TBC BANK CASE:

Money Laundering Prosecution

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The TBC Bank Case: Money Laundering Prosecution of Mamuka Khazaradze, Badri Japaridze and Avtandil Tsereteli

EXECUTIVE SUMMARY

After an evaluation of the TBC Bank money laundering prosecution, the author is of the opinion there is no basis to prove Mamuka Khazaradze, Badri Japaridze or Avtandil Tsereteli committed a money laundering offence, either individually or as co-conspirators.

This opinion was made after an assessment of Georgian and international laws, the Indictment, the facts in issue, and accepted international jurisprudence in money laundering cases, information and material obtained during meetings in Tbilisi in February 2020, and from other sources as referred to.

This opinion is based upon the following key reasons:

- The alleged conduct is not capable of proving each element of the money laundering offence.

- There is no evidence from which to infer an intention:
    - to 'legalise'(launder) any funds obtained by way of loan;
    - to conceal the 'illegal origins' of the loan funds; or
    - to integrate those funds back into the legitimate economy.

- Even if the court found every fact in issue in the case in favour of the prosecution, those facts are not capable of supporting a money laundering charge.

- Money laundering and the underlying predicate crime (misappropriation in this case) are separate offences.

- Proof of a predicate the crime of misappropriation alone is not proof of money laundering.

- Even if the prosecution proved misappropriation, the subsequent conduct alleged could only support the *use* of misappropriated proceeds, not the *laundering* of those proceeds.

- Internationally courts condemn the practice of prosecuting for money laundering, when the conduct alleged extends no further than conduct capable of proving the predicate crime.

- Because of the statutory time limitation, the crime of misappropriation cannot now be prosecuted as a stand-alone offence, nor can it be proven as a predicate crime.

- It can be an abuse of process to circumvent a statute of limitations by prosecuting a person for an inappropriate or artificially constructed charge (money laundering) to get around the fact that the appropriate charge for the conduct alleged (misappropriation) is statute barred.

- In many jurisdictions, where the court has determined a prosecution is an abuse of process, the court has used its inherent power to protect the court by terminating those proceedings.

THE PROSECUTION INDICTMENT

The office of the Prosecutor General's Office of Georgia (POG) issued an indictment on 24 July 2019 against Mr. Mamuka Khazaradze and Mr. Badri Japaridze, accusing them of having committed the crime of money laundering, as set out in Article 194(2)(a) and (3)(c) of the *Criminal Code of Georgia* (CCG).[1] Mr. Avtandil Tsereteli was subsequently charged in August 2019 with assisting in the legalization of illicit income $ 16 664,000, committed in a group.[2]

The allegation, as set out in the Indictment, is that in April 2008, Khazaradze, then Chairman of JSC TBC Bank (TBC Bank), and Japaridze, then Deputy Chairman TBC Bank, conspired to deceitfully misappropriate large sums from TBC bank, which misappropriated large sums that they subsequently laundered.

The POG allege Khazaradze and Japaridze asked their friend, Avtandil Tsereteli, to take loans from TBC Bank. In April and May 2008, Tsereteli, through his companies Samgori Trade LLC (Samgori T) and Samgori M LCC (Samgori M), obtained loans from TBC Bank in the amount of 16,664,000 USD. On each occasion the loan funds were deposited into the Samgori accounts, the funds were converted into GEL and then transferred to the personal named accounts of Mamuka Khazaradze and Badri Japaridze, in respect of which corresponding loan agreements were executed.

The indictment alleges that to formally meet the banking regulations and to disguise their criminal intent, the legal entities elected by Khazaradze and Japaridze (Tsereteli's Samgori T and Samgori M companies) submitted false information about the purpose of the loan to TBC bank, stating falsely the loan was for "*augmenting the cash flow*". The prosecution further alleges that in order to deceive bank management, various immovable properties were formally mortgaged as collateral "*for securing the sham loans*".[3]

The prosecution alleges after Khazaradze, Japaridze and Tsereteli jointly, deceitfully and illegally misappropriated large sums from JSC TBC Bank, they conspired to legalize those illicitly gained sums in order to disguise their source of origin, location, real owner and genuine nature.

As set out in the indictment, the final date of the loan repayment was set as October 21, 2008. On October 21, 2008 and November 7, 2008, Samgori T and Samgori M were provided with extension of the loan repayment terms by one year. On December 31, 2008, the loans were classified as bad loans and were 'written off' by TBC Bank. The TBC Bank also released the properties from the mortgage used to secure the loan and on 8 August 2012, the bank fully released the above mentioned companies from any loan liabilities.

[1] The Indictment alleges M. Khazaradze and B. Japaridze committed the criminal offence set forth in Article 194(2)(a) and (3)(c) of the Georgian Criminal Code, - *the legalization of illegal income, i.e. money laundering (use, purchase, possession, conversion and transfer of the property) in order to conceal its illegal origin, as well as concealment or disguising of it genuine nature, source of origin, its ownership title, accompanied by the receipt of a particularly large income, committed by a group of co-conspirator.*

[2] See statement of POG referred to in Business Media Georgia. https://www.bm.ge/en/article/businessman-avtandil-tsereteli-has-been-charged-quotas-an-accomplice-in-money-laundering-casequot/38818/

[3] Indictment.

THE DEFENCE POSITION

The Defence denies the money laundering charges.[4] The Defence case is that Khazaradze and Japaridze borrowed money as part of a commercial arrangement to increase TBC Bank's statutory capital in 2007-2008 in the context of the dynamically growing Georgian economy. To affect their intention to increase the bank's capitalization, the two reached an agreement with the Allied Irish Bank (AIB), in which the AIB agreed to contribute USD 80 million in refinancing, provided TBC Bank managed to raise those funds first. Khazaradze and Japaridze secured 60 million from other sources, and reached out to Georgian business partners for the remaining 20 million, including Tsereteli, owner of Samgori Trade and Samgori M.

