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Background

BGEO Group Ltd (the "**Defendant**") is the parent company and 100% shareholder of JSC BGEO Group ("**BG Georgia**") and the 79.75% shareholder of JSC Bank of Georgia ("**Bank of Georgia**") (together the "**BG Group**"). In 2011, the Bank of Georgia entered into a $100 million general credit line facility agreement with a Georgian company called Rustavi of which Roman Pipia (the "**Claimant**") was the beneficial owner.

Bank of Georgia enforced its security and sold the assets of Rustavi by way of auction on 1 September 2016 to EUI Investments Limited. The Claimant raised a number of complaints against the Defendant but primarily it alleged that EUI Investments Limited bought Rustavi's assets using a loan provided by BG Georgia and funded by the Defendant and that, in doing so, the purchaser was illegitimately connected to the BG Group companies and to the Defendant's Chief Executive Officer at the time. The Claimant issued proceedings against the Defendant and seven other defendants. In these proceedings the Defendant sought to establish that documents held by its subsidiary companies had never been within its control.

CPR 31.8 limits the duty of disclosure to those documents which are or have been in a party's control. Subsequent to the introduction of the Disclosure Pilot, implemented on 1 January 2019, CPR 31.8 is also now governed by the requirements of Practice Direction 51U. The Defendant made an application to the Court maintaining that it does not control documents held by its subsidiary company in which it owned a 100% shareholding. It was up to the Court to determine whether there was a control arrangement between the parent company and its subsidiaries and what constitutes "control" in a parent/subsidiary relationship.

Two letters were sent from the Defendant to the CEO's of both subsidiary companies on 30 March 2018 (the "**March 2018 Letters**") asking that "all the documents pertaining to [the claim] as requested by us or our advisors" be provided to the Defendant. Some specific documents were requested and provided, and it was agreed that these documents were within the Defendant's control.

Until this point, BG Georgia and Bank of Georgia had also been parties to the claim, however, on 27 April 2018, the Claimant served a Notice of Discontinuance on them.

It was later decided at a CMC in December 2018 that disclosure would be conducted according to the Disclosure Pilot Scheme.

On 7 June 2019, the Defendant wrote to BG Georgia to request "open access" for their solicitors to examine the subsidiary's documents and data for anything relating to the issues in dispute. BG Georgia responded on 28 June 2019 and maintained that it was obliged to protect the bank's information and would be unable to agree to this under Georgian Law. On 11 June 2019, the Defendant also wrote to the Bank of Georgia who replied in a similar fashion on 4 July 2019 that they would be "unable to comply" (the "**June 2019 Letters**"). The BG Group all shared a single electronic document storage system on a server in Georgia. This was not for document sharing purposes but for cost and administrative purposes.

The Decision

Mr Justice Baker considered CPR 31.8 and CPR PD 51U. He maintained that "*a parent company does not exercise control over the documents of or held by its subsidiaries merely by virtue of its shareholding in those companies (Lonrho Ltd v Shell Petroleum Co Ltd (No 1) [1980] 1 WLR 627)*".

He found that a parent company would only have control if either:

1 There is an existing agreement or understanding allowing free and unfettered access to the subsidiary's documents; or

2 The parent company has an enforceable legal right to obtain such documents.

CPR 31.8 applies to documents that are or have been in a party's control and, therefore, documents would have to be disclosed if access had been granted to third party documents even for a limited period of time. Mr Justice Baker held that control could apply to a single document and access given to documents under a "standing consent" by a third party, such as those documents provided subsequent to the March 2018 letters, would be disclosable even if access was not unrestricted. In considering whether third party documents were within a party's control for the purposes of disclosure, it was found that the following must be considered:

1 The scope of the documents covered by the consent - the types of documents covered by the consent;

2 The type of consent - how would the disclosing party get hold of the documents; and

3 The quality of consent - is there free and unfettered access to the documents.

In his judgment Mr Justice Baker found that the issue here was the quality of the consent. It was accepted that access to the subsidiaries' documents was agreed subsequent to the March 2018 letters but found that this access was not conditional on them being a party to the claim. He held that the agreement would not be terminated on this basis because, as subsidiaries of the Defendant, it was also within their interest to cooperate with defending the claim. The June 2019 Letters did not refer to the existing agreement in the March 2018 Letters and, therefore, it was found that the previous agreement was not terminated or changed in any way. Mr Justice Baker found that such a broad request as made in the June 2019 Letters was not sensible as it was probable that the subsidiaries would be unable to agree to such a request and, therefore, an adverse inference should be drawn. Mr Justice Baker advised the Defendant to make reasonable and proportionate requests for relevant documentation under the use of Model C Requests and pursuant to the agreement formulated in the March 2018 letters. He also advised that the parties "engage in constructive dialogue" in order to determine the extent of the Model C documents.

Commentary

Given that the new CPR PD 51U fails to define or provide further detail as to when documents

would be deemed to be within a party's "control", this decision provides welcome clarity on the scope of disclosure. Not only does the judgment clarify what constitutes control for the purposes of disclosure, but also the ambit of obligations on companies and their lawyers in obtaining documents from subsidiaries. It is worth noting that it is likely that this duty will extend to inter-group companies and this should be considered when reviewing any document sharing agreements or platforms.

For further information, please contact Georgina Squire or the Partner with whom you usually deal.