Neutral Citation Number: [2024] CA (Bda) 2 Civ

Civil Appeal No. 8 of 2022

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE SUPREME COURT OF BERMUDA SITTING IN ITS CIVIL JURISDICTION (COMMERCIAL COURT)
BEFORE THE HON. CHIEF JUSTICE
CASE NUMBERS 2017: No. 293 and 2020: No. 373

Before:

THE PRESIDENT, SIR CHRISTOPHER CLARKE
JUSTICE OF APPEAL GEOFFREY BELL

and

JUSTICE OF APPEAL SIR ANTHONY SMELLIE

BETWEEN:

CREDIT SUISSE LIFE (BERMUDA) LIMITED

Appellant

-v-

(1) BIDZINA IVANISHVILI

(2) EKATERINE KHVEDELIDZE

(3) TSOTNE IVANISHVILI

(4) GVANTSA IVANISHVILI

(5) BERA IVANISHVILI

(6) MEADOWSWEET ASSETS LIMITED

(7) SANDCAY INVESTMENTS LIMITED

Respondents

AND BETWEEN:-

CREDIT SUISSE LIFE (BERMUDA) LIMITED

Appellant

-v-

(1) BIDZINA IVANISHVILI

(2) MEADOWSWEET ASSETS LIMITED

(3) SANDCAY INVESTMENTS LIMITED

Respondents

Timothy Otty KC, Sebastian Isaac KC, Peter Dunlop and Izabella Arnold of Walkers (Bermuda) Limited, for the Appellant

Louise Hutton KC, Sarah-Jane Hurrion and Henry Komansky of Hurrion & Associates Ltd, for the Respondents

Date of Hearing: 11 December 2023
Date of Ruling: 29 February 2024

APPROVED RULING

CLARKE P

1. We have for determination the following matters:

   (i) whether leave should be given to Credit Suisse Life (Bermuda) Limited ("the Appellant/CSLB") to appeal to the Judicial Committee of the Privy Council ("JCPC") from our judgment of 23 June 2023 (and whether that appeal should include the Amended Grounds served on 20 October 2023);

   (ii) whether there should be a suspension of the execution of the judgment pending the appeal to the JCPC; or a direction that the judgment be carried into execution, subject to the Respondents entering into good and sufficient security for the due performance of such

order as may be made on the hearing of the appeal by the JCPC; or no form of stay or security at all.

2. So far as leave is concerned, the Respondents confirmed in their skeleton argument that they did not oppose leave to appeal in principle, given that the amount of the judgment (US $607.35 million plus interest - "the Judgment Sum") massively exceeds the amount required to be in issue (US $12,000 or more) in order for there to be an appeal as of right. At the same time the Respondents submitted that the appeal was "*hopeless*" or, at best "*a desperate last throw of the dice*", such that no or, at best, nominal security should be ordered.

3. That position involves an inherent inconsistency. Although the Appellant has an appeal as of right, it still requires the leave of this Court (or of the JCPC) to appeal to His Majesty in Council. The grant of leave is not a matter simply of form. The position was most recently addressed in the decision of the JCPC in *A v R* [2018] UKPC 8, a case from Guernsey, which has almost identical provisions as to appeals as of right as those in Bermuda.

4. In the course of his judgment in that case Lord Mance said this:

> "8 *An appellant's appeal as of right does not mean that the Court of Appeal has no control over the appeal. Orders in Council in many jurisdictions with appeals as of right to the Board provide for the appellate court to grant final leave to appeal only after the appellant has provided security for costs and complied with other prescribed procedural conditions, such as the preparation of the record of proceedings. More generally, a court of appeal has power to make sure that there is* ***a genuinely disputable issue*** *within the category of cases which are given an appeal as of right. Thus in Alleyne-Forte v Attorney General of Trinidad and Tobago [1998] 1 WLR 68 Lord Nicholls of Birkenhead, delivering the judgment of the Board, stated (p 73):*
>
> > *"An appeal as of right, by definition, means that the Court of Appeal has no discretion to exercise. All that is required,* ***but this is required****, is that the proposed appeal raises* ***a genuinely disputable issue*** *in the prescribed category of case."*
>
> [Bold added]

5. Tempting though it is to conclude that our judgment cannot sensibly be impugned, I am satisfied that CSLB's appeal raises genuinely disputable issues, even though, in my view, CSLB faces considerable difficulties in securing a successful outcome of the appeal (particularly in the light of the several different bases on which we have found against it). These issues include (a) whether CSLB owed any obligation to the Respondents other than to deposit the relevant funds in an account with Credit Suisse AG and instruct it as to how these assets should be dealt with; (b) whether the agreement with CSLB was that there should be a discretionary mandate; (c) the starting point of CSLB's obligation to invest; (d) the date when that obligation ceased; and (e) whether the "whole portfolio" model for damages was appropriate. I do not propose to expand on these points further in this judgment since it will be for the JCPC to determine their validity or otherwise.

