Neutral Citation Number: [2021] EWHC 86 (Comm)

Case No: CL-2018-000026

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT
QUEEN'S BENCH DIVISION

Royal Courts of Justice,
Rolls Building
Fetter Lane, London,
EC4A 1NL

Date: 20 January 2021

Before :

MRS JUSTICE COCKERILL DBE

- -

Between :

ROMAN PIPIA	**Claimant**
- and –	
BGEO GROUP LIMITED **(formerly known as BGEO GROUP PLC)**	**Defendant**

- -
- -

Ms Camilla Bingham QC, Ms Amy Rogers & Mr Matthew Hoyle (instructed by **Steptoe and Johnson UK LLP**) for the **Claimant**
Mr Alexander Polley (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **Defendant**

Hearing dates: 12 January 2021
Draft judgment sent to parties: 14 January 2021

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Wednesday 20 January 2021 at 10:30am.

Mrs Justice Cockerill :

Introduction

1. This application is one for further Extended Disclosure under the Disclosure Pilot. The focus of the application is email correspondence and the contents of the mobile phones of two key witnesses.

2. It arises in the context of a claim where the Claimant ("Mr Pipia") claims that through a series of cunning transactions orchestrated by the Defendant ("BG UK"), he was unlawfully deprived of a Georgian fertiliser plant worth hundreds of millions of dollars. BG UK denies any wrongdoing – indeed, any involvement in the events subject to this dispute.

Factual background

3. Mr Pipia is a Georgian businessman who claims that at the times material to this claim, he held and managed various business interests through a number of corporate vehicles of which he was the ultimate beneficial owner, including Rustavi Azot LLC ("Rustavi Azot"), Agrochim SA ("Agrochim"), and Loyal Capital Group SA ("Loyal").

4. Rustavi Azot is at the centre of this claim. It is a company registered in Georgia. Mr Pipia's case is that until August 2016, it owned and successfully operated a production plant producing nitrogen based fertilisers, and that the production plant was one of the largest industrialised businesses and employers in Georgia.

5. BG UK is a company incorporated in England and Wales, and the parent holding company of JSC BGEO Group ("BGEO Georgia"), a company incorporated under the laws of Georgia. BGEO Georgia in turn is the parent holding company of JSC Bank of Georgia ("BoG"), also a Georgian registered company.

6. In summary, the events giving rise to the disputes between the parties arise out of the following transactions entered into between 2011 and 2016.

7. In 2011, Rustavi Azot and Agrochim entered into a USD 100 million general credit line agreement (the "GCLA") with BoG. The loans advanced by BoG under the GCLA were secured by a series of mortgages and pledges over Rustavi Azot's property.

8. On 27 June 2014, Loyal entered into a USD 100 million facility agreement (the "EWB Facility") with East West United Bank of Luxembourg ("EWB"). The EWB Facility was secured by various pledges over the issued shares in Agrochim and other companies controlled by Mr Pipia, and their respective dividend accounts.

9. In 2015 and 2016, Mr Pipia sought to restructure the GCLA and the EWB Facility. His case is that a "*Fixed Asset Valuation Report*" of Grant Thornton Akhvlediani LLC, prepared in connection with that proposed restructuring and dated 31 December 2015, valued the "Fixed Assets" of Rustavi Azot at approximately USD 388,488,000 or GEL (Georgian lari) 930,390,000.

10. On 22 August 2016, BoG appointed Tbilisi Auction House Limited (the "Auction House") to sell the assets of Rustavi Azot by auction. The appointment of the Auction

House purported to be an appointment of a "Specialist". This appears to be a term of art under Georgian law, but its meaning and relevance is for another day.

11. On 24 August 2016 EWB exercised its pledge over Agrochim's shares by serving a Default Notice and Voting Rights Suspension Notification pursuant to the terms of the EWB Facility. Mr Pipia says that he thus lost control of Agrochim and Rustavi Azot.

12. On 1 September 2016 an auction was held of the property and assets of Rustavi Azot (the "Auction"). The starting price was GEL 199,328,134.40. There were two bidders: BoG and JSC EU Investments Limited ("EUI"). EUI's bid of GEL 235,078,134.40 was declared winning. The Auction is currently the subject matter of litigation before the Georgian courts, albeit neither party to the present claim is a party to those proceedings.

13. Following the Auction, EUI entered into an option agreement with Rustavi Carbomide Limited (another company that Mr Pipia claims is ultimately owned and controlled by him), and a lease agreement with Rustavi Azot. Both of those agreements were terminated by EUI in November and December 2016 respectively.

14. Thus as the situation stands at present, the fertiliser plant is now under the control of EUI, and Mr Pipia's companies appear to have no contractual or other rights in respect of it. Mr Pipia says that these events entitle him to various delictual causes of action against BG UK under the Civil Code of Georgia. BG UK denies any wrongdoing (indeed paragraph 4(5) of its Re-Amended Defence and Counterclaim denies any "*involvement in the GCLA, the Auction, or the dispute that has arisen from it*"), and advances a number of factual and legal defences, as well as a counterclaim under two Release and Indemnity Agreements which it alleges preclude Mr Pipia from bringing this claim. It is of course not for me today to resolve those issues.

15. Mr Pipia says that two particular individuals are central to the events in issue: Irakli Gilauri ("Mr Gilauri") and Avtandil (or Avto) Namicheishvili ("Mr Namicheishvili"). I did not understand BG UK to disagree with this; as Mr Polley for BG UK submitted, it was common ground that both were very important individuals in this case. BG UK intends to call both of them to give evidence at trial.

16. Mr Gilauri was at all material times the CEO of BG UK and BGEO Georgia. He was also the CEO of BoG until 1 September 2015, when he moved to BoG's Supervisory Board (of which he became Chairman on 2 November 2015). He resigned from his roles with all three companies in February 2018. Mr Namicheishvili was at all material times employed by BGEO Georgia as Group General Counsel. Mr Pipia says that both of them acted in bad faith and were instrumental in the wrongdoing which he alleges against BG UK. It is Mr Pipia's case that "*Georgian law treats good faith as a central, non-negotiable baseline in all commercial relations*".

