Westacre Investments Inc *v* The State-Owned Company Yugoimport SDPR (also known as Jugoimport-SDPR) and others
[2015] SGHC 143

Case Number : Originating Summons No 1311 of 2004

Decision Date : 27 May 2015

Tribunal/Court : High Court

Coram : Edmund Leow JC

Counsel Name(s) : Giam Chin Toon S.C., Tan Hsuan Boon and Mark Lee (M/s Wee Swee Teow & Co) for the plaintiff; Gabriel Peter and Govindarajan Asokan (M/s Gabriel Law Corporation) for the first and second defendants; Paul Tan Wei Chean and Wong Yoke Cheng Leona (M/s Allen & Gledhill LLP) for the third defendant; Lee Eng Beng S.C., Paul Tan and Sarah Hew (M/s Rajah & Tann LLP) instructed by Suresh Damodara (M/s Damodara Hazra LLP) for the fourth and fifth defendants.

Parties : Westacre Investments Inc — The State-Owned Company Yugoimport SDPR (also known as Jugoimport-SDPR) — Deuteron (Asia) Pte Ltd — DnB Nor Bank ASA Singapore Branch — Teleoptik - Ziroskopi — Zrak - Teslic — Cajevac (Previously Known as Rudi Cajavec)

Evidence – Proof of Evidence

Trusts – Express Trusts

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 121 of 2015 was dismissed while the appeals in Civil Appeals Nos 117, 118 and 134 of 2015 were allowed by the Court of Appeal on 31 August 2016. See [2016] SGCA 51.]

27 May 2015 Judgment reserved.

Edmund Leow JC:

Introduction and Background

1 This case marks the latest chapter of a judgment creditor's long and circuitous journey to realise an arbitral award that was made in its favour more than 20 years ago. In February 1994, Westacre Investments Inc ("the JC") prevailed in arbitration proceedings against the judgment debtor, which is now known as The State-Owned Company Yugoimport SDPR or Jugoimport-SDPR ("the JD"). A dispute had arisen over an agreement in which the JC agreed to provide consultancy services to the JD, which was a supplier of defence equipment in the former Yugoslavia. The arbitral tribunal found the JD liable to pay a sum of more than US$50m. Attempts were made to enforce the award in various jurisdictions; in March 1998, the JC managed to obtain a judgment in the English High Court for more than £41m. In 2004, the saga started to unfold in Singapore. Court proceedings here began after the JC uncovered evidence that the JD's subsidiary – a Singapore company now called Deuteron (Asia) Pte Ltd ("Deuteron") – maintained the JD's funds in bank accounts with DnB Nor Bank ASA Singapore Branch, a Norwegian bank with a Singapore branch ("the Bank"). As of March 2009, the funds amounted to more than US$17m.

2 The JC thus moved to garnish the funds to partially satisfy its judgment debt. It applied to register the English judgment in Singapore on 5 October 2004. By 28 October 2004, the JC had

obtained a Mareva injunction – which remains in force – to freeze Deuteron's accounts with the Bank. The JC then filed two summonses on 28 April 2005 for provisional garnishee orders against Deuteron and the Bank. These summonses were filed on the back of the Notes to Deuteron's annual financial statements for the financial years between June 1998 and June 2003, which stated that the funds belonged "wholly and exclusively" to the JD. The affidavit of Mr Lim Poh Weng ("Mr Lim") dated 10 November 2004 and filed on behalf of Deuteron also stated that Deuteron held funds of about US$15m in the bank accounts "for and on behalf" of the JD. The day after the two summonses were filed, the court issued garnishee orders to show cause, which were served on the Bank, Deuteron and the JD.

3 But just when the JC thought that its wait was over, the JD applied in June 2005 to set aside the registration of the English judgment. The JD had argued that the English judgment should not be registered in Singapore as it was no longer enforceable in England due to the time period that had elapsed. The application made its way to the Court of Appeal, which on 9 May 2007, directed the JC to refer to the English courts the question of whether the English judgment remained enforceable. Tomlinson J in *Westacre Investments Inc (a company incorporated under the laws of Panama) v The State-Owned Company Yugoimport SDPR (also known as Jugoimport-SDPR)* [2008] 1 All ER (Comm) 780 answered the question in the affirmative. On 30 December 2008, our Court of Appeal dismissed the JD's application.

4 As the garnishee proceedings resumed, three new parties – Teleoptik-Ziroskopi, Zrak-Teslic and Cajevec ("the Other Parties") – entered the scene to stake a claim to the funds. To that end, affidavits were filed in February and March 2009 by the Other Parties, JD and Deuteron ("the Defendants"), which made a volte-face. Essentially, all the parties were saying that the funds in Deuteron's bank accounts belonged to the Other Parties instead of the JD. The Defendants each filed summonses for an order that the garnishee proceedings be converted to a writ action and tried. The JC and the Other Parties also filed summonses seeking a summary determination of the question of the ownership of the funds: see *Teleoptik-Ziroskopi and others v Westacre Investments Inc and other appeals* [2012] 2 SLR 177 at [8] ("*Teleoptik-Ziroskopi v Westacre*"), which helpfully recounts the following case developments in the High Court (at [9]-[11]):

(a) On 24 August 2010, the applications to convert the garnishee proceedings to a writ action were dismissed. These orders were confirmed on 8 November 2010.

(b) On 21 September 2010, the JD was granted one month to file further evidence but it missed the deadline.

(c) On 2 November 2010, the JD's request for a time extension was refused.

(d) On 17 December 2010, the applications of the JD and the Other Parties to admit further evidence were dismissed.

(e) On 19 May 2011, the High Court summarily determined that the funds belonged wholly and exclusively to the JD, and made the interim garnishee orders granted in April 2005 (see [2] above) final.

5 The Defendants filed appeals against the various orders of the High Court Judge. Having heard all parties, the Court of Appeal ("CA") in *Teleoptik-Ziroskopi v Westacre* allowed the appeals in part. It set aside the order making the garnishee order absolute and directed a trial to resolve the disputes of fact. This was how the case came before me.

The Court of Appeal's decision

6 It is instructive to reproduce the facts canvassed before the CA and its decision in greater detail for its direct relevance to the present case and as it suggests some "terms of reference".

7 The Defendants furnished four documents to support its contention that the Other Parties were the beneficial owners of the funds. According to them, the JD – then known as the Federal Directorate of Supply and Procurement – had contracted with a foreign government on 23 July 1991 to supply it with military equipment ("the Supply Contract"). However, the JD could only have concluded the US$54m contract with the consent of the Other Parties, which were domestic manufacturers that had entered into negotiations with the foreign buyer over the equipment. The Other Parties had to contract through an intermediary as under the Yugoslav socialist regime, only the JD was allowed to enter into military contracts with foreign buyers, unless the government allowed otherwise. Therefore, the JD was simply operating as the Other Parties' "commission agent", a role that entitled it to about 2.5% of the contract price for its efforts, including negotiating with the foreign buyer on contractual terms.

8 As provided for in the Supply Contract, the foreign government sent US$10,631,624.72 ("the Advance") to the JD in Yugoslavia so that the Other Parties could buy raw materials from overseas. The Advance was paid to the National Bank of Yugoslavia in US currency and was immediately credited to the JD's account with the National Bank of Yugoslavia in dinars. As the Yugoslav dinar faced strong inflationary pressure at the time, the Other Parties wanted to reconvert the Advance and keep it in US currency, as their payment for the raw materials were to be made in a foreign currency. Given that currency controls stood in the way of the Other Parties having a foreign currency account, the Other Parties and the JD decided that the JD would transfer the Advance to Deuteron. This agreement was encapsulated in a document dated 21 October 1991 between the JD and Deuteron ("the Pre-Protocol"). The Advance was subsequently transferred by the JD to Deuteron's accounts with the Bank, which received the same sum in US currency on 18 November 1991. The Advance could still be traced to the funds in Deuteron's bank accounts.

9 According to the Defendants, the JD and the Other Parties had entered into an informal or oral commission agreement about four months prior to the actual commission agreement, Contract No. E/4860-1 ("the Commission Agreement") that was dated 12 December 1991. About a fortnight later on 28 December 1991, all the Defendants entered into a Protocol that "detailed the mechanism by, and the purposes for which the [Advance] would be paid out" on the instructions of the Other Parties ("the Protocol"). Appendix 1 of the Protocol also set out, *inter alia*, how much of the funds belonged to each of the Other Parties (US$9,242,868.74) and the amount of the funds payable to the JD and various foreign agents as commission.

10 However, about six months later, the Monetary Authority of Singapore acted on a United Nations Security Council resolution by issuing a circular that required Yugoslavia-related assets to be frozen. As the circular was only revoked on 20 March 2009, the Other Parties' alleged assets remained frozen until then.

11 In view of its version of events, the Defendants submitted that the Other Parties had an *in rem* right to the money under the Supply Contract, notwithstanding that the JD was the contracting party with the foreign buyer. Therefore, the Other Parties argued that they were the beneficial owners of the funds in Deuteron's accounts in the Bank, and the final garnishee orders should be set aside.

12 The CA, after also considering the JC's response (see *Teleoptik-Ziroskopi v Westacre* at [25]-[34]), concluded that the "crux of the matter was that the Other Parties should not be deprived of their day in court to show that they owned the beneficial interest" to the funds. It therefore allowed the appeals and set aside the order making the garnishment absolute. It said, at [35], that:

In the context of a summary determination, the Judgment Debtor, Deuteron and the Other Parties only had to put up an arguable defence that ought to be resolved at trial. The heart of these appeals was simply whether the Other Parties, who said the Funds belonged to them, should be allowed their day in court to prove that claim.

13 The CA disagreed that summary determination was appropriate. The High Court should have decided on the version of events to accept, as the case was one where the legal issues that would arise depended largely on the facts. For example, it was only after factual findings were made that the governing law of the Commission Agreement could be determined. For example, if the lower court had found that the Commission Agreement was not a sham but had been legitimately entered into, certain factors might then be weighed to conclude if Yugoslav law should apply. These factors included the submissions of the JD and the Other Parties that the Commission Agreement was "an agreement between Yugoslavian parties, executed in Yugoslavia and was necessary under Yugoslavian law and regulations", and an article in the Commission Agreement that required disputes to be resolved "by a regular court in Belgrade".