6. I am also satisfied that CSLB should have leave to amend Ground 1 (7) of its Grounds of Appeal as follows:

> *"(7) At ¶222-223, the Court of Appeal anyway erred ~~in law~~ insofar as it did not consider or implicitly wrongly ~~as it~~ upheld the Chief Justice's conclusion that Mr Lescaudron's provision of false Direct Reports caused the Respondents loss, there being no analysis in either the Judgment or the Appeal Judgment capable of supporting that conclusion."*

7. The proposed amendment is of the most modest character. Since the un-amended grounds contend that the Court erred in upholding the conclusion referred to, it is debatable whether such an amendment is even needed. If the Court was wrong it would not seem to matter whether that error arose because the Court failed to consider the question or implicitly reached the wrong conclusion. And the Respondents, who contend that what is sought to be said was not the basis on which the Chief Justice's judgment was appealed and that the alleged failure by the Court of Appeal to consider this issue was not raised with the Court on the circulation of the draft judgment (as, indeed, it was not), are in no way prejudiced by the making of the amendment.

8. I would also allow the proposed amendment to paragraph 4 (2) (b) of the Grounds so as to make "*discretionary mandate*" read "*non-discretionary mandate*". This was a typographical error.

The existing stay

9. In his judgment of 25 July 2022 Hargun CJ recorded at [56] that CSLB contended that a stay should be granted pending appeal because:

> *(i) The process of enforcing an order for the recovery of the Judgment Debt in Georgia will be protracted and difficult with a real risk that the Judgment Debt or part of it, will ultimately not be recovered.*
>
> *(ii) The Plaintiffs' assets are controlled by Mr Ivanishvili and there are cogent reasons why the process of enforcement against those assets is highly likely to be difficult, protracted or impossible..."*

10. In response to those contentions, the Respondents agreed that the Judgment Sum should be paid into, and held in, an escrow account at Bank Julius Baer, pending determination of CSLB's appeal. Accordingly, Hargun CJ ordered a stay on condition that CSLB arranged to pay USD 607.35 million into the escrow account within 42 days. In so doing he stated that this arrangement "*meets all of CSLB's legitimate concerns in relation to the recovery of the monies paid in the event that CSLB was successful on appeal*": Stay Judgment [58].

11. The operation of the escrow arrangements is governed by (i) a tripartite escrow agreement dated 21 September 2022 between (a) the Respondents/Plaintiffs, (b) CSLB and (c) the Escrow Agent and (ii) a Deed of Agreement dated 23 September 2022 between CSLB and the Respondents/Plaintiffs.

12. The way in which the contractual machinery operates is as follows:

> (i) Clause 4 of the Deed of Agreement provides that at the "*Conclusion Date*" the parties *"shall send a joint instruction to the Escrow Agent for the release of the Escrow Assets*". The parties are thus mandated to instruct the Escrow Agent to release the Escrow Assets in accordance with the amount payable to the relevant party at the Conclusion Date.
>
> (ii) "*Conclusion Date*" is a defined term. Insofar as material, it is 14 days after the determination of the appeal before this Court (which was on 23 June 2023) *"unless within that 14 day period any Party applies to ... the Court of Appeal of Bermuda for an order that the Escrow Assets should not at that time be released in which case the period shall be*

extended until the determination of that application, including the determination of any appeal of the decision on that application".

The 14 day period for making an application was extended by a Consent Order dated 14 July 2023 which (a) recorded the agreement of the parties that the Conclusion Date should be 21 days after the date of determination of the appeal; and (b) provided that the Respondents would not take any steps to enforce until 21 days after the handing down of the Appeal Judgment. The Appellant's application for a stay was duly made on 14 July 2023.

13. Payment of the judgment sum was duly made into an account at Bank Julius Baer on terms agreed between the parties and it remains there, together with accrued interest. The parties then came to an agreement that $ 75 million (comprising $ 70,708,114.32 in damages and $ 4,291,885.68 in post-judgment interest) should be released from the escrow account to the Respondents in relation to the Appellant's admission of a limited liability to the Respondents, thereby reducing the outstanding principal under the judgment from $ 607.35 million to $ 536,641,885.68.

