IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2016] SGCA 51

Civil Appeal No 117 of 2015

Between

The State-Owned Company
Yugoimport SDPR (Also
known as Jugoimport – SDPR)

… *Appellant*

And

Westacre Investments Inc

… *Respondent*

Civil Appeal No 118 of 2015

Between

Deuteron (Asia) Pte Ltd

… *Appellant*

And

Westacre Investments Inc

… *Respondent*

Civil Appeal No 121 of 2015

Between

(1) Teleoptik-Ziroskopi
(2) Zrak-Teslic

… *Appellants*

And

(1) Westacre Investments Inc
(2) The State-Owned Company Yugoimport SDPR (Also known as Jugoimport – SDPR)
(3) Deuteron (Asia) Pte Ltd
(4) DnB Nor Bank ASA Singapore Branch

… *Respondents*

Civil Appeal No 134 of 2015

Between

Westacre Investments Inc

… *Appellant*

And

(1) The State-Owned Company Yugoimport SDPR (Also known as Jugoimport – SDPR)
(2) Deuteron (Asia) Pte Ltd
(3) DnB Nor Bank ASA Singapore Branch
(4) Teleoptik-Ziroskopi
(5) Zrak-Teslic
(6) Cajavec (previously known as Rudi Cajavec)

… *Respondents*

JUDGMENT

[Civil Procedure] — [Garnishee Orders]
[Trusts] — [Express Trusts]

The State-Owned Company Yugoimport SDPR (also known as Jugoimport-SDPR)
v
Westacre Investments Inc and other appeals

[2016] SGCA 51

Court of Appeal — Civil Appeals No 117, 118, 121 and 134 of 2015
Sundaresh Menon CJ, Andrew Phang Boon Leong JA and Steven Chong J
19 January 2016

31 August 2016 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 In April 2005, the judgment creditor in the present case obtained two *ex parte* provisional garnishee orders against a subsidiary of the judgment debtor and a bank where the subsidiary had deposited some funds. The provisional orders were obtained on the ground that the funds deposited in the subsidiary's bank accounts ("the Funds"), which in March 2009 amounted to more than US$17m, belonged beneficially to the judgment debtor.

2 The judgment creditor's path towards making those two provisional orders final and absolute has been fraught with difficulties. After more than a decade, it is still embroiled in court proceedings as it strives to bring this all to an end. The judgment debtor launched two attacks against the provisional orders. First, it applied in June 2005 to set aside the registration of the English

judgment on which the garnishee action was predicated. After three years of litigation, that application was dismissed by this court. Then, the judgment debtor, together with its subsidiary and three companies from the former Socialist Federal Republic of Yugoslavia ("Yugoslavia"), whom we shall refer to as "the Other Parties", contested the garnishee proceedings on the ground that the Funds in fact belonged beneficially to the Other Parties and not to the judgment debtor.

3 When the second of those two matters was heard in May 2011, the High Court summarily determined that the Funds belonged wholly and exclusively to the judgment debtor and not to the Other Parties. The two provisional orders were therefore made final and absolute. That decision was subsequently reversed on appeal in September 2011 when this court found that a trial was necessary to resolve the factual issues that had been raised.

4 After a trial that spanned 21 days between November 2013 and February 2015, the Judicial Commissioner ("the Judge") found that the Funds were beneficially owned by the judgment debtor, and made final and absolute the garnishee order against the bank, but not that against the subsidiary (see *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR (also known as Jugoimport-SDPR) and others* [2015] 4 SLR 529 ("the Judgment")). This led the parties to file their respective appeals against the parts of the decision that were not in their favour, thus bringing this matter before this court for the third time.

5 The present case concerns four cross-appeals that arose from the Judgment. Three of the four appeals are brought by the judgment debtor, the subsidiary and the Other Parties respectively and are against the Judge's finding that the Funds belong beneficially to the judgment debtor and his

decision to make the garnishee order against the bank absolute. The last appeal is the judgment creditor's appeal against the Judge's decision not to make absolute the garnishee order granted against the judgment debtor's subsidiary.

6 Three issues lie at the core of the appeals: (a) whether the Funds are beneficially owned by the Other Parties; (b) whether the garnishee order against the subsidiary should have been made absolute; and (c) whether the garnishee order against the bank should have been made absolute.

7 In our judgment, the Judge was correct to have found that the Funds are beneficially owned by the judgment debtor and not by the Other Parties. We do not, however, agree with his decision in respect of both the garnishee orders. In our judgment, there is no basis to make the provisional order against the bank absolute because the bank does not owe the judgment debtor a debt. On the other hand, the order against the subsidiary should have been made absolute because it owes the judgment debtor a debt in equity, which can be garnished. The debt in equity arose because the subsidiary held the Funds on a bare trust for the judgment debtor *and* the judgment debtor had demanded the Funds in 1995. For this and other reasons, which we elaborate on below, we reverse the Judge's decision in part and make absolute the provisional garnishee order against the subsidiary, but not against the bank. We also make some other ancillary orders.

The parties

8 The judgment creditor, Westacre Investments Inc, is a consultancy company that was incorporated in Panama in 1988 to provide consultancy services to clients intending to do business in the Middle East, in particular in Kuwait. We refer to it as the Judgment Creditor. By 1992, the Judgment

Creditor had largely suspended commercial activities, but continued to pursue its contractual and judicial claims through arbitration and, where necessary, to enforce arbitral awards in its favour in various jurisdictions, as it is doing in the present case. The Judgment Creditor is a respondent in Civil Appeals No 117, 118 and 121 of 2015 (which we will refer to as "CA 117", "CA 118" and "CA 121" respectively), and is the appellant in Civil Appeal No 134 of 2015 ("CA 134").

9 The judgment debtor, The State-Owned Company Yugoimport SDPR (formerly known as the Federal Directorate of Supply and Procurement), is a company that is wholly-owned by the Serbian government. We refer to it as the Judgment Debtor. It was founded in 1949 in Yugoslavia. It is the appellant in CA 117 and a respondent in CA 121 and CA 134.

10 The subsidiary of the Judgment Debtor, against whom the Judgment Creditor has sought a garnishee order, is a Singapore company, Deuteron (Asia) Pte Ltd ("Deuteron"). It is the appellant in CA 118 and a respondent in CA 121 and CA 134. It was formerly known as FDSP (Asia) Pte Ltd and was incorporated on 18 June 1991. On 28 October 1991, the Judgment Debtor became a shareholder of Deuteron, holding 51% of its shares, with representation on its board of directors. Nearly a decade and a half later on 23 December 2005, the Judgment Debtor came to wholly own Deuteron and gained complete control of its board.

11 The other garnishee in these proceedings is DnB Nor Bank ASA Singapore Branch ("the Bank"). It is the Singapore branch of a Norwegian bank ("DnB Nor Bank"). Although it is a respondent in CA 121 and CA 134, it is a neutral party, and is involved only because the Funds are held in Deuteron's accounts with it.