The Defence does not deny the existence of any of the loan transactions and maintains that all transactions and loans were part of a series of legitimate business transactions and loan arrangements related to the recapitalization of TBC bank. They deny the allegation that they misappropriated monies from the TBC Bank, and they deny they laundered monies received as loans from Tsereteli through the Samgori company accounts.

Khazaradze and Japaridze have testified that they were not aware that the money they received from Tsereteli was initially loaned from TBC Bank, but rather the monies came from his companies which had a line of credit in TBC Bank worth USD 35 million, enabling him to access funds at any time.[5] Tsereteli confirms this and has told investigators that he did not initially tell Khazaradze the source of the funds he had loaned him.[6]

Khazaradze and Japaridze maintain that the loans were written off at the same time as a total of GEL 200 million in bad debts accrued in TBC Bank were written off, in the context of post-war adjustment and the global financial crisis. In the court proceedings, there has been evidence from the bank authorities which clarified in the Court, that such a practice of writing off debts was applied to all major 'hopeless' loans war of 2008, being due to the heavy post-war economic conditions, as well as at the request of the National Bank of Georgia and international investors.[7]

The Defence have testified that loan agreements they had with various individual and company creditors were genuine loans to legal entities, and there has been other corroborating documentary and witness evidence which confirms this.[8] These individual and company creditors have all confirmed the genuine nature of the loan and the writer understands there is no evidence to support that the loans Khazaradze and

[4] Sources of information in relation to the Defence case are several and include information from the following sources: the Indictment; Mamuka Khazaradze and Badri Japaridze and other persons and organisations in meetings in Tbilisi in early February 2020; Transparency International Georgia TBC Bank Time-Line and other reports accessed through https://www.transparency.ge/en; Georgian and international media reports; *TBC Bank Case Report, prepared by Mr.* Moshe Lador and Mr. Paul E Coffey dated 1 and 2 September 2019; the *Amicus Curiae Opinion* of the Public Defender (Ombudsman) of Georgia, 9 January 2020; and other information sourced as per the footnote.

[5] Lador, Moshe, and Coffey, Paul E., *TBC Bank Case Report,* 1 and 2 September 2019.

[6] Ibid.

[7] Public Defender (Ombudsman) of Georgia, *Amicus Curiae Opinion,* 9 January 2020, which refers at page 2, to V.B. questioning materials, Materials of the Criminal Case #074020818802, volume 10, page 94-137, questioning of P.G., volume 10, pages 214-230.

[8] Ibid, page 10.

Japaridze had with others were a sham or fictitious from which to infer they were arrangements designed to conceal the true nature of funds.[9]

FACTS IN ISSUE

There is no dispute about the loans from the TBC Bank to Samgori T and Samgori M company accounts owned by Tsereteli. There is no dispute about the subsequent transfer from the Samgori accounts into the personal named accounts of Khazaradze and Japaridze. There is no dispute that the money received by them was used to repay creditors in a series of loan arrangements as alleged by the prosecution. There is no dispute that the subject loans were subsequently written off.

The issue for consideration is whether the transactions subsequent to the transfer of the loans from TBC Bank into the Samgori M and Samgori T accounts, were acts which could constitute money laundering.

The prosecution allege that these transactions amounted to layering and legalization of illicit income. The prosecution alleges the sums from the Samgori T and M accounts were transferred to the personal accounts of Khazaradze and Japaridze so that they could be laundered and suggest the subsequent transactions were fictitious.[10]

The Defence contend the receipt of the funds into their bank accounts, and the subsequent use of the monies to pay off creditors, were legitimate commercial transactions relating to legitimate loan arrangements associated with their intention to capitalize the JBC Bank. The Defence denies the intention to *legalize illegal income*.

The issue for consideration is whether, having regard to the GCC and interpretations of money laundering laws internationally, the conduct of Khazaradze, Japaridze and Tsereteli as alleged by the POG is capable of being conducted which if proven, could constitute a money laundering offence.

An analysis of the facts, support that whilst the facts in issue in this case are facts which might be capable of supporting a case alleging misappropriation, they do not support a case of money laundering. Even if the court found every fact in issue in favour of the prosecution, those facts are not capable of supporting a money laundering charge.

THE LAW

Khazaradze and Japaridze are charged under Article 194(2)(a) and (3)(c) of the Criminal Code of Georgia (CCG) which article provides:

> *Article 194 - Legalisation of illegal income (money laundering)*
> *Legalisation of illegal income, i.e. giving legal form to illicit and/or undocumented property (use, purchase, possession, conversion, transfer or other actions in connection with property) in order to conceal its illegal and/or undocumented origin or to assist another person in evading liability, as well*

[9] Public Defender (Ombudsman) of Georgia, op.cit., at page which refers to V.B. questioning materials, Materials of the Criminal Case #074020818802, volume 33.
[10] Ibid.

as concealment or disguising of its genuine nature, source of origin, location, dislocation, movement, its title and/or of other rights related to it, -
shall be punished by a fine or imprisonment for a term of three to six years.

2. The same act:
committed jointly by more than one person;
….
shall be punished by imprisonment for a term of six to nine years.
3. The same act:
….
c) accompanied by receipt of particularly large income, -
Shall be punished by imprisonment for a term of nine to twelve years.

A plain reading of Article 194 is that it is directed to criminalizing the process whereby illegally obtained money or property ('dirty money') is legalized or legitimized ('washed') into legitimate ('clean') money.