General principles in respect of the grant of a stay

14. The general principles in respect of the grant of a stay pending appeal to the Court of Appeal are well established. In *Hong Kong and Shanghai Banking v Newocean Energy* [2021] CA (Bda) 214 Civ at [26] I set out the position as follows:

"In Aabar Block SARL v Maud [2016] EWHC 1319 (Ch) Snowden J (as he then was) set out the law on stays of judgments and orders in the following terms:

22. The principles applicable on an application for a stay pending appeal were helpfully summarised by Mr Justice Eder in Otkritie International Investment Management Ltd & Ors v Urumov & Ors [2014] EWHC 755 (Comm) at paragraph 22. Mr Justice Eder stated:

"*As summarised by the claimants, the applicable principles are as follows:*

1. First, unless the appeal court or the lower court orders otherwise, an appeal shall not operate as a stay of any order or decision of the lower court: CPR r 52.7.

2. Second, the correct starting point is that a successful claimant is not to be prevented from enforcing his judgment even though an appeal is pending: Winchester Cigarette Machinery Ltd v Payne, CA Unrep, 10 December 1993, per Ralph Gibson LJ.

3. Third, as stated in DEFRA v Downs [2009] EWCA Civ 257 at [8]-[9], per Sullivan LJ (emphasis supplied):

> *'...A stay is the exception rather than the rule, solid grounds have to be put forward by the party seeking a stay, and, if such grounds are established, then the court will undertake a balancing exercise weighing the risks of injustice to each side if a stay is or is not granted.*
>
> *It is fair to say that those reasons are normally of some form of irremediable harm if no stay is granted because, for example, the appellant will be deported to a country where he alleges he will suffer persecution or torture, or because a threatened strike will occur or because some other form of damage will be done which is irremediable. It is unusual to grant a stay to prevent the kind of temporary inconvenience that any appellant is bound to face because he has to live, at least temporarily, with the consequences of an unfavourable judgment which he wishes to challenge in the Court of Appeal. So what is the basis on which a stay is sought in the present case?'*

4. Fourth, the sorts of questions to be asked when undertaking the 'balancing exercise' are set out in Hammond Suddard Solicitors v Agrichem International Holdings Ltd [2001] EWCA Civ 2065 at §22, per Clarke LJ (emphasis supplied):

> *'By CPR rule 52.7, unless the appeal court or the lower court orders otherwise, an appeal does not operate as a stay of execution of the orders of the lower court. It follows that the court has a discretion whether or not to grant a stay. Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce*

the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being able to recover any monies paid from the respondent?'

5 Finally, the normal rule is for no stay to be granted, but where the justice of that approach is in doubt, the answer may depend on the perceived strength of the appeal: Leicester Circuits Ltd v Coates Brothers pie [2002] EWCA Civ 474 at§ 13, per Potter LJ."

15. I would make two further observations. First, whilst the considerations set out above relate to the question as to whether a stay should be granted, it is open to the Court to decline a stay if sufficient security is provided as will ensure that the appellant will suffer no irredeemable prejudice if his appeal from the judgment made against him is successful[1]. Second, it is necessary to consider the impact of the provisions of section 5 of the Appeals Act 1911.

The Appeals Act 1911

16. Section 5 of the Appeals Act 1911 ("the Appeals Act") provides

"Payment of money or performance of duty; direction

5. Where the judgment appealed from requires the appellant to pay any money or perform any duty, the Court shall have power when granting leave to appeal, either to direct that the said judgment shall be carried into execution or that the execution thereof shall be suspended pending the appeal, as to the Court seems just; and in any case where the Court directs the said judgment to be carried into execution, the person in whose favour it was given shall, before the execution thereof, enter into good and sufficient security, to the satisfaction of the Court, for the due performance of such order as His Majesty in Council may think fit to make thereon."

17. This wording makes clear that, in relation to appeals to the JCPC, the Court of Appeal can choose to direct that the judgment shall be carried into execution or that execution shall be suspended, according

[1] There are, in effect, four courses which a Court of first instance can take in respect of a money judgment namely: (i) to allow execution of the judgment; (ii) to allow execution but only if the judgment creditor provides security for the return of any amount ordered by the Court of Appeal; (iii) to order a stay of execution; and (iv) to order a stay, but only if the judgment debtor provides security for payment of the judgment debt.

to what it thinks is just. But, if it thinks it just to choose the former course, the person(s) in whose favour the judgment was given are bound, before execution takes place, to give good and sufficient security for the payment of whatever the JCPC may ultimately decide is due.