14 The CA also added that the High Court had seemingly placed "undue emphasis" on the Deuteron documents – a shareholder resolution dated 8 April 1999 and the annual audited financial statements – that stated that the funds belonged "wholly and exclusively" to the JD. This was because the CA felt that the "critical document" was the Commission Agreement, which described the relationship between the JD and the Other Parties. The CA also disagreed with the views of the High Court (which were arrived at after a summary determination) that the funds in the Bank could not be held on trust by the JD for the Other Parties, pointing to Appendix 1 of the Protocol (see [9] above). In allowing for a trial for the Other Parties to show their beneficial interest in the funds, the CA recognised that the Other Parties might well be "puppets employed by the [JD] to prolong these proceedings, but that was not something [they] could assume without clear evidence" (at [44]).

Directions for trial

15 The senior assistant registrar gave directions to the parties for trial on 21 November 2011. He directed that the JC would be the plaintiff while the JD, Deuteron, the Bank and the Other Parties would be the defendants. In giving the timelines for the filing of the pleadings, he identified the following issues to be tried:

(a) Whether there was any debt due or accruing due in any and what amount from Deuteron and/or the Bank to the JD at the time the provisional garnishee orders were served;

(b) Whether the funds in Deuteron's accounts with the Bank belonged beneficially to the Other Parties since 1991; and

(c) Whether the plaintiff or the defendants bears the burden of proof in this case.

The burden of proof in the present case

16 The JC submits that the burden of showing cause why an interim or provisional garnishee order should not be made final is on the JD and the garnishee, Deuteron. It further submits that a third party that comes forward to oppose the making final of an interim order is under a similar burden as it appears to show cause.

17 The JD and Deuteron, as the garnishee, submits that the legal burden should fall squarely on the JC to prove that there is a debt due or accruing due from Deuteron and/or the Bank to the JD in

order for the funds in the bank accounts to be garnished. So it "does not mean that merely by obtaining a garnishee order *nisi*, the legal burden of proof of the JC to prove the same as aforesaid is in any way discharged or somehow now shifted to the JD and/or Deuteron".

18 The Other Parties submit that the legal burden is on the JC throughout, whether the garnishee proceedings are at the *nisi* or show cause stage. While it is the case that once an order *nisi* is obtained, the burden shifts to the parties seeking to resist an order absolute at the show cause stage, this is merely an *evidential burden*, and this evidential burden can, in the course of proceedings, shift back and forth between parties depending on the state of the evidence. They say that "[it] cannot be that the garnishee or any party opposing the garnishee proceedings has the legal burden to prove that there is no debt due or accruing due. It would be a legal burden to prove a negative." Therefore, the Other Parties are contending that because they are running a joint case with JD and Deuteron in opposing the JC's attempt to garnish the funds, they bear the same burden as JD and Deuteron, and the burden is an evidential one.

The nature of garnishee proceedings

19 It is essential to first understand the nature of garnishee proceedings in order to make sense of the respective burdens of proof borne by the parties in the present trial. Order 49 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("the ROC") provides the rules for garnishee proceedings. O 49 r 1(1) of the ROC states that:

> Where a [judgment creditor] has obtained a judgment or order for the payment by [the judgment debtor] of money … and any other person within the jurisdiction (… the garnishee) is indebted to the judgment debtor, the Court may … order the garnishee to pay the judgment creditor the amount of any *debt due or accruing due to the judgment debtor from the garnishee*, or so much thereof as is sufficient to satisfy that judgment or order and the costs of the garnishee proceedings.

20 An application for the court order is made by *ex parte summons* supported by an affidavit identifying the judgment or order to be enforced and stating the amount remaining unpaid under that judgment or order. The applicant must depose to the best of its information and belief that the garnishee is indebted to the judgment debtor and state the sources of its information or grounds for its belief. This is laid out in O 49 r 2 of the ROC. Under O49 r 3 of the ROC, the provisional order must be served on the judgment debtor (unless the court directs otherwise), and the garnishee so that it has the opportunity to show cause as to why the order should not be enforced: see also *Singapore Civil Procedure 2015* vol I (GP Selvam gen ed) (Sweet & Maxwell Asia, 2014) at para 49/3/3 ("*Singapore Civil Procedure*"). Therefore, if the garnishee fails to attend at the appointed time for the consideration of the matter or does not dispute the debt, the court may go on to make the garnishee order final: O 49 r 4 of the ROC. There is no full trial at this stage. However, where the garnishee disputes liability to pay the debt due or claimed to be due from him to the judgment debtor, the court can summarily determine the question at issue or order that any question necessary for determining the liability of the garnishee be "tried in any manner in which any question or issue in an action may be tried": O 49 r 5 of the ROC.

21 However, the ROC envisages the situation where it is not the garnishee that is disputing that there is a debt due or accruing due from it to the JD. There are situations, as in the present case, where a third party makes a claim to the money that is sought to be garnished. Strictly speaking, the third party is not disputing whether there is a debt due from the garnishee to the JD. What the third party is asserting is that it is entitled to the particular debt that is sought to be garnished. Therefore, the court should not finalise the interim garnishee order. This is clear from O 49 r 6(1) of the ROC:

> If in garnishee proceedings it is brought to the notice of the Court that some person other than the judgment debtor is or claims to be entitled to the debt sought to be attached or has or claims to have a charge or lien upon it, the Court may order that person to attend before the Court and state the nature of the claim with particulars thereof.

22 After the court hears the third party, the court can either summarily determine the questions as between the claimants or make other orders that it thinks just, including "an order that any question or issue necessary for determining the validity of the claim of such other person … be tried in a manner as mentioned in Rule 5": O 49 r 6(2) of the ROC.

The JC bears the legal burden of showing a debt due or accruing due

23 Having perused the legal submissions and authorities cited by all parties, I am of the view that the question of whom the legal burden resides on is not so much determined by whether a party is the plaintiff or defendant in the entire case, but by the particular issue in the case itself. The senior assistant registrar had directed for a trial on two substantive issues: whether there was any debt due or accruing due from Deuteron and/or the Bank to the JD, and whether the funds in Deuteron's accounts with the Bank belonged beneficially to the Other Parties since 1991.

24 While the JD, Deuteron and the Other Parties are all cast as defendants in the present case, the former issue is really a matter as between the JC, JD and Deuteron (the Bank is not taking any side in this matter). The JC received its interim garnishee orders based on an *ex parte summons* supported by an affidavit. However, the fact that the JC had previously shown that there was a debt due or accruing from Deuteron and/or the Bank to the JD for the purposes of obtaining interim garnishee orders does not mean that the JC has discharged its legal burden at trial to show that there is a debt due or accruing. There are several reasons for this. The interim garnishee orders were secured on an *ex parte* basis, so the supporting evidence was not tested at trial. Where there is an arguable dispute, the courts will order a trial of the issue to determine if a judgment creditor can indeed garnish a debt because it is owed to the judgment debtor by the garnishee. As counsel for JD and Deuteron pointed out, we have moved to the stage of judicial proceedings, which means that pursuant to s 2 of the Evidence Act (Cap 97, Rev Ed 1997) ("EA"), Parts I to III of the EA apply. Part III of the EA provides for the burden of proof in judicial proceedings. In particular, s 103(1) of the EA states that the party who "desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist". Therefore, the facts that the JC had previously asserted for the purpose of securing the interim garnishee orders now have to be proven on a balance of probabilities.

25 This is supported by Form 104 in the ROC, which has to be completed pursuant to the order for trial made under O 49 r 5 of the ROC. This form states that "[it] is ordered that the judgment creditor and the garnishee proceed to the trial of an issue wherein the said judgment creditor shall be plaintiff and the said garnishee shall be the defendant, and that the question to be tried shall be whether there was any debt due or accruing due … from the garnishee to the judgment debtor …".

26 Therefore, I hold that the JC has the legal burden of showing, on a balance of probabilities, that Deuteron and/or the Bank had a debt due or accruing due to the JD at the time that the interim orders were made.

The Other Parties bear the legal burden of showing ownership of the funds

27 In the present case, the Other Parties have also been cast as defendants alongside the JD and Deuteron. However, where the burden of proof is concerned, the Other Parties are not entitled to

stand in the same position as their co-defendants. It is true that all the Defendants are seeking to prevent the interim garnishee orders from being made final. However, while Deuteron is merely defending the JC's claim to the purported debt, the Other Parties are essentially asserting an ownership claim over that debt. Therefore, the question of whether the funds in Deuteron's accounts with the Bank belonged beneficially to the Other Parties is really a tussle between the Other Parties and the JC. For this issue, I cannot accept that the JC bears the legal burden of proving that the funds are *not* held on trust for the Other Parties. That would require the JC to prove a negative. If the counsel for the Other Parties is right, the logical conclusion is that a third party can establish its claim to the money without having to prove the claim on a balance of probabilities. A *bona fide* judgment creditor would have to constantly fend off a random array of third party claimants if all that these claimants have is an evidential burden.

28 Indeed, in the context of a third party who claims to have a charge or lien over the debt that is sought to be garnished, *Singapore Civil Procedure* states at 49/6/2:

> The form of issue as between the claimant and judgment creditor is that the *claimant is made plaintiff in the issue, and the judgment creditor the defendant in the issue*; and the issue itself will be whether the claimant was entitled to or had a charge or lien upon the debt sought to be attached at the time of the service of the provisional garnishee order.
>
> [emphasis added]

29 The same form of issue must surely apply to the situation where the third party does not claim to have a charge or lien over the debt sought to be garnished, but claims to be entitled to it. Therefore, while it cannot be that the garnishee has the legal burden to prove that there is no debt due or accruing due, this does not mean that the Other Parties have no legal burden to prove the very issue that they have entered the present case for – to show that the debt that is sought to be garnished belongs to them. To hold otherwise is tantamount to requiring the JC to prove a negative (that the Other Parties do *not* own the debt), when the Other Parties are the ones who know best about their claim. Under s 105 of the EA, "the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person". Section 108 of the EA also states that "[w]hen any fact is especially within the knowledge of any person, the burden of proving that fact is upon him." The Other Parties have not satisfied me that there is anything in law that requires a judgment creditor to disprove the claims of third parties on a balance of probabilities. The judgment creditor's legal burden extends only to proving its claim – that there is a debt due or accruing due – as against the garnishee.

30 Further, I note that the CA in *Teleoptik-Ziroskopi v Westacre* stated that the "crux of the matter was that the Other Parties should not be deprived of their day in court *to show that they owned the beneficial interest*" to the funds (see [12] above) [emphasis added]. It also said, at [35], that:

> … The heart of these appeals was simply whether the Other Parties, who said the Funds belonged to them, should be allowed their day in court to prove that claim.