The wording in Article 194 is identical to the wording required to be adopted as set out in the Vienna and Strasbourg Conventions.[11]

THE MONEY LAUNDERING PROCESS

The *Financial Action Task Force* (FATF), the internationally recognised body for setting global money laundering standards, defines money laundering as the process used by criminals to disguise the source of their funds to enable them to enjoy the profits of their criminal activities without attracting attention to the underlying activity from which the monies were generated.[12] Criminals do this by disguising the sources, changing the form, or moving the funds to places or places where they were less likely to attract attention. There are typically three stages of money laundering, although funds do not always go through the three stages as follows:[13]

Placement – the launderer introduces illegal profits into the legitimate financial system. This might be done by breaking up large amount of cash into less conspicuous smaller 'structured' sums which are then deposited directly into a bank account or several bank accounts[14]. Placement may involve purchasing a series of monetary instruments (cheques, money orders, etc.) which are then collected and deposited into accounts

[11] Vienna *Convention on Money Laundering, Seizure and Confiscation of the Proceeds from Crime*, Clause I, Article 3 and Strasbourg Convention on Laundering, Search and Confiscation of the Proceeds from Crime, Clause I, Article 6.
In the *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime*, Strasbourg, 8.XI.1990, Chapter I Article 1e. provides that "predicate offence" means any criminal offence as a result of which proceeds were generated that may become the subject of an offence as defined in Article 6 of this Convention. Chapter II Clause 6 provides Each Party, shall adopt such legislative and other measures as may be necessary to establish as offences under its domestic law, when committed intentionally:
a. the conversion or transfer of property, knowing that such property is proceeds, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of the predicate offence to evade the legal consequences of his actions;
b. the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of, property, knowing that such property proceeds.

[12] *Financial Action Task Force* website www.fatf-gafi.org/faq/moneylaundering.

[13] *Financial Action Task Force* website www.fatf-gafi.org/faq/moneylaundering.

[14] Often referred to as '*structuring*' or '*smurfing*', is when a person deliberately splits cash transactions to avoid a single large transaction being reported in threshold transaction reports, or where they travel with cash amounts in a way that avoids declaring cross border movements of the cash. See AUSTRAC website, https://www.austrac.gov.au/glossary/structuring

in another location. Illegal cash may be placed with legitimate cash in a cash business such as a restaurant or a laundry.

Layering – after the funds have entered the legitimate financial system, in the 'layering' phase, the launderer engages in a series of conversions or movement of the funds to hide their illegal source. The launderer might wire the funds through a series of accounts at various banks across the globe, or through a series of shell companies whose only real purpose is to channel illicit funds. The launderer might disguise the transfers of payments as being for goods and services, thus giving a legitimate appearance.

Integration – this is the stage where the criminal profits re-enter the legitimate economy, disguised as profits from an overseas investment company, which funds are then used by the launderer to invest the funds into real estate, luxury assets or business ventures after having transferred illicit funds through a series of shell companies which had no real trading purpose, other than to hide the origin of the original funds.

THE ELEMENTS OF MONEY LAUNDERING

To prove money laundering, the prosecution needs to prove the following elements of the crime:

- There was a **'predicate crime'**.
- **'Illegal income'** was derived from predicate crime.
- There was **'legalization'** of the illegal income
- **'Intention to conceal'** the illegal origin of the income.

'Predicate Crime'

The prosecution must firstly prove to the criminal standard the existence of a predicate crime. The predicate crime relied upon by the POG in this case is misappropriation, the indictment alleging:

> "*After M. Khazaradze and B. Japaridze jointly, deceitfully and illegally misappropriated large sums from JSC TBC Bank, they conspired to legalize illicit sums in order to disguise their source of origin, location, real owner and genuine nature."*

The POG allege the statement in the loan application that the purpose of the loan was for *'augmenting the cash flow'* was a false statement. The prosecution alleges that in order to deceive the bank management, "*various immovable properties were formally mortgaged for securing the sham loans"*, which mortgaged immovable properties were periodically released from existing liabilities without grounds.

The prosecution case is that when the loan monies were transferred from TBC Bank and *'placed'* into the Samgori accounts, the predicate criminal activity was complete.[15]

[15] The Public Defender (Ombudsman) of Georgia, op. cit. observed in its *Amicus Curiae Opinion* after consideration of this case that, "*…it is not the refusal to pay the loan, its illegal disposal or any other kind of appropriation of the sum that is considered to be a crime, but conclusion of the loan agreement itself."*

The predicate crime must be proved to a criminal standard. However, significantly, in this case the predicate crime of misappropriation has never been proved against any party in relation to the 16,664,000 USD loan,[16] and is now statute barred.

No separate acts of money laundering

In this case the conduct relied upon to prove the predicate crime of misappropriation, is the same conduct that is relied upon to prove the money laundering offence. The conduct in question, which is the subject of the case, is whether Khazaradze and Japaridze misappropriated monies from the TBC Bank. There is no conduct separate from the conduct relating to the circumstances surrounding the securing of the loan from TBC to Tsereteli's Samgori company accounts.

There are no separate acts which could constitute money laundering in this prosecution against Khazaradze, Japaridze or Tsereteli. To prosecute for money laundering in such circumstances is contrary to accepted jurisprudence with courts in a number of jurisdictions expressing their clear disapproval of the use of charges of money laundering in circumstances where there was no separate act of criminality beyond the substantive offence charged.

In this case, the indictment purports to separate what is essentially the same conduct. The prosecution does this by alleging the predicate crime of misappropriation is complete at the point where money is 'placed' in the Samgori accounts, with all subsequent conduct amounting to money laundering.[17]

The subject prosecution is essentially a prosecution for two offenses in the one indictment, firstly the misappropriation offense, and secondly the money laundering offence. The prosecution relies upon an artificial separation of conduct which is conduct only capable of supporting a misappropriation offence. Money laundering is a separate offence involving separate conduct to the offence of misappropriation.

Such a construction as has occurred in this case have been found in other jurisdictions in similar cases involving similar factual scenarios, to be artificial and impermissible constructions condemned by the courts. Where money laundering has been prosecuted based upon conduct, which is simply conduct of the underlying crime, money laundering convictions have been overturned on appeal.[18]

The acts subsequent to the obtaining of the funds into the Samgori are acts relating to the *use* not the *laundering* of the funds. There has also been widespread condemnation of the practice to prosecute using money laundering laws where the evidence relied upon is simply evidence of the underlying predicate crime and the *use* of the property obtained from that predicate crime.