12 The Other Parties, who entered the fray in early 2009 to contend that the Funds belonged beneficially to them, are (a) Teleoptik-Ziroskopic, a company registered in Serbia and Montenegro; (b) Zrak-Teslic, a company registered in Bosnia and Herzegovina; and (c) Cajavec (previously known as Rudi Cajavec), a company registered in Bosnia and Herzegovina. The Other Parties appear to be arms manufacturers.

13 Shortly before the trial, the court was informed by counsel for *the Judgment Creditor* that Teleoptik-Ziroskopi was under some form of restructuring, and that Zrak-Teslic and Cajavec were bankrupt. It appears that Cajevec has since been struck off the register. During the trial, counsel for the Other Parties applied to be discharged from acting for Cajevec. The Judge did not grant the application as he was not satisfied that counsel had taken sufficient steps to ascertain the status of Cajevec. For ease of reference, we will continue to use the term "the Other Parties" even when referring only to Teleoptik-Ziroskopi and Zrak-Teslic. Only Teleoptik-Ziroskopi and Zrak-Teslic (and not Cajavec) are appellants in CA 121, though all three are respondents in CA 134.

14 The parties, aside from the Bank, are split into two main camps along the following lines:

(a) the Judgment Debtor, Deuteron and the Other Parties align themselves arguing that the Funds belong beneficially to the Other Parties and there is thus no basis on which the garnishee orders can be made absolute; and

(b) the Judgment Creditor argues that the Funds belong to the Judgment Debtor, and therefore Deuteron and the Bank can be garnished.

For ease of reference, we will retain the terminology used by the Judge and continue to refer to the Judgment Debtor, Deuteron and the Other Parties collectively as "the Defendants".

Background

15 The history of the proceedings between a judgment creditor and a judgment debtor is not usually relevant to the determination of whether provisional garnishee orders ought to be made absolute. But it may be relevant in this case because at its core, the Judgment Creditor's argument is that, consistent with its delay tactics and refusal to comply with court orders over the years, the Judgment Debtor is using the Other Parties as puppets to prolong the proceedings and to prevent the Judgment Creditor from enforcing its claim to the Funds.

16 On 28 February 1994, the Judgment Creditor prevailed in arbitration proceedings brought against the Judgment Debtor before a tribunal constituted under the auspices of the International Chamber of Commerce in Geneva. This arbitral award arose out of a dispute over an agreement pursuant to which the Judgment Creditor was to provide consultancy services to the Judgment Debtor. The total sum owed by the Judgment Debtor to the Judgment Creditor under the award stands at more than £56m. Over the last 22 years, the Judgment Creditor has endeavoured to realise its arbitral award in various jurisdictions, including the United Kingdom ("the UK"), Kuwait, Cyprus, and Switzerland. The Judgment Debtor, in turn, has opposed each and every one of those enforcement proceedings.

17 On 13 March 1998, the Judgment Creditor obtained an English judgment against the Judgment Debtor to enforce the arbitral award. Pursuant

to various garnishee and receivership orders that were pursued in the UK, the Judgment Creditor managed to recover slightly more than £4m from the Judgment Debtor. The residual amount remained outstanding.

18 The dispute shifted to Singapore in July 2004, when the Judgment Creditor uncovered evidence that there were funds here that it believed belonged beneficially to the Judgment Debtor. These are the Funds that are in Deuteron's accounts with the Bank. This led the Judgment Creditor to commence proceedings in Singapore. On 5 October 2004, the Judgment Creditor registered the English judgment here and on 28 October 2004, it successfully obtained a Mareva injunction over Deuteron's assets, including the Funds. The Mareva injunction included an order that Deuteron was to inform the Judgment Creditor in writing of all the monies that it held that belonged to the Judgment Debtor, and thereafter file an affidavit detailing the same.

19 Pursuant to this order, the following transpired:

(a) Deuteron's solicitors wrote a letter to the Judgment Creditor's solicitors on 3 November 2004 stating that "[Deutron] has confirmed that a sum of USD14,925,995.59 or thereabouts stands to credit of the [Judgment Debtor] in [the Bank]".

(b) Two days later, Deuteron's solicitors sent another letter attaching the statements of four bank accounts "showing the monies held by [Deuteron] for and on behalf of [the Judgment Debtor]". Based on the bank statements that were exhibited, the Funds amounted to approximately US$15m then.

(c) Thereafter, on 10 November 2004, Mr Lim Poh Weng, who was then a director and shareholder of Deuteron, affirmed an affidavit exhibiting the bank account statements, and deposed that the monies in the accounts were "held by Deuteron for and on behalf of [the Judgment Debtor]".

20 On 28 April 2005, the Judgment Creditor filed two summonses for provisional garnishee orders against Deuteron and the Bank. The provisional orders were granted the next day, and Deuteron and the Bank were ordered to show cause as to why the provisional orders should not be made absolute. What followed next has already been summarised in the introduction to this judgment (at [2] above). The Judgment Debtor resisted the garnishee proceedings in two ways.

21 First, the Judgment Debtor applied on 2 June 2005 to set aside the registration of the English judgment in Singapore on the ground that it was no longer enforceable in the UK due to the time period that had lapsed. As a result of this application, the garnishee proceedings were stayed. The Judgment Debtor succeeded at first instance before the High Court. The matter went on appeal before the Court of Appeal in May 2007, and the court directed the Judgment Creditor to refer the question of whether the judgment was still enforceable in the UK to the English courts. Tomlinson J answered the question in the affirmative in April 2008 (see *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR* [2009] 1 All ER (Comm) 780). With this, the Court of Appeal reversed the High Court's decision and dismissed the Judgment Debtor's application on 30 December 2008 (see *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR* [2009] 2 SLR(R) 166).

22 The second way in which the Judgment Debtor has resisted (and continues to resist) the garnishee proceedings is by maintaining that the Funds do not belong to it. This assertion was first made in 2005 while the proceedings for the setting aside of the English judgment was still on-going. The Judgment Debtor's legal counsel, Miodrag Milosavljevic, deposed in an affidavit dated 9 December 2005 that the Judgment Debtor "kept the said monies [in the Bank] as trustee of its *sub-suppliers* [referring here to the Other Parties] based on the provisions set forth in [the] Protocol" [emphasis added]. The Other Parties also set out their position that the Judgment Debtor and Deuteron held the Funds as their trustees in a letter that was sent in October 2005 to the Judgment Creditor's solicitors by the solicitors who were acting on behalf of two of them at that time. The Other Parties took no further action over the next three years to assert their alleged beneficial ownership of the Funds until the Judgment Debtor's application to set aside the registration of the English judgment was dismissed on appeal in December 2008. At that stage, the Defendants began to actively contest the garnishee proceedings by arguing that the Funds belonged beneficially to the Other Parties. Various representatives from the Defendants deposed affidavits to this effect in February and March 2009.

23 In the latter half of 2009, the Defendants applied to convert the garnishee proceedings into a writ action, but failed. In October 2009, the Judgment Creditor and the Other Parties respectively sought a summary determination in their favour of the issue of the Other Parties' ownership of the Funds. The Judgment Debtor for its part made successive requests for an extension of time to file further evidence. Those requests were all dismissed as it had previously been granted a month to file further evidence but had failed to abide by the timelines.