17. By this application, Mr Pipia seeks from BG UK the disclosure of various emails, WhatsApp messages, and other communications of Messrs Gilauri and Namicheishvili. Mr Pipia's difficulty is that the two gentlemen appear to reside out of the jurisdiction, neither is a party to these proceedings, and neither is employed by BG UK (albeit Mr Gilauri used to be). Further, the mobile telephones which contain the WhatsApp messages and the like are said to be Mr Gilauri's and Mr Namicheishvili's personal possessions, rather than the property of BG UK or any of its subsidiaries.

18. On 15 January 2018, Mr Pipia issued the claim form against eight defendants, naming BG UK as the First Defendant. The other defendants included BGEO Georgia, BoG, Mr Gilauri, and Mr Namicheishvili.

19. By two Notices of Partial Discontinuance dated 27 and 30 April 2018, Mr Pipia discontinued the claim against all Defendants save for BG UK. The claim therefore proceeds between Mr Pipia and BG UK only, and only those two parties are subject to duties of disclosure.

20. By an application notice dated 9 July 2019, BG UK applied for a declaration that any documents held by BGEO Georgia or BoG were not within its control for the purposes of disclosure. That application was dismissed by Mr Justice Andrew Baker on 26 February 2020: *Pipia v BGEO Group Ltd (formerly known as BGEO Group plc)* [2020] EWHC 402 (Comm) (the "Control Judgment"). Andrew Baker J held that BG UK set up with BG Georgia and BoG control arrangements under which BG Georgia and BoG gave their standing consent to provide to BG UK on request documents held by them that pertain to this claim, and therefore documents which fell within the scope of those arrangements were within BG UK's control for the purposes of disclosure. He further held that the effect of those arrangements on BG UK's disclosure obligations was that BG UK was required to formulate requests for particular documents or classes of documents to the two subsidiaries with which they can sensibly and reasonably readily comply.

21. The most recent Disclosure Review Document approved by the Court is appended to a consent order of Mr Justice Andrew Baker dated 16 September 2020. This is therefore the order for Extended Disclosure which Mr Pipia seeks to vary.

22. On 23 October 2020, Mr Pipia issued this application. The Application Notice seeks an "*Order for additional Extended Disclosure from the Defendant.*" The draft order sought is in the following terms:

> "1. The Defendant shall provide additional Extended Disclosure by list in respect of Disclosure Issues 3, 4, 7 and 9-23 of the Disclosure Review Document attached to the Order of Andrew Baker J dated 16 September 2020, in accordance with Schedule 1 to this Order, and simultaneously provide inspection by provision of copy documents, by 4pm on [ ] 2020.
>
> 2. Insofar as documents within Schedule 1 to this Order are held by JSC Bank of Georgia or JSC BGEO Georgia, the Defendant's obligation under paragraph 1 shall be to make reasonable and proportionate requests for those documents in accordance with the judgment of Andrew Baker J dated 26 February 2020 [2020] EWHC 402 (Comm)."

23. Schedule 1 has four paragraphs, but the parties have reached agreement on paragraphs 2 to 4. Accordingly, the only relevant paragraph of Schedule 1 to the draft order that I need to consider is paragraph 1. It is in the following terms:

> "1. Model C [alternatively, Model D] disclosure as follows:

> All documents created between 1 August 2016 and 1 August 2017 in which Mr Gilauri and/or Mr Namicheischvili sought to plan, arrange, discuss (whether between themselves or with others) and/or provide updates or reports in relation to: (a) the seizure or acquisition of Rustavi Azot or its assets (i.e. 'Project Bastille'); and/or (b) any steps which would or might prevent Mr Pipia from recovering Rustavi Azot or its assets, or limit such recovery.
>
> [Such disclosure to comprise documents:
>
> (1) stored:
>
> (a) on Mr Gilauri's mobile telephone +995 599 474 774;
>
> (b) on Mr Namicheishvili's mobile telephone [number];
>
> (c) on Mr Gilauri's email account igilauri@bog.ge;
>
> (d) on Mr Gilauri's email account anamicheishvili@bog.ge;
>
> (2) within the date range 1 August 2016 to 1 August 2017;
>
> (3) responsive to the following key words (in English and Georgian):
>
> (a) Azot;
>
> (b) Bastille;
>
> (c) EUI OR EU Investments OR Urumashvili;
>
> (d) EWB OR EWUB OR Sistema OR Rosanov OR Vsevolod;
>
> (e) Roma* OR Pipia;
>
> (f) Shekriladze.]"

24. In paragraph 1(1)(d), reference appears to have been intended to Mr Namicheishvili rather than Mr Gilauri.

The arguments

25. Counsel were largely agreed as to the questions I must resolve. The enquiry has two stages. First there is the threshold question whether the documents sought are, for the purposes of disclosure, within the control of BG UK. If they are not, the application must fail. The second stage is the test in paragraph 18 of Practice Direction 51U: whether an order that they be disclosed is necessary for the just disposal of the proceedings, as well as reasonable and proportionate "*as defined in paragraph 6.4*".

26. The issue of control only arises in respect of the mobile telephones, which are in possession of Messrs Gilauri and Namicheishvili. Their BoG email accounts are,

unsurprisingly, in physical control of BoG, being on BoG servers, and Messrs Gilauri and Namicheishvili have no access to them. It is therefore common ground that by virtue of the Control Judgment they were in control of BG UK for the purposes of disclosure in the sense that BG UK was required to make to BoG any requests that may be specified in the approved DRD in respect of those accounts.

27. I should at this stage also note that Mr Polley made the point that the "control" of the email accounts was limited by the parameters set out in the Control Judgment, but as Mr Polley noted, those submissions overlap with the issues of necessity and proportionality. In respect therefore of the email accounts, I only need to determine whether Mr Pipia's application should be allowed by reference to the test in paragraph 18 of Practice Direction 51U.

28. Mr Pipia seeks to establish BG UK's control of the two mobile telephones by several routes.

29. First, in respect of direct control of Mr Gilauri's telephone (but not Mr Namicheishvili's), Mr Pipia relies on Mr Gilauri's service agreement as the CEO of BG UK. The agreement is governed by English law.

30. Ms Bingham QC relied independently on each of Clauses 2.9 and 15.1 of this agreement. As for Clause 2.9, she submitted the effect of this provision was that BG UK could inspect everything on the mobile phone, even personal messages, both during and after the termination of agency.