Prosecution policy guidelines in a number of jurisdictions which have been at the forefront of global anti-money laundering legislative initiatives, specifically require that the underlying offence ought to be charged as it represents the conduct which gave rise to the defendant's criminal proceeds and, "*that where a*

[16] The only action taken against Khazaradze and Japaridze has been in relation to violations of fiduciary duties, that is conflict of interest which did not lead to any criminal charge and which violations do not and could not constitute a predicate crime. This information is contained in many sources, including the *Amicus Curiae Opinion* of the Public Defender (Ombudsman) of Georgia, ibid., p. 8.

[17] Indictment.

[18] *Thorn v The Queen* [2009] NSWCCA 294; *Nahlous v The Queen* [2010] NSWCCA 58; *Schembri v The Queen* [2010] NSWCCA 149; *Dela Cruz v R* [2010] NSWCCA 333.

defendant has done no more than simply consume the proceeds of his own crime, an additional money laundering charge is not justified".[19]

The acts subsequent to the money being received into the Samgori accounts, including the payment into the personal named accounts of Khazaradze and Japaridze, is simply the *use* of the money which has been received, and is not conduct that can constitute money laundering in the circumstances of this case.

Money laundering and the underlying criminality are separate offences, and the practice of artificially laying money laundering charges in lieu of the underlying crime, for example, because of the typically higher penalties for money laundering is contrary to international practice.[20]

In Australia, a Federal Prosecution policy directive issued after such judicial criticism by superior appellate courts,[21]requires that before laying such a charge of money laundering, prosecutors must examine the nature and extent of the alleged criminal conduct disclosed by the evidence, and prosecutors "*should avoid constructing cases on an unduly artificial basis in order to lay money laundering charges.*"[22]

In one of the cases critical of the practice of indicting for money laundering when the evidence relied upon was evidence which supported a prosecution for the underlying crime which had not been charge, the Court of Criminal Appeal in *Thorn v The Queen* found as follows:[23]

> "[27] *This was an unusual use of the money laundering offence. To the extent there was an overlap with the fraud offences, the charge represented the use of the funds that had been dishonestly obtained under those offences. The criminality was very much in the obtaining of the funds not in their use. It is somewhat analogous to a robber being sentenced for both the robbery and being in possession of the stolen goods…*
>
> *[31] But here, the applicant was merely transferring the money obtained by the fraudulent claims from the company account to his personal account or drawing it from an ATM so that he could use it to gamble. He was doing nothing to hide the source or to change the nature of the fund. He was simply gaining access to them."*

Accordingly, if a person uses their fraudulently obtained money to pay off a loan, that is not money laundering, as the purpose is not to conceal the true source and pretend the money is legitimate – it is simply the way the proceeds were *used.* However, if a person arranged for fraudulently obtained funds to be deposited into smaller amounts into a number of bank accounts and then through a series of overseas shell companies, so as to give the appearance the money was legitimate income from a legitimate overseas business, that would be money laundering. In the latter case the acts are clearly consistent with the intention to 'legitimise' fraudulently obtained funds. In the former example they are simply using the funds which are proceeds of crime.

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[19] Bell, R. (2001), "*Discretion and Decision Making in Money Laundering Prosecutions*", Journal of Money Laundering Control, Vol. 5 No. 1, p. 41 at 45.

[20] Ibid., p. 45, and see generally.

[21] *Thorn v The Queen* [2009] NSWCCA 294; *Nahlous v The Queen* [2010] NSWCCA 58; and *Schembri v The Queen* [2010] NSWCCA 149; *Dela Cruz v R* [2010] NSWCCA 333.

[22] Commonwealth Director of Public Prosecutions (Australia's Federal Prosecuting Agency): *Money laundering – guidance for charging offences under Division 400 of the Code: National Legal Direction*, March 2017.

[23] *Thorn v The Queen* [2009] NSWCCA 294 per Howie J at [27] and [31].

Best practice guidance for prosecutors when determining whether to charge a money laundering offence in circumstances where the accused is alleged to a have committed the acts constituting the predicate crime, is reflected in the United Kingdom Crown Prosecutor Service (CPS) Policy guidelines, which guidelines include so far as is relevant to this case, the following:[24]

- The underlying offence ought normally to be proceeded with, as it represents the conduct which gives rise to the criminal proceedings.
- Money laundering and the underlying criminality are separate offences. Money laundering activities should not be seen simply as "part and parcel" of the underlying criminality.
- A money laundering charge ought to be considered in circumstances where the defendant has done more than simply consume the proceeds of his or her crime.
- Where there is any significant attempt to transfer or conceal ill-gotten gains money laundering should normally be considered as an additional charge, in part because the purpose of the concealment will be to defeat or avoid prosecution and confiscation.
- A charge of possession of laundered proceeds may not be necessary when charging the predicate crime, for example where the proceeds were "*simply kept under the bed",* as confiscations of the benefit of the offence may be sufficient.

Fundamental and universally accepted legal principles require that a prosecutor choose a charge which adequately reflects the nature and extent of the criminal conduct and which will provide the court with an appropriate basis for sentencing.[25]

In this case against Khazaradze, Japaridze and Tsereteli have been charged with money laundering in circumstances where the criminality alleged is concerned only with the elements of the crime of misappropriation, and any alleged criminality is associated only with the obtaining of the funds and the *use* of the funds alleged to have been misappropriated. There is no conduct consistent with money laundering.

Predicate crime alleged is statute barred

Because the POG is barred by the statute of limitations from proceeding with a misappropriation charge, it is now not possible to prove the alleged predicate crime. Even if there was sufficient evidence to justify laying a charge of misappropriation, the prosecution cannot now do so, and it must follow that it is also not now possible to prove to the criminal standard the existence of a predicate crime.

International law standards provide that Khazaradze and Japaridze should be able to rely upon the protection provided to defendants by the statute of limitations, irrespective of whether or not misappropriation charge could be proved. This is considered in more detail below.[26]

'Illegal Income' derived from predicate crime

[24] Proceeds of Crime Act 2002 Part 7 – Money Laundering Offences, Legal Guidance, Proceeds of Crime https://www.cps.gov.uk/legal-guidance/proceeds-crime-act-2002-part-7-money-laundering-offences (accessed 1 February 2020).

