Neutral Citation Number: [2016] EWHC 1824 (QB)

Case No: HQ13X02561

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/07/2016

Before:

THE HON MR JUSTICE FOSKETT

- -

Between:

DANIEL ALFREDO CONDORI VILCA & 21 OTHERS	**Claimant**
- and –	
(1) XSTRATA LIMITED	
(2) COMPANIA MINERA ANTAPACCAY S.A. (FORMERLY XSTRATA TINTAYA S.A.)	**Defendants**

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- -

Charles Béar QC and Kate Boakes (instructed by **Leigh Day**) for the **Claimants**
Shaheed Fatima QC (instructed by **Linklaters LLP**) for the **Defendants**

Hearing dates: 8 and 11 July 2016

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Approved Judgment (No.2)

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.

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MR JUSTICE FOSKETT:

Introduction

1. This judgment deals with another aspect of the fraught issue of the e-disclosure in this case. The judgment needs to be read in the light of the judgment in *Vilca and 21 others v Xstrata Limited and another* [2016] EWHC 389 (QB) and the Supplemental Judgment reported under the same name at [2016] EWHC 946 (QB).

2. A number of issues have been raised. Some were resolved during the hearings that took place on 8 and 11 July 2016 and some have required my decision. A sense of the scale of the disputation can be obtained from the volume of material lodged prior to the hearing.

3. The most significant matter for consideration is the application made on behalf of the Claimants that the Defendants be ordered to procure what is described as "an appropriate re-review of their disclosure", to be carried out by a lawyer independent of Linklaters LLP (see further at paragraphs 8-34 below).

4. I summarised the nature of the case in paragraphs 9-17 of the first judgment. In shorthand terms, I described the broad nature of the allegations and the nature of the associated disclosure as follows:

> "16. Various breaches of duty, both under English and Peruvian Law are alleged, but the validity or otherwise of the legal arguments is not relevant at this stage. Mr Béar summarised the pleaded case as involving allegations that the defendants incited, procured or participated in the police violence, facilitated the unlawful actions of the police by offering logistical support, facilities and information and also bore responsibility through a breach of a duty of care owed to the protesters. There is, as might be anticipated, an issue about vicarious liability. All these allegations are firmly denied by the defendants.
>
> 17. The disclosure issues that arise relate, in general terms, to the issues thus raised. Again in very general terms, what was known, discussed and planned at a relatively senior level within D1 and D2 and between those companies and the PNP and any other security personnel before the anticipated protest would be potentially relevant, as would any documents emerging during the events themselves. Anything that represented some kind of analysis of the events that occurred thereafter could also be relevant."

5. Following the order made pursuant to the rulings contained in that judgment and the Supplemental Judgment the disclosure exercise has continued. The Claimants suggest that it is not being carried out in accordance with the normally accepted criteria and that the approach to it has been "grudging". A particular omission (reinforced by other matters), it is suggested, has given rise to the need for the re-review to which I have referred.

6. I would simply note that I made the following observation in my first judgment at paragraph 100:

> "At the moment, the instructions of those instructing Linklaters seem to be to limit disclosure as much as possible. There is, of course, a perfectly understandable costs element to instructions of that nature and also an understandable concern that sensitive documents that go beyond what it is reasonable or necessary to disclose should not be disclosed. However, whatever the legal or factual merits of the case advanced for the claimants, its nature is tolerably clear and the kind of document that is potentially relevant to it is also tolerably clear. The defendants would be ill-advised to give the appearance of being reluctant to cooperate in the process of making these documents available …."

7. I will deal with this application first.

A re-review?

8. I described the "first level manual review" of documents revealed in the e-disclosure exercise in paragraph 35 of my first judgment. The majority of documents generated by the searches were in Spanish. Any document not excluded by this process is next considered at a second level manual review by a Spanish-speaking associate and the final level of review would be at partner or senior associate level prior to which there would have to be translation of the relevant document. It is through that process that a document that is chosen for disclosure or non-disclosure is identified.