24 On 19 May 2011, the High Court summarily determined that the Funds belonged wholly and exclusively to the Judgment Debtor, and made absolute the provisional garnishee orders against Deuteron and the Bank that had been granted six years earlier in April 2005 (see *Westacre Investments Inc v The State-Owned Company Yugoimport SDPR (Deuteron (Asia) Pte Ltd, garnishee) and others* [2011] SGHC 123 ("*Westacre (HC's decision on summary determination*)). The Defendants appealed.

25 On 28 September 2011, the Court of Appeal allowed the appeals in part, setting aside the order making the garnishee orders absolute, and directed a trial to resolve the disputes of fact (see *Teleoptik-Ziroskopi and others v Westacre Investments Inc and other appeals* [2012] 2 SLR 177 ("*Westacre (CA's decision on summary determination)*"). The trial was heard by the Judge, whose decision is the subject of the present set of appeals.

26 We will set out the parties' respective cases and summarise the Judge's decision before explaining our decision.

The parties' cases

The Defendants' case

27 Broadly speaking, there are two parts to the Defendants' case: (a) that the Funds are beneficially owned by the Other Parties and not the Judgment Debtor; and (b) that even if the Funds are beneficially owned by the Judgment Debtor, they nonetheless cannot be garnished because Deuteron would "merely" be a trustee and not a debtor of the Judgment Debtor.

The Funds are beneficially owned by the Other Parties

(1) The 1991 Documents

28 The Defendants argue that the Funds held in Deuteron's accounts belong beneficially to the Other Parties, and can be traced to a sum of US$10,631,615.72 that had been transferred from the Judgment Debtor's account with the National Bank of Yugoslavia into Deuteron's accounts with the Bank on 18 November 1991 ("the Advance"). They contend that this was borne out by four documents entered into in 1991 ("the 1991 documents") as follows:

(a) a supply contract dated 23 July 1991 that was entered into by a government buyer (which we refer to as "the Buyer") and the Judgment Debtor ("the Supply Contract");

(b) a pre-protocol dated 21 October 1991 that was concluded in Yugoslavia between the Judgment Debtor and Deuteron ("the Pre-Protocol");

(c) a contract numbered No. E/4860-1 dated 12 December 1991 that was concluded in Yugoslavia between the Judgment Debtor and the Other Parties (the Other Parties label this as the Commission Agreement, but we consider it more appropriate to refer to it neutrally as "Contract E/4860-1"); and

(d) a protocol dated 28 December 1991 that was concluded in Singapore between the Defendants ("the Protocol").

(2) The Judgment Debtor was a commission agent of the Other Parties

29 According to the Defendants, the Judgment Debtor entered into the Supply Contract with the Buyer to supply the latter with military equipment as a commission agent of the Other Parties, who are arms manufacturers. The total value of the Supply Contract was more than US$54m. They assert that it was necessary for the Judgment Debtor to be involved as an intermediary between the Other Parties and the Buyer because the government of Yugoslavia regulated all military equipment contracts between buyers from foreign countries and domestic manufacturers, such as the Other Parties. The Judgment Debtor, which was then known as the Federal Directorate of Supply and Procurement, was to serve as the government agency that would act as such an intermediary and was, in most instances, the only agency that could legally enter into military equipment contracts with foreign buyers.

30 The Defendants assert that the commission agency relationship between the Judgment Debtor and the Other Parties was first orally concluded in July or August 1991, and was subsequently embodied in Contract E/4860-1 on 12 December 1991.

(3) Transfer of the Advance to Deuteron's accounts in Singapore

31 On 4 October 1991, the Buyer paid the Advance to the Judgment Debtor's account with the National Bank of Yugoslavia. The Defendants say that the Advance was meant as funds for the Other Parties to purchase raw material for the manufacture of arms. The payment was in United States ("US") dollars, and the monies were converted to Yugoslav dinars as required by the prevailing regulations.

32 According to the Defendants, the Other Parties decided to transfer the Advance out of Yugoslavia and convert the monies to a more stable currency as the Yugoslav dinar was facing strong inflationary pressure. Since the Other Parties neither owned any foreign currency account nor had any bank accounts outside of Yugoslavia, they decided to transfer the Advance to a US dollar bank account of Deuteron, a company affiliated to the Judgment Debtor. The Advance was transferred to Deuteron's accounts with the Bank in Singapore on 18 November 1991. Before the transfer was done, the Judgment Debtor and Deuteron entered into the Pre-Protocol on 21 October 1991. The Defendants say that thereafter, between 22 and 28 December 1991, representatives of the Defendants met in Singapore to discuss the terms upon which the Advance that had already been transferred was to be dealt with. The discussions culminated in the execution of the Protocol on 28 December 1991.

33 The Defendants submit that the arrangement, as set out in the Protocol, was that the Judgment Debtor would be paid a 2.5% commission fee of $236,996.63 from the Funds pursuant to Article 14 of Contract E/4860-1. The remainder (that is 97.5%) of the Funds was to be held by the Judgment Debtor on trust for the Other Parties. They contend that the Advance was never utilised by the Other Parties because of the civil war that broke out and because the monies in the Bank had been frozen since June 1992. After the war broke out, the United Nations imposed sanctions on Yugoslavia by way of United Nations Security Council Resolution 757 of 1992 dated 30 May 1992, which led the Monetary Authority of Singapore ("MAS") to issue a circular to freeze funds in Singapore that were linked to Serbia and Montenegro on 10 June 1992. The Funds fell within this category. The MAS circular was only revoked on 20 March 2009. But the Funds remained frozen thereafter pursuant

to the Mareva injunction that has been in place since 28 October 2004 (see [18] above).

34 The Defendants submit that the terms of the 1991 Documents, as well as the course of events and transactions, show that the Other Parties beneficially own the Funds. They argue that under Yugoslav law, the Other Parties had proprietary rights in the Advance from 1991 because the Judgment Debtor had entered into the Supply Contract as the commission agent of the Other Parties, and it thus followed that when the Advance was transferred to Deuteron's accounts, it was impressed with a trust for the benefit of the Other Parties.

There is no debt even if the Funds belong beneficially to the Judgment Debtor

35 The Defendants further submit that even if we find that the Judgment Debtor is the beneficial owner of the Funds, the Funds cannot be garnished because Deuteron will "merely" be a trustee of the Funds and such a trust would not constitute a *debt* that can be garnished. This argument had not been raised prior to the trial. It was not an issue when the matter was before the High Court in 2011 in *Westacre (HC's decision on summary determination)*, nor when the matter was heard on appeal by this court in *Westacre (CA's decision on summary determination)*.

The Judgment Creditor's case

36 The Judgment Creditor, on the other hand, argues that the Defendants' case that the Other Parties have beneficial ownership of the Funds is nothing more than an elaborate ploy by the Judgment Debtor to prevent it from garnishing the Funds to satisfy the judgment debt that has been outstanding since 1994.