31. Mr Pipia argued that the word "computer" in this clause embraces "*all laptops, tablets and smart phones; anything … that is internet enabled.*" Reliance was placed on the definition of a computer in the 12th Edition of the Concise Oxford English Dictionary and on *R v Bannon* [2011] EWCA Crim 2969.

32. As for Clause 15.1, Mr Pipia argued that it must necessarily survive termination of the contract because otherwise it could only be exercised in the very moment of termination. Mr Pipia submitted that Clause 15.1(a) and (d) gave BG UK control of Mr Gilauri's Georgian mobile phone quite independently from Clause 2.9.

33. BG UK contended that Clause 15.1 did not automatically confer a right of access to all documents merely by virtue of them containing confidential information; the crucial question was whether it was BG UK's property; and that Clause 15.1 could only operate during the period of employment and shortly thereafter, because shortly after the termination of employment Mr Gilauri would have no confidential information left in his possession.

34. BG UK also relied on Mr Gilauri's contract with BoG, which contained similar obligations owed to BoG. BG UK took me to the judgment of Hamblen J in *Saltri III v MD Mezzanine* [2012] EWHC 1270 (Comm) to the effect that where an employee is seconded to another employer, he owes duties of confidence to the second employer and he cannot disclose to the first company documents concerning the second, absent its express consent.

35. BG UK also challenged Mr Pipia's submissions on the equivalence between a computer and a mobile telephone.

36. Second, Mr Pipia says that BG UK has direct rights to access the devices on the basis of fiduciary duties owed to it by Mr Gilauri and Mr Namicheishvili.

37. Mr Pipia submitted that as BG UK's CEO and fiduciary, employed by it directly under a contract of service governed by English law, Mr Gilauri was obliged at common law (quite apart from his contractual duties) both during and after the termination of his agency to permit inspection of all materials and data in his possession relevant to the business of the defendant. He submitted that this obligation was owed separately from any contractual arrangements that were in place. He relied for this proposition on the judgment of Mummery LJ in *Fairstar Heavy Transport v Adkins* [2013] 2 CLC 272.

38. As for Mr Namicheishvili who was not employed by BG UK, Mr Pipia relied on his service agreement with BGEO Georgia. Clause 2.2 of that contract provided that Mr Namicheishvili would report to the CEO and the board of directors of BG UK, and that his responsibilities would be defined by them. Clause 2.7 acknowledged he would owe fiduciary duties to "*the Company and/or the Group*", and cl. 1 defined the "Group" as including BG UK. This was said to give rise to a *Fairstar* duty owed to BG UK.

39. BG UK relied on *Al-Nehayan v Kent* [2018] EWHC 333 (Comm) for the proposition that where a contract exists, fiduciary duties are shaped by the terms of the contract. As for Mr Namicheishvili, BG UK further pointed out that unlike Mr Gilauri's service contracts, Mr Namicheishvili's agreement with BGEO Georgia was governed by Georgian law. It made the point that the nature of fiduciary duties under Georgian law has not been explored by either party. BG UK also submitted that "Group" in Clause 2.7 of the contract with BGEO Georgia referred to BGEO Georgia itself and drew attention to Clause 10.5 which excluded rights of third parties. He submitted that Mr Namicheishvili's contractual obligation to report to the board of BG UK did not create a legal relationship between him and BG UK: it was an obligation he owed to BGEO Georgia under his contract with it. Finally, BG UK submitted that the important question for the imposition of a *Fairstar* duty was to ask which principal's business Mr Namicheishvili was carrying out, and that this could only be BoG or BGEO Georgia.

40. Third, Mr Pipia argues that control can be established indirectly by a two-step process: first, the relevant subsidiary has the right to the information on the mobile telephone, and second, the effect of the Control Judgment is that this gives BG UK control of it. In essence, Mr Pipia submitted that BoG was entitled to the information on Mr Gilauri's mobile telephone on the same two bases as he had submitted BG UK was: by reason of Mr Gilauri's status as an agent and a fiduciary, and the express provisions of his contract of service. I was again taken to the relevant contract, this time Mr Gilauri's service agreement as the Chair of the Supervisory Board of BoG. This agreement is also governed by English law. Particular reliance was placed on clauses Clause 6.7, Clause 7.2 and the definitions in Clause 1. On this basis it was said that that information is for the purposes of disclosure within the control of BG UK by virtue of the Control Judgment, because the relevant subsidiary (here, BoG) has agreed to supply it to BG UK.

41. Mr Pipia relied on the same indirect two-step process in respect of Mr Namicheishvili: he submitted that first, BGEO Georgia has the right to the information on the telephone, and second, the effect of the Control Judgment is that this gives BG UK control of it. Clauses 6.7 and 7.2 of his contract are materially identical to the same clauses in Mr Gilauri's contract with BoG. Mr Pipia therefore submitted, on the same basis as he had

in respect of Mr Gilauri, that the effect of the Control Judgment is that the contents of Mr Namicheishvili's mobile phone are within the control of BG UK.

42. BG UK challenged the second step of this analysis, submitting that this was an impermissible extension of the Control Judgment, because it sought to impose, by a roundabout way, a duty of disclosure on BoG itself by requiring a non-party to make requests to a further non-party. BG UK submitted that if BoG were a party, then by virtue of the Control Judgment Mr Gilauri's mobile phone could well be within its control for disclosure purposes, so long as it had the contractual rights to it contended for by Mr Pipia. But BoG was not a party, and did not owe any disclosure duties to Mr Pipia. Its only participation in the disclosure was as a recipient of any requests which BG UK, as a party, was required to make to it. It would therefore be a step beyond the Control Judgment to say that BG UK had control over such documents as BoG would have had if it had been a party itself, including such that it had a right to demand from a further non-party.

43. As for necessity, Mr Pipia submitted that Mr Gilauri and Mr Namicheishvili were at the centre of the dispute. Mr Pipia's case is that Mr Gilauri was the person who devised the scheme to seize Rustavi Azot from him and, among other things, was the person who gave him false assurances that the plant would be returned to him. As for Mr Namicheishvili, Mr Pipia's case is that he was Mr Gilauri's "*second in command*", and an equally key player in the events; amongst other things, Mr Pipia's Amended Particulars of Claim accuse Mr Namicheishvili of dishonestly procuring from him the Release and Indemnity Agreements on which BG UK now relies.