9. An e-mail exchange on 13 April 2012 between Mr Sartain (see paragraph 79 of my first judgment) and Mr Marun (see paragraph 46 of my first judgment) lies at the heart of the Claimants' application. Each was a member of the CCBU, Mr Sartain the global CEO and Mr Marun the V-P. However, the exchange started a little earlier than the particular e-mails to which I will draw attention.

10. It starts for this purpose with an e-mail to Mr Mick Davis, D1's CEO at the time, sent by Mr Chris Bain, the Director of CAFOD (the official Catholic aid agency for England and Wales) on 30 March 2012. That e-mail referred to the fact that CAFOD's "partner the Vicariate of the Sicuani Prelature[1] will be in London, together with the Mayor of Espinar and the head of the Espinar civil society network on Thursday 26th April 2012" and inviting Mr Davis to "direct us to the appropriate person within Xstrata in London so that we can take this opportunity for our partner to discuss options for improving" communications in Peru about the concerns that exist locally "about soil and water quality, local security and other issues" arising from the Tintaya and Antapaccay mines. There was no reply to that e-mail and Mr Bain forwarded his e-mail again on 13 April 2012 to Mr Davis saying that "[planning] is well underway for the itinerary of our Peruvian partners coming in a few weeks" and reminding him of the request "to put us in touch with the appropriate person at Xstrata so that we can organise a meeting whilst they are in London this month." It appears

[1] This is described in the Schedule to the Amended Particulars of Claim to be "a local Catholic Church organisation involved in the dialogue between the mine and the local community."

that a Draft Meeting Agenda was sent with this e-mail indicating the likely participants from the CAFOD side, one of whom was the Mayor of Espinar, another being Sergio Huamani Hilario (see paragraph 13 below).

11. These e-mails were addressed "Dear Mick", but it is not clear to what extent Mr Davis knew of Mr Bain and CAFOD because he forwarded the second e-mail to Mr Sartain, Ms (Claire) Divver and Mr Noethiger with the following message:

> "Charlie
>
> Who are these people (I have not heard of them before) and do you know anything about the issue. Do you want Claire to meet with the ????
>
> Mick"

12. The direct response on the same day from Mr Sartain to Mr Davis (which was copied to Ms Divver, Mr Noethiger, Mr Drago and Mr Marun) was as follows:

> "This Cafod group is an anti-mining NGO and it seems they are sponsoring this delegation on a tour to Europe, being led by the Mayor of Espinar, who is a total reprobate. Over the past year we have been countering his moves against the company through the strong support that we enjoy from the majority of the community groups in the Espinar Province. The Mayor has been making outrageous claims, basically trying to extort more money from the company, with his principal goal to increase the "Convenio Marco" or provincial contribution (negotiated to settle the BHBP dispute in 2004) from 3% of EBIT to 30% of EBIT!!
>
> Domingo alerted Claire to this likely visit late last week and we need to coordinate the finalisation of a strategy to counter his sponsored visit to the UK and Europe. This will most likely include sending an alternative reputable delegation from Espinar to counter the lies that will be spread by this group. We understand that this delegation is also planning a visit and protests in Switzerland. It is being co-sponsored by Swiss NGO Multiwatch.
>
> We will finalise the strategy in coordination with Claire early next week."

13. The Mayor of Espinar, who Mr Sartain had described as "a total reprobate", was Oscar Mollohuanca Cruz. His name figures prominently in the two Intelligence Reports to which I will refer below (see paragraph 39), as amongst others does the name Sergio Huamani Hilario (see paragraph 10 above). He is named in the Intelligence Reports as the Vice-President of FUDIE (which is the Espinar Civil Society Interest Defense Association). He is a claimant in the present proceedings.

14. According to the disclosed documents, it appears that both Sr Cruz and Sr Hilario were intending to attend the meeting that did in fact take place in London on 26 April 2012, but the Minutes suggest that only Sr Hilario attended (together with Ruth Ibarra, the Director of the Vicariate of the Sicuani Prelature). Mr Marun and Ms Divver attended on behalf of Xstrata.