37 Although the Judgment Creditor does not have personal or direct knowledge of the transactions between the Defendants or of their relationship, as it was never privy to any of the transactions, it relies on the following documentary evidence which it argues is sufficient to establish that the Judgment Debtor is the beneficial owner of the Funds:

(a) Deuteron's audited financial statements for the financial years of 1998 to 2008, in which it stated that the Funds were excluded from Deuteron's accounts because the Funds and the interest that accrued from it "belong wholly and exclusively" to the Judgment Debtor;

(b) a resolution passed on 8 April 1999 by Deuteron's shareholders, including the Judgment Debtor, ("the April 1999 Resolution") in which it was stated that the Funds and the "interest or gains accrued belong wholly and exclusively" to the Judgment Debtor;

(c) a settlement agreement dated 30 April 2001 between two directors of the Judgment Debtor, Jovan Cekovic and Zoran Matic, and Lim Poh Weng (a director of Deuteron), ("the April 2001 Settlement") the first article of which read "[a]ll monies in [the Bank] belong solely to [the Judgment Debtor] --- Agreed";

(d) a letter dated 3 November 2004 from Deuteron's solicitors to the Judgment Creditor's solicitors stating that "[Deuteron] has confirmed that a sum of USD14,925,995.59 or thereabouts stands to credit of the [the Judgment Debtor] in [the Bank]" (see [19(a)] above);

(e) another letter dated 5 November 2004 from Deuteron's solicitors to the Judgment Creditor's solicitors attaching the statements

of four bank accounts "showing the monies held by [Deuteron] for and on behalf of [the Judgment Debtor]"(see [19(b)] above);

(f) an admission in the affidavit filed by Lim Poh Weng on 10 November 2004 that the Funds were 'held by Deuteron for and on behalf of [the Judgment Debtor]" (see [19(c)] above);

38 The Judgment Creditor relies on the following four main grounds to argue that the Defendants' case that the Funds are held on trust for the Other Parties cannot stand:

(a) First, it argues that the 1991 Documents do not support the Defendants' assertion that the Judgment Debtor was the commission agent of the Other Parties. Instead, the documents show that the Other Parties were the Judgment Debtor's sub-contractors, and at best had only contractual rights against the Judgment Debtor rather than a proprietary interest in the Funds.

(b) Second, it asserts that even if the Judgment Debtor was found to be a commission agent of the Other Parties, this did not confer on the Other Parties any *in rem* rights to, or interest in, the Advance (and by extension the Funds) under Yugoslav law.

(c) Third, it asserts that no trust could have arisen at the time the Advance was transferred to the Bank because the concept of a trust is not known under Yugoslav law. Moreover, the Defendants' case is contradicted by the declarations made by Deuteron and its representatives that the Funds were wholly and exclusively owned by the Judgment Debtor (see [37(a)-(f)]] above) and by the conspicuous

lack of such declarations or any attempt by the Other Parties to assert their beneficial ownership in the Funds.

(d) Fourth, it argues that the Defendants have failed to prove that the *Advance* can be traced to the *Funds* and thus their claim that the *Funds* are held on trust must fail even if the court accepts that the *Advance* was held on trust for the Other Parties. In this regard, the Judgment Creditor asserts that the Advance, or the bulk of it, had been dissipated because the total balance in Deuteron's accounts with the Bank had fallen to only $70,000 by June 1992. The Defendants' explanation for this is that the trust had subsequently been reconstituted when other monies were later transferred to Deuteron's accounts. The Judgment Creditor refutes this on the ground that it had not been shown that there was any intention to reconstitute the trust.

39 As for the Defendants' alternative argument that the Funds could not be garnished even if it were found to be beneficially owned by the Judgment Debtor because a trust is not a debt, the Judgment Creditor argues that Deuteron, as a bare trustee of the Funds, owes the Judgment Debtor a debt which can be garnished. In respect of the order against the Bank, the Judgment Creditor argues that this was perfectly sustainable because the Judgment Debtor could sue the Bank for the Funds by joining Deuteron, as a co-defendant, in a procedure akin to "the *Vandepitte* procedure" so called because it was discussed in the case of *Vandepitte v Preferred Accident Insurance Corporation of New York* [1933] AC 70 ("*Vandepitte v Preferred Accident*"). In the alternative, the Judgment Creditor argues that since the Bank could be subject to garnishee proceedings once Deuteron is found to owe the Judgment Debtor a debt and fails to pay, there is no reason to insist on a separate set of

garnishee proceedings when the garnishee order against the Bank could simply be made absolute in the present set of proceedings.

The decision below

40 The Judge dismissed the Other Parties' claim that they had beneficial ownership in the Funds. He was sceptical of the Defendants' claim that the Judgment Debtor and the Other Parties had a commission agency relationship, and considered that their relationship appeared more consistent with that of a main contractor and a sub-contractor. He held that in any event, even if he was prepared to assume "for the sake of argument" that the Judgment Debtor was a commission agent of the Other Parties, such a relationship did not confer anything more than contractual rights on the Other Parties as shown from the judicial decisions and academic commentary adduced by the Judgment Creditor's experts on Yugoslav law, whose evidence he accepted over that of the Defendants' experts.

41 The Judge was also not persuaded by the Defendants' argument that a trust had been created when the Advance was transferred to Singapore, either through the transfer or through the subsequent execution of the Protocol. He found that regardless of whether Yugoslav or Singapore law applied in the determination of this issue, there was no intention to create a trust in favour of the Other Parties.

42 Instead, the Judge found that the Funds were held by Deuteron on a bare trust for the Judgment Debtor, and that the Judgment Creditor, as a garnishor, could step into the shoes of the Judgment Debtor, and exercise the Judgment Debtor's right to collapse the trust as against Deuteron. This, he held, allowed the Judgment Debtor to acquire Deuteron's chose in action

against the Bank, which resulted in the Bank owing a debt to the Judgment Debtor that could be garnished by the Judgment Creditor. He thus made the provisional garnishee order against the Bank absolute. The Judge declined, however, to make the provisional garnishee order against Deuteron absolute as he thought that a trust could not be construed as a debt.

43 The Judge included a section at the end of the Judgment detailing reasons why he found the credibility of the Defendants to be suspect. Although he was "unable to conclusively determine if the Other Parties [were] puppets of the [Judgment Debtor] to prolong the proceedings", he noted the coordinated manner in which they shifted their positions. He also expressed some doubts as to whether the Other Parties had standing to bring the claim and alluded to the possibility that they were not the parties listed in the Pre-Protocol and Protocol. He did not see a need to resolve this "vexed" issue given his holding that the Other Parties would in any event have had no right to the Funds.

Summary of the four appeals

44 Collectively, the four appeals brought by the Judgment Debtor, Deuteron, two of the Other Parties, and the Judgment Creditor respectively, cover the entire decision of the Judge. Broadly speaking, the Defendants are appealing in CA 117, CA 118 and CA 121 against the Judge's finding that the Funds belong beneficially to the Judgment Debtor and his decision to make the provisional garnishee order against the Bank absolute, while the Judgment Creditor is appealing in CA 134 against the Judge's refusal to make the order against Deuteron absolute.