44. BG UK attacked Mr Pipia's case on necessity on several fronts. First, it argued that the extensive disclosure given to date was sufficient, and that all the searches which could usefully be made had already been carried out, in fact encompassing almost all the keywords sought by Mr Pipia. It relied on the judgment of the Chancellor in *UTB v Sheffield United* [2019] EWHC 914 (Ch) [2019] Bus LR 1500 for the proposition that disclosure should be restricted to what is really needed, and the power to vary an order for Extended Disclosure should be used sparingly. Second, he emphasised that Mr Gilauri and Mr Namicheishvili are not parties to the proceedings (Mr Pipia having discontinued the claim as against them), and themselves owed no duties of disclosure. Third, he submitted that the Claimant's position that the material disclosed by reference to the current DRD was highly probative of his case showed that further Extended Disclosure was unnecessary, and posed unjustified risk to the timetable given the proximity to the trial.

45. On reasonableness and proportionality, Mr Pipia submitted that in the context of a claim for hundreds of millions of dollars, his request was plainly proportionate; as Ms Bingham QC put it, he was asking for an additional mobile telephone to be searched.

46. BG UK attacked the reasonableness and proportionality of the request on a number of grounds, submitting that the keywords sought in the application were unjustifiably broad and almost certain to return non-responsive documents, given that they include first names or terms such as "EU Investments". It further submitted that this point overlapped with the issue of control, because the request oversteps what Mr Justice Andrew Baker held to be appropriate in the Control Judgment. BG UK pointed out that a party conducting a disclosure exercise could run test searches and refine them if they produced too great numbers of documents, while the Control Judgment required

formulating appropriately focused requests; there was no question of imposing on BoG or BGEO Georgia obligations akin to Model D disclosure exercises. Second, BG UK submitted that the application was not linked to the issues for disclosure, and if it had been, it would have resulted in essentially the same requests as had already been made by BG UK of its subsidiaries. Third, in respect of mobile telephones, it submitted that the Court should be cautious to order disclosure of a private device of an individual who is not a party to the proceedings.

The Legal Background

47. By PD51U paragraph 10.3, *"[t]he parties' obligation to complete, seek to agree and update the [DRD] is ongoing*". By paragraph 18.1 this court may, "*at any stage*":

> "… make an order that varies an order for Extended Disclosure. This includes making an additional order for disclosure of specific documents or narrow classes of documents relating to a particular Issue for Disclosure …"

48. However that is not an unfettered discretion. While there is no need to show a change in circumstances it is for the party seeking the variation to show that varying the original order for Extended Disclosure is necessary for the just disposal of the proceedings and is reasonable and proportionate: PD51U paragraph 6, paragraph 18.2.

49. As Mr Polley reminded me in the course of submissions, this has been considered by Vos CHC in *UTB v Sheffield* at [78]-[79] where he emphasised necessity and noted:

> "The requirements for the parties to co-operate and to act with proportionality are of the greatest importance under PD51U … the court will only make an order for Extended Disclosure where it is persuaded that it is appropriate to do so in order fairly to resolve one or more of the Issues for Disclosure.
>
> Extended Disclosure is not, therefore, something that should be used as a tactic, let alone a weapon, in hard-fought litigation. It is all about the just and proportionate resolution of the real issues in dispute…"

50. By PD51U paragraph 6.4:

> "In all cases, an order for Extended Disclosure must be reasonable and proportionate having regard to the overriding objective including the following factors—
>
> (1) the nature and complexity of the issues in the proceedings;
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> (2) the importance of the case, including any non-monetary relief sought;
>
> (3) the likelihood of documents existing that will have probative value in supporting or undermining a party's claim or defence;
>
> (4) the number of documents involved;

> (5) the ease and expense of searching for and retrieval of any particular document (taking into account any limitations on the information available and on the likely accuracy of any costs estimates);
>
> (6) the financial position of each party; and
>
> (7) the need to ensure the case is dealt with expeditiously, fairly and at a proportionate cost."

The Control Judgment

51. This judgment forms a key part of the backdrop to the application and merits separate treatment.

52. BG UK sought, ahead of disclosure, an order declaring that "*it does not control documents held by either [BGEO Georgia or BoG]*". Andrew Baker J heard full argument on that point and rejected that proposition, in his judgment of 26 February 2020. He did not however accept that there was unqualified control. He found that by virtue of an exchange of letters dated 30 March 2018, the Defendant has control over "*documents held by BG Georgia [&] BoG, that pertain to this claim, as might be requested by BGUK (or its advisers)*".

53. BG UK therefore had some obligation in respect of disclosure of documents held by these entities; but full Model D disclosure was not ordered. Andrew Baker J held that the Defendant's duties under PD51U extended to making specific requests for documents to BGEO Georgia and BoG. As Andrew Baker J explained at [57]-[59]:

> "57. By those Letters, BG UK sought and obtained BG Georgia's and BoG's agreement to provide it (or its advisors) with all documents pertaining to this Claim such as it (or its advisors) might request. It was a standing promise and, in line with the authorities, it does not matter whether it would be enforceable as a contract. It was thus a standing consent of the type considered in my simple example, above, namely a consent to provide documents on request. The request for consent was not in any way conditional or qualified; and the request was '*Acknowledged and agreed*' by each authorised counter-signatory likewise without condition or qualification.
>
> 58. The scope of the consent thus sought and obtained was clearly enough defined. It covered documents held by BG Georgia, respectively BoG, that pertain to this Claim, as might be requested by BG UK (or its advisors). To be clear, the need for a request seems to me to be a cumulative requirement for triggering, in respect of any particular document or documents, the promise to provide it to BG UK. It therefore affects the scope as well as the type of consent given, and it would not be reasonable to interpret this as enabling BG UK to make a request for '*all documents you hold pertaining to the Claim'*, without further specificity or direction as to what

> BG UK had identified that BG Georgia, respectively BoG, could provide to it as relevant to the Claim. That will need to be borne in mind when considering what the court can or should order, as regards BG UK's Extended Disclosure obligations in respect of BG Georgia's and BoG's documents. But it does not affect the quality of the consent given, which was a standing consent giving BG UK unfettered access to documents held by BG Georgia or BoG relevant to the Claim for which a request could be formulated by BG UK that would sensibly enable BG Georgia or BoG to comply.
>
> 59. What I have just described is, in my judgment, control, for disclosure purposes under CPR 31.8 or paragraph 1.1 of Appendix 1 to CPR PD 51U, as regards the documents covered by the arrangement."