18. I cannot regard that wording as entitling the Court of Appeal, if it grants leave, to allow execution but to make no order as to security or, indeed, an order for security which it does not regard as good and sufficient. As to that, security for an amount which is less than the Judgment Sum might be good (e.g. if it was a bank guarantee) but it might not be sufficient for the payment of whatever the JCPC might decide. (Nor does the fact that the escrow arrangements were agreed take the present situation outside the scope of section 5, as the Respondents suggest).

19. Insofar as there is any incongruence between the approach of the Supreme Court in relation to appeals to the Court of Appeal and that of the Court of Appeal in relation to appeals to the JCPC (where an order for execution without security is not an available course), that is the result of the imperative provisions ("*shall*") of the Appeals Act[2].

20. In the present case it seems to me apparent that, quite apart from section 5 of the Appeals Act, there are solid grounds for declining to allow the judgment to be enforced forthwith without any stay or security, rather than either granting some form of stay or allowing execution but ensuring that CSLB is able to recover any amount paid in respect of the Judgment Debt if its appeal against the judgment is successful. The principal factor that causes me to take that view is the risk, if enforcement of the judgment now takes place, but the appeal of CSLB is subsequently successful, in whole or in part, that CSLB will not be able to recover the whole sum and that, at the very least it may face severe difficulties in doing so. I set out my grounds for that conclusion in the paragraphs that follow.

21. Mr Ivanishvili is exceptionally wealthy and could no doubt repay the Judgment Sum or any part of it if ordered to do so by the JCPC. But, as he himself said in his evidence, he "*prefer[s] not to give details of the actual family wealth*". He has not identified any assets against which execution could readily be

[2] The Respondents submit that it would be very odd, if the Supreme Court had rejected an application for a stay pending an appeal to the Court of Appeal and had not ordered that any security should be given, that the judgment debtor (sic – *semble* creditor is meant) should be required to give security for an appeal to the Privy Council. That, however would be the effect of what the Act provides. Further, if there has been no stay by the Supreme Court and execution has taken place in full, no order by the Court of Appeal that the judgment shall be executed or that the execution should be suspended could be made. The section does not contemplate the court undoing an execution which has already occurred.

levied. The likelihood is that much of his wealth is held, indirectly, by companies or trusts, either in Georgia or elsewhere.

22. At a very late stage in the proceedings before us (namely on 23 November 2023) the Respondents made an offer to provide security, if that was required under section 5 of the Appeals Act. The offer related to two asset classes. The first class was of certain assets within the ultimate ownership and control of Meadowsweet Assets Limited ("Meadowsweet"), and its sole shareholder and director, Ekaterina Khvedelidze ("EK"), the second Respondent, located within Georgia. The second was a portfolio of shares in Lullaby Investments Limited ("Lullaby"), which are held at Bank Julius Baer.

23. As to the first class, it appears from the Respondents' security proposal document, sent with Hurrion's letter of 23 November 2023, that there is an unquoted investment in the Georgian Co-Investment Fund comprising a valuable portfolio of assets all of which are located in Georgia. These assets are held within a Group structure ("the GCF Group"), via GCF LP of the Cayman Islands, which is owned 100% by Meadowsweet. GCF LP is the 100% owner of GCF Luxembourg Sarl which owns a substantial number of subsidiaries with accompanying sub-subsidiaries, all of which are Georgian. The trading companies within the Group are said to be engaged in economic activities in Real Estate, Energy, Agriculture and Manufacturing within the Georgian economy. No indication is given as to which companies are engaged in which activity. None of the companies identified are public companies nor are their shares tradeable in any public markets.

24. The security proposal document states that there is existing debt (intragroup and external financial institution loans) of circa US$ 291 million and that EK, as ultimate beneficial owner of the GCF Group would wish to refinance the Group (with the consent of the other plaintiffs) and use some of the funds currently held in escrow so to do. She is, however, prepared to pledge the shares in GCF Luxembourg and provide such additional security as is considered necessary for the purposes of security pursuant to section 5. It is said to be the Plaintiffs' "*belief*" that, even after refinancing of external loans with financial institutions, the value of the assets held by the GCF Group is in excess of US $ 750 million.