[25] Bell, R. (2001), "*Discretion and Decision Making in Money Laundering Prosecutions*", op.cit., p. 45.

[26] See below under heading Statute of Limitations.

To prove this element of the money laundering charge, the prosecution must be able to prove the existence of a predicate crime, and that the money is derived from that crime. If proving the predicate crime was not statute barred, and in the event the offence of misappropriation was proved, it would follow that the money obtained from any misappropriation would be proceeds of that crime.

However, as referred to above, proving proceeds of crime, is not of itself, proof of an offence of money laundering.

'Legalization' of Illicit Income

Legalization of illicit income refers to the 'laundering processes by which illegally obtained money is made to appear legitimate. It typically involves placement, layering and integration, although it does not have to involve all three steps, as referred to above.[27]

The indictment alleges:

> *"After M. Khazaradze and B. Japaridze jointly, deceitfully and illegally misappropriated large sums from JSC TBC Bank, they conspired to legalize illicit sums in order to disguise their source of origin, location, real owner and genuine nature. To further their intent, the received sums had to be converted and layered, and several transactions under various agreements have to be executed. To further their intent, according to their agreement, the amounts deposited to the account of Samgori M and Samgori T were converted into GEL on the day of their placement, and under the formal loan agreements, at an interest rate of 17%, were transferred to the personal accounts of M. Khazaradze and B. Japaridze at the same bank."*

It is alleged that upon *placement* of funds into the accounts of Khazaradze and Japaridze, the sums received from Samgori M and Samgori T were *'disposed, divided and under various agreements were transferred by Mr. Khazaradze and Mr. Japaridze in order to cover their personal loans in Georgia and abroad*'.[28] The indictment sets out in detail the manner in which the funds were used, and there is no dispute that the money was, as alleged, used to repay various loans. However, this is not money laundering it is simply evidence of how the funds were used.

Although the indictment refers to the 'placement' of funds into the Samgori accounts, such placement is not evidence of money laundering. It is simply a necessary step in appropriating the loan. If it were proven that there was a misappropriation, this would simply be the obtaining of the funds, not the laundering of the funds.[29]

The acts of transferring into the personal accounts of Khazaradze and Japaridze is simply evidence the obtaining and *use* of the appropriated funds (or misappropriated if proven), but not evidence of the laundering of those funds.

When considering whether a transaction supports money laundering activities, it is necessary to consider whether it makes commercial or business sense. For example, the frequent purchase and sale of investments

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[27] *Financial Action Task Force* website www.fatf-gafi.org/faq/moneylaundering

[28] Indictment.

[29] *Thorn v The Queen, op.cit.*

can be a sign of 'layering' activities, especially where fees and commissions exceed investment income.[30] Large cash movements, will often be capable of raising an inference money is proceeds of crime, in the absence of a compelling reason, commercial or otherwise, for eschewing the banking system, with the attendant risks of theft and loss.[31]

In this case, all the transactions remained part of the documented legitimate economy. The loans which have been verified, related to the intention of Khazaradze and Japaridze to capitalize the TBC Bank. There is witness testimony and documentary evidence that each loan has been verified as a genuine loan to genuine creditors and that each loan was to repay obligations which related to the TBC Bank capitalization. [32] None of the loans have been proven to be fictitious[33] or part of a series of illogical transactions with no business or commercial purpose.

Even if it was established that Khazaradze and Japaridze did know Tsereteli obtained the money from the TBC Bank as alleged and did misappropriate the 16,664,000USD,[34] their subsequent conduct did not extend beyond simply gaining access to the funds and using the funds to pay other loans. They did not take any steps to 'legalize' illegally acquired money through a series of illogical transactions. There was no integration back into the legitimate economy. The money was not channelled through a 'legalization' laundering process back into the pockets of Khazaradze and Japaridze or to any other party in a concealed form.

Accordingly, there is no conduct capable of supporting anything was done to change the character of the money legalize it *"through a series of transactions, conversions and transfers"* as alleged to conceal its illegal source,[35]and then integrate it back into the legitimate economy.

'Intention to conceal' the true source

To prove the money laundering offence, the prosecution must prove that Khazaradze and Japaridze intended to conceal the source of the funds. In this regard, the prosecution allege that after receiving the funds Khazaradze and Japaridze afterwards *'…legalized it through a series of transactions, conversions and transfers, thus concealing its illegal source, as well as by disguising its genuine nature, source of origin, movement and ownership title'*.[36]

However, there is nothing about the way in which any of the loan arrangements or transactions were structured from which to infer Khazaradze or Japaridze had the required 'guilty intention' (*mens rea)*[37] to conceal the source of the funds.

The money was received into their personal named account. There was no attempt by Khazaradze or Japaridze to conceal their involvement at that point, or at any subsequent point the source of the funds. All

[30] See Bell, Dr. R.E. "*Proving the Criminal Origin of Property in Money-Laundering Prosecutions*", (2000) Journal of Money Laundering Control, Vol. 4 No. 1, pp. 12-25.

[31] Ibid.

[32] Public Defender (Ombudsman) of Georgia, *Amicus Curiae Opinion*, op.cit., p.10.

[33] Ibid. p.10.

[34] This is suggested in Lador, Moshe, and Coffey, Paul E., *TBC Bank Case Report,* 1 and 2 September 2019

[35] Indictment.

[36] Indictment.

[37] *Mens rea* is Latin for "guilty mind" - is the mental element of a person's intention to commit a crime; or knowledge that one's action or lack of action would cause a crime to be committed.

the loan arrangements were documented and there was no attempt to hide either the origins of the funds, the recipients of the funds, or their own connection to the funds and loans, which loans related to the intention of Khazaradze and Japaridze to capitalize the TBC Bank.