54. There was then consideration of the appropriate mode of requests to BGEO Georgia and BoG at [65] -[70]:

> "65. Whilst this will be a matter for the hearing consequential to this judgment, which will also be a resumption of the second CMC to finalise directions for Extended Disclosure, it strikes me, provisionally, that the pertinent disclosure obligation upon BG UK, deriving from the control arrangements it has in place under the 30 March Letters, will be to make reasonable and proportionate requests for documents pursuant to that arrangement. That may lend itself most naturally to the adoption of Model C for Extended Disclosure, the parties and the court appreciating that whatever Model C Requests are settled at the CMC will in practice be for BG UK to make to BG Georgia and BoG (as applicable).
>
> 66. I observe now – because it is not clear to me the parties have taken this onboard in their work on the Disclosure Review Document – that under Model C, the assessment of relevance sufficient to require that documents will be disclosed is intended to be an aspect of settling the Model C Requests…
>
> 67. The intention and effect of the language used in CPR PD 51U is this, namely that any documents located upon a reasonable and proportionate search that fall within the scope of a Model C Request adopted as part of directions for Extended Disclosure will be disclosed. Model C Requests therefore should be defined with that end result in mind; and a request for a disclosing party to search for "any or all documents relating to" a topic is not, to my mind, a Model C Request at all.
>
> 70. … That the Application has failed, i.e. that BG UK has not persuaded the court to deny generally the notion that it has control over any of BG Georgia's or BoG's documents, does not mean it will be appropriate, or meaningful, to require, in effect,

> that BG UK ask BG Georgia or BoG to conduct something akin to a Model D Extended Disclosure exercise such as might have been their duty if they had been co-defendants. ..."

55. I turn now to the specific issues.

Mr Gilauri's phone: control

56. Mr Irakli Gilauri is to be the Defendant's lead witness at trial. He has served a 36-page witness statement. He is currently CEO of JSC Georgia Capital and CEO and Chairman of Georgia Capital PLC, the latter of which was formed in May 2018 when BG UK demerged its businesses into two separate entities. He faces allegations of serious delictual and bad faith conduct. It is common ground that he is an "*important individual in the case*".

57. He used three mobile phones over the period in issue at trial: an English mobile; and two Georgian mobiles (i.e. two handsets, with a single number). There is no dispute that he used those mobile phones to communicate in relation to the issues in dispute with BGEO employees, with third parties, and with Mr Pipia himself.

58. The English mobile has been searched. Mr Gilauri says that he replaced his Georgian mobile handset in February 2017. But Mr Gilauri still has the handset he used from February 2017 onwards. There will be relevant messages on that handset, as Mr Namicheishvili's WhatsApp disclosure makes clear.

59. It is submitted, and I accept, that his WhatsApp, Viber and SMS messages will likely give the Court an unguarded picture of some of his actions and this may assist as to his intentions. I also accept that that picture may very well be significant, in a case which raises major issues concerning Mr Gilauri's good or bad faith at relevant times and where it appears that the documentary record is not as full as it is in some cases and where there may be issues about the accuracy of some of the documentary record (for example there is at least one issue about the dating of a document).

60. I would therefore accept that to the extent that these messages are in the control of the Defendant it would be right to make an order for disclosure if one were at the original stage of ordering disclosure. But the fact that it would doubtless be interesting does not mean that the documents are disclosable – nor that the test for varying the disclosure ordered is met.

61. On control there are three limbs relied on by the Claimant – some of which are also relevant to Mr Namicheishvili.

62. I will deal first with the one which was least strongly urged by Ms Bingham for Mr Pipia. That was the route via BoG, which has a contract with Mr Gilauri by which it may seek such materials, and which has agreed to pass on materials relevant to this litigation. I accept the submission made by Mr Polley that this route is a step too far; while documents which BoG itself has are themselves taken to be within the Defendant's control, that does not mean that documents which BoG does not have but may have a right to ask for, are within the Defendant's control. That is not what Andrew Baker J's judgment says.

63. Even on the basis of request, this becomes akin to an order for third party disclosure, which is subject to a different and more stringent test, even where the third party is subject to the jurisdiction of the Court (which BoG is not). But I would add that while Mr Pipia shied away from contending that what was sought was that BoG should compel production, that outcome would logically follow from the submission that BG UK should be ordered to produce this material.

64. The next question is the question of general fiduciary duties. Mr Pipia points to the judgment of Mummery LJ in *Fairstar Heavy Transport v Adkins* [2013] 2 CLC 272 at [51]-[56], in a dispute between an employer and its former CEO who had stored business information on his personal computer:

> "51. In brief, *Fairstar* is entitled to the relief claimed by it against Mr Adkins for the following reasons:
>
> 52. First, their former relationship had been that of principal and agent.
>
> 53. Secondly, as a general rule, it is a legal incident of that relationship that a principal is entitled to require production by the agent of documents relating to the affairs of the principal.
>
> 54. Thirdly … 'documents' may, depending on context, include information recorded, held or stored by other means than paper, as is recognised in the [CPR]. In CPR 31.4 'document' means '*anything in which information of any description is recorded'* and 'copy' means, in relation to a document, '*anything onto which information recorded in the document has been copied, by whatever means and whether directly or indirectly.*' Those follow the same definition used in legislation. According to the notes to CPR 31.4 ' *While the word [document] in non-legal usage is commonly associated with information recorded only on paper, the true meaning of the word is far wider, reflecting its derivation from the Latin 'documentum' referring to something which instructs or provides information. The term extends to electronic documents, including emails: see [PD] 31B, para 1*'. In that context content cannot be separated from form, since a blank sheet of paper providing no information would not be a document and a blank electronic communication would not be an email.
>
> 55. Fourthly, materials held and stored on a computer, which may be displayed in readable form on a screen or printed out on paper, are in principle covered by the same incidents of agency as apply to paper documents. The form of recording or storage does not detract from

> the substantive right of the principal as against the agent to have access to their content.
>
> 56. Fifthly … Quite apart from the existence or non-existence of property in content, Mr Adkins was under a duty, as a former agent of *Fairstar*, to allow *Fairstar* to inspect e-mails sent to or received by him and relating to its business. The termination of the agency did not terminate the duty binding on Mr Adkins as a result of the agency relationship."

