in any way responsible for the violence that took place on 1 August 2005 and subsequently;
- ii) the police had used similar tactics against the protestors on two previous occasions during their march before they got to the mining site;
- iii) the arrests of the Claimants followed the shooting of a policeman by a demonstrator; and
- iv) there was no good reason why the Claimants were unable to secure legal redress in Peru prior to the expiry of the limitation period.

Accordingly, he submitted that, on the basis of non-disclosure alone, the Claimants’ application for continuation of the injunction should be dismissed.

### **The court’s determination in relation to non-disclosure**

21. I accept Mr. Phillips’s submissions that, to a certain extent, Burton J was not presented with a full picture of the evidence at the hearing of the without notice application. In particular, I agree that he should have been told that it was certainly

arguable that the origins of the violent confrontation between the police and the protesters, and the subsequent arrest and detention of certain of the protesters, had been brought about as a result of the protesters shooting Captain Revollar in the leg, at some distance from the mining site, and that there was considerable doubt as to whether Mr. Garcia had indeed been killed at the mining site. I also consider that the Claimants' duty of disclosure required counsel to have indicated to the judge the weakness of the evidence which suggested the presence of any executives of Monterrico or Rio Blanco at the mining site during the relevant period, or indeed of their employees' involvement in the violence and brutality at the mining site. I also consider that the court ought to have been told of the Defendants' own English translation of the press release dated 16 January 2009.

22. However, in my judgment, the detailed analysis of the evidence which has been rehearsed before me during the *inter partes* application would not have been appropriate, or indeed, in the absence of the Defendants' input, available during the course of the hearing before Burton J. He had read the principal affidavit, and clearly formed his views on the basis of that. As Mr. Phillips accepted, there is clearly, on the basis of that evidence, a good arguable case that the police were involved in the commission of unjustifiable acts of violence, brutality and degrading treatment of detainees. The critical issue is whether the Defendants were involved in such conduct, whether they were any way responsible for it, and/or whether they are liable, vicariously or otherwise, for what occurred. Although I consider the case in this respect could have been presented more fairly, I am not prepared to conclude that this is a situation where the Claimants' failure to do so disentitles them from the continuation of the relief sought, if they were otherwise entitled to such relief on the basis of the arguments presented at the *inter partes* hearing before me.

### **Good arguable case**

23. No point was taken by Mr. Phillips in relation to the jurisdiction of the court to determine the substantive claim in the light of Article 2 of the Judgments Regulation, and the fact that Monterrico's registered office, and therefore its domicile, was in England when the Claimants issued these proceedings; see *Owusu v Jackson and Others* Case C-281/02 [2005] QB 801.
24. Mr. Phillips submitted that the Claimants had failed to show that they had a "good arguable case" against Monterrico either on the facts or in law to justify the grant of a freezing injunction: see *Ninemia Maritime Corporation v Trave GmbH (The Niedersachsen)* [1983] 1 WLR 1412 at 1415-1417.
25. He submitted that his analysis of the facts demonstrated that the Claimants' case on the facts rested largely upon mistranslated documents and misplaced speculation. He submitted that there was no arguable case that Forza, the security company hired by the Defendants, let alone Rio Blanco, were involved in the assaults or abuses perpetrated by the police, albeit that he accepted that the evidence disclosed a good arguable case that the police were involved in such abuses. He further submitted that the Claimants' arguments on Peruvian and English law were fundamentally flawed. In particular, so far as the alleged liability on the part of Rio Blanco was concerned for the alleged injuries of the Claimants, there was no duty on the part of Rio Blanco under English law to intervene and prevent the police from causing injuries, nor falsely imprisoning detainees; *Smith v Littlewoods Organisation Ltd* [1987] AC 241.