45 The parties' cases on appeal are largely similar to their positions in the court below. The Defendants continue to assert that the Other Parties, and not the Judgment Debtor, are the beneficial owners of the Funds, and that even if the Funds are held on trust for the Judgment Debtor, this does not translate to either Deuteron or the Bank owing a debt to the Judgment Debtor. On this basis, they contend that the garnishee proceedings must fail. Further, they argue that the Judge's holding that the Judgment Creditor can step into the shoes of the Judgment Debtor and collapse the bare trust is wholly contrary to legal principle.

46 The Judgment Creditor, on the other hand, maintains that it is clear from the documentary evidence and the conduct of the parties that the Funds belong beneficially to the Judgment Debtor, and argues that the Judgment Debtor is colluding with the Other Parties to thwart its efforts to recover the money. In support of its appeal in CA 134, the Judgment Creditor argues that the Judge was wrong to have declined to make the garnishee order against Deuteron absolute because (a) the legal burden to prove that the provisional order against Deuteron should *not* be made final lay with the Defendants, and they failed to discharge it; (b) Deuteron owes an equitable debt to the Judgment Debtor as a bare trustee; and in the alternative, (c) Deuteron owes the Judgment Debtor a "legal" debt as the latter was entitled to recover the Funds from it by an action for money had and received.

47 Where necessary, we will elaborate on the arguments of the parties in our analysis of the issues.

The issues before us

48 Three issues fall to be determined in the present set of appeals:

(a) whether the Other Parties beneficially own the Funds;

(b) whether the Judge should have made the provisional order against Deuteron absolute; and

(c) whether the Judge was correct to have made the provisional order against the Bank absolute.

Whether the Other Parties beneficially own the Funds

49 For the Other Parties to succeed in their claim, they would have to prove not only that a trust was created when the Advance was transferred out of Yugoslavia to Singapore or when (or before) the Protocol was executed, but also that the Advance can be traced to the Funds. We begin with the first of these issues, namely whether the Advance was held on trust for the Other Parties.

Whether a trust had arisen over the Advance

50 Given the cross-border elements present in this case, it is not immediately apparent whether Singapore law should govern the question of whether the Advance was held on trust. It was transferred out from Yugoslavia, and the transaction involved four Yugoslav parties (namely, the Judgment Debtor and the Other Parties). On the other hand, the Advance was paid here and some discussions pertaining to the transaction evidently took place here. Further, there are also two Singapore parties involved (namely, Deuteron and the Bank).

51 The main contenders for the law that will govern the creation of an express trust over the Advance are (a) the law of the forum; (b) the *lex situs* of the trust property; and (c) the proper law of the putative trust. Although the

point is not covered by direct authority, the prevailing view is that the proper law of the putative trust would apply (see *Halsbury's Laws of Singapore* vol 6(2) (LexisNexis, 2013 Reissue) at para 75.335, *Augustus v Permanent Trustee Co (Canberra) Ltd* (1971) 124 CLR 245, and *The Republic of the Philippines v Maler Foundation and others and other appeals* [2014] 1 SLR 1389 at [101]). The proper law of the putative trust is the law expressly or impliedly chosen by the settlor, or in the absence of either an express or implied choice, the system of law with the closest connection to the putative trust. Both Mr Francis Xavier SC ("Mr Xavier"), who appears for the Other Parties, and Mr Giam Chin Toon SC, who appears for the Judgment Creditor are in agreement that the proper law of the putative trust should apply, but disagree on whether this points to Yugoslav law or Singapore law. Counsel for the Judgment Debtor and Deuteron, Mr Peter Gabriel ("Mr Gabriel"), like Mr Xavier, argues that Singapore law should apply but did not specify if this was on the basis that Singapore law is the proper law of the putative trust.

52 The Judge did not see a need to make a definitive finding on this issue as he found that no trust could have arisen under either law. In essence, and for the reasons we go on to discuss, we share this view.

No trust could have arisen if Yugoslav law applied

53 If Yugoslav law is found to be the proper law of the putative trust and thus the applicable law, no trust could have arisen given that there was no concept of a trust under Yugoslav law. This much is, at least impliedly, conceded by the Defendants.

No trust could have arisen even if Singapore law applied

54 Even if we take the Defendants' case at its highest and assume that Singapore law is the proper law of the putative trust and thus the governing law, we are satisfied that no trust in favour of the Other Parties could have arisen because the evidence is clear that the parties had no intention to create a trust.

55 Under Singapore law, an express trust arises only when the three certainties are present: certainty of intention, certainty of subject matter and certainty of the objects of the trust. The main issue here concerns the first certainty – certainty of intention – which requires clear evidence of an intention on the part of the alleged settlor to create a trust and to subject the trust property to trust obligations, as opposed to creating any other form of binding legal relationship (for example, a contractual relationship). The intention of the alleged settlor must be to dispose of the property so that somebody else *to the exclusion of the disponent* acquires the beneficial interest in the property (see *Paul v Constance* [1977] 1 WLR 527 at 531). As we noted in *Guy Neale and others v Nine Squares Pty Ltd* [2015] 1 SLR 1097 ("*Guy Neale*"), it is the substance, and not the form, of the alleged settlor's words and conduct that is important and the alleged settlor is not required to state explicitly or specifically that he is creating a trust. This is also the view expressed by the learned authors of *Snell's Equity* (John McGhee gen ed) (Sweet & Maxwell, 33rd Ed, 2015) ("*Snell's Equity*") at para 22-013:

> … No particular form of expression is necessary for the creation of a trust if, on the whole, it can be gathered that a trust was intended. It is unnecessary for the settlor to use the word "trust": the court construes the substance and effect of the words used, against the background of any relevant surrounding circumstances. Indeed, the settlor need not even understand that his words or conduct have created a trust if they have this effect on their proper legal construction.

> Conversely, it is not enough that the settlor describes the transaction as a trust if on its proper construction the transaction was not intended to operate as a trust. …

56 The intention of the alleged settlor to create a trust may be inferred not only from his words and conduct, but also from the surrounding circumstances and the interpretation of any agreements that might have been entered into (see *Guy Neale* at [58]). Where an agreement does not contain any express term that reflects the intention to create a trust, whether such an intention may nonetheless be inferred would depend on what may appropriately be taken to be the expectations of the parties in the light of the commercial context (see *Hinckley Singapore Trading Pte Ltd v Sogo Department Stores (S) Pte Ltd* [2001] 3 SLR(R) 119 at [33]).

57 Mr Xavier submits that the facts surrounding the transfer of the Advance to Singapore show that the Judgment Debtor intended that Deuteron should hold the Advance for the Other Parties and apply it for the benefit of the Other Parties. He relies on the Pre-Protocol and the Protocol, which he submits are governed by Singapore law, as the principal evidence of the intention to create such a trust, and submits that these are of high probative value because they are documents contemporaneous with, and constitutive of, the creation of the trust. In particular, he draws our attention to cll 3, 4 and 5 of the Pre-Protocol, which state as follows:

> …
>
> 3. The First Party [*ie*, Deuteron] and the Second Party [*ie*, the Judgment Debtor] agreed that the amount of the advance payment will be deposited at the bank account of the First Party i.e. with the [Bank].
>
> 4. The deposited amount shall be used exclusively for purchasing the raw materials, parts, assemblies and other goods for the needs of the Manufacturers [*ie*, the Other Parties].