31 Admittedly, the question of where legal burden lies is complicated because the defence of Deuteron and the JD is factually similar to the Other Parties' claim. The JD and Deuteron are saying that there is no debt to be garnished because the funds are being held on trust for third parties, which they identify as the Other Parties. The Other Parties are saying that they are the beneficiaries of the funds that are being held on trust. Therefore, the Defendants are aligned in their factual

positions, and they have in fact, essentially run a joint case for the purpose of the trial, such that the Defendants may be said to have adopted one another's evidence and arguments to a great extent. But their respective burdens of proof are different because the issues that concern them are different. For even if I find that Deuteron and/or the Bank has no debt due or accruing due to the JD, this does not *ipso facto* mean that the funds belong to the Other Parties. I must still be satisfied that the Other Parties own the funds because that is an issue I must decide.

32 The upshot is this: if the Other Parties can show that they own the funds on a balance of probabilities, Deuteron would have succeeded in adducing more evidence than it needed to rebut the JC's claim. But even if the Other Parties cannot prove that they own the funds, this only means that the Other Parties cannot lay claim to the funds vis-à-vis the JC. It may well be the case that the JC still cannot garnish the funds because enough evidence has been adduced to undermine its claim that there is a debt due or accruing due to the JD from Deuteron and/or the Bank.

33 Since the Defendants rely on the same evidence, but bear different burdens of proof, I will first decide on the issue of whether the Other Parties have beneficial ownership of the funds. Even if I answer this question in the negative, I still have to decide on whether the JC has managed to discharge its legal burden on whether there is a debt due or accruing due from Deuteron and/or the Bank to the JD.

Whether the funds in Deuteron's accounts with the Bank belonged beneficially to the Other Parties since 1991

34 Throughout the trial, it was only made clear to me that the purported beneficiaries were the Other Parties (see [86]-[94]). The final position taken is that Deuteron is the trustee of the funds for the Other Parties. The Other Parties rely heavily on the four documents, which I assume to be authentic as there is no evidence from the JC to the contrary. Their case is that the JD had entered into the Supply Contract as a commission agent for the Other Parties, which were involved in the negotiations leading up to the Supply Contract and had the final say in the products which were the subject of delivery, their technical characteristics and aspects, the terms of the technical warranties and quality acceptance, time frames for delivery and prices. To the Other Parties, the effect of a commission agency agreement in Yugoslavia was that the economic benefits of the transaction would accrue to the Other Parties and be protected from the creditors of the JD, who would only be entitled to 2.5% of the contract value. The written Commission Agreement on 12 December 1991 was merely a memorialisation of a pre-existing oral agreement that had already existed at the time of the Supply Contract. The Other Parties also submit that it is a "red herring" as to whether under a commission agency relationship in Yugoslavia, assets acquired by the commission agent – the JD – would be the property of the JD or the Other Parties'. This is because the real issue is the beneficial ownership of the funds, which are in Singapore. The four documents, construed in the light of the governing laws, will lead the court to infer that the intention of the parties was for Deuteron to hold the Advance on trust for the Other Parties in Singapore. This trust arose when the Advance was remitted to Singapore, or at the latest, when the Defendants entered into the Protocol in Singapore. Moreover, the Advance can be traced to the funds in Deuteron's bank accounts with the Bank.

The governing law of the four documents

35 The stages to determine the governing law of a contract are laid out in cases such as *Pacific Recreation Pte Ltd v SY Technology Inc* [2008] 2 SLR(R) 491. At [36], the court held that "the first stage is to examine the contract itself to determine whether it states expressly what the governing law should be. In the absence of an express provision one moves to the second stage which is to see whether the intention of the parties as to the governing law can be inferred from the circumstances.

If this cannot be done, the third stage is to determine with which system of law the contract has its most close and real connection".

36 For the Supply Contract, Article 15 makes clear that it is governed by the law of the foreign buyer, which is a common law jurisdiction. Article 16.3 prohibits assignment of rights and obligations without consent. The signature page shows that the JD and the foreign buyer were contracting "for and on behalf" of themselves.

37 While the Supply Contract is related to the Commission Agreement, the CA in *Teleoptik-Ziroskopi v Westacre* at [37] opined that the parties' intention was to subject the Commission Agreement to Yugoslav law. The agreement states that disputes will be resolved in a Belgrade court, was drafted in the Serbian language by Serbian parties in Serbia and signed there as well. I find that the Pre-Protocol and the Protocol are also governed by Yugoslav law. The Pre-Protocol was prepared in compliance with the Yugoslavian national bank's requirements to obtain approval for the JD to transfer the Advance outside Yugoslavia. As for the Protocol, the evidence of Ms Slobodanka Belanovic ("Ms Belanovic") of Teleoptik was that she "viewed it as a purely Yugoslavian transaction and had in mind Yugoslav law and regulations". In an earlier affidavit, she had also stated that in her view, Singapore law did not apply to the Protocol. This was also supported by the evidence of the JD's Ms Nada Manic, who stated in her affidavit of evidence-in-chief that when the Protocol was drafted in Serbian, "no party was having any legal issue in mind under Singapore law but was looking at it totally from a Yugoslav perspective". Therefore, the intentions of the parties, who did not have the help of lawyers, were that Yugoslav law applied.

38 While the Supply Contract regulates the relationship between the foreign buyer and the JD, the Commission Agreement – and the Pre-Protocol and Protocol – can be seen as an "internal arrangements" among the Defendants to regulate their rights and obligations in accordance with Yugoslav law.

Whether there was a commission agency relationship

39 I first examine the purported commission agency relationship between the JD and the Other Parties in Yugoslavia. The central document is Contract No. E/4860-1, which is described by the Defendants as the Commission Agreement. The Other Parties point, *inter alia*, to Article 1.1, which states that the JD had concluded the Supply Contract "on its own behalf and for the account of the Suppliers". They then point me to Article 771 of the chapter on Commission Business in the 1978 Yugoslav Law of Contract and Torts ("the LCT"). This states that "[b]y a contract of commission business the commission agent shall assume the obligation to perform, for a fee, on his own behalf and for the account of the client, one or several transactions entrusted to him by the client". A licence agreement that was annexed to the Supply Contract also stated that the JD was expressly contracting "on behalf of manufacturers". The Other Parties also submit, based on the testimonies of the factual witnesses, that the JD had entered into the Supply Contract as the Other Parties' commission agent, and that this had always been the practice. The parties' conduct and the four documents provide further corroboration of the Other Parties being the principals, notwithstanding that none of the documents used the term "commission agent".

Whether there was a sub-contracting relationship

40 Despite the Defendants' submissions that the Other Parties were the principals in a commission agency relationship with the JD, the relationship does appear to be consistent with that between a main-contractor and its sub-contractors, *ie*, the JD was the main-contractor. This would mean that Contract No. E/4860-1 had been entered into "back to back" with the JD's agreement with the foreign

buyer to supply the military equipment. Such an arrangement does exist in Yugoslav/Serbian practice and would confer on the Other Parties no greater than a contractual claim.

41 For example, there was a four-month delay between the signing of the Supply Contract and the signing of the Commission Agreement. Ms Belanovic of Teleoptik and Mr Bosko Sipovac of Zrak-Teslic explained that such a delay was usual during that period, that time was required to gain the necessary approvals from the Defence Ministry, and that there was no necessity for commission agreements to be executed in writing – there was already an oral agreement in place. An oral agreement that arose around the time of the Supply Contract is relevant towards showing that the Other Parties were not mere sub-contractors. Yet, given the value of the armaments deal to the Other Parties, I would reasonably expect that there would have been more evidence that documented the existence of an oral commission agency relationship. The Defendants respond that the ravages caused by the outbreak of the civil war in the 1990s, which also saw damage wrought on the Other Parties' offices from NATO airstrikes, had led to the loss and destruction of documents and/or correspondence. I do have some sympathy for this response, but the burden is on the Other Parties to prove their claim to beneficial ownership of the funds. And as the JC points out, "[i]t is highly significant that five … different companies (JD, Deuteron, Teleoptik, Zrak-Teslic and Cajevec) located in different geographical locations and countries (Belgrade, Singapore and Republic Srpska in Bosnia and Herzegovina) each maintaining their own records all failed to produce any correspondence evidencing the alleged '*commission agency relationship*'". [emphasis in original]. The belated mention of the oral agreement also fuels doubts. For example, Ms Belanovic worked in Teleoptik as the director of the foreign trade department in 1991, and was thus personally familiar with the circumstances. In her affidavit dated 27 March 2009, she claims that the Other Parties took "active part in discussions" with the foreign buyer, "over issues of technical specifications, prices, terms of deliveries and other details of the end products". Authorised representatives of the Other Parties conducted negotiations, in cooperation with the JD's representatives, on "crucial elements" of the Supply Contract, including the subject matter, price, delivery time and warranty. She further asserts that the JD could not conclude the Supply Contract without the Other Parties' consent. However, she does not clearly mention that at that point, the JD was already a commission agent of the Other Parties. Instead, she goes on to say:

> That was the prescribed procedure we followed. [JD] would then sign or execute all contracts, in its own name, with any buyer, or as the case here, the [Supply Contract], with the Buyers, for the account of and on behalf of the Manufacturers.
>
> The manufacturers under such contracts *subsequently entered into a commission agency agreement* with [the JD]…
>
> … The Commission Agreement reflected the terms of the [Supply Contract], whereby all rights and obligations under the [Supply Contract] are assumed by the respective Manufacturers.
>
> [emphasis added]

42 However, in her affidavit affirmed on 4 November 2009, she clarifies that an understanding that the JD was to act as the Other Parties' agent was already in existence at the time of the Supply Contract. The JC, characterising this as a shift in position, has pointed out that this averment came only after its expert had pointed to the absence of any agreement showing a commercial agency relationship when the Supply Contract was signed.

43 It will also be recalled that the Other Parties, as "principals" in the commission agency relationship, were allegedly keen to reconvert the Advance to US currency and have it moved to

Deuteron's bank account. This was the reason that the Pre-Protocol was entered into. The Pre-Protocol does refer to the Other Parties and states that the Advance shall be used "exclusively" for purchasing raw materials and other items for their needs. But although it was apparently their decision to transfer the funds, the Other Parties were not signatories to the Pre-Protocol between the JD and Deuteron. The JD signed off on the Pre-Protocol on and for its own behalf. Unless the JD and the Other Parties were seeking to deceive the Yugoslav authorities, it is curious that the JD did not sign off "on its own behalf and for the account of the Other Parties", thus tracking the wording in Article 1.1 of the alleged Commission Agreement. The Defendants' insist that the central document for the purpose of the commission agency relationship is the Commission Agreement. But as it is not the Defendants' case that the JD could make a unilateral decision to transfer the Advance to Deuteron, I am of the view that the Pre-Protocol is relevant towards determining the relationship between the JD and the Other Parties.