Similarly he contended there was no such duty under Peruvian law. He submitted that, although the Claimants' draft Particulars of Claim accused Monterrico of having "instigated and/or counselled the trespass to the persons of the Claimants and/or conspired to cause them injury and/or conspired to use unlawful means", in fact, Mr. Meeran had conceded in his First Affidavit that the Claimants had no evidence that Monterrico "provided assistance or encouragement in relation to the injuries and/or false imprisonment". Moreover, he argued, that although the Claimants' draft Particulars of Claim further accuses Monterrico of having negligently failed to ensure "adequate risk management of the mine's operations", in fact, no duty of care as between Monterrico or RBC and the protestors had been pleaded or accepted; and neither Defendant could be liable under English law for the actions of the Police: *Fisher v Oldham Corporation* [1930] 2 KB 364; nor could such liability arise under Peruvian law. Finally he submitted that, as a matter of Peruvian law, Monterrico could have no liability for the acts of its subsidiary. However in argument he accepted that he was content for the purposes of this application alone to adopt the Claimants' approach in relation to issues of Peruvian law.

### **Conclusion on the issue of good arguable case**

26. I have given careful consideration as to whether it is appropriate for me, on this application, to analyse the alleged weaknesses of the Claimants' case in the detailed and extensive manner in which Mr. Phillips contends that I should. In my judgment it is not appropriate for me to do so on this type of application. Having reviewed the evidence in its entirety, and despite the undoubted potential weaknesses in the Claimants' case against Monterrico, both factually and as a matter of law, I am just about satisfied that the Claimants have demonstrated that they have surmounted the hurdle of demonstrating a good arguable case for the purposes of supporting a freezing injunction.
27. The alleged facts as to Monterrico's responsibility and participation in the alleged brutality against the protestors would appear to be sufficient to found a cause of action. On any basis the facts are keenly disputed to such an extent that it is impossible for me to resolve them in any meaningful way on an interim application. Despite Mr. Phillips' persuasive arguments to the contrary, the evidence in relation to the participation, or part played, by Monterrico's employees or officers, whether actually at the mining site or behind the scenes, is not so clear cut in my judgment as to exonerate the company conclusively from any legal responsibility for the brutality which it appears occurred as a result of the conduct of the police. On the contrary, although the allegations are unclear, and unspecific, the Fedepaz complaint alleges participation on the part of Rio Blanco/Monterrico employees. Any detailed arguments based on the absence of legal liability, or responsibility on Monterrico's part for the acts of the police, or in relation to limitation issues or issues of foreign law, should, in my judgment, be the subject of a focused Part 24 application rather than deployed in broad brush arguments in defence to an application for a freezing injunction.

### **Risk of dissipation**

28. There was no dispute on the evidence before me that, in the absence of injunctive relief, there was a real risk that Monterrico would not retain assets within the jurisdiction sufficient to meet any claim against it or Rio Blanco. Thus, in its

evidence, Monterrico confirmed that, following Monterrico's acquisition by Zijin in June 2007, there was no significant commercial reason for Monterrico to maintain a presence in England. The evidence further indicated that there was indeed a possibility that the group might reorganise so as to relocate Monterrico's operation to Hong Kong or mainland China (in order to centralise management and save costs by Monterrico sharing office space with other group companies), although there was, apparently, no fixed timetable for such reorganisation. Moreover the evidence showed that Monterrico was already operating from an office in Hong Kong and that all but one of its directors is Chinese and not resident in this jurisdiction. It has delisted from AIM and there were sound commercial reasons for its likely relocation. The Claimants did not suggest that there were sinister reasons for the removal of its assets and its effective seat from this jurisdiction, but in such circumstances Mr. Phillips realistically did not seek to argue that there was no risk that assets would not be available within the jurisdiction to satisfy any judgment which the Claimants might obtain.