25. The security could, it is said, include each or any of the following:

    (a) Share security to be granted by EK over her shareholding in Meadowsweet;

    (b) Security over the limited partnership interest owned by Meadowsweet in GCF LP;

(c) Share security over the shareholding owned by GCF LP in GCF Luxembourg;

(d) All assets security over all assets owned by GCF Luxembourg and possibly in addition;

(e) Either all assets or specific asset security granted by each of the trading subsidiaries owned by GCF Luxembourg.

26. I am not satisfied that any of the above constitutes good and sufficient security. Security of the latter kind, although it may take many forms (e.g. a demand guarantee, promissory note, letter of credit, pledge of tradeable shares or easily saleable assets of the relevant value, or a payment into an escrow account[3]) needs, generally speaking, to be readily available to pay any amount ordered by the JCPC at, or soon after, the moment when the order requires payment: see *Monde Petroleum SA v Westernzagros* [2015] EWHC 67 at [61]. Security by way of a charge over real property is not commonly ordered since if the real property is valuable there should be no difficulty in providing security by way of a bank guarantee or some other alternative which would be simpler to enforce against if necessary: *AP (UK) Ltd v Wheat Midland Fire and Civil Defence Authority* [2001] EWCA Civ 1917 at [17] – [18]. I would take the same view in respect of charges over shares in private companies or specific assets of such companies.

27. Further, if there is (as here) no evidence that a bank would decline to give a guarantee, the Court should not proceed on the basis that none was available. In addition, if the evidence was that a bank was not prepared to give a guarantee on the security of a charge over the property put forward as potential security that would, in the absence of explanation, itself indicate that the proposed security was inadequate.

28. Lastly, there is nothing before us but a statement of "*belief*" in the "*value of the assets*" held by the GCF Group after refinancing of external loans (the position in relation to other liabilities is unclear). We have no accounts of any kind, let alone accounts of particular companies, or any valuation of particular assets.

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[3] In *The Commissioner of Taxpayer Audit and Assessment v Cigarette Company of Jamaica Ltd (In Voluntary Liquidation)* the Jamaican Court of Appeal considered rule 6 of the *Jamaica (Procedure in Appeals to the Privy Council) Order in Council 1962* (which is in substantively identical terms to Section 5) and, by way of security, simply required the Cigarette Company's parent company to give an undertaking to repay any monies refunded to it by the Commissioner in the event the appeal to the Privy Council was successful. I would not regard such an undertaking by Mr Ivanishvili as sufficient security in the present case.

29. The first class of assets does not satisfy the requirement to which I have referred in [26] above. Enforcement of the security offered in categories (a) - (d) would in all probability involve a tortuous process of attempting to obtain value by a sale of the interest of the security giver in the relevant company or partnership, or by taking control of and realising value from underlying companies in Georgia. Category (e) is only put forward as a possibility and enforcement would involve securing or enforcing a sale of the relevant asset. All such enforcement would probably involve action in Georgia.

30. As to enforcement there are a number of potential problems. First, in relation to enforcement against Mr Ivanishvili himself, there is a risk that he will be sanctioned – something for which the European Parliament has repeatedly called for on account of "*his role in the deterioration of the political process in Georgia*": see, for example, the resolution of the European Parliament of 9 June 2022, followed by similar resolutions on 14 December 2022 and 15 February 2023. CSLB suggests that, in those circumstances, there is a significant incentive on him to move any assets outside Georgia into Georgia or to other jurisdictions outside the relevant sanctions regime or to transfer them to third parties or legal entities outside his direct control. Even if that does not happen there would be likely to be significant added difficulty in enforcing judgments against the assets of a sanctioned person in many countries. The Respondents characterise these suggestions as pure speculation. But, in my view, they represent a real risk.

31. It is, also, tolerably clear that if the judgment sum is remitted to Mr Ivanishvili or the other Respondents it or a substantial portion of it will be remitted to Georgia. In his affidavit of 14 September 2023 Mr Ivanishvili said in terms that his express purpose in seeking payment of the judgment debt out of escrow was that it should be available to be invested in the Georgian economy [16]; and in their letter of 23 November 2023, with accompanying security proposals, Hurrion indicated that the intent of EK, the 2nd Respondent was to "*use some of the funds currently held in escrow*" to refinance the Georgian Co-Investment Fund. Further, all the other Respondents are Georgian nationals and presumably some, perhaps most, of their assets are held in Georgia.