In a money laundering case, an intention to conceal can be proven by direct evidence for example and admission, or by way of inference from the surrounding circumstances. In *United States v Garcia-Emanuel,*[38] the court stated that there were a variety of types of evidence to consider when determining whether a transaction was designed to conceal or disguise the nature, location, source, ownership or control of criminal proceeds. The list referred to included unusual secrecy surrounding the transaction; structuring the transaction in a way to avoid attention; highly irregular features of the transaction; using third parties to conceal the real owner; or a series of unusual financial moves culminating in the transaction and expert evidence on the practices of criminals.[39]

In this case there is no direct evidence of concealment, and Khazaradze and Japaridze do not admit or agree that they intended to conceal the true source of the funds. There are no other indicia from which to infer the *mens rea*.

By way of illustration, the case of *U.S. v Millender*[40] involved an investment fraud scheme whereby the defendants had solicited 600,000USD worth of "loans" from church congregants and other private lenders with promises of high rates of return in circumstances where they misled their creditors about the true purpose of the loan. Although found guilty of fraud, the Court dismissed the money laundering charges, finding that '*concealment'* of money laundering requires that the prosecution prove "*a specific intent to structure a transaction so as to conceal the true nature of the proceeds*."[41] The Court held that none of the transactions "*was sufficiently structured such that a jury could infer the required 'mens rea'*" because none of the transactions "*concealed the source of the money or reflected any other indicia that their purpose was to conceal their source*".[42]

Similarly, the funds in question in this TBC Bank case have never been concealed. The manner in which the loans were subsequently written off is contended by the Defence to not be unusual in 2008 due to the heavy losses in post-war economic conditions and in the context of the global financial crisis, which contention has been supported in evidence.[43] Irrespective of what the business practices were at the time, the writing off of the loan cannot in these circumstances be an act which can be argued as consistent an act of money laundering. The 'writing off' of the loan might arguably be evidence supporting a fraud (although this fact is

[38] *U.S. v. Garcia-Emanuel*, 14 F.3d 1469 (10th Cir. 1994)

[39] Ibid.; *Bell, Dr. R.E. "Proving the Criminal Origin of Property in Money-Laundering Prosecutions", op.cit.*

[40] *United States v Terry W. Millender And Brenda Millender*, 2017 Case No. 1:16-Cr-239-L & 2 (Ajt), which involved an investment fraud scheme charged against the founder and pastor, and the 'first lady' of a church (VLC). The evidence at trial established that the pastor conceived of and founded Micro-Enterprise Management Group (MEMG), purportedly for the purpose of helping the poor in developing countries by making small, short-term loans to entrepreneurs who wished to start or expand existing businesses. To fund the enterprise, MEMG solicited 600,000USD worth of "loans" from VLC congregants and other private lenders with promises of high rates of return.

[41] Ibid.

[42] Ibid.

[43] See Public Defender (Ombudsman) of Georgia, *Amicus Curiae Opinion*, op.cit., there is reference to bank authorities clarifying in the Court that the practice of writing off debts was applied to all major 'hopeless' loans after the war of 2008, at V.B. questioning Materials, Material of the Criminal Case #074020818802, volume 10, page 94-137, questioning of P.G., volume 10, pages 214-230.

not relied upon by the prosecution to prove the predicate crime of misappropriation[44]), but it is not evidence which supports any element of the money laundering charge.

Given the above, there is no evidentiary basis from which to infer there was an intention on the part of either Khazaradze, Japaridze or Tsereteli to conceal the '*genuine nature, source of origin, movement and ownership title'* as alleged.

STATUTE OF LIMITATIONS

By reason of the statute of limitations, the prosecution cannot prosecute the defendants for misappropriation under Article 180 of the CCG because it is statute barred by Article 71 of the GCC,[45] by reason of its maximum penalty.[46] The money laundering charge, which is aggravated by reason of the allegation is classified as an especially grave offence which statute of limitation does not expire for 25 years.[47]

A 'statute of limitations' is as a statute providing for a timeframe within which criminal proceedings must be instituted. Statutes of limitation provide for a non-exculpatory defense to a criminal defendant so even if the accused is criminally culpable, a statute of limitations will bar prosecution if an action is not commenced within the statutory timeframe.

To proceed in circumstances where there is a statutory prohibition against initiating a prosecution of the underlying predicate for misappropriation in this case, raises the following issues:

- It is not possible to launder illegal money unless there is proof of a predicate criminal offence from which the illegal money is derived. The statute of limitations prevents any person from now being prosecuted for misappropriation, so the prosecution cannot prove that there is a predicate crime to the criminal standard required.
- To proceed with a charge of money laundering in lieu of the underlying criminal activity where the conduct relied upon is conduct which might support the underlying predicate crime, because the money laundering charge attracted a higher penalty or to avoid a statute of limitations, is a practice that has been widely condemned in money laundering cases in other jurisdictions as an improper exercise of prosecutorial discretion, and abuse of process.

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[44] Public Defender (Ombudsman) of Georgia, *Amicus Curiae Opinion*, op.cit., page 2 referring to V.B. questioning Materials, Material of the Criminal Case #074020818802, volume V10, page 8.

[45] **Article 71** of the GCC provides:

The person shall be released from criminal liability if:

a) two years have passed since the perpetration of the crime for which the maximum sentence prescribed by the article or part of the article of the Special Part of this Code does not exceed two years of imprisonment; b) six years have passed since the perpetration of any misdemeanour; c) ten years have passed since the perpetration of any grave offence; d) twenty-five years have passed since the perpetration of any especially grave offence.

2. The term of limitation shall cover the period from the day of wrongdoing before the effectiveness of the conviction….

[46] **Article 12** of the GCC provide:

Crime Categories

1. In accordance with the maximum term of imprisonment provided as punishment by the article or part of the article of this Code, there shall be three categories of crime: a) misdemeanor; b) grave crime; c) especially grave crime.

2. Misdemeanor shall be the crime of aforethought or crime of negligence for practice whereof the sentence provided by this Code is not in excess of ten years of imprisonment.

3. Grave shall be the crime of aforethought or crime of negligence for practice whereof the sentence provided by this Code is not in excess of ten years of imprisonment.

4. Especially grave shall be the crime of aforethought or crime of negligence for practice whereof the sentence provided by this Code exceeds ten years of imprisonment or covers a full life term.

[47] Ibid.