> 5. The authori[s]ed representative of [the Judgment Debtor] shall, based on the particular written request of the [Other Parties], issue a written order to the authori[s]ed person of [Deuteron] to effect the payment on behalf of the Manufacturer for the purchased goods [*ie*, the Other Parties].

Mr Xavier submits that cll 3 and 4 clearly demonstrate that the parties had an intention to create a trust, in that pursuant to cl 3, the Judgment Debtor would transfer the legal title of the Advance to Deuteron, and pursuant to cl 4, the beneficial interest in the monies would vest in the Other Parties. He further argues that cll 4 and 5 impose trustees' duties on Deuteron. Pursuant to these clauses, Deuteron was expected to keep the Advance in its account for the exclusive use of the Other Parties and to apply it at their direction by making payment for their purchases.

58 Next, Mr Xavier submits that the Protocol contains language and terms that cohere with a trust arrangement. For example, the Other Parties are described as "beneficiaries" in para 3 of the Protocol. Further, the appendix to the Protocol sets out a breakdown of how the Advance is to be allocated to each of the Other Parties. He submits that like the Pre-Protocol, the Protocol too prescribed certain obligations on Deuteron that resembled trust obligations. These include: (a) earmarking the Advance for the Other Parties; (b) placing the Advance in a time deposit in accordance with the Other Parties' instructions; (c) making payments upon the written order and directions of Other Parties; (d) keeping a proper record of the funds spent by the Other Parties; and (e) returning any funds that had not been spent to the Other Parties, or using such remaining funds for other purposes in accordance with the instructions of the Other Parties.

59 In the final analysis, the requirement of certainty of intention entails the ascertainment of the actual intention of the settlor of the putative trust. As

set out at [56] above, this may require us to look at the surrounding circumstances of the transaction including the documents or agreements that have been entered into. Mr Xavier's argument focuses on aspects of the documents that bear features which would be consistent with the existence of a trust. But this skips an essential and anterior step in the inquiry – which is whether these features are actually indicative of the intentions of the settlor. In many instances, this is presumed. But where, as here, it is evident that the parties did not have in their contemplation the mechanism of a trust and where there is nothing to indicate a conscious choice of Singapore law to govern the Pre-Protocol and Protocol, we are unable to infer that there was an intention on the part of the settlor to create a trust *even if* the documents did have elements that resemble a trust or terms that resemble "trust-like" obligations.

60 In our judgment, it is significant and fatal to Mr Xavier's case that the Pre-Protocol and Protocol, which were expressed in the Yugoslav language, were negotiated by Yugoslav parties without the benefit of legal advice from Singapore. The evidence of the representatives of the Defendants, including those who had first-hand knowledge of these matters, having not only participated in the discussions but having also signed the Protocol on behalf of the respective parties, is that the parties had in mind Yugoslav law, as opposed to Singapore law, when they concluded those arrangements in 1991. We set out a few telling extracts from the evidence of the representatives of the Defendants:

(a) Miodrag Milosavljevic, a legal counsel for the Judgment Debtor, deposed at para 17 of her witness statement dated 20 July 2007 that was filed in the proceedings before the Queen's Bench Division (Commercial Court), that "[even] [t]hough the place where the Protocol was signed was Singapore, no Singapore legal advice was

> sought as the parties had no intention of applying Singapore law … [and] [t]he Protocol was drafted to reflect the way the parties understood the position under [Yugoslav] law".
>
> (b) Nada Manic, who signed the Protocol on behalf of the Judgment Debtor, deposed at para 23 of her affidavit dated 3 February 2009 that "no party was having any legal issue in mind under Singapore law" when they were discussing the Protocol, which was drafted in the Serbian language. She stated that quite on the contrary, the parties were "looking at it totally from a Yugoslavian perspective".
>
> (c) Slobodanka Balanovic, who signed the Protocol on behalf of Teleoptik-Ziroskopi, deposed at para 30 of her affidavit dated 25 March 2009 that "[w]hen [they] all signed the Protocol in Singapore [they] viewed it as a purely [Yugoslav] transaction and had in mind Yugoslav law and regulations". In a later affidavit dated 2 August 2013, she again stated at para 28 that "[w]hen [she] signed the Protocol, [she] viewed it as a purely [Yugoslav] transaction and had in mind Yugoslav law and regulations", and expressed the view that the "other parties to the Protocol would also have held the same views'.

Further, we note that the Defendants had each pleaded in their respective defences that the Pre-Protocol and Protocol were governed by Yugoslav law (as opposed to Singapore law) even though they (at least the Other Parties) have since changed their positions on appeal.

61 Collectively, the evidence points to the irresistible conclusion that (a) the Pre-Protocol and Protocol were entered into on the basis of Yugoslav law rather than of Singapore law; and more importantly, (b) the parties could not have *intended* to create a trust given that they had no knowledge of Singapore

law. Further, there is nothing to suggest that the parties had deliberately chosen Singapore as the destination of the transfer of the Advance because it is a common law jurisdiction that recognises the concept of a trust and the resultant separation of the legal and beneficial interest. On the contrary, the evidence reflects that Singapore was chosen because the parties wanted to transfer the monies out of Yugoslavia and Singapore merely happened to be where the Judgment Debtor had an affiliated company. We are thus satisfied that even if Singapore law applied to govern the question of whether a trust had been created, our conclusion would remain that there was no trust over the Advance because the parties could not be found to have intended a factual arrangement that had a particular legal consequence when that consequence was not within their contemplation.

62 We note that a substantial part of the parties' submissions and of the Judgment was spent on the question of whether the Judgment Debtor was a commission agent of the Other Parties and whether if so, the Other Parties would have had a proprietary interest in the Advance under Yugoslav law before it was transferred to Singapore. In our judgment, these two issues have only peripheral relevance to the issue of whether a trust had arisen over the Advance. While these issues are relevant as part of the surrounding circumstances that may be considered in ascertaining whether the parties had the intention (or the lack of an intention) to create a trust, the key question, in the final analysis, is whether a trust had been intended when the Advance was transferred to Deuteron's accounts in Singapore. For the reasons we have outlined, we do not think it had been.

Conclusion on the issue of whether a trust had arisen

63 In the premises, we are satisfied that whether it is Yugoslav law or Singapore law that is the proper law of the putative trust, no trust could have arisen in favour of the Other Parties over the Advance. The Pre-Protocol and Protocol, and the transactions between the parties, gave rise only to a series of contractual rights between the parties, and not to any proprietary rights or interests. The Other Parties therefore cannot be the beneficial owners of the Funds. Their claim is accordingly dismissed. The Other Parties might well have contractual claims against the Judgment Debtor pursuant to the transactions entered into in 1991 but that has no relevance to the present appeals. This renders moot the second part of this issue, namely, whether the Advance can be traced to the Funds. Notwithstanding this, we will offer some observations.