32. In relation to enforcement in Georgia there are potential problems. Georgia has a process for enforcing foreign judgments. But the evidence before us indicates that, because of Mr Ivanishvili's continuing position of influence in Georgia there is a real risk that the Georgian judiciary may reach a decision which is not free from Mr Ivanishvili's interference or influence. We have before us a sizeable body of evidence collated by Professor Bowring, an English academic with extensive academic and practical knowledge of the Georgian political and legal system. I do not propose to summarise it all but to cite

certain passages of it which appear to me to be the most significant, using the helpful summary contained in the Appellant's skeleton argument before us.

33. First, there is evidence as to the politicisation of Georgia's judicial system. Notably:

(a) Freedom House's Freedom in the World 2021 Report noted that *"[d]espite ongoing judicial reforms, executive and legislative interference in the courts remains a substantial problem* ..."The Heritage Foundation has similarly noted that *"[p]olitical interference undermines the independence of the judicial system"*.

(b) The European Parliament's Research Service has also noted the lack of effectiveness of judicial reforms, at least so far as political interference is concerned:

> *"Judiciary reform has emerged as a key priority for Georgia, in line with the country's commitments as part of the AA [the Association Agreement with the EU]. However, the reforms have mainly addressed institutional and procedural norms, while leaving untouched the 'system of influence' that permeates the judicial system from within and maintains the existence of an influential group of judges (called 'clan' by prominent Georgian watchdogs) backed by the ruling coalition."*
>
> [Underlining added in this and subsequent sub-paragraphs]

(b) The lack of effectiveness of Georgia's judicial reforms is confirmed by the decision of the US State Department on 5 April 2023 to sanction four Georgian judges for "*significant corruption*". According to the US Ambassador to Georgia, "*the State Department determined, based on credible and corroborated evidence, that these individuals abused their public positions by engaging in significant corrupt activity. Their actions undercut judicial and public processes by offering benefits to or coercing judges to decide cases in favor of political allies and manipulating judicial appointments to their benefit*".

(d) Those concerns are reflected in statements by members of the Georgian judiciary, quoted in an article published in 2022 by the Review of Central and East European Law:

(i) A Georgian District Court judge said in June 2018 that "[*t*]*hey [the Georgian Dream party founded by Mr Ivanishvili] wanted to reform the system, but then they thought: 'Why reform? These people are ready to serve us.' They struck a deal and it was all over*".

(ii) A non-judicial member of the Georgian High Council of Justice said in June 2018 that "I *think there is a deal between the judicial leaders and the Georgian Dream.... They told these judges: 'you are in charge of the system.' This is part of the deal they have with the ruling party that the system needs to work smoothly. They have to secure this. If there are disruptions, they will be told, 'We appointed you here to take care of things... you take care of the system and we will not touch you. In exchange, sometimes you have to do us favors on certain topics and this system has to work smoothly*'"

34. Second, there is evidence concerning the very significant influence of Mr Ivanishvili in Georgia:

(a) Transparency International Georgia has noted that "[*d*]*espite formally leaving politics, Bidzina Ivanishvili retains influence over Georgia's ruling party and a number of key institutions ...*".As Professor Bowring points out *"[a]ccording to Transparency International, such influence on democratic institutions qualifies as state capture"*. Those findings were published on 22 April 2022. On 27 September 2023 Transparency International Georgia published additional findings, noting:

> "*The current situation vis-à-vis corruption in Georgia is characterized by impressively low levels of petty corruption combined with near total impunity for high-level corruption. Unfortunately, Georgia is experiencing the ultimate form of corruption – a 'state capture'. According to Transparency International's Corruption Perception Index (CPI), the influence of the ruling party's founder over key institutions meets the definition of state capture*."

(b) The European Parliament has raised specific concerns regarding the politicisation of justice in Georgia and Mr Ivanishvili's systemic *"excessive influence*" over Georgia's "*political,*

economic and public life". On 14 December 2022 the European Parliament adopted its annual implementing report on the EU association agreement with Georgia, which said this:

> "*[The European Parliament] underlines the need to eliminate the excessive influence of vested interests in economic, political and public life as one of the priorities identified by the Commission to be addressed before Georgia is granted candidate status; recommends addressing the excessive influence of vested interests, notably of the oligarch and former Prime Minister Bidzina Ivanishvili, in a systemic way through structural and regulatory reforms in various areas of the country's political, economic and public life; [The Parliament] reiterates its call on the Council and democratic partners to take appropriate measures, including imposing personal sanctions on Ivanishvili and all those individuals enabling and responsible for the deterioration of the democratic process."*