44 The English translation of the Pre-Protocol produced by the JD and the Other Parties described the Other Parties as "manufacturers". However, it eventually came to light that in the original Serbian version, the Other Parties had in fact been described as "podizvodjaci" or "sub-contractors", and the JC argues that the translation was deliberately inaccurate, in an attempt to mislead the court. The response of Ms Vesna Stupar ("Ms Stupar"), the JD's witness, was that the description of the Other Parties as sub-contractors was a mistake. I entertain grave doubts that drafters could have made such a basic mistake. Ms Nada Manic, the JD's witness, sought to explain in her testimony that the Pre-Protocol had been done in haste and that the Serbian words for "manufacturers" and "sub-contractors" were very similar. But as the JC points out, "[the Pre-Protocol] was written in the Serbian language and prepared by experienced Serbian parties who were very familiar with transactions such as this and with commission agency agreements as well … the word 'podizvodjaci' (sub-contract) was repeated a total of [eight] times in the one and a half page document". Moreover, in an affidavit filed in December 2005, a few years before the Other Parties appeared in the proceedings in 2009, the JD's legal counsel had also described the Other Parties' as "sub-suppliers" (although he also stated that the JD kept the monies as their "trustee"). At trial, Ms Stupar again said that this was an error. But it beggars belief that at a time when the JD was already disputing the JC's claim to the funds (at that time, this was on the basis that the English judgment should not be registered in Singapore), the JD's legal counsel – who must have understood the legal significance of his words – would have made such a mistake. To my mind, an equally, if not more likely explanation was that the JD subsequently changed its position when the Other Parties appeared in the proceedings.

45 There are even aspects of the purported Commission Agreement itself that appear consistent with a sub-contract agreement. For example, Article 2.2 provides that the prices in the Supply Contract were fixed, but that the prices for the Other Parties were provisional and would be agreed subsequently, at a time that was no later than 45 days before the first shipment under the alleged Commission Agreement. There is some force in the JC's submission that if the Other Parties were "indeed principals, there is no reason why their prices would have to be 'agreed' later with the JD". Article 3.3 also affects the weight that I can give to the Commission Agreement, which is supposed to formalise the oral agreement that the JD and the Other Parties had entered into at the time of the Supply Contract. The Defendants' version of events is that the Other Parties had wanted the JD to transfer the Advance to Deuteron. It is of note that the transfer of the Advance was then done, and this happened *before* the Commission Agreement was entered into. But the written agreement provides no mention that the Other Parties had instructed the JD to transfer the Advance to Singapore. Instead, Article 3.3 provides that the "[c]ounter-value of generated foreign currency inflow" will be paid to the Other Parties' drawing account with the Social Accounting and Auditing Service within three working days of the receipt of notification about inflow of proceeds.

46 Notwithstanding the doubts that the JC has seeded in relation to the purported commission agency relationship, I am prepared to assume, for the sake of argument, that there was a commission agency relationship between the JD and the Other Parties under Yugoslav law. But even if I assume that, I find that under Yugoslav/Serbian law, the commission agency relationship does not confer anything higher than contractual rights on the Other Parties in relation to their shares of the Advance. This means that as a commission agent, the JD had ownership of the Advance when it was received from the foreign buyer, and continued to have ownership of the Advance even when it transferred the money to Deuteron in Singapore. Indeed, as I will go on to explain, the conduct of the parties also shows me that any claim that the Other Parties have, even if there was a Commission Agreement, is merely a contractual one.

The legal effect of a commission agency relationship

47 It cannot be disputed there is no concept of beneficial ownership, or trust, in Yugoslav/Serbian law. In this regard, any situation conferring some semblance of "property rights" in a party who is not the legal owner must tend to be the exception rather than the rule. The question nevertheless arises of whether, in a commission agency relationship, the Advance that the JD receives from the foreign buyer is deemed to be the property of the Other Parties, which makes it immune from execution by the JD's creditors. I answer this question in the negative and come to my conclusion after preferring the opinions of the JC's Serbian law experts, which are logical, cogent and properly substantiated by case law and commentaries. I find these qualities lacking in the opinions of the Serbian law experts of the Defendants.

48 The Other Parties rely, *inter alia*, on Articles 787(2) and 788 of the LCT to support their contentions. The word "client" in these articles refers to the Other Parties. The three articles in the relevant section that deals with "Relations with Third Parties" state:

> **Article 787.** *Client's Right to Claims Originating from a Transaction with a Third Party.*
>
> (1) A client may demand fulfilment of claims from the transaction entered into by a commission agent with a third party and for his account, only if the commission agent has assigned them to him.
>
> (2) However, in terms of the relation between a client and a commission agent and his creditors, such claims shall be treated from their inception as the client's claims.
>
> **Article 788.** *Limitation of Rights of Commission Agent's Creditors*
>
> Commission agent's creditors shall not, in order to collect their claims, even in case of his bankruptcy, take measures of execution against rights and objects of property acquired by the commission agent in performing the order on his own behalf but for the account of the client, except in the case of claims in relation to acquiring these rights and objects of property.
>
> **Article 789.** *Bankruptcy of a Commission Agent*
>
> (1) In case of a commission agent's bankruptcy, the client may request separation of goods handed over by him to the commission agent to be sold on his account out of the bankrupt's assets, as well as of goods acquired by the commission agent on his account.
>
> (2) In such case the client may request from a third party to whom the commission agent has delivered the objects, their price or any unpaid part.

49 The Other Parties point out that there is a dearth of judicial and academic commentary guidance on how the core principles of the commission agency relationship in the LCT apply to the monies held by a commission agent in a bank account. However, they submit that the language of Articles 787(2) and 788 is "clear – the claims of the commission agent on the contract with the third party are, as between the commission agent and its client, to be regarded as the client's claims, and rights and objects of property acquired by the commission agent in performing the contract are immune from execution by the commission agent's creditors, even in the bankruptcy of the commission agent".

50 I make a few points. First, the effect of the articles is not as obvious as the Other Parties characterise it to be. Article 787(1) provides that a client can demand fulfilment of claims only if the commission agent had "assigned them to him". The fact that a claim needs to be assigned suggests that the claim does not belong to the client from the onset. It should be noted that the Supply Contract between the foreign buyer and the purported commission agent, the JD, expressly prohibits assignment. Article 787(2) does seem to provide that where there are creditors involved, the claims are treated as the client's claims "from their inception". But the conferment of the right to claim against the third party does not necessarily mean that the client has property or ownership rights. Similarly, Article 788 merely prohibits the seizure of property by a commission agent's creditors. It does not necessarily mean that the client has property or ownership rights. In addition, Article 789 has the effect of protecting the client in the specific situation of its commission agent's bankruptcy. In a civil law jurisdiction without the institution of trust, it stands to reason that the articles provide for exceptional situations protecting the client precisely because there is no general concept of beneficial ownership in the legal system. In any event, Article 789 does not apply in this case because the JD is not bankrupt. In fact, it has never been explained why the Other Parties did not make any claim against the JD, which was never known to be bankrupt.

51 The Other Parties submit that as Serbia is a civil law jurisdiction, judicial decisions or academic commentary should be disregarded when they "do not appear consistent with codified law and do not speak with one voice". Such statements are disingenuous and unrealistic and cast doubts on the credibility of their experts. As was stated in *The Civil Law Tradition* (John Henry Merryman & Rogelio Perez-Perdomo) (Stanford University Press, 2007) at pp 46-47, "… judicial decisions are not a source of law … [t]his is the theory, but the facts are different … [t]hose who contrast the civil law and the common law traditions by a supposed non-use of judicial authority in the former and a binding doctrine of precedent in the latter exaggerate on both sides". On the other hand, the preponderance of evidence adduced by the JC's Serbian experts convinces me of their proposition that Serbian law does not confer upon the client property rights over the money that is in the commission agent's bank account. As such, all the Other Parties have is a contractual claim.

52 I need only mention a few of the authorities cited by the JC that the Other Parties dispute. A 1959 decision of the Supreme Commercial Court of the former Yugoslavia stated that the plaintiff-client "did not acquire any property right on money which the [defendant] commission agent received from its foreign buyer as the purchase price and which became a part of its property". This was referred to by one Professor Miodrag Trajkovic in his book. The Other Parties claim that the JC's experts had omitted to include the accompanying statement by the authors that "[w]e disagree … with this position … since … it is contrary to our concept of commission agency agreement. In turn, the JC has pointed out the following extract from Professor's Trajkovic's book:

> The commission agent would remain the 'owner of the money' until it transfers the amount to the client/principal. This long-standing position and its operation by analogy when it comes to monies collected is not only supported by the language of the LCT, but was reflected even prior to the enactment of the LCT in the 1959 decision of the Supreme Commercial Court of the former

Yugoslavia.

53 In his preface to the 1959 decision, Professor Trajkovic also had the following comment:

> It is considered in judicial practice of most countries that the commission agent becomes the owner of the goods. The same is true for the practice of our commercial courts, which can be seen from the following statement of reasons contained in the judgment The Supreme Commercial Court …

54 In view of the above, and the other authorities cited by the JC, I accept the JC's submission that the disagreement of the professor with the 1959 decision reflects his personal view. The Other Parties also take issue with another decision, from the Supreme Court of the Federation of Bosnia and Herzegovina, which was cited by the JC experts. The Other Parties say that the comments of the court show that a commission agency appears to carry the right of separation with respect to money in a bank account. However, the decision goes on to say that only the separation of "an individual thing" can be demanded. Money, including money on the account, is a "generic thing", and can be considered as an individual thing only if its owner "at the moment of its delivery had singled it out in a manner which could ensure its safe identification …" In other words, money in a bank account is fungible. This lends support to the JC's submissions that claims arising under a commission agreement are *in personam* in nature, such that a commission agent can pay off a debt to its client using any of its monies.