65. I do not however see this as an entirely helpful route as regards Mr Gilauri. (Nor, for reasons to which I will come, is it helpful as regards Mr Namicheishvili). This is because the ambit of the duty in his case must be viewed in the light of the specific terms of the agreements which he signed. This is the point made by Mason J in the High Court of Australia in *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41, 97, cited with approval by Leggatt LJ in *Al Neyahan v Kent* [2018] 1 CLC 216 at [141]:

> "That contractual and fiduciary relationships may co-exist between the same parties has never been doubted. Indeed, the existence of a basic contractual relationship has in many situations provided a foundation for the erection of a fiduciary relationship. In these situations it is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction."

66. The fiduciary relationship does however form a relevant backdrop to this extent – it establishes that absent anything in the agreements, the documents of someone who is a fiduciary will be within the control of the principal, in the sense that the principal will be entitled to inspection of his documents insofar as they are the business documents of the principal.

67. This therefore takes us to the third reason – which was the principal reason given in the skeleton argument for Mr Pipia – and which made most sense in terms of the history of this litigation. That is because at the time of the debate before Andrew Baker J it was not known that Mr Gilauri had an agreement with the Defendant. However on disclosure it became apparent that Mr Gilauri entered into an agreement with the Defendant in 2011 – and a later agreement with BoG.

68. Taking the agreement with the Defendant first, Mr Gilauri's service agreement appointed him as the Defendant's CEO. The clauses relied on were:

> "2.9… [Mr Gilauri] hereby authorises [BG UK], and any agent instructed by [BG UK], to access any program or data held on

> any computer used by [Mr Gilauri] in the course of performing his duties of employment (and regardless of whether the program or data is related to the executive duties of employment).'
>
> … 15.1 On termination… or at any time on request [Mr Gilauri] will:
>
> (a) immediately return to the Company in accordance with its instructions any or all property belonging to [BG UK] which is in [Mr Gilauri's] possession or control including but not limited to documents or other records containing Confidential Information…
>
> (b) permanently destroy …. all Confidential Information … in documents or other records ….which do not belong to [BG UK] or any Associated Company…..
>
> (d) if requested disclose to [BG UK] all passwords created or controlled by him in respect of documents or records belonging to the Company".

69. Also of note was the definition of "*Confidential Information*" under Clause 9 which includes: "*terms of business with clients/customers*", "*business plans and strategies*", "*financial information and plans*", "*any proposals relating to the acquisition or disposal of a company or business or any part thereof*", "*any information or document which [he] … should reasonably expect to be regarded as confidential*", "*any information which has been given to [the Defendant or an Associated Company] in confidence by customers, suppliers or other third parties*". These are said to be relevant to the allegations as to the Defendant's plan to take over Rustavi Azot.

70. Dealing first with Clause 15.1, I was not attracted by the submission (which did appear to be made, though was not pursued orally) that the obligation extended only as far as the termination of the agreement, and that the words "*at any time on request*" referred only to a time prior to the end of the agreement. The words "*at any time*" are not on their face so limited. On its face Clause 2.9 is more extensive than the common law right in that there is no exclusion for personal information and no temporal limit.

71. There is no good reason why on its face the obligation should terminate with the agreement. There is no provision for release. It would be a surprising result if it did – particularly against the backdrop where one is looking at a listed company which will have statutory obligations which mean it may want to or need to control such information even after its officers have left it. It would, as the Claimant submitted, be absurd to suggest that the Defendant was entitled to the return of its confidential information only at the very moment that Mr Gilauri's employment terminated and not a minute later. Delivery up obligations are commonplace in senior executive employment contracts, specifically to ensure that an employer has a contractual right to the return of its property post-termination.

72. I do not consider that the *Kent* case suggests this limitation. What Leggatt LJ said at [142] was:

> "First, what the parties have contractually agreed may determine whether their relationship is of a fiduciary nature – for example, whether they have entered into a partnership or whether one has agreed to act as agent for the other. Second, where the parties are in a fiduciary relationship, the scope and content of the fiduciary duties owed by one to the other will be shaped and may be circumscribed by the terms of the contract between them."

73. This does not suggest that any contractual agreement will limit or will displace the duties which would arise at common law. It merely explains that the contract will tailor those duties, and may result in their being less than they would have been at common law. Whether that is the case or not will be a question of construction in each case.

74. In this case I was certainly not persuaded that the contract should be read as excluding all fiduciary duties other than those which are expressly delineated in the contract. Again that is not how the *Kent* authority appears to treat the situation; and it is not what one would expect as a matter of common sense. Further the wording present in the relevant contracts which acknowledges fiduciary status (for example clause 2.5 of Mr Gilauri's contract acknowledges that he is a fiduciary of the company, to similar effect clause 2.7 of Mr Namicheishvili's contract) positively suggests the existence of duties existing but not expressly described in the contract.

75. I am also not attracted by the submission that a smartphone is not a computer for the purposes of this clause. Mr Polley is quite right that the authority cited, *R v Bannon* [2011] EWCA Crim 296 ("*we suspect that all devices which are internet enabled are probably in one form or another also computers*" in the context of a SHPO), is weak authority for the conclusion that it is. Nonetheless it seems to me that given what smartphones do, and that they manifestly hold programs and data, the clause would logically (and temporal factual matrix considerations aside) embrace all smartphones.

76. As for BG UK's second point that this construction should not be adopted because the parties would not have anticipated it covering smartphones in 2011, that might possibly be true. However, that is something on which some evidence might have been adduced if the point were taken seriously. Smartphones did exist in 2011 – and had done so for some time.

77. But in the event I am not sure that it makes a difference. This is because either (i) the parties did contemplate smartphones and WhatsApp type communication at the time (in which case the smartphone/computer equivalency is good) or (ii) they would not have envisaged in 2011 the communication of the sort used now, but they would have anticipated communications of the nature conducted in this case by computer (in which case the smartphone/computer equivalency is covered on a functional basis). In either event I am satisfied that the clause covers smartphones.