15. Returning to the sequence of e-mails, it is now clear that Mr Sartain sent a direct e-mail to Mr Marun (not copying it to anyone else but described as of "high" importance) on the back of the e-mail chain ending with Mr Davis' "Who are these people" e-mail (see paragraph 11 above) in the following terms:

> "José pienso que deberíamos tomas un approach muy directo, proactivo y fuerte para enfrentar estos h de p's.
>
> Saludos
>
> Charlie"

Translated this is:

> "José, I think we should take a very direct, proactive and strong approach to confront these SOBs.
>
> Regards
>
> Charlie."

16. I have been told that the abbreviation "h de p's" is an abbreviation for "hijos de puta" - "sons of whores", an expression that is said to be "highly derogatory and abusive".

17. Mr Marun replied in the following terms shortly afterwards:

> "Charlie
>
> Tenemos todo un plan en plena ejecución que va desde lo político hasta lo comunicacional. Después te cuento pero estamos actuando muy fuerte en este tema. El lunes tengo organizado un workshop con toda la gente de RRCC para seguir presionando otras acciones.
>
> Saludos
>
> José"

Translated this is:

> "Charlie,
>
> We have a whole plan in full execution, from the political to the communicative. I will tell you about it later, but we are proceeding very strongly along those lines. On Monday I have

> a workshop organised with all the people from RRCC[2] to continue pushing other actions.
>
> Regards
>
> José."

18. It is now not in dispute that the e-mail exchange between Mr Sartain and Mr Marun is "relevant and disclosable" (see paragraph 20 below), but the sequence of events leading to this position is such that the Claimants submit that there are real concerns about the integrity of the disclosure process.

19. Disclosure has taken place in tranches. There can be no objection to that in a case where the whole exercise is extensive and extended. What occurred is that Tranches 1, 4 and 5 (in respect of which inspection took place in December 2015 and January 2016) contained the three e-mails in the chain preceding the exchange between Mr Sartain and Mr Marun, including that from Mr Davis to Mr Sartain (see paragraph 11 above). Tranche 7 (in respect of which inspection took place on 24 March 2016) was said to contain relevant e-mail data of Mr Sartain. However, it did not include the above e-mail exchange. That exchange was not disclosed until Tranche 8 in respect of which inspection took place on 11 and 14 April 2016.

20. In a letter dated 26 May 2016, Leigh Day asked Linklaters about the history of the disclosure of the e-mail exchange between Mr Sartain and Mr Marun. In a letter dated 2 June, Linklaters said this:

> "3. [The email from Mr Sartain to Mr Marun] was first seen in the document review that led to Tranche 7. The view taken, at a senior level, was that, in light of a number of factors, [this] email was not disclosable. First, as is clear from the subject matter of the preceding emails and the agenda sent to Mr Davis with the second email, the issues that it was proposed be discussed in London, and to which the Exchange is addressed, related to general local issues and no mention is made of a possible strike or the Group's attitude towards it. Secondly, the three preceding emails (and the agenda attached to the second email) had already been disclosed. The fourth email was not regarded as adding any new information to those three emails. Thirdly, the fourth email is dated 13 April 2012, which is before the announcement of the proposed strike and over 5 weeks before the start of the strike on 21 May 2012. It therefore says nothing about the principal events in issue.
>
> 4. When the response from Mr Marun that completed the Exchange was reviewed, in the document review that led to Tranche 8, and the Exchange was seen in full it was decided [that both emails] in the chain were disclosable and they were disclosed. We therefore do not dissent from your view that "…

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[2] The Community Relations Team: see paragraph 59 of my first judgment.

> *this exchange is … relevant and disclosable …*"" (Emphasis as in original.)

21. It follows from this that a positive decision not to disclose Mr Sartain's e-mail to Mr Marun had been made initially "at a senior level" (in other words, at the final level of review referred to in paragraph 8 above), but that that decision was changed after Mr Marun's reply was revealed in the review that lead to Tranche 8. Mr Reid says that the decision to disclose both e-mails was made on 9 March. The actual disclosure by list for Tranche 7 was given on 18 March 2016 and the disclosure by list of Tranche 8 was on 1 and 5 April 2016 – thus only 14 days or thereabouts later. There is no doubt, of course, that whatever went wrong on the first occasion when Mr Sartain's e-mail was reviewed (if that is the correct view), it was put right quickly. It does have to be observed that Linklaters did not draw attention to the changed position until asked specifically about it by Leigh Day. Equally, it took Leigh Day some while to note the new revelation before seeking an explanation.