55 Yet another decision cited by the JC's Serbian experts, this time from the Supreme Commercial Court of the former Yugoslavia in 1971, states that the fact "that the plaintiff and the first defendant concluded a commission agency agreement and that the funds in foreign currency came to the account on the basis of that legal relationship do not allow for a conclusion that these funds in foreign currency belong to the plaintiff, nor do these facts allow us to conclude that the said funds in foreign currency may not serve to settle the debts towards other creditors of the plaintiff's commission agent …" The Other Parties say that this decision involved commission agency relationships where the commission agent had failed to transfer funds received from a foreign buyer. They seek to distinguish it from the present case on the ground that the Advance was not transferred to the Other Parties only because they had instructed the JD to keep the Advance abroad to preserve its value. It is difficult to see the distinction. The Other Parties may argue that the transfer of money on the Other Parties' instructions amounts to an act of disposition that shows ownership. But in the first place, the documents do not mention that the transfer was made on the instruction of the Other Parties. In fact, as mentioned above, the Commission Agreement, which was entered into after the transfer was effected, stated that the money was to be transferred into the Other Parties' "ordinary account with the Social Accounting and Auditing Services … within three … working days from the receipt of notification".

56 There are other court decisions and academic authorities in relation to the ownership of money and goods that were brought to my attention by the JC's experts. The Other Parties say that the court decisions pre-dated the LCT, but the JC's experts submit that they are still considered authoritative today – and produced ample support for their assertion. For example, the 1971 decision above and a similar 1958 decision were cited in a book titled The Commentary of the Law on Contracts and Torts that was published in 1980 by Professors Slobodan Perovic and Dragoljub Stojanovic, who are considered to be leading legal experts on Yugoslav/Serbian contract law. In contrast, the Defendants' experts could not muster any case law support for their counter-arguments and instead fell back on the argument that their legal system does not observe *stare decisis*, the doctrine of precedent. This dented their credibility. Professor Dragor Hiber ("Professor Hiber") for the Other Parties also referred to sub-paragraphs 3 and 4 of Article 48 of the Foreign Exchange Law to

support the argument that Yugoslav/Serbian law did not prohibit an arrangement where the JD acts on behalf of the Other Parties to transfer money out of the jurisdiction, when these sub-paragraphs were not even in force in 1991. Professor Hiber admitted that he made a mistake in his report, which casts further doubt on the veracity of his opinion. In fact, before confirming at the trial that there is "no such thing" as the institution of trust in Serbian law, Professors Hiber and Gaso D. Knezevic had in their joint affidavit of evidence-in-chief affirmed on 2 August 2013 averred that "Serbian law is no stranger to the concept of beneficial ownership", although they stated in their joint reply affidavit affirmed on 18 November 2013 that the notion of beneficial ownership did not exist.

57 To summarise, the Other Parties have not proven that under Serbian law, they had any *in rem* rights over the Advance. I reject the evidence of their experts, and that of the JD's Serbian law expert, Mr Oliver Zivkovic, who has not shown himself to be independent as he was in fact the JD's lawyer. All the Other Parties have is an *in personam* claim for the Advance – and they have not even sued the JD for the money in Serbia.

Whether a trust arises in favour of the Other Parties when the Advance entered Singapore or when the Protocol was signed

58 Based on the Defendants' case, the JD and the Other Parties had the intention to enter into a commission agency arrangement under Yugoslav law. If the only reason for moving the money overseas was to avoid the depreciation of the dinar, their intention must have been to maintain the commission agency arrangement. After all, there is no suggestion that the Other Parties chose Singapore specifically because it is a common law jurisdiction with a trust concept. The concept of trust would have been foreign to the Yugoslav parties. I have found that a commission agency arrangement does not have the effect of conferring on the Other Parties anything more than contractual rights in Yugoslavia. They do not become the owners of the Advance in a commission agency arrangement. It thus follows that the Yugoslav parties would likely have had no intention, or even the knowledge, to create anything more than contractual rights. Despite this, the Other Parties are saying that even if the documents are governed by Yugoslav law, the court can infer an intention to create a trust when the money enters Singapore. They say that the issue of the ownership of the funds is governed by Singapore law, and that the court can make this inference because the "overwhelming evidence", including the Pre-Protocol and the Protocol, shows that the three certainties for the creation of the trust are met. Even if I accept the Other Parties' submission that Singapore law is applicable to infer the existence of a trust, after examining the evidence, I still fail to ascertain any intention to create a trust that arises when the Advance was paid into Deuteron's bank accounts or even when the Protocol was eventually signed in Singapore.

No certainty of intention

59 The Other Parties say an express trust was created when the Advance entered Singapore in November 1991. The intention of the JD, Deuteron and the Other Parties with regard to the holding and administration of the Advance "could not be clearer". This can be gleaned from their evidence relating to the commission agency relationship and the terms of the Pre-Protocol, which establish that when the Advance entered Singapore, the intention of the parties was for Deuteron to hold the Advance for the Other Parties in "defined proportions and administer the monies in accordance with the Other Parties' instructions and a framework that was to be worked out." The Pre-Protocol states that the monies are to be "used exclusively for purchasing the raw materials, parts, assemblies, sub-assemblies and other goods for the needs of the [Other Parties]." Payments from the monies are to be made only by written request of the Other Parties.

60 The Other Parties also say that at the very latest, a trust would have arisen when the Protocol

was executed on 28 December 1991. Even if the Protocol is governed by Serbian law, it does not prevent the Protocol, or its execution, from being evidence of the parties' intention from which a trust can be inferred or created under Singapore law. Appendix 1 of the Protocol spelled out how much of the funds belonged to each of the Other Parties and the amount of funds that was payable to the JD as its commission. The Other Parties say that the "explicit allocation" is a hallmark of trust, and another hallmark is the obligation imposed on Deuteron by the Protocol to account to the Other Parties for their respective agreed proportions of the Advance. Moreover, the Protocol also stipulates that any part of the Advance that is not spent shall be returned to the Other Parties or used in accordance with their wishes.

61 But as stated above, the parties had clearly intended for Yugoslav law to govern the documents. If Yugoslav law applies to the documents, this must lead to an inference that the parties had not intended for a trust of the money to arise, as there is no concept of beneficial ownership in Yugoslavia, not even in a commission agency relationship. As the JC puts it in its closing submissions, "it is not reasonable to believe that Yugoslav lay persons, thinking in terms of Yugoslav law, would have intended legal consequences of an institution which is unique to the common law world, especially when they have clearly stated that Singapore law is not applicable to their relationship".

62 The Pre-Protocol dated 21 October 1991 refers to the Other Parties as sub-contractors, and they were not even signatories to it. In other words, it is not clear that the terms of the Pre-Protocol regard the Other Parties as possessing property rights over the Advance in any sense. Assuming that the JD was the main-contractor of the Other Parties, the Pre-Protocol may also be consistent with an obligation of the JD to release parts of the Advance to its sub-contractors on the basis that they must use the money exclusively for the purposes of fulfilling the JD's obligations under the Supply Contract. The provision in the Pre-Protocol that states that payments are to be made only by written request of the Other Parties may have been included only because they are the parties who will know the sources from which they are procuring. The JC raises other arguments, but my point is that the documentary evidence of a trust is not as clear as the Other Parties claim.

63 The Protocol does provide for an appendix with a breakdown of how the Advance is to be allocated to each of the Other Parties, after deduction of commission fees. It also provides that Deuteron shall earmark each of the Other Parties' shares and time-deposit specific sums for them. The Other Parties are to receive monthly bank statements. The Other Parties also note that the Protocol provides for the disbursement and administration of the Advance. The Other Parties claim that the subsequent conduct of the parties was consistent with the provisions of the Protocol until the funds were frozen in June 1992. Ms Belanovic of Teleoptik testified that her company received monthly statements regarding the balance in the accounts and the interest accruing.

64 But Ms Belanovic's evidence is unsubstantiated testimony. The opposite is true – the conduct of the parties to the Protocol shows that there was no intention to create a trust even when the Protocol was executed. The Other Parties fall back on the tumultuous period in Yugoslavia in the 1990s to explain the absence of documents, but over the past 20 years, there was no evidence that the Other Parties had acted on their purported rights to their funds, even when the war ended and the funds grew with interest to more than US$17m. There is no evidence that enquiries were made over how their monies were handled. I do not accept the Other Parties' response that the lack of correspondence is reasonable as the funds were frozen at all material times and there was no reason to doubt the JD because of their close relationship. No reference was in fact made to the monies in their own audited accounts as their assets – they were apparently treated as receivables, *ie*, a contractual right, and later written off. On 12 August 2013, the High Court ordered the Other Parties to produce their audited accounts. The financial statements that were eventually produced by Teleoptik and Zrak-Teslic made no reference to their alleged shares of the Advance (about 10% and

50%). This is additional evidence that the Other Parties never regarded themselves as having ownership over the Advance, as mere debts would have been written off after some time.

65 On the other hand, in Singapore, there were repeated admissions by Deuteron – in its financial statements from 1998 to 2008, in its shareholders' resolution in 1999 and in its affidavit and solicitor's letter in November 2004 – that the Advance belongs to the JD. All this was not disputed then by the JD, which owns Deuteron. As the JC points out, even though the Other Parties appeared in court proceedings here in 2009, they had never asked for a correction to reflect the "true position" in Deuteron's financial statements. This evidence militates against any intention to create a trust for the Other Parties, and suggests that the funds are beneficially owned by the JD.

66 The Protocol prescribed that Deuteron shall "earmark the funds on the account for the beneficiaries and shall then time deposit them based on the instructions received from each beneficiary". Appendix 1 spelled out the precise amounts payable to the JD as commission and the amounts for each of the Other Parties. This document was signed on 28 December 1991, more than a month after the Advance was transferred to Singapore. The JD pleaded in its Defence that the funds were "already earmarked" pursuant to the Protocol and there was no need or ability to deal further with the funds due to the onset of civil war and/or the imposition of sanctions by the UN. The sanctions were imposed in June 1992. But even when the Advance was sent to Singapore, it was paid right into Deuteron's bank accounts which contained other funds of Deuteron. The Advance was not segregated from the rest of Deuteron's money. Neither did it seem that the JD's commission, which had not been paid, was kept separate from the Other Parties' entitlement to the funds.

67 The JD and Deuteron, in their closing submissions, say that the issue of whether the funds were earmarked does not remove the fact that there is a trust under the Protocol; a failure to earmark is at best a breach of trust. I pause to note that the Other Parties have never alleged breach of trust. Along similar lines, the Other Parties say that "what is important is the intention to treat the advance payment (and the respective proportions of it specifically allocated to each of the Other Parties) as distinct sums for which Deuteron was accountable to the Other Parties". They contend that the fact that the Advance is paid into a bank account containing other money does not stop it from constituting the subject matter of a trust.