78. So, subject to the point about the interrelationship of Clause 15.1 and Clause 2.9, I would hold that Clause 2.9 gives the Defendant the right to access Mr Gilauri's smartphone which he used while under contract to the Defendant.

79. That interrelationship point is this. Setting aside the broad question about the temporal ambit of the clauses, which I have dealt with above, it was suggested that the scheme of Clause 15.1 drives a conclusion that only Clause 15.1 (and not Clause 2.9) is capable

of surviving termination. That is because 15.1(a) contemplates returning all BG UK owned Confidential Information while 15.1(b) contemplates destruction of all Confidential Information which is not BG UK owned.

80. What is said is that this clause contemplates that after termination Mr Gilauri will have no confidential information left; he will either have delivered it up, or destroyed it. In that context it is said that the Clause 2.9 right would not be of any practical use once Clause 15.1 had been complied with, and that in those circumstances and in circumstances where the BoG agreement did contain an express provision as to survival of obligations, I should read Clause 2.9 as temporally limited to the currency of the agreement.

81. Attractively as these submissions were put, I was not persuaded by them. One can clear the BoG survival provision out of the way first. The reading of Clause 2.9 cannot be driven by a provision in a later agreement. That can form no part of the relevant factual matrix. And while the point reading across from Clause 15.1 is plainly arguable, I consider that in the context of the very wide wording of Clause 2.9 (which does on its face permit access to his computer regardless of the personal nature of the material held on it) the better view is that it is not time limited, and that the provision operates as a backstop to enable BG UK to check that all relevant material has been handed over – or to access non-confidential but work related information if necessary.

82. The final layer of argument related to the fact that Mr Gilauri also had a contract with BoG, and it was said for BG UK that the records on the mobile phone could not be disclosed without consent from BoG, and hence that the records were not disclosable on the *Lonrho* test ([1980] 1 WLR 627). That submission was advanced by reference to the case of *Saltri III v MD Mezzanine SA and others* [2012] EWHC 1270 (Comm). In that case there was an application for specific disclosure between co-defendants in a dispute relating to a financial restructuring of a group of companies. During the course of the restructuring it became necessary to consider what the Security Trustee which held and enforced security for significant borrowings would do if the restructuring became a non-consensual restructuring. That involved a melding of teams between the lead lenders and the security trustee by way of secondment of EL employees to CB.

83. A dispute arose as to whether documents produced by employees of the security trustee (EL) during the course of secondment to the lender (CB) were produced during the course of their employment and were thus within the control of their employer. Hamblen J accepted submissions that:

> "…the question is whether EL have the relevant control, not whether a particular employee could in some capacity have had access to the documents. They provide the example of a person, A, who is an officer of two companies, X and Y (it matters not for this example whether X and Y are related companies). They submit that the fact that A may as director of X have access to its documents cannot mean that if Y is sued Y has control of X's documents.
>
> … where an employee is seconded to another employer, he owes duties of confidence to the second employer and he cannot

> disclose to the first company documents concerning the second, absence its express consent.
>
> … if an employee of X is seconded to another company, Y, documents produced by him during the course of his secondment are prima facie Y's documents confidential to Y and X has no right to inspect them. Any other conclusion would be far-reaching and indeed unworkable, …"

84. I am not persuaded that this argument bites at all in circumstances where there is no question of separating out BG UK messages from BoG messages, given the terms of Clause 2.9. It therefore does not matter for whom Mr Gilauri was acting. But to the extent the argument does bite I would conclude that the principle is not applicable here and that the case is distinguishable.

85. *Saltri* was a very different case, as the brief description I have given makes clear. Mr Polley accepted that the parallel was far from exact and that in *Saltri* one right was plainly superior to another. Here there is no secondment, such that Mr Gilauri should be regarded as working effectively for BoG, and giving them the right to "trump" BG UK. He worked as BG UK's CEO throughout. Even the terms of the BoG contract appeared to acknowledge the rights of BG UK. For example, that provided for him to report to the board of BG UK, and Clause 9.3 of that contract provided that he would not:

> "During or after the employment make any copies, notes or records of any matter relating to the business of the company or any associated company other than for the benefit of [BG UK]."

86. That being the case, it could not either be said to be a case where the rights are balanced, in which case BG UK said that consent would be necessary and there would be a lack of control for *Lonrho* purposes.

87. It follows that Mr Gilauri's mobile phone is within the control of the Defendant and the jurisdictional hurdle is cleared for that portion of the application.

Mr Namicheishvili's phone: control

88. The position is different as regards Mr Namicheishvili. He had no contract with BG UK. He did undertake fiduciary obligations, but in the context of his contract with BGEO Georgia – which is a contract governed by Georgian law on which I have no expert evidence. The case that he was a fiduciary of BG UK was a recent innovation and only fairly faintly advanced. It is not currently a pleaded issue. Given the seriousness of imposing fiduciary obligations, the possible arguments of Georgian Law (in particular given the existence of a "no third party rights" clause) I am certainly not prepared to conclude, on the material and limited argument before me, that such a relationship exists to the standard requisite for an obligation to disclose to result.

89. That leaves Mr Pipia with the indirect route, namely saying that his documents are in the control of BoG, and therefore within the control of BG UK. I reject that submission essentially for the same reasons as exist in relation to the same argument for Mr Gilauri. What is being sought by this route is effectively third party disclosure by the back door.

90. Mr Namicheishvili' s mobile phone therefore is not within BG UK's control. It follows that whatever dissatisfactions Mr Pipia has with the redactions in the WhatsApps and other documents provided by him, they are not ones I can order BG UK to make good. The disclosures of these materials have been in essence voluntary disclosures.

Emails: proposed further disclosure

91. Finally I come to the emails. In relation to this the issue is not about control but about what is said to be a shortfall in result. In essence what is said is that something must have gone wrong because the results of the disclosure exercise have been so slight and that a more extensive approach to disclosure should be ordered to make this good. This part of the application fails for a variety of reasons. One of those is that I am not persuaded that it proceeds on a correct premise, in that the "*something must have gone wrong*" analysis appears to be defective.