22. As I have said, it has been recognised within Linklaters at least since 9 March that the e-mail from Mr Sartain should have been disclosed, but it is said that the need to change the view first taken only arose as a result of the emergence of Mr Marun's reply. I am unable to see what difference that made. The potential relevance of Mr Sartain's e-mail is that, prima facie, it demonstrates an attitude on his part to those orchestrating the campaign against Xstrata in Espinar which he passed on to someone of influence within Xstrata locally. Mr Sartain was a very powerful and senior figure within Xstrata at the time and if his attitude permeated to others then it is at least possible to see that the Claimants would have grounds for arguing that those subjected to his influence might be prepared to facilitate, connive in or otherwise encourage the unlawful acts of the PNP if such acts are established. It is the kind of matter reflected in what I said in paragraph 17 of my first judgment, namely, that disclosure, in general terms, may relate to "what was known, discussed and planned at a relatively senior level within D1 and D2 and between those companies and the PNP and any other security personnel before the anticipated protest" took place. I do not understand why Mr Marun's response was of significance in deciding whether Mr Sartain's e-mail should or should not be disclosed: Mr Sartain had conveyed his view to another very powerful person within D2 who would thus be aware of it, whether he agreed with it or not and whether he acted upon it or not. As it happens, his response was at least arguably positive.

23. What I have found somewhat troubling is that, despite the recognition that the e-mail exchange should be disclosed (which it has been), there still appears to be a view on the Defendants' side that the e-mail from Mr Sartain only became relevant and disclosable after Mr Marun's reply emerged. Various attempts to justify this position have been taken as the letter from Linklaters (see paragraph 20 above) shows. I am unable to see that any of the matters relied upon justified non-disclosure. In the first place, it is said that the context of his e-mail was that set by the earlier e-mails which did not refer to a possible strike and merely referred to "general local issues". Equally, it is said that the first three e-mails were disclosed and it was not thought that Mr Sartain's e-mail "added any new information to those" e-mails. I cannot accept either contention: as I have said, his e-mail demonstrated, at face value, evidence of a very senior person's attitude towards those who were orchestrating dissent in the region of the mine. It does not seem to me that an attitude such as this, in order to be

potentially relevant to the issues in this case, must obviously be focused solely on how to deal with the strike if the strike took place. Something similar may be said in relation to the other matter relied upon, namely, that the taking place of the strike had not been announced at the date of the e-mail: there is ample material for the trial judge to conclude that the distinct possibility of a strike, or disturbances, would occur on or around 21 May as had occurred on many occasions in the past. Indeed there are documents which pre-date the e-mail that show that a strike was understood by Xstrata to be planned for 21 May. Mr Sartain's attitude would, as it seems to me, be likely to be the same, whether a strike had been announced or not announced and to that extent the announcement or otherwise of a demonstration on 21 May would make no difference to the issue of disclosure. I should, of course, emphasise that there may be a perfectly acceptable explanation for the language used and the sentiments expressed (which will be a matter for the trial judge), but the test at this stage is whether the attitude thus evidenced is capable of being relevant. In my view, it is.

24. Mr Reid has suggested in one of his witness statements that Mr Sartain took a dim view of the motives and actions of the Mayor and "the only reasonable inference from the context of the emails is that "s.o.bs" refers primarily to him." With respect, I do not think this analysis bears scrutiny. The agreed translation of the original refers to the need to confront "these sons of bitches", not "this son of a bitch". It will be a matter for the trial judge, but the more natural inference is that, whilst he may well have been referring to the Mayor, he was referring to others also - Sr Hilario, for example.