68 But while it is true that a mixing of monies is not fatal to the validity of a trust, the fact that the monies were mixed only begs the question of whether, against the words of the Protocol, there was an intention to create a relationship that imported proprietary rights in the first place. It seems that the parties did not take the words of the Protocol seriously, in the sense that Deuteron saw its task as simply to ensure that there were enough funds in all its bank accounts to meet the requirements of the Other Parties. This would be consistent with the creation of mere contractual rights, where money that is paid out need not come from a specific pool of funds.

69 My finding on the lack of intention at the time of the purported creation of the trust is buttressed by evidence that the Advance was subsequently moved around between accounts. The evidence adduced concerning the tracing of the Advance is complicated and based on incomplete bank statements, but it must be clear that at the very least, money left Deuteron's Singapore accounts after the Advance came in. Deuteron's director, Mr Zoran Matic's affidavit of evidence-in-chief on 17 July 2013 had declared that "these monies were the monies that were sent from November 1991 … and it was always rolled over … [and] these are the very same monies deposited for the [Other Parties] and these monies have never been touched since the date of deposit. But at trial, he admitted that there were "payments in, payments out", although the amount had always been maintained The Other Parties explain that there were other accounts that Deuteron maintained in Oslo and Hong Kong. What Mr Zoran Matic did was to ensure that the total balance in all the

accounts put together did not fall below the sum of the Advance. The Other Parties themselves allege that the funds could have been moved from Deuteron to a company called Restonic, before finding "their way back to Deuteron's account later".

70 The Other Parties were raising these arguments to discredit the report of the JC's forensic accountant, Mr Christopher Bruce Johnson, who had concluded that the balance in Deuteron's bank accounts in Singapore had fallen to very low levels. It is true that in arriving at his findings, he had not taken into account the balances in the physical accounts maintained in Oslo and Hong Kong. He had also not been able to factor in the bank statements for the periods in which they were not available. However, I do not even need to rely on his evidence on tracing at all. It is clear that not only was the Advance mixed with the money in Deuteron's accounts in Singapore, the funds in the accounts were also moved around, allegedly within Deuteron's accounts with the Bank. The inference to draw from Mr Zoran Matic's evidence is that he saw it as his responsibility to ensure that the total amount of monies in Deuteron's various accounts was maintained at a level sufficient to pay off the obligations to the Other Parties. Such a loose arrangement again suggests that the obligations were merely contractual in nature.

71 In view of the Other Parties' failure to prove the certainty of intention, there is no need to go into the evidence of the other two certainties *viz*, subject matter and objects, or the merits of their attempt to trace the Advance into the funds in Deuteron's bank accounts using equitable presumptions, even though the Defendants have not alleged any breach of fiduciary duty vis-à-vis Deuteron. No trust in Singapore can arise in their favour even on the argument that Singapore law applies to the issue of ownership of the funds. The Other Parties have failed to discharge their legal burden to show that they had beneficial interest in the funds in Deuteron's bank accounts.

72 I make some closing comments to pull together the strands of my findings before moving on to the next issue. The key question I have asked in resolving this entire issue is: when did ownership of the Advance shift? As I have found, the answer is that it never shifted from the JD. I start from the genesis of the Advance. The Advance was made from the foreign buyer to the JD pursuant to the Supply Contract between them. This Supply Contract is expressly stated to be governed by the law of the foreign buyer – a common law country. This Supply Contract prohibits the assignment of rights and obligations to third parties without consent. To the outside world, the owner of the Advance is the JD. But when the Advance enters Yugoslavia, its ownership may be affected by the "internal" arrangements that are made between the JD and the Other Parties. The arrangements include the Commission Agreement. A significant part of the trial was spent on the legal effect of the Commission Agreement under Yugoslav law. The question is whether the commission agency arrangement shifts the ownership of the Advance to the Other Parties even in a civil law jurisdiction with no institution of trust. I find that it does not have that effect. Therefore, the Other Parties have no more than a contractual claim as against the JD at this point; the ownership of the Advance remains with the JD.

73 The next stage of my inquiry concerns the effect of the JD's transfer of the Advance to Deuteron, its related company in Singapore. The relevant documents here include the Pre-Protocol and Protocol. The Other Parties' argument is that even on the basis that the documents are governed by Yugoslav law, the intention of the parties, as gleaned from the terms and all the circumstances, is that Deuteron will hold the Advance for the benefit of the Other Parties. Therefore, a trust arises on the application of Singapore law. I recognise that foreign parties do not have to use words synonymous with "trust" in order for a trust to arise. But as the Other Parties put it, it is the substance that counts. Even taking the Other Parties' argument at the highest, the evidence still does not bear out the intention to create a trust of any sort. Their actions at the time of the purported trust, and through the years, simply do not match their words today. A trust cannot be lightly inferred, and the various actions of the Defendants have been inconsistent with the words of

the documents and the Defendants' witnesses that purport to prove a trust of the Other Parties' shares of the Advance. The actions are only consistent when one takes cognisance of the fact that the Yugoslav parties had viewed their rights and obligations through the lens of Yugoslav law. This means that the movement of the Advance to Singapore was never done in contemplation of any further rights than that afforded under a commission agency arrangement under Yugoslav law, *ie*, contractual rights. So, even in Singapore, the ownership of the Advance remained with the JD.

Whether there is a debt due or accruing due to the JD

74 While the Other Parties are out of the picture, the question nevertheless remains as to whether the JC can garnish the funds in Deuteron's bank accounts. This depends on whether the JC can discharge its legal burden to prove that there is a debt due or accruing due to the JD. I come to the conclusion that the funds in the Bank are beneficially owed to the JD, so the interim garnishee order against the Bank is to be made absolute.

75 First, the letters that were written by Deuteron's solicitors in November 2004 indicate that the funds in the Bank belonged to the JD. When the JC obtained its Mareva injunction on 28 October 2004, the injunction included an order for Deuteron to inform the JC through affidavits "of all the monies belonging to the [JD] which are held in bank account(s) in the name of [Deuteron]". This order was served personally on Mr Zoran Matic, who was the JD's representative on Deuteron's board of directors. On 3 November 2004, a letter from Deuteron's solicitors to the JC's solicitors stated that " … [Deuteron] has confirmed that a sum of USD14,925,995.59 or thereabouts stands to credit of the [JD] in [the Bank]". Two days later, a second letter stated: "[P]lease find attached the bank account statements showing the monies held by [Deuteron] for and on behalf of the [JD]". At trial, Mr Zoran Matic testified that after receiving the order, the JD was informed about the JC's claim and together with Mr Lim – who was director of Deuteron from its incorporation in June 1991 until his 51% stake in Deuteron was transferred to the JD on 23 September 2005 – they had visited Deuteron's solicitors, ostensibly to issue instructions on the contents of the letters. No clarification was made at the time that the Other Parties were the owners of the funds.

76 Then there was the affidavit that Mr Lim affirmed for Deuteron on 10 November 2004. This was in response to the order in the Mareva injunction. The affidavit was signed with Mr Zoran Matic's knowledge. The affidavit did not depart from the wording of the two letters – it was stated that the funds were "held by Deuteron for and on behalf of the [JD]". In other words, Deuteron was then saying that the funds belonged to the JD. I give weight to the fact that these letters and the affidavit were produced in response to a court order with the benefit of legal advice, so the parties must have understood the legal implications.

77 The JC has also referred to Deuteron's unanimous shareholders' resolution on 8 April 1999, which was disclosed pursuant to a court order on 26 May 2009. According to the resolution, a sum of US$12.3m in its accounts with the Bank and the accruing interest belonged "wholly and exclusively" to the JD. The signatories were Mr Lim and the JD's then-representative, General Jovan Cekovic. The JD held 49% of the shares in Deuteron at that time. There was no mention of the funds belonging to the Other Parties pursuant to the Pre-Protocol and the Protocol. On the resolution, counsel for JD and Deuteron explain that it has not been revoked pending a determination of issues in this proceedings. But as the JC points out, if the funds do not belong to the JD, there is no need to wait for any determination. Moreover, a new resolution that states that the funds belong to the Other Parties will be relevant towards disproving the debt that is owed to the JD.

78 Over the span of about a decade, Deuteron's financial statements, which were audited by external auditors, had stated that the funds in the bank accounts belonged "wholly and exclusively to

[the JD]". These statements were approved by Deuteron's directors, certified by auditors, and repeated until the year ended 30 June 2008. The Notes to Deuteron's financial statement for the year ended 30 June 1998 states:

> 5. CASH AT BANK
>
> Excluded from this account is fixed deposit of USD12,302,983 (1997: USD 11,654.939) as this deposit and interest belong wholly and exclusively to [JD], a shareholder of the company. Confirmation for the exclusion has been given to auditors through the passing of a members' resolution dated 8th April 1999.

79 The financial statements of Deuteron have not been amended to reflect that the funds are in fact, held for the Other Parties. In fact, after the JC referred to the repeated admissions in an affidavit filed on 14 July 2009, Deuteron, in apparent breach of the Companies Act (Cap 50, Rev Ed 2006) ("the Companies Act"), simply stopped filing its accounts. No accounts for the period from June 2008 onwards are available. This can only mean that the directors and auditors are unwilling to sign off on statements that will contradict their previously stated position that the money belongs to the JD, and I draw an adverse inference in that regard. There is no reason why they should not reverse the statements if their current position is truthful. I need only add that the JD must have had clear oversight of the statements, given that they were represented on the board of directors of Deuteron up till 23 September 2005, after which it obtained 100% of the shares in Deuteron and controlled the entire board. In other words, Deuteron's accounts were signed off by directors who were representatives of the JD. The Defendants' response is that the statement was inserted by Mr Zoran Matic because of an internal shareholder dispute between the JD and Mr Lim, to ensure that he had no basis to make any claim in connection with the funds that Deuteron was holding for the Other Parties. Specifically, counsel for the JD and Deuteron submit that "the monies were being held by Deuteron and the JD as per the Protocol", so the court must conclude that the statement in the 1999 resolution and the annual financial statements were "merely to give effect to the Protocol so that the monies were not interfered with by the other shareholder in Deuteron".