(c) On 15 February 2023 the European Parliament reiterated these concerns in the context of the ongoing detention of ex-President Mikheil Saakashvili, adopting a resolution that "*underlines the fundamental role that oligarch Bidzina Ivanishvili has played in Mr Saakashvili's ongoing detention 'as part of a personal vendetta'. Therefore, Parliament reiterates its call on the Council and democratic partners to consider imposing sanctions on Mr Ivanishvili for his role in the deterioration of the political process in Georgia*"

(d) The European Commission has recently recommended that Georgia be granted candidate status to join the EU, but only on the understanding that a number of steps are taken – including, most relevantly, judicial reform.

35. I do not accept the suggestion that we should regard this evidence as inadmissible hearsay or, in any event, give little weight to it.

36. In addition, the concerns illustrated in what I have quoted above are reflected in the UK Home Office Country Policy and Information Note relating to Georgia of May 2021. That Guidance cites a series of sources speaking to a lack of judicial independence in Georgia and to the pervasive influence of Mr Ivanishvili over executive, legislative and judicial authorities. It makes observations to the following effect as sufficiently reliable to inform UK decision making:

(a) "*Ivanishvili ... holds no government office but exerts significant influence over executive and legislative decision making ... Ivanishvili's policy influence has been visible in the authorities' generally favourable treatment of his financial and business interests, and in particular the multi-billion dollar Georgian Co-Investment Fund (GCF)...*" 4.2.2[4];

(b) "*The Georgian Dream government is a typical post-Soviet agglomeration of personalities with no clear ideology ... The party is entirely dominated by an oligarch ... The personal and financial security of this oligarch is the main objective of the party*" 4.2.3;

(c) "*Many Georgians accuse the government of ... selective justice*" 4.2.4;

(d) "*Voters who helped the Georgian Dream sweep to power ... were forced to live through ... clannish rule in the judiciary system ... and clear signs of state capture*" 4.2.5;

(e) "*A number of notorious cases ... raised further suspicions about the politicization of the justice system*" 6.4.1.

(f) "*There remained indications of interference in judicial independence and impartiality. Judges were vulnerable to political pressure from within and outside the judiciary*" 6.4.2; and

(g) "*Despite ongoing judicial reforms, executive and legislative interference in the courts remains a substantial problem, as does a lack of transparency and professionalism surrounding judicial proceedings*" 6.4.3.

37. I have not forgotten the evidence of the Respondents' expert, Dr Khetsuriani, a former president of the Georgian Constitutional Court, which focuses on positive judicial reforms taken by Georgia since 1995, and refers to examples of recognition of the quality of its judicial system, such as the following:

(i) According to the 2022 'Corruption Perceptions Index' published by Transparency International, Georgia was 41st out of the 180 countries included in the index.

[4] The references are to the paragraph numbers in the Note. It is to be noted that the GCF (which is put forward as a potential security) is an entity in respect of which Mr Ivanishvili is said to have had influence with the authorities.

(ii) According to the 2021 'Rule of Law Index', Georgia was the leader in Eastern Europe and Central Asia. It also ranked among top 5 middle-income countries globally.

(iii) According to the 2023 Transparency Index, Georgia was in 17th place globally.

(iv) The European Anti-Corruption Centre's 2021 'Index of Public Integrity' ranks Georgia in 32nd place globally.

38. Dr Khetsuriani asserts that there is an absence of direct evidence that "*Mr Ivanishvili has influence over the judiciary in Georgia*" , that it is "*difficult to assess the extent of Mr Ivanishvili's alleged influence, if any, on the Georgian political system, let alone to establish whether he has current influence on the judicial system*" and that he is "*not aware of any evidence of Mr Ivanishvili exerting pressure in civil claims ... to gain an advantage for himself, his family and or his controlled businesses*". I cannot, however, regard that evidence as dispelling the concerns which naturally arise from the matters to which I have referred above.

39. Mr Ivanishvili has said in terms in his affidavit that neither he nor the other Respondents would take steps to make it difficult for CSLB to recover the Judgment Sum or to enforce any order made by the JCPC; that he would not seek to influence the judiciary of Georgia should proceedings be brought against the Respondents there; and that he remains able and willing to comply with any order that the JCPC may make. I would hope all of that to be true. But in the light of the material to which I have referred, which Mr Ivanishvili does not address in his evidence, it is not possible to be confident that that is so, and it is certainly not possible to regard the security suggested as anything like equivalent to a bank guarantee.