92. The starting point here is that this is not a "*smoking gun*" case. It is not a case where it is said that on Issue A there has been no disclosure, and it is inconceivable that there could be a nil return. There has been disclosure. Mr Pipia says that it is very low, and indeed the figures he relies on are low. However they are apparently deceptively low in that he has counted only emails where the first email in the chain is from the relevant persons. What I do not have is a figure for the total number of emails by those persons; and that is certainly different – Mr Polley tells me that his solicitors found 21 emails from the relevant persons within 3 email chains.

93. Secondly this is not a case where it can be said that contextually there simply must be reams of emails from these individuals, rather than a scattering. Different business models operate in different ways. Some businesses operate entirely by email, and the documentary record is full to bursting. Others however operate in large part by phone, by video call, or other more evanescent means. I have no reason to believe that it must be the case that the current case tends to the former paradigm rather than the latter.

94. Against this background I do not consider that the first hurdle of persuading me that that something has gone wrong is surmounted. In those circumstances the hurdle of necessity is unlikely to be cleared.

95. That might be possible if the disclosure exercise had revealed that the exercise performed was misaligned, or required refocussing to provide material necessary for particular points. But that is not really said to be the case. Materials have been revealed on the relevant issues. What is said is that there is likely to be more if a wider search was made. But that was probably always the case – a wider search would almost always provide more. There is nothing specific missing. I do not think it is appropriate, particularly in the context of the Disclosure Pilot's ethos, to say that the hurdle of necessity is met where further disclosure would merely provide the Roll-Royce outturn. One might also say that such an approach would be disproportionate.

96. Then one moves into the nature of the requests and the shift which is discernible in them from the requests which were made following Andrew Baker J's judgment. It was effectively conceded that the request now being made was a Model D request, when what had been put forward then were Model C requests. Ms Bingham said "*If the defendant wants to call it a Model D request we can live with that. We ourselves have formulated it in the alternative as a Model D request because we recognise that it has*

some of the characteristics of Model D. I don't shrink from that…". In the light of what Andrew Baker J said about the nature of a Model C request, that tacit concession is plainly right. Ms Bingham may be right that Andrew Baker J's judgment does not set its face against Model D; but in the light of it a very clear case for the need for the extra material would have to emerge, which it does not.

97. There are also issues about the clarity of the request, which would be another pre-requisite in the light of Andrew Baker J's judgment. Some effort has been made to link the request to the original disclosure issues, but the result is not felicitous. Ms Bingham agreed it was a "cold towel" job – which is exactly what requests to a non-party should not be.

98. To the extent that what is being sought is said to be Model C, (and considering proportionality if a Model D request is being sought) there is also very obvious scope for the requests to produce false positives in the sense of irrelevant documents. Roma*for example, can produce not just documents relating to any person called Roman known to the individuals, but references to the film "Roman Holiday", romantic weekends or romance languages. Similar problems arise in relation to EU Investments, Sistema (a company, but also the Russian word for system), Azot (a company but the Georgian word for nitrogen) and so forth.

99. Those problems were effectively conceded in reply when Ms Bingham accepted that what was being sought was something which would have to be whittled down by BG UK.

> "So what is envisaged is this: that requests are made to the subsidiaries in accordance with schedule 1, those documents are then provided to Freshfields and, once in Freshfields' hands, the defendant provides extended disclosure against the disclosure issues."

100. That, it seems to me, is the antithesis of what Andrew Baker J had in mind, or what should be expected of a non-party to this litigation. This is the more so when it is clear that in fact most of these searches have been done already via focussed requests made by BG UK to BoG and BGEO Georgia. The bulk of what would result has emerged. The request would now need to justify the re-running of the searches either by reference to the actual re-running or by reference to the incremental gains. Ms Bingham heroically tried to do so, but her efforts did not convince. The new documents did not emerge from repeat requests as such; and given the crossover between what was searched for and what was not the chances of significant further material emerging appears to me to be slight.

101. Taking all these points against the background of the scale of the existing disclosure, the stage of the proceedings and the quality of the existing disclosure, (with which I will discuss in more detail below) I would certainly not be prepared to exercise the discretion to order further disclosure in relation to the emails.

Mr Gilauri's phone: discretion

102. That just leaves the question of necessity and proportionality as regards Mr Gilauri's phone. Having decided that it is within the control of BG UK there remains a question

about whether I should exercise the discretion. I do this carefully bearing in mind the guidance of Vos CHC in *UTB*.

103. I bear in mind that there has been very extensive disclosure – more than 75,000 pages overall of which over 23,000 come from BG UK. That includes some WhatsApps - albeit that they have been redacted by Mr Namicheishvili. Having said that I do see some force in the arguments about the immediacy of WhatsApps which suggest at least a strong desirability of having such material in a more complete form, particularly against the background of what may be a broad and necessarily somewhat impressionistic exercise on bad faith under Georgian Law.

104. BG UK urges the state and stage of the proceedings. We are close to trial (19 April 2021). The remaining deadlines are numerous and now run hard up against the PTR. There is no room for destabilisation of preparations on either side. This is a factor which has rather more weight as regards the emails which carry with them potential for extensive results and review (and correspondence). It is not in my judgment such a considerable factor when it comes to the single phone records. A good deal of what is sought may not be recoverable because of a handset change which is said to have occurred in February 2017. In any event what is sought is focussed and would seem to have fairly small disruptive potential.

105. In the end the question is one of necessity for the just disposal of proceedings. Given (i) the picture which emerges of a business environment where the email and documentary record may not be of the most assistance; (ii) the immediacy of mobile phone communications via WhatsApp and similar means and (iii) the nature of the issues, and in particular the apparently broad view which is taken of bad faith under Georgian law, I am just persuaded that this hurdle is met.

106. That view is bolstered by the fact that the WhatsApps which are available at present have the potential to be a stacked deck. What has happened to the existing WhatsApps is undesirable. If (as it seems) it is jurisdictionally possible to ensure that so far as possible the WhatsApps in play are filtered only by qualified solicitors, rather than by a party witness, that strikes me as being desirable to the point of necessity.

Conclusion

107. In the circumstances I grant the application insofar as it relates to Mr Gilauri's phone only.