80 These arguments strain logic – if the JD and Deuteron had really intended to conduct their affairs in accordance with the Other Parties' purported rights under the Protocol (and I had found that they did not), there is no reason why the statement will not then say that the money belonged "wholly and exclusively" to the Other Parties instead of the JD. A settlement proposal dated 30 April 2001 was signed by Mr Lim and addressed to General Jovan Cekovic and Mr Zoran Matic. This document also did not mention that the ownership of the money in Deuteron's bank accounts lay elsewhere. The relevant part states: "After serious consideration, we propose the following for settlement for mutual benefits: - (1) All monies in DnB belong solely to [JD] – Agreed". By 2005, JD had acquired all of Lim's shares in Deuteron. But the statement still remained. No reasonable explanation has been given for the repeated admissions over the years, even after Mr Lim left the picture. Mr Lim may have been able to offer one, but the Defendants did not call him as a witness. In fact, Mr Lim's evidence would also have been valuable to explain, among other documents, Deuteron's affidavit's filed in response to the court order.

81 Deuteron's bank accounts were frozen in June 1992 following the UN sanctions. In November 1995, the sanctions against the Federal Republic of Yugoslavia (Serbia and Montenegro) were suspended, but the sanctions concerning Bosnia and Herzegovina remained in place. On 1 December 1995, Deuteron wrote to the Bank, in instructions signed off by Mr Lim, to withdraw and transfer all the funds to a Hong Kong bank account of a company called Acedale Holdings Limited. In response to the Bank's request for documentary proof that Deuteron's Yugoslavian directors were not Bosnian, Deuteron replied on 11 December 1995:

…

> Please note that [Deuteron] was registered in 18th June 1991. The Yugoslavian Directors are all Serbian Serbs operating in Belgrade all the time. For the past four years we have no activities due to the United Nations sanction.
>
> As United Nations have suspended the sanctions and banks in other countries have lifted the banking restriction … It is only fair that we do the same and return their money as we have no business transaction with them for all these years.
>
> Please act immediately as our first request was dated 1st December 1995 which is long over due.

It seems that the funds were supposed to be returned to Deuteron's Yugoslav directors, who were representatives of the JD in Deuteron. A certificate dated 15 December 1995 was also produced in response to the Bank's request for documentary evidence of the nationality of the three Yugoslavian directors. This certificate was signed by General Jovan Cekovic – then director-general of the JD and a Deuteron director – and certified that Deuteron's three Yugoslavian directors were citizens of the Federal Republic of Yugoslavia (Serbia and Montenegro). These suggest that Deuteron and the JD were working together to transfer the funds out of Deuteron's bank accounts to the JD, through the vehicle of Acedale Holdings Limited. I further note that this attempt of the parties to transfer monies elsewhere buttresses my finding that there was no intention to create a trust of the Advance in Singapore, an issue that I resolved above. There is one further point. Given the sanctions, the funds could be taken out only if no Bosnian entities had any interest in the funds. Two of the Other Parties – Zrak-Teslic and Cajavec – were Bosnia-based entities. Unless they were lying, the request made by Deuteron is an implicit admission that the funds belonged to the JD, which was not subject to the sanctions as it was owned by the Federal Republic of Yugoslavia (Serbia and Montenegro). While Mr Zoran Matic had said in his affidavit that Mr Lim's requests to withdraw the funds were made without his knowledge and Deuteron's, he later said at trial that the JD had even sent over passports "proving that directors of [the JD] are not Bosnians".

82 Documents such as Deuteron's resolution in 1999 and the statements in their audited accounts do not, on their own, confer ownership rights of the funds on the JD. However, when the evidence is taken as a whole, it is clear to me that the JC has, on the balance of probabilities, proven that the funds in Deuteron's bank accounts belong to the JD. The JD and Deuteron have failed to adduce any credible evidence to the contrary. As the Other Parties' claim to being the beneficial owners of the funds did not even get off the ground, the evidence adduced in that issue cannot assist the JD and Deuteron on this issue.

83 Deuteron is the legal owner of the funds in its bank accounts, which I have found to be beneficially owned by the JD, albeit the legal right to the funds is held by Deuteron. The case of *Webb v Stenton* (1883) 11 QBD 518 holds that a debt can be either equitable or legal in nature, although "debts owing or accruing" must refer to an actual present debt. I have no doubt that there is a debt, and that it is a present debt. By Deuteron's own admission, the letter on 3 November 2004 from Deuteron's solicitors to the JC's solicitors stated that the funds stood to the credit of the JD in the Bank. Moreover, on the facts of the case, Deuteron cannot be anything but a nominee or bare trustee for the funds. This means that the funds must return to the beneficial owner – the JD – at its instance. As a garnishor, a JC steps into the shoes of the JD. It follows that it has the right to collapse the bare trust vis-à-vis Deuteron. The effect of this must be that the JD will acquire Deuteron's chose in action against the Bank. This becomes a debt owed to the JD by the Bank that the JC can garnish.

84 Therefore, I make the provisional garnishee order against the Bank absolute. However, I do not think I should make the garnishee order absolute as against Deuteron, as Deuteron does not owe a debt to the JD. Notwithstanding the submissions of the JC, it is difficult to see how a trust can be construed as a debt.

The credibility of the Defendants

85 My overall conclusion, after hearing the parties at trial, is that the credibility of the Defendants is suspect. Although I am not minded to make specific findings, I am of the view that their general lack of credibility affects the weight I give to their evidence.

The unclear manner by which the funds were beneficially owned by the Other Parties

86 Until the closing stages of the case, it was unclear whether the Defendants were arguing that Deuteron held the funds on trust directly for the Other Parties, or whether it was a situation where Deuteron held on trust for the JD, which in turn held the money beneficially for the Other Parties, or some variant of the two.

87 In March 2009, when the Other Parties staked their claim to the funds, Ms Belanovic and Mr Sipovac stated in their affidavits that clearly, the financial statements stated that *Deuteron* was to hold the monies for the JD. "Obviously, *[JD] is in turn holding the [Bank] monies* in accordance with the Protocol." Mr Zoran Matic's affidavit in February 2009 stated that it was him, as director of Deuteron, who suggested to the auditors to insert the note in the financial statements to make clear that the funds were not Deuteron's. He said: "I had stated it as belonging to the [JD], as it was *the [JD] who had the responsibility to the Manufacturers* under the Protocol … The purpose of the words I chose was to ensure that the Funds would always be properly administered according to the Protocol. That was the obligation of the [JD] … To my mind, *the [JD] was always under a legal duty to protect the Funds for the Manufacturers*." [emphasis added]. In the ensuing hearings before the High Court and the CA in *Teleoptik-Ziroskopi v Westacre*, it appeared that the Defendants had taken the position that Deuteron held on trust for JD, who in turn held on trust for the Other Parties. This may be the reason why the CA had thought that the High Court had placed undue emphasis on the documents of Deuteron, as these pertain to the relationship between Deuteron and the JD but not the relationship between the JD and the Other Parties (which had to be determined by the four 1991 documents). I can only speculate that perhaps the Defendants saw obstacles in either approach (see [86)], and thus left the manner by which the funds were held deliberately ambiguous.

88 Back in December 2005, when Miodrag Milosavljevic, the chief of the legal department of the JD, filed an affidavit for the registration of the English judgment in Singapore to be set aside, he had also said: "As per cashheld at [the Bank], *the [JD] kept the said monies as trustee* of its sub-suppliers based on the provisions set forth in Protocol signed on December 28, 1991, in Singapore … [t]he beneficiaries are the sub-suppliers". [emphasis added].

89 But throughout the present trial, I was only told that the purported beneficiaries were the Other Parties. The manner of holding of the trust or trusts was far from clear. In the light of how the Defendants conducted the proceedings, I can only surmise that this key aspect of the Defendants' case was being deliberately left vague to create more room for manoeuvre.

90 I start with the pleadings in 2012. The JD's Defence states that the *JD and Deuteron* were holding the monies for the Other Parties' benefit. Deuteron's Defence states that *Deuteron* was holding the monies for the Other Parties benefit. The Other Parties' Defence, for example, states that a trust had been created over the Other Parties' monies. [emphasis added]. At trial, as another

example, Mr Zoran Matic, when asked to be clear on his position of which party was holding the money, said: "It was a joint obligation of both, because, you know, Deuteron – Yugoimport was a shareholder of Deuteron, and Deuteron acted as per instructions of Yugoimport and there was another partner".

91 In JD and Deuteron's closing submissions, counsel stated that "[a] failure to earmark [is] at best … a breach of trust on the part of *the trustee*". [emphasis added]. Since the Protocol stated that "[Deuteron] shall earmark the funds on the account for the beneficiaries and shall then time deposit them based on the instructions received from each beneficiary", it seems that counsel was referring to Deuteron as the sole trustee here. However, he later stated that "[i]nsofar as [the JD and Deuteron] are concerned, the Funds are held for the benefit of [Other Parties]". In his replying closing submissions, he stated " … even if the JD had tried to obtain the release of the money through whatever method, it had done so, in order for it to be able to fulfil its obligation under the Protocol vis a vis the Other Parties". In the Other Parties' reply closing submissions, they stated, in response to the JC's assertion that the identity of the trustee was uncertain, that Deuteron was the trustee while the JD had contractual obligations to supervise Deuteron and ensure that the funds were protected for the benefit of the Other Parties.

92 In view of all this, I sought clarity during the closing arguments on 26 and 27 February 2015 by posing the question expressly. In response to my query, counsel for the JD and Deuteron said that *both* the JD and Deuteron were trustees:

Court:	Just to clarify, your position is that there is a back-to-back trust, it is Deuteron holds for Yugo and then Yugo holds for other parties, is that your position?
Mr Gabriel:	Your Honour, that is one of --
Court:	Not Deuteron directly holding for the other parties.
Mr Gabriel:	The document actually, your Honour would – it all depends on how your Honour looks at the facts. The document is a single document. The obligations are all stipulated in the document. How the parties look at it and interpret is a separate issue from interpretation of the document, which is a matter of law. So whether we say the trust is by Deuteron holding it in trust for JD and then JD holding it in trust for them or whether it is actually a trust that is direct from Deuteron to them, is a matter of legal interpretation which the court –
Court:	No, but what's your position?
Mr Gabriel:	Our position is we are both trustees.
Court:	Both meaning?
Mr Gabriel:	Deuteron is a trustee and Yugoimport is also a trustee. But it is difficult to separate them. It is in the account of Deuteron, as your Honour would know.