Whether the Advance can be traced to the Funds

64 As we emphasised at the hearing of the appeal, the burden of proving that the Advance can be traced to the Funds lies with the Defendants. It is not for the Judgment Creditor to prove that the Advance *cannot* be traced to the Funds. In our judgment, even assuming – contrary to our holding on the first part of this issue – that the Other Parties did have a proprietary interest in the Advance, the Other Parties would have failed to discharge their burden of proving that the Advance can be traced to the Funds.

65 The initial case put forward by the Defendants was that the Advance was earmarked in Deuteron's accounts and never moved from there, and that the Funds consisted of the same monies as the Advance, save with the addition of accumulated interest. Subsequently, they changed their position and accepted that the monies had been moved but maintained that the Advance

could nonetheless be traced to the Funds. The timing of the change in position coincided with the time that the report of the Judgment Creditor's forensic accounting expert, Mr Christopher Bruce Johnson ("Mr Johnson"), was introduced into evidence. Mr Johnson had concluded in the report that the Advance had not been earmarked and had in fact been moved and dissipated. He made the following observations:

(a) The Advance was credited into two of Deuteron's accounts (*ie*, Accounts No 50901 and 57901) with the Bank on 19 November 1991.

(b) A month later, on 19 December 1991, these monies together with the accumulated interest, were split into several deposits and were credited into three accounts (*ie*, the two original accounts and an account Mr Johnson refers to as "the US$ Call Account").

(c) The monies in these three accounts were mixed and credited into the US$ Call Account, and two other accounts (Account No 58701 and another account he refers to as "the US$ Current Account") over the course of several transactions that took place between 17 January and 2 June 1992.

(d) By 22 June 1992, which was the date that Deuteron's accounts with the Bank were frozen pursuant to MAS's circular (refer to [33] above), the total balance in the five accounts, which the monies originating from the Advance had entered (*ie*, Accounts Nos 50901, 57901 and 58701, the US$ Call Account, and the US$ Current Account), had been reduced to US$32,258.41, a sum far lower than the Advance which was US$10.63m.

66 Mr Johnson concluded on this basis that the Advance could not be traced to the amount of US$10,759.085.65 that was in an account he refers to as "the US$ Collateral Account" as at 5 January 1996. The US$ Collateral Account is the account that contains the bulk of the Funds (approximately US$14.9m as at 29 October 2004). Mr Johnson also concluded from the bank statements that were made available to him that the aggregate sum across all 13 of Deuteron's accounts with the Bank fell below the value of the Advance on several occasions. The total balance in the accounts was approximately US$7.1m on 1 June 1991 and subsequently dropped to less than $70,000 on 4 June 1992, after approximately US$6.5m was withdrawn from the accounts on that day.

67 Mr Xavier contends that Mr Johnson's evidence is inaccurate and should be disregarded. First, he submits that Mr Johnson's analysis was based on incomplete documentation as he did not have the statements for 1994 and 1995. Second, he argues that Mr Johnson had failed to take into account the balances of Deuteron's accounts with other branches of DnB Nor Bank in Oslo and Hong Kong. Lastly, he submits that Mr Johnson had ignored evidence showing that the monies could have been moved between Deuteron and another company, Restonic Trading Ltd ("Restonic"), which was supposedly in a "close relationship" with Deuteron.

68 Mr Xavier further submits that, in any event, tracing is a legal concept that cannot be determined by forensic accounting. He argues that even though the monies may have been moved out of the accounts, the Advance may nonetheless be traced to the Funds because the presumption in *In re Hallett's Estate; Knatchbull v Hallett* (1880) 13 Ch D 696 ("*In re Hallett's Estate*") applies. Under this presumption, a trustee is taken to have dealt with his own money first where sums are removed from his bank account containing a

mixture of trust monies and the trustee's own monies. Recognising that the presumption in *In re Hallett's Estate* can only apply where the remaining balance in the bank account is greater than the value of the trust monies, Mr Xavier argues that the total balance of *all* of Deuteron's accounts worldwide with DnB Nor Bank (and not just those with the Bank) always exceeded the value of the Advance. He argues that Mr Johnson's evidence to the contrary should be disregarded because Mr Johnson had erroneously failed to take into account Deuteron's accounts with the Oslo and Hong Kong branches of DnB Nor Bank. In this regard, he points to correspondence between Deuteron and the Bank beginning on 15 November 1991, in which Deuteron asked the Bank to do the following:

> (a) assist it in opening a deposit account with DnB Nor Bank's head office in Oslo and to deposit approximately US$153m in that account;
>
> (b) remit US$58,150.80, and interest earned on this amount, from the account in Oslo to its account in Singapore after a month (on 16 December 1991); and
>
> (c) transfer the remaining amount, including interest, to Hong Kong sometime after December 1991.

69 Mr Xavier further submits that, in any event, even assuming that the balance in all of Deuteron's bank accounts across all branches of DnB Nor Bank had fallen below the sum of the Advance, this is not fatal to the tracing of the Advance to the Funds because the trust had been reconstituted by 12 June 1992 when monies in Deuteron's accounts with the Bank were "replenished" to a sum in excess of the Advance. He relies on *James Roscoe (Bolton) Ltd v Winder* [1915] 1 Ch 62 ("*Roscoe v Winder*") for the proposition

that a trustee may reconstitute a trust if he repays funds into the trust account and expresses an intention that the funds are for the benefit of the trust. Mr Xavier says that there is ample basis in the present case to infer such an intention.

70 We are not persuaded by Mr Xavier's submissions. First, as we have stated at the outset, the burden lies with the Defendants to prove that the Advance can be traced to the Funds. This burden cannot be discharged merely by pointing to alleged deficiencies in Mr Johnson's evidence. If the Defendants' case is that the Advance can be traced to the Funds because the monies had been paid into Deuteron's accounts in Oslo or Hong Kong or Restonic's accounts, the burden is on them to prove that this was indeed the case and further, that these monies remained traceable despite the transfers. This they have not done. While Zoran Matic, a director of Deuteron and the Judgment Debtor, initially stated in his affidavit of evidence-in-chief that the Judgment Debtor would refer to the evidence of its accounting experts from M/s BDO LLP to support its claim that the Funds were the monies that were deposited by the Other Parties, he later deleted this statement from his affidavit when he came to give oral testimony at trial.