It can constitute an abuse of process to commence criminal proceedings under a criminal offence provision that is not subject to an expired statute, in this case money laundering under A.194, but to rely upon the same conduct that would have been relied upon if the matter had been prosecuted for misappropriation under A.180, but for the statute of limitation.

Such prosecutions are considered to be an abuse of process in a similar way to a 'double jeopardy'[48] prosecution, and such prosecutions in other jurisdictions have been terminated, either permanently or conditionally, by way of a stay of proceedings being ordered on the charge or indictment.[49]

ABUSE OF PROCESS TO MANIPULATE LAW TO AVOID STATUTE OF LIMITATIONS

To prosecute someone for money laundering in circumstances where the predicate crime has never been prosecuted, or is statute barred, has been widely criticized in many jurisdictions.

The circumvention of a statutory limitation by prosecuting a person on an inappropriate charge of money laundering to overcome a statute of limitations for the appropriate charge for the alleged conduct (in this case misappropriation), can constitute abuse of process warranting the termination of the prosecution by the Court.

The Doctrine of Abuse of Process

The fundamental principles underlying the doctrine of abuse of process is preventing the judicial system being used in a way that is inconsistent with its fundamental values, purposes and principles. Abuse of process can result in termination of the proceedings permanently (the permanent stay) or a termination which is conditional upon certain action by the prosecution (the temporary stay).

The doctrine of 'abuse of process' is an essential part of the modern criminal law and can be understood "*as a concept descriptive of circumstances attending a prosecution such that the prosecution should be pre-emptively terminated by the court with jurisdiction to hear the matter*."[50]

Matters considered to constitute an abuse of process include: unjustifiable delay which results in the defendant suffering serious prejudice to the extent that no fair trial can be held; the trial of a defendant after extensive and prejudicial pretrial publicity; of double jeopardy; the trial of a defendant after the loss or destruction of relevant material by the prosecution; where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place because the prosecution have been guilty of investigative impropriety; and where the prosecution have otherwise been guilty of manipulation or misuse of the process of the court.[51]

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[48] '*Double jeopardy'* is the prosecution or punishment of a person twice for the same offence. Relevantly, in cases of double jeopardy, a trial is barred if the crime charged *'is in effect the same, or is substantially the same, as either the principal or a different crime in respect of which [the defendant] has been acquitted or could have been convicted or has been convicted*'. *Connelly v DPP* [1964] AC 1254, 1305 per Lord Morris.

[49] Lawrence, Stephen, *Abuse of Judicial Process in Criminal Proceedings* para 16-17
https://criminalcpd.net.au/wp-content/uploads/2017/01/abuse-of-judicial-process-criminal-cle-0117.pdf

[50] ibid., para 17.

[51] *Lee v the United Kingdom* ECHR 18 September 2012 (Apps no 25119/09, 57715/09 and 57877/09), para. 42; also see generally, Choo, op. cit., Chapter 2 'Prosecutor Manipulation or Misuse of Process, in *Judicial Stays of Criminal Proceedings* (Second Edition) Oxford University Press (2008).

As to the applicability of the abuse of process doctrine in criminal law and the role of the Courts in ensuring its processes are protected from abuse, Lord Devlin posed two powerful questions in House of Lords in *Connelly v DPP:* [52]

> *"Are the courts to rely on the Executive to protect their process from abuse? Have they not themselves an inescapable duty to secure fair treatment for those who come or are brought before them? To questions of this sort there is only one possible answer. The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused."*

Courts around the world have long held they have the power to unilaterally terminate criminal prosecutions that inflict unfairness or tend to undermine the legitimacy of the judicial branch of government. The European Court of Human Rights confirmed the jurisdiction of courts to so terminate and 'stay' proceedings In *Lee v the United Kingdom* as follows: [53]

> *"All criminal courts, including courts-martial, have a wide common law jurisdiction to stay proceedings on the grounds of abuse of process. The application to stay proceedings is in the nature of a "plea in bar"…. [and] operates to prevent a case proceeding to trial."*

Courts in many jurisdictions have attempted to broadly categorize the types of circumstances where a court should refuse to allow a criminal prosecution to proceed because to do so would constitute an abuse of process, some are as follows:

- In *R v Beckford*, the Court of Appeal of England and Wales considered that whilst many reasons have been identified, there are two main strands: [54]
  a) Cases where the court concludes that the defendant cannot receive a fair trial; and
  b) Cases where the court concludes that it would be unfair for the defendant to be tried.
- In *Attorney-General of Trinidad and Tobago* v. *Phillip*, it was described as *"... a formidable safeguard to protect persons from being prosecuted in circumstances where it would be seriously unjust to do so*". [55]
- In *Canadian Union of Public Employees v City of Toronto and Attorney General of Ontario,*[56] the Supreme Court of Canada held, "*Judges have an inherent and residual discretion to prevent an abuse of the court's process*".
- In *Moti v The Queen,*[57] the High Court of Australia confirmed two broad purposive categories of abuse of process: *"…. First, "the public interest in the administration of justice requires that the court protect its ability to function as a court of law by ensuring that its processes are used fairly by State and citizen alike"…. Second, "unless the court protects its ability so to function in that way, its failure will lead to an erosion of public confidence by reason of concern that the court's processes may lend themselves to oppression and injustice". Public confidence in this context refers to the trust reposed constitutionally in the courts to protect the integrity and fairness of their processes. The*

[52] Ibid, 1254

[53] *Lee v the United Kingdom*, op. cit.

[54] (1996) 1 Cr. App. R. 94 at 100

[55] [1995] 1 A.C. 396

[56] 2003 SCC 63

[57] [2011] HCA 50 (7 December 2011) at [57] , [77] ff

concept of abuse of process extends to a use of the courts' processes in a way that is inconsistent with those fundamental requirements".

In the case of *Director of Public Prosecutions v. Humphreys,*[58] *(referred to in Lee v the United Kingdom*) the discretion to stay a proceeding was said to be of "*great constitutional importance*" and a power which "*should be jealously preserved*". The concept of the right to a fair trial and to be treated fairly which underpins the abuse of process doctrine, is enshrined in the Constitution of Georgia.[59] Article 2 of the GCC requires compliance with the Constitution of Georgia and also with principles and standards of international law.