…

Mr Gabriel: … Both of us are trustees, that is, Deuteron is a trustee and so is Yugoimport. Yugoimport is a trustee because it cannot release any monies unless the instructions of the beneficiaries are given … Deuteron is a trustee, it is trustee for both the other parties and even Yugoimport where it cannot release the money to either one, it can only release if beneficiaries give instructions as per the protocol and the beneficiaries must sign it and then the representative of Yugoimport must initial it and then the money is released. …

Court: Let me try. I know it's difficult. So what you are saying is there's only one trust. Because what I'm asking you is, is there a back-to-back; back-to-back means there are two trusts. What you are saying is there's only one, there aren't two. I mean, there are quite a number of affidavits from your side saying there are two trusts but put that to one side. You are saying that there's only one trust.

Mr Gabriel: One trust on both the parties.

Court: On both Deuteron as well as Yugoimport.

Mr Gabriel: Yes. They are both trustees.

Court: Very strange trust, isn't it.

93 I was of the view that this was rather bizarre, and asked counsel if it would not be simpler to construe two trusts, *ie*, Deuteron held for the JD and JD in turn, held for the Other Parties. To that, he replied that that was "probably the more logical conclusion that I would take, it's in that sense it's a back to back." He ended by saying that he would clarify his position the next day. The next day, the instructed counsel of the Other Parties said that the Other Parties' position was that Deuteron was the trustee and the funds were being held for the Other Parties. However, he also said that the JD was nonetheless a party to the trust – as the JD was the party with the "substantial commercial interest in the proper administration of the trust". Finally, later that day, counsel for the JD and Deuteron said: "So the long and short of it is … where is the beneficial use. The beneficial use is in the other parties, Deuteron is holding it in trust, Yugoimport is sitting there as the person who is administering the trust and that's the position we take."

94 Therefore, it was only during the closing arguments, when I posed the question expressly, that it became clear that the Defendants' final position was that there was one trust with one trustee – Deuteron – who held the funds for the Other Parties, although the JD was an administrator of the trust with certain powers and duties. Perhaps they had finally realized that the relationship between the JD and the Other Parties would have been governed entirely by Yugoslav law, which had no trust concept. I therefore decide on this case on the basis that Deuteron allegedly holds the funds on trust for the Other Parties, although the lack of clarity even in the late stages of the case reflects negatively on the Defendants' general credibility as a whole.

The credibility of the Defendants in other respects

95 The position that was taken by the JD and Deuteron on the one hand, and the Other Parties on the other, also seemed to shift in a coordinated fashion. As an example, Deuteron had been repeating the same admission in its financial statements between 1998 and 2008 that the funds belonged to the JD. But when the Other Parties appeared to stake their claim on the funds in 2009, the JD and Deuteron swung around to support the Other Parties' claim that they were the true owners of the

funds.

96 Important witnesses, such as Mr Lim – the former Deuteron director – and the external auditors of Deuteron's annual statements were not called to explain the admissions before the shift in position. The witnesses that were called, such as Mr Zoran Matic, contradicted themselves at trial. For example, Deuteron sent a letter to the Bank with an attachment payment order to pay a company in Egypt. Mr Zoran Matic signed the letter as executive director and authorised signatory. This was clearly an attempt to utilise the monies although he insisted in his affidavits that the monies were kept intact and were always "rolled over". The monies did not leave the accounts because the Monetary Authority of Singapore instructed for the deposits to remain frozen. At trial, he said at one point that he had sent the letter as a "desperate attempt" to get the money unfrozen, and the facts in the letter were not true. And while he apparently did so at the JD's instigation, he had stated on affidavits that "there was never any agreement or request by … the [JD] for the monies to be transferred outside the jurisdiction". At trial, it was also revealed that the JD's Serbian law expert had acted for the JD in about 15 cases and was still representing the JD in "two or three".

97 I also have doubts over whether the Other Parties' lawyer in Serbia, Vukica Protic ("Ms Protic"), who in turn instructed their Singapore lawyer, had proper instructions from her clients. She was issued with powers of attorney by the Other Parties. On 5 August 2013, the JC alerted the Other Parties' solicitors that Cajavec was in bankruptcy. On the same date, she had affirmed on behalf of all three Other Parties that their recent records did "not reflect that the subject funds are being held" by Deuteron in the accounts of the Bank for the Other Parties. On 12 August 2013, a court order required the Other Parties to produce their audited accounts. Cajavec did not comply with the order. It was bankrupt – and it was the JC who brought that fact to the parties' attention. In a subsequent affidavit, she then said that she had "ascertained from the Internet" that the JC was correct to state that her client was in bankruptcy, and that her power of attorney would cease to be effective as of the date of commencement of the bankruptcy. Despite laying claim to about 35% of the funds, there is no sign of the liquidator having had any contact with Ms Protic. At trial, she confirmed that she had only met a representative for Zrak-Teslic and Cajavec once, and she did not witness the execution of the powers of attorney. Therefore, she was dependent on her opponent to inform her of the bankruptcy of her own client, and upon being informed, she could find no better information than what was available on the Internet. It seems that she took instructions mainly from Teleoptik, the company with the smallest interest in the Advance, at about 10%. As the JC put it, this was like the "tail wagging the dog". This raised grave doubts in my mind as to whether the correct parties were before the court, as well as whether Ms Protic had proper instructions from the clients that she purported to represent.

98 The Defendants have relied on the tortured course of history in Yugoslavia to explain the absence of documentation that would have assisted their claim. For example, Ms Protic asserts that the Other Parties' offices were damaged in the NATO bombing in 1999, which the JC dismisses as a "convenient, vague and historically inaccurate excuse". It is impossible for me to ascertain the truth of such issues, but I am clear that the course of history cuts both ways – it also gives pause as to whether the Defendants are the right parties to lay claims on the funds. A brief sojourn into the history of Yugoslavia is necessary to understand this.

99 Yugoslavia was a former socialist regime that pulled together six constituent republics, including Bosnia-Herzegovina and Serbia, into a federation. This was the milieu in which the JD was based. But the federation disintegrated as the forces of communism ceded to nationalism, leading to attempts by some of the republics to secede in the early 1990s. The situation was complicated by the presence of different ethnic groups and religions. In Bosnia for example, there were Bosnian Muslims, Bosnian Serbs, and Bosnian Croats. By 1992, a bloody war had erupted among the various groups for control

over territories there. The situation only stabilised in 1995 with the Dayton Accords, a peace agreement that provided for Bosnia to be preserved as a single state but with two entities: the Federation of Bosnia and Herzegovina (mainly Muslims and Croats), and Republika Srpska (Serbs). Today, the JD is a Serbian state-owned company. The business entities that existed before the wars seem to have splintered into different companies along the lines of the new nation-states. I cite just one example – of Zrak-Teslic – which is one of the Other Parties (besides Cajevac) in the Republic of Srpska in Bosnia.

100 Mr Sipovac testified that: "To put it precisely, there is a Serbian Zrak, there is a Croatian Zrak and Bosnia or Muslim Zrak, meaning that the same separation on ethnical basis that prevailed within the civil war struck also this Zrak Holding company. It was divided along the ethnical lines." To support the claim that Zrak-Teslic is the legal successor of the Zrak Holding of Sarajevo in the 1991 documents, the Other Parties exhibited a decree issued by the Government of the Republic of Srpska. But the JC says that a Zrak entity called Zrak DD Sarajevo also exists, in Sarajevo (which is not part of the Republic of Srpska). Therefore, the question is whether the Other Parties are even the right parties to stake their claim to the funds. In any event, Zrak-Teslic has also turned out to be bankrupt, as was pointed out on the first day of trial on 25 November 2013 based on a search by the JC. Confirmation of the bankruptcy was only received on 25 February 2014, along with a new power of attorney purportedly issued by the liquidator. Given my holding in this case, I do not need to determine this vexed issue of whether the Other Parties are the proper parties. My point is only that on the whole, the credibility of the Defendants is suspect.

101 If the Defendants' version of events in this case is true, they would also have been liable for various illegal acts in Yugoslavia and in Singapore. These include the following:

(a) In 1991, Article 48 of the Foreign Exchange Law required the Other Parties to obtain permission from the National Bank of Yugoslavia to transfer money overseas. If they indeed owned the Advance, they would have been guilty of circumventing the legislation as they had no permission to move the Advance overseas.

(b) Two of the Other Parties are in Bosnia. If the money belonged to the Other Parties, Deuteron and the JD would have been lying to the Singapore authorities in 1995 that the funds belonged to the JD's Yugoslav directors and had no Bosnian links.

(c) If the funds really belonged to the Other Parties, Deuteron's directors and auditors would, in stating that the funds belonged to the JD, been giving false information in apparent breach of s 402 of the Companies Act. Their earlier affidavits in this case would also have been false.

102 Lastly, the question remains unanswered as to why the Other Parties never acted on their claim against the JD in Yugoslavia pursuant to the Commission Agreement?

Conclusion

103 In conclusion, I find that there is a debt due or accruing due from the Bank to the JC. The sum is based on the amount of US$15,047,844.44 stated by the JC in its statement of claim, and will also include the interest that has accrued since then, subject to the costs order that I make. I therefore hold that the provisional garnishee order under Summons in Chambers No 2151/2005/B should be made final.

104 Having had their day in court to show that they owned the beneficial interest in the funds, the Other Parties have failed to discharge their legal burden to demonstrate their ownership. Even if the

burden had been on the JC to show that the Other Parties are not beneficial owners, I would still have been unable to hold for the Other Parties because of the state of their evidence, which is riddled with contradictions and credibility issues. That said, I am unable to conclusively determine if the Other Parties are puppets of the JD to prolong the proceedings.

105 The CA in *Teleoptik-Ziroskopi v Westacre* (at [43]) also raised the question of whether the Supply Contract had been frustrated under its proper law, which might spell the risk of the JD being liable twice for the same debt – once to the JC under the garnishee order, and once to the foreign buyer under the Supply Contract's proper law. Frustration was not an issue that was properly ventilated during the trial. In any event, given my findings in this case, any claims that arise are merely contractual in nature, *ie*, they can be met by any of the JD's funds. There is no risk of the JD being liable for the same debt.

106 The JC had applied under Summons 5128 of 2013 for *inter alia*, an order that the defence of Cajavec be struck out and judgment entered for the JC, on the grounds of non-compliance with the 12 August 2013 court order to produce its accounts. There is no need to make any order on this in view of my holding in this case. Summons 5430 of 2013 is an application by the Other Parties' solicitors to be discharged as solicitors for Cajavec – I will not order the discharge; as to date, I am not satisfied that they have taken sufficient steps to ascertain the status of their client.

107 I will hear the parties on costs.