25. Although not referred to in Linklaters' letter (see paragraph 20 above), Ms Fatima took a number of other points in relation to the need for disclosure of Mr Sartain's e-mail, the focus of her submissions being that the process under consideration is that of "standard disclosure" under Part 31.6. These submissions are made in support of the proposition that, whilst the e-mail exchange between Mr Sartain and Mr Marun (not just Mr Sartain's e-mail) is accepted now to be relevant and disclosable, it was a reasonable decision on the part of Linklaters initially to withhold disclosure of Mr Sartain's e-mail. It was, it is argued, a matter of judgment which permits a "margin of discretion" and Linklaters' decision fell within the bounds of reasonable responses to the issue.

26. Part 31.6 requires disclosure by a party of documents that (i) adversely affect his own case, (ii) adversely affect another party's case or (iii) support another party's case. Ms Fatima drew attention to *Nichia Corp v Argos Limited* [2007] EWCA Civ 741 and *Shah v HSBC* [2011] EWCA Civ 1154 and the reminders given in those cases of the constraints placed within the CPR upon the applicability of the *Peruvian Guano* test to standard disclosure. In short, such an approach does not apply to standard disclosure. She also contends, by reference to *Cheshire Building v Dunlop* [2007] EWHC (QB) 403, that admissions can limit the need for disclosure. She argues that the pleaded issues raised in the Amended Particulars of Claim are whether the Defendants (i) instigated/facilitated/directed/controlled the PNP causing harm to the Claimants <u>during the protest</u> in an actionable manner and/or (ii) incurred liability by failing adequately (or at all) to prevent the PNP harming the Claimants <u>during the protest</u> (her emphasis). She contends that the attitude of two very senior officers within Xstrata concerning the way in which it "should approach the local community" is thus not an issue in the litigation. She was referring to the way Mr Richard Meeran

of Leigh Day had asserted in a witness statement that the e-mail was disclosable on the basis that "it provides significant insight into the mindset of two very senior officers of the Defendants concerning the way in which the business should approach the local community".

27. She says that "[the way] in which the business should approach the local community" is a topic of huge scope and breadth given that it is accepted by the Defendants "that there has been a history of unrest in the area and that some of the unrest relates to the role and alleged effects of the Tintaya Mine" (see [55(a)] of the Re-Amended Defence). All that is, she submits, the context in which the critical events took place and there may be documents that are part of the story or background or which may lead to a train of inquiry enabling a party to advance his own case or damage that of his opponent (see *Shah v HSBC* at [32]), but any such documents are not documents that fall within the scope of CPR 31.6.

28. When she enlarged on this in her oral submissions she contended that since the attitude of Mr Sartain and any other officers of D1 or D2 towards the Mayor (and, presumably, to any of the others behind the local dissent) was not a pleaded issue, it followed that it was not part of the case being advanced against the Defendants that there was a hostile attitude towards such people. It would, she submitted, require amendment of the pleadings to enable such a case to be advanced.

29. Mr Béar submitted that this approach overlooks the need to disclose documentary material that is evidentially relevant to the pleaded cases rather than approaching disclosure by reference to the literal formulation of the pleaded issues. He accepted that documents relating to "the substance of the underlying socio-environmental dispute, the points of difference or antagonism between the mine … and the local population or elements of the local population" would not be disclosable under standard disclosure, but "the attitude and strategy that the company [adopted] in response to the way in which those issues were developing between it and the local community … are relevant … not because they were a response to the underlying issues" but because they may inform "the issue of whether the company was inciting or controlling the police, or whether the company negligently failed to restrain the police in the circumstances that arose." He submitted that the logic of Ms Fatima's argument was that if there was a document in which Mr. Sartain or some other senior officer of Xstrata said "I want the police to go in hard against the protestors", it would not be disclosable because there was no pleaded allegation that there was personal animosity towards the protestors or their leaders.

30. I accept the broad thrust of those submissions. I do regard the decision not to disclose Mr Sartain's email before seeing Mr Marun's reply to be an error. I accept, of course, that it was an error made in good faith, but error it was. I do not think there is any real mileage in trying to decide whether it was nonetheless within the range of reasonable responses to the question of whether it was disclosable: the reality is that it was plainly disclosable on the basis that it may materially advance the case of the Claimants and/or may materially adversely affect the Defendants' case. The fact that it was not disclosed, and the nature of the various arguments put forward to justify non-disclosure, does give rise to the question of whether too narrow a view is being taken of the parameters within which standard disclosure is required in this case. I will return to that issue after I have considered briefly the other matters relied upon in support of the application for a re-review.