Avoidance or Manipulation of Statutory Time Limits

In circumstances where, *'the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality,"*[60] the courts have found this to be an abuse of process which would justify a stay of proceedings.[61]

Relevantly, it is observed in support of the prosecution in the *TBC Bank Case Report,* that the predominant facts alleged are *"fraud-type"*: [62]

"In this case, the predicate activity is clearly fraud committed against the Bank. Such activity may itself violate one or more "fraud-type" statutes covered separately in the Criminal Code of Georgia. We are advised by the prosecution that Georgia's statute of limitations makes the filing of separate charges in this case pertaining to predicate offenses of fraud, etc. impermissible."

The predominant facts in issue in this case are whether or not the evidence supports a misappropriation. The facts in issue in this case do not extend beyond facts in issue for a misappropriation.

The authorities establish the following relevant propositions in cases where the conduct should have been prosecuted under a different section of the same Act, but the time limit for the prosecution under the appropriate section has expired:

- The same conduct cannot be prosecuted under another section to avoid or circumvent a statutory time bar.
- A prosecution can be brought under a different section for independent conduct which was not merely part of the conduct which constituted the time barred offence.
- The appropriate charge depends on the predominant facts of the case.

In this case the prosecution relies upon the same predominant facts to prove the money laundering offence, as they would if the prosecution was for misappropriation. The allegations at their highest might be capable of supporting a misappropriation offence, but do not support a money laundering offence. The predominant arguments put forward by the prosecution are directed towards the circumstances surrounding the original loan to the Samgori companies.

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[58] [1977] A.C. 1.

[59] Constitution of Georgia, Article 31

[60] *R v Derky Crown Court, exp Brooks* (1985) 80 Cr App R 164, 168-9 (decision of 1984).

[61] Choo, Andrew L T, *Judicial Stays of Criminal Proceedings* (Second Edition) Oxford University Press (2008) p.21.

[62] Lador, Moshe, and Coffey, Paul E., *TBC Bank Case Report,* 1 and 2 September 2019.

The issue of attempts to circumvent statutory time limits was considered by the U.K. House of Lords in *R v J*[63] in which case the Court accepted the contention that the proceedings should be stayed as an abuse of process in circumstances where the charge was laid to circumvent a statute of limitations. In that case the prosecution was indicted under section 14 of the *Sexual Offences Act 1956* because section 6(1) which was appropriate to the facts of the case was subject to a 12-month time limit for prosecution. In that case, even though the House of Lords considered that the CPS had acted in good faith, and also that the prosecution was in the public interest, a stay should be granted:[64]

> *"Parliament does not intend the plain meaning of its legislation to be evaded and it is the duty of the courts not to facilitate the circumvention of the parliamentary intent ... In the present case the intent to avoid the statutory time limit is freely acknowledged and, in any event, manifest. In these circumstances the conclusion is inescapable: as a matter of construction of the Act the time limit cannot be circumvented by the manipulation of the indictment to charge conduct falling squarely within section 6(1) as an offence under section 14 solely in order to avoid the time limit under the former provision."*[65]

In a case where a stay was granted for abuse of process involving charges under a Penal Code for making a false statement, a permanent stay was granted on the basis that the conduct, which was based on the filing of a false tax return, was statute barred under the Income Tax Act.[66]

The House of Lords has also considered the question whether it is an abuse of process to bring a new charge against the defendant after he or she has previously been charged with a different offence in respect of the same incident, and the custody time limit relating to this previous charge has expired, and in the words of Lord Hope of Craighead in *R (Wardle) v Crown Court at Leeds*:[67]

> *"…the concept of abuse of process is not to be confined to cases where there is proof of conscious dishonesty or of an improper motive on the part of the prosecution …. It seems to me that a broader and simpler test is, in this context, more appropriate. That would be more in keeping with the purpose of article 5.1 of the [European Convention on Human Rights], which is to protect the individual from arbitrariness when he is deprived of his liberty."*

A statute of limitations is a statutory protection provided by the law to a defendant. Like any other defendant, Khazaradze, Japaridze and Tsereteli should not be deprived of that statutory protection in circumstances where an inappropriate charge of money laundering is laid, which money laundering charge has the effect of circumventing the statutory bar to the appropriate charge for the conduct alleged.

The principles of abuse of process provides that a statute of limitation protection must prevail, irrespective of whether the defendants are guilty of the predicate crime, irrespective of whether it is in the public interest to prosecute a particular defendant,[68] and irrespective of whether there is a proper or any improper motive behind this prosecution.[69]

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[63] [2004] UKHL42, [2005] 1 AC 562

[64] Ibid., [39].

[65] Ibid., [37].

[66] Chaudhry v State [2012] FJHC 1229 (Fijian High Court)

[67] *R (Wardle) v Crown Court at Leeds* [2001] UKHL 12, [2002] 1 AC 754, [97].

[68] *R v J.* op.cit. *[69].*

[69] *R (Wardle) v Crown Court at Leeds,* op.cit.

CONCLUSION

Having regard to Georgian and international law standards and accepted jurisprudence, the facts in this case do not disclose conduct on the part of Mamuka Khazaradze, Badri Japaridze or Avtandil Tsereteli, which could support the money laundering offence with which they are charged.

There is no conduct capable of proving the elements of a money laundering crime. The conduct relied upon, and the facts in issue in this case, do not extend beyond facts in issue which might, if proven, support the underlying predicate crime. The facts are not capable of supporting the offence of money laundering under Article 194 of the GCC. Courts have and continue to condemn the practice of prosecuting for a money laundering offence when the conduct alleged goes no further than to the prove the existence of the predicate crime and no separate act of money laundering. The appropriate charge for the conduct alleged in this case is statute barred. To circumvent or avoid a statute of limitations by prosecuting someone for money laundering is an abuse of process contrary to the fundamental principles protecting the rights of all defendants.

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