### **Discretion**

29. In deciding whether to grant a freezing injunction, the court has to determine what is "just and convenient" in all the circumstances of the case; see section 37 (1) of the Supreme Court Act 1981 (now the "Senior Courts Act, 1981").
30. Mr. Phillips submitted that in all the circumstances of the case it was neither just nor convenient for the court to require Monterrico to freeze a significant part of its capital and to restrict its commercial freedom, whilst the Claimants attempted to construct an arguable case against Monterrico. He argued that, even if (contrary to Monterrico's principal arguments) the court took the view that the Claimants have a good arguable case, it should nevertheless exercise its discretion to discontinue the freezing injunction and order an inquiry into damages. He submitted that there was no justification for the serious interference in the legitimate commercial activities of Defendants which an injunction would cause. This, he said, was a case where:
  - i) the proceedings were clearly brought as part of an orchestrated and continuing political/environmental campaign;
  - ii) the events in question took place four years ago;
  - iii) those events have been investigated by the judicial authorities in Peru and the local NGO, Fedepaz;
  - iv) despite those investigations the evidence obtained by the Claimants that either Defendant was involved in or responsible for the alleged injuries suffered by the Claimants was tenuous, and the reality was that the Claimants hoped that such evidence would emerge on disclosure;
  - v) on the Defendants' case, the claims were statute-barred in both England and Peru;
  - vi) the sums that the Claimants seek to freeze were massively disproportionate to the relatively small personal injuries claims that they actually advance; and



- vii) one of the Claimants, Mr. Vasquez, has shown a willingness simply to lie in order to support his case.
31. Alternatively, Mr. Phillips submitted, should the Court be minded to continue the freezing injunction, then the Claimants should be required to give a cross-undertaking in damages, even if it is not to be fortified. He made the following points:
- i) With a large number of Claimants there was an obvious prospect that one or more of them may have or obtain substantial assets. The claim itself, of course, would be such an asset if successful. There is no reason why Monterrico should be deprived of any potential right of recourse against all the Claimants in the event that it is decided that it has suffered damage by reason of the injunction which the Claimants ought to pay.
  - ii) The Claimants should be required to give an undertaking to use best endeavours to obtain an ATE policy within a specified period and, if one is not obtained, to consent to the reduction in the amount of the injunction.
  - iii) The quantum of the injunction should be greatly reduced to reflect:
    - a) a more realistic assessment of the Claimants' projected claims and their projected costs; and
    - b) a reduced ATE Policy premium given that Monterrico has now expressly agreed to limit recovery of its costs to £1.25m.

### **Conclusion in relation to the grant of an injunction**

32. I consider that despite the points made by Mr. Phillips it is appropriate that I should nonetheless exercise my discretion to grant some sort of freezing injunction against Monterrico. No injunction is sought as against Rio Blanco, but the Claimants seek an order effectively requiring Monterrico to prevent any of its subsidiaries from selling shares in Rio Blanco, or in intermediate subsidiary companies, which hold shares in the mine, or shares in such subsidiaries. The Claimants also seek an order requiring Monterrico to prevent Rio Blanco from disposing of any of its assets, including its interests in the proposed mine at Rio Blanco. The terms of the draft order sought expressly states that it does not prohibit Monterrico "from dealing with or disposing of any of its assets in the ordinary and proper course of business" and that the order will cease to have effect if Monterrico pays the sum of £5,015,000 into court or makes provision for security in that sum by another agreed method.

### **Quantum of freezing order**

33. The draft order supplied by Miss Otton-Goulder seeks a freezing order in the sum of £7.2 million. However in his eighth affidavit, Mr. Meeran suggests that the total figure should be £7.4 million. This is made up as to:
- i) £2 million in respect of damages,
  - ii) £4.275 million in respect of the Claimants' estimated costs of fighting the action including, in relation to both solicitors and counsel, who are acting on a

“no win no fee” basis, an uplift or success fee of 100% on top of the estimated normal figure for costs, and also including the separate costs of the application for the freezing order;

- iii) £1.13 million ATE (“after the event”) insurance premium to insure the Claimants against liability in respect of the Defendants’ costs in circumstances where Monterrico has now expressly agreed to limit recovery of its costs to £1.25 million.