31. A number of other matters were mentioned in Mr Meeran's second witness statement which he suggested showed that a restrictive view on the issue of disclosure was being taken. Mr Béar developed arguments based upon these matters. With one marginal exception, none really persuaded me that there was any particular concern about the parameters within which issues of disclosure were judged by those responsible for making the decisions within Linklaters. One obviously relevant email (in which Mr Llanque said, following the death of a local resident, that "We need the police to say that the assault was perpetrated by criminals dressed up as police officers") was disclosed a little late, but that must happen in this kind of disclosure exercise. The only exception (which, as I have said, is marginal) was what arguably at any rate appeared to be a geographical limitation on the exercise. The Claimants were seeking disclosure of documents relating to a company called Bechtel, a construction company contracted to work on the Antapaccay mine, but an answer given by Linklaters concerning a specific request for disclosure suggested, on one interpretation, that because an incident took place at Espinar (some 15 kms away from the Tintaya mine) involving a confrontation between the police and strikers, it was of no relevance to the issues raised in the present proceedings "pleaded or otherwise". Reference was made to the distance to which I have referred.

32. I do not think that, on a fair analysis, any restrictive geographical parameter was being applied to the issue of disclosure being raised at the time which, in any event, has now been abandoned. All I would say is that it does need to be emphasised that any document in the e-disclosure exercise that throws light on the attitude of anyone within the Xstrata set up with arguably potential influence over how the companies within the group would react to, and give instructions relating to the handling of, the proposed or actual protests relating to the Tintaya mine is relevant and disclosable. That is so wherever the document may have been generated. Any such document may, of course, throw a beneficial light on those attitudes; equally, it may not. But whatever its complexion, it is disclosable.

33. Is the issue raised by the Claimants sufficient to justify the kind of review they seek? I do not doubt (consistent with the view expressed by Teare J in *Nolan Family Partnership v Walsh* [2011] EWHC 535) that I could direct a review by another firm of solicitors or by independent counsel even if, as is suggested, it would be unprecedented. However, it would be a most unusual order to make (imposing, as it would, a costs burden on the client whose solicitor's conduct was the subject of the review) and it would, in my view, require strong grounds for it to be ordered. I do not consider that what was, in reality, one erroneous (albeit significant) decision is sufficient to justify any such order in this case. As it happens, the erroneous decision was corrected quickly which is what I would have expected from a firm of the standing of Linklaters. That standing also suggests to me that, if invited to consider how to review the e-disclosure exercise to-date to ensure that documents that fall within the parameters referred to in paragraph 32 above have not been unjustifiably excluded, I would have confidence that a sensible formula would be put forward. I do not, therefore, propose to make any order or direction at this stage, but will ask Linklaters to consider the terms of this judgment and to put to me within a period of 14 days from the date when the judgment is handed down a plan for achieving what I have asked. The Claimants may comment on that proposed plan within 14 days of receiving it if they wish and I will consider whether it meets the need for the kind of review I have mentioned.

34. I will turn to the other issues upon which my ruling is required.

Deletions from Mr Marun's e-mail account

35. It is not in issue that the evidence demonstrates that certain e-mails were deleted from Mr Marun's e-mail account, including the e-mail from Mr Sartain to which reference has been made above (see paragraph 15). It is (at least now) common ground that the deletions did not occur after the commencement of these proceedings, but the Claimants suggest that there is some basis for asserting that the selective deletion was done deliberately to avoid the revelation of the e-mails in any internal investigation. The Claimants contend that the circumstances require an explanation and that an order requiring Mr Marun to provide a witness statement giving an explanation should be made. The Defendants do not suggest that this may not be a legitimate area for inquiry at the trial, but submit that it does not merit inquiry as part of the disclosure process.