40. As to the second class, it is said that Lullaby is a private investment fund and that the Respondents are willing to give security over shares which are currently owned by Mr Bidzina Ivanishvili, EK, Mr Bera Ivanishvili (together with his wife Mrs Nanuka Gudavadze). The shares are held in accounts with Bank Julius Baer and are said to be currently worth $ 206 million. They are currently being used as collateral for a loan of $ 82 million from Bank Julius Bear. The Lullaby shareowners would, with the consent of the other Plaintiffs, use some of the funds currently held in escrow to repay the loan. Valuations from Bank Julius Bear of the separate shareholdings as of 31 October 2023 have been produced. The Respondents propose that there should be a declaration of trust in favour of CSLB to enable CSLB to take control of the entirety of the shareholding as far as might be required to satisfy any outstanding repayment obligations arising in the event of a successful appeal.

41. These assets are worth, at best $ 206 million, which is less than a third of the amount currently due under the judgment. Further, the basis of the valuations by Julius Baer is not apparent; and the valuations describe nearly 100% of the value as attributable to "*Alternative Investments*" (unspecified) rather than "*Equities and similar positions*" (also unspecified), which account for only $ 594,000.The valuations are, therefore wholly uncertain and incapable of realistic assessment; and the prospect of ready realisation of the value specified is highly questionable, not least because it would seem unlikely that any of the investments are readily tradeable. Nor is it apparent where the underlying assets are located. Accordingly I am not satisfied that the security suggested in respect of this second class is "*good and sufficient security*" either.

42. Further, we have no evidence that Mr Ivanishvili and the other Respondents could not procure a bank to give a guarantee (as Walkers for the Appellant had suggested on 28 November 2023), or that they have made any attempt to do so, or as to the terms, as between them and a bank on which they could do so. I can see no reason why we should proceed on the basis that they cannot do so; or why we should require CSLB to accept some markedly inferior security.

43. In my judgment the order which we should make is that the Judgment Debt (less the $ 75 million to which I have referred in paragraph [13] above) shall be carried into execution subject to the provision of security in the form of an irrevocable on-demand guarantee from a first-class bank in Switzerland or the United Kingdom guaranteeing the sum of $536,641,865.68, together with statutory interest at the judgment rate on the sum of $607.35 million from 29 March 2022 to the date on which the sum of $ 75 million is released to the Respondents and on the sum of $536,641,865.68 thereafter, for the due performance of such order as His Majesty in Council may think fit to make.

44. Such an order seems to me preferable to making an order which allows the continuation of the Escrow Account, which is the type of order which CSLB invited the Court to make, albeit on an enhanced and adjusted basis to ensure that the Escrow Account, which is currently invested at a net rate of c 1.46%, has sufficient to cover the Judgment Debt plus interest.

45. The order that I propose is consistent with the default position under the Escrow Agreement that the Escrow Assets should be released to the party which succeeded before this Court, and will mean that, for the price of a guarantee from a first class Swiss or UK bank, Mr Ivanishvili will get his hands on an enormous sum, which, according to him, he would be able to invest with returns of the order of 11% or

more. That he could achieve such returns is highly questionable but, if he is right on this, the release of the funds in escrow will enable him to do so. The alternative is that the funds remain locked in the Escrow Account and the Respondents will be entitled to interest on the judgment sum at the statutory rate of 3.5 % per annum. And, if this order is made, CSLB will have what is, in truth, good and sufficient security for the repayment of any amount which the JCPC may in due course order.

46. In the light of those considerations the balance of injustice is one that favours the Respondents, who would suffer a far greater injustice if they were denied the right to execute completely (even if the Escrow arrangements continued) than CSLB would suffer if the Respondents were paid the Judgment Sum against the security of a bank guarantee in favour of CSLB, in which case it would be difficult to see how CSLB would suffer any injustice at all. Contrariwise, if execution was permitted without a stay, the balance of injustice would favour the Appellant. But, having regard to section 5, that is not an option in any event.

47. We indicated to the parties the order that we proposed to make. A draft of this order was originally provided to us by the Appellant, and has now, subject to a few amendments, been agreed by the parties as giving effect to this judgment and the division as between principal and interest of the $ 75 million to which I refer in paragraph 13 above. This is, therefore, the order that we propose to make.

BELL JA

48. I agree.

SMELLIE JA

49. I also agree.