## **Damages**

- 34. In Mr. Meeran’s first affidavit he assessed the likely quantum of the Claimants’ general damages claim at between £25,000 and £45,000 per Claimant including damages for psychological injury. No estimate was made of special damages, but I agree with Mr. Phillips that in the circumstances these are likely to be very small. On the basis of 31 Claimants, that gave rise to a figure for the total general damages claim of between £775,000 and £1,395,000. Miss Otton-Goulder submits that this figure does not take into account aggravated damages and exemplary damages; she submits that the Claimants are arguably entitled to the latter on the basis that Monterrico’s conduct was calculated to make vast profits anticipated from the mine if only it could proceed to exploit the mining site. In Mr. Meeran’s fifth affidavit he gave a more detailed breakdown of the estimated quantum of the individual Claimants’ respective claims, amounting in total to some £2 million, including aggravated damages claimed by 26 claimants (£25,000 per claimant).
- 35. In my judgment, in the circumstances of this case, to include any figure for aggravated or exemplary damages is highly speculative and is difficult to justify, although, in the light of the evidence served post-hearing, there is increased foundation for such a claim. I consider that it is fair and realistic, given the absence of any direct evidence from the Claimants themselves, to discount the claimed figure of £2 million to some small extent. Accordingly, in the exercise of my discretion, I adopt a figure of £1.6 million as the quantum of the claim for the purposes of the injunction.

## **Legal costs.**

- 36. The evidence of Mr. James Curle, a partner in the firm of Lawrence Graham LLP, solicitors acting on behalf of Monterrico, was to the effect that the sum of £4.275 million in respect of the Claimants’ estimated costs of fighting the action was grossly overestimated in circumstances where the case will mainly involve the preparation of fairly simple witness statements recording straightforward factual evidence and no form of disclosure will be required on the part of the Claimants. He also criticised the absence of any detailed breakdown of the work that would be involved and pointed to the fact that the medical expert evidence upon which the Claimants propose to rely has already been prepared. He contended that the real difficulty was the logistical one of communicating with the Claimants and ultimately arranging for them to give evidence in London. He suggested that certain logistical arrangements might be reflected in disbursements incurred by the Claimants, but that did not require, or justify, the contribution of fee earners charging City rates.

37. In his submissions, Mr. Phillips likewise submitted that, in effect, taken separately, the individual claims were the sort of claims that one might expect to see litigated in the County Court, were it not for the political and foreign dimension.
38. In my judgment, one is left with the impression that the estimated figure included for projected costs is exaggerated or overstated. I was not referred to any authority as to the approach which the court should take in relation to a freezing order, where the amount sought to be frozen includes a figure in relation to a hundred percent conditional fee uplift, and I was told that counsel were not aware of any such authority directly on the point. I take the view that I should discount the figure put forward by the plaintiffs by roughly 30% to reflect not only what I regard as the overestimate in the Claimants' projection of the time and complexity of running the action, but also to reflect the likelihood that costs will only be recoverable on the standard basis. Accordingly I conclude that a figure of £2.85 million is the appropriate figure to include under this head, on the assumption that it is legitimate to allow for the 100% uplift.