36. Ms Fatima says that Mr Marun is likely to be a witness and, if so, this is a matter he will have to deal with. If he is not a witness and there is no real explanation for his absence from the witness box, it is not difficult to see that the Claimants would at least have the basis for inviting the trial judge to draw an adverse inference along the lines permitted in *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324.

37. As it seems to me, that is a sufficient way of dealing with the matter and I am not persuaded that there is any requirement for me to order Mr Marun to prepare a witness statement now dealing with the issue. He, and the Defendants' advisers, are on notice of what will be said if the matter is not explained satisfactorily.

Date range for PNP communications

38. The "relevant period" for e-disclosure is from 1 April to 31 August 2012: see paragraph 19 of my first judgment.

39. The Claimants seek to extend that period backwards to 1 January 2012. One basis for making this application is that some documents have emerged from before 1 April 2012 which show communication between D2 and the PNP which are said to be relevant to the management of and response to the eventual protest. Indeed it is correct that a 22-page Intelligence Report (presumably prepared by the PNP) dated 19 January 2012, setting out the history of the antagonism towards the mine in the local community and identifying the Mayor and others as leaders of that antagonism, has been disclosed as part of the documentary disclosure. The report set out the history going back to 2003 when the Mayor "started a violent occupation, with looting and destruction of the Tintaya mining company with millions [of dollars'] worth of loss." It referred to other protests on 21 May 2004 and on the same day each year thereafter for several years. There is a further Intelligence Report dated 13 April 2012 (which carries the Xstrata Copper logo) which predicts a demonstration on 21 May 2012. Another basis for the application are the witness statements of Colonel Raúl Ramos Villagarcía (formerly of the PNP) and Sr Hector Herrera Mendoza (the Chief Provincial Prosecutor in Espinar at the time of the protest) which support the suggestion that there was an unusually close relationship between D2 and the PNP.

40. Ms Fatima complains about the admissibility of those two witness statements, but that will be a matter for the trial judge. Taking what they say at face value, it does not seem to me that it adds weight to the suggestion that the relevant period is extended backwards. If the simple suggestion is that there was a close relationship between D2 and the PNP, then that would, at least at face value, seem to be clear from material already disclosed. It would seem that there had been close dealings over a good number of years. Equally, I am unable to see why the existence of, and the contents of, the Intelligence Reports demands the extension backwards of the relevant period. Disclosure of email traffic from 1 April 2012 (some 7 weeks prior to the material events) ought to be sufficient for the purposes for which e-disclosure is required, but there is always the prospect that an email passing during that period may refer to something that occurred prior to 1 April 2012 which would generate a legitimate request for further disclosure. However, I am not persuaded that there is any reason to extend the period on the basis of the argument or material put before me.

Antapaccay file server back-up tapes

41. The final issue is whether I should append to what is now an agreed order concerning the Antapaccay file server back-up tapes a provision that entitles the Claimants to apply for payment of a sum of money into court or for some other appropriate sanction if there is a default by the agreed date of 31 August 2016.

42. I do not need to dwell upon this at any length: there have been delays in providing this disclosure, but the delays have been explained to me and I am prepared to accept those explanations. Ms Fatima accepts that it would have been better had an application been made for an extension of time to comply with the order I made previously and has apologised on her clients' behalf for not having done so. However, I am proposing to approach this issue on the basis that the date proposed can be met without difficulty and that if any insurmountable obstacle presents itself, I will be told in advance so that I can consider whether to grant an extension of time for compliance.

43. In those circumstances, it seems unnecessary for there to be a provision which would entitle the Claimants to apply for a sanction: if there is a further delay which is inexcusable, D2 may face a very strict order.

Further directions

44. The Defendants remain anxious that a trial date be set fairly soon. I understand that, but until I am reasonably satisfied that all proper disclosure and inspection has taken place, I am reluctant to set this case on a path towards trial. It lies principally in the Defendants' hands to see that this occurs expeditiously. Nonetheless, I propose to make the working assumption that the next time this matter comes before me (which I intend to suggest should be no later than mid-November this year) that I will then be in a position to give positive directions which will move this case towards trial.