#### **ATE insurance premium.**

39. I was not referred to any authority as to the approach which the court should take in relation to a freezing order, where the amount sought to be frozen includes a figure to reflect the cost of an ATE insurance premium. I was likewise told that counsel were not aware of any such authority directly on the point.
40. Mr. Phillips accepted that, in principle, such a premium was recoverable in the event that the Claimants were successful in the action. It seems to me, nonetheless, to be somewhat unfair that the Defendants should effectively have to provide up front security for the payment of their own costs, particularly in circumstances where the differential between the ATE premium of £1.13 million and the projected figure for their own limited costs of £1.25 million is relatively small. The result effectively would be that the preponderance of the litigation risk would be shifted onto Monterrico. In my judgment, in all the circumstances, it would be proportionate for any freezing order to require Monterrico merely to provide security in a sum equal to 50% of the estimated ATE premium of £1.13 million, i.e. £565,000. I also accept Mr. Phillips' submission that the Claimants should be required to give an undertaking to use best endeavours to obtain an ATE policy in an amount of £1.13 million within a specified period and, if one is not obtained, to consent to an appropriate reduction in the amount of the injunction.
41. Accordingly, in my judgment, the quantum of the freezing injunction should be in a sum of £5,015,000.

#### **Further disclosure**

42. If Monterrico is prepared to provide security within the jurisdiction in respect of this sum, I take the view that there is no need for the court to consider the further disclosure of information sought by the Claimants in relation to assets of Monterrico and/or its subsidiaries. If it is not prepared to do so, then I will hear further argument from the parties as to the issue of further disclosure.

### **Cross-undertaking in damages by the Claimants**

43. Notwithstanding the fact that the Claimants are said to be impecunious, I see no reason why the Claimants should not be required to give a cross-undertaking in damages, even though I do not require it to be fortified. The likely damages are of course: (i) the cost of any bond or bank guarantee to provide security; and/or (ii) more remotely, Monterrico's loss of business opportunity as a result of having its capital tied up through the injunction or provision of a bond or bank guarantee. The chances of the court ordering a particular Claimant to pay significant damages in the event that his particular claim failed is likely to be very small, since the damage which, on this hypothesis, Monterrico may have suffered as a result of the injunction, or as a result of securing its liability, *in respect of that particular Claimant's individual claim* (as opposed to the total aggregate loss) is likely to have been negligible, even if all the Claimants were to fail in their claims. For example, it is highly unlikely that the court would order an individual Claimant to compensate Monterrico in respect of losses it suffered through securing its liability for the alleged claims of other Claimants. But I see no reason why the individual Claimants should not have to face the possibility of the downside risk which other litigants have to bear, if they claim wide ranging injunctions of the type sought here. Nor do I see any reason why Monterrico should be deprived of any potential right of recourse against each individual Claimant in the event that the court subsequently decides that Monterrico has suffered damage by reason of the injunction which an individual Claimant ought to pay. That is particularly so in the circumstances of this case where the Claimants have not themselves provided witness statements; where there has been considerable delay, and, notwithstanding the mitigating reasons for the delay, the claims are very stale; and there are serious legal issues in relation to limitation and corporate responsibility
44. I shall need to hear argument about the precise terms of the order in the light of the above judgment.

### **Postscript**

45. On 1 October 2009, after I had completed this judgment in draft, but before it had been sent to the parties, I received a copy of the 11<sup>th</sup> affidavit of Mr. Meeran, sworn on 1 October 2009. This exhibited signed statements from three people who were said to be employees of Rio Blanco at the time of the protest. These statements appear to support the Claimants' case that employees of Rio Blanco were involved in, or responsible for, the direction of police activity at the mining site. In particular, the statements refer to an "administrator", a Mr. Tirado, in charge of the Rio Blanco site, who, it is said, co-ordinated the operation against the protestors and gave instructions to employees, Forza and the police on how the operation was to be conducted. It is also said that Mr. Tirado was in communication with Mr. Bristow and Mr. Angus and directed the police, Forza and employees to abuse and torture the protestors. The statements were obtained by a Mr. Louis McGregor, a legally qualified paralegal employed by Leigh Day & Co.
46. Monterrico has not had an opportunity to answer or comment on this evidence, and, indeed, it might take some time for it to be in a position to do so. However, I do not propose to delay delivery of the judgment further, by asking for a response from Monterrico, since the further evidence merely supports the conclusion which I had

already reached independently on the issue of good arguable case, and does not affect my judgment on the other issues.