71 Second, there is no legal basis to support Mr Xavier's submission that *all* of Deuterons' accounts with DnB Nor Bank, including or especially its overseas accounts in Oslo and Hong Kong, *must* be taken into account in determining whether the total balance had fallen below the value of the Advance. Each and every bank account is a separate and distinct asset. The crediting of trust monies into one account, or in this case a few accounts, does not necessarily mean that the monies in all the accounts would be regarded as trust funds. This was made clear in *Ong Jane Rebecca v Lim Lie Hoa and others* [2005] SGCA 4 ("*Ong Jane Rebecca*"), an appeal arising out of an

inquiry into the assets of an estate. The respondent in the case was one of the administrators and beneficiaries of the estate. The appellant who was seeking the inquiry argued, among other things, that the assistant registrar (whose decision had been affirmed by the High Court) had erred in excluding certain assets, including funds in three bank accounts in a Hong Kong bank that were in the respondent's name, from the estate. One of the issues before the court was whether the monies in all three accounts could be regarded as belonging to the estate because the respondent had admitted to mixing the funds of the estate that she held on trust with her personal funds in one of the three accounts. The appellant relied on the assumption of law that where a trustee mixes trust funds with his own funds, the whole of an account is subject to the trust unless there is proper accounting of the funds (*per Caltong (Australia) Pty Ltd v Tong Tien See Construction Pte Ltd* [2002] 3 SLR 241) for this argument. In holding that there was no basis to trace the estate monies into, and to apply the principle of mixing to, the other accounts, this court emphasised that each bank account is a separate and distinct asset, and the fact that monies may have been credited into one account did not necessarily mean that the monies in all the accounts that the trustee had with the bank would be regarded as trust funds (at [77]-[78]). The reasoning applies here with equal force.

72 There is thus no basis for the Other Parties to invite us to take into account Deuteron's other accounts with DnB Nor Bank when they have not proven that the Advance was in fact paid into those accounts. Tracing does not entail a mere consideration of the totality of the trustee's assets; rather it involves actually establishing the flow of the trust assets from where it was at the outset to where it is said to be at the end. Mr Johnson's evidence showed that the balance of the two accounts that the Advance had first been credited

into (*ie*, Accounts Nos 50901 and 57901) had fallen to zero. Even if we consider the balance of three other accounts that Mr Johnson had found that monies from the Advance had been transferred to (see [65(b) and [65(c)] above), the total balance of those five accounts was only US$32,258,41 as of 22 June 1992 (see [65(d)] above). As to the evidence of the transfer of the sum of US$153m to Deuteron's bank account in Oslo, on which the Defendants heavily rely (see [68] above), the evidence suggests that the transfer took place on 15 November 1991, which was four days *before* the Advance was banked in Singapore. The Other Parties have not proven that the monies in Oslo, a portion of which had been transferred back to Singapore with the remainder to Hong Kong, were in any way related to the Advance.

73 Third, we are unable to accept Mr Xavier's submission that the trust had been reconstituted. While we accept that a trustee may reconstitute a trust if he repays funds into a trust account and expresses an intention that the funds are for the benefit of the trust (*per Roscoe v Winder*), no such intention has been shown in the present case. Mr Xavier submits that there is ample basis to infer that Deuteron had the intention to reconstitute the trust. He points to the testimony of Zoran Matic, a director of both the Judgment Debtor and Deuteron, that the funds remaining in the accounts were intended to be for the benefit of the Other Parties, and argues that this is corroborated by the subsequent assertions made by Deuteron in its financial statements that the Funds did not belong to Deuteron as well as its subsequent attempts to withdraw the sum for the benefit of the Other Parties when the sanctions were finally lifted.

74 In our judgment, none of this demonstrates that Deuteron had the intention, using the language of the court in *Roscoe v Winder*, to "clothe" the funds that were subsequently transferred into the accounts with a trust in

favour of the Other Parties. As for Zoran Matic, he was the representative of the Judgment Debtor and Deuteron, and is therefore likely to have a vested interest in these proceedings. And the assertions in Deuteron's financial statements do not assist the Other Parties since those assertions in fact state that the Funds belong wholly and exclusively to the *Judgment Debtor* and not the Other Parties. If anything, those assertions contradict the Defendants' case that the Funds are held on trust for the Other Parties. Similarly, there is no evidence that the efforts to withdraw the sum after the sanctions were lifted were for the benefit of the Other Parties.

75 Furthermore, as pointed out by the Judgment Creditor, the Other Parties have not provided any particulars in respect of the circumstances surrounding the alleged reconstitution. They have not provided information on the source of the funds that had been transferred into the accounts, the date that the transfers were made, or the specific bank accounts from which Deuteron had allegedly drawn the funds with the intention of reconstituting the trust. Moreover, the monies that the Other Parties claimed had been applied to "replenish" the accounts were never repaid into the two bank accounts that the Advance had originally been transferred into.

76 In these circumstances, we accept the Judgment Creditor's submission that the Other Parties have failed to prove that Deuteron had intended to reconstitute the trust funds such that credit balance that presently remains in its accounts (namely, the Funds) constitute trust monies which are traceable from the Advance.

77 Looking at the evidence in totality, we are satisfied that the Defendants have not proved that the Advance can be traced to the Funds.

Conclusion on whether the Other Parties beneficially own the Funds

78 As set out at [49] above, the Other Parties' claim can succeed only if they prove that the Advance was held on trust for it, *and* that the Advance can be traced to the Funds. They have failed on both counts. We thus uphold the Judge's decision that the Other Parties never had, and do not have, any beneficial interest in the Funds. Accordingly, the Other Parties' appeal in CA 121 is dismissed.

Whether the provisional order against Deuteron should have been made absolute

79 We move to the second issue: whether the provisional garnishee order against Deuteron should have been made absolute. It is common ground that the dismissal of the Other Parties' claim does not conclusively resolve the issues of whether the provisional orders against the two garnishees can be made absolute. Even if the Judgment Debtor is the beneficial owner of the Funds, which for the reasons we detail at [90]-[102] below we are satisfied it is, it still remains to be shown that the garnishees each owe the Judgment Debtor a *debt*, which the Judgment Creditor can garnish.

80 The Judgment Creditor raises two points in support of its appeal against the Judge's decision not to make the provisional order against Deuteron absolute. First, the Judgment Creditor argues that once a provisional garnishee order has been obtained, the burden shifts to the Judgment Debtor and the garnishees to show why such a provisional order should not be made absolute. Second, it argues that in any event, it is clear that there is a debt due and accruing due from Deuteron to the Judgment Debtor, which can be garnished.

The preliminary issue of burden of proof

81 In our judgment, the Judge was correct to have found that the Judgment Creditor bears the legal burden of proving that there is a debt due or accruing due from the garnishees to the Judgment Debtor notwithstanding that provisional garnishee orders have already been obtained.

82 It bears emphasis that a provisional garnishee order is usually obtained by way of an *ex parte* application. In such circumstances, we consider that the legal burden remains on the judgment creditor to prove the existence of such a debt if this is disputed by the garnishee and the matter proceeds for determination either summarily or at trial. In *Zoom Communications Ltd v Broadcast Solutions Pte Ltd* [2014] 4 SLR 500 ("*Zoom Communications*") (at [75]), we held that a plaintiff retains the burden of showing that Singapore is the proper forum at the *inter partes* stage if the foreign defendant who has been served, after the plaintiff succeeded at the *ex parte* stage to obtain leave to serve the originating process on a foreign defendant out of jurisdiction, challenges the jurisdiction of the Singapore court. We so held because we considered that in the final analysis, the party applying for the order at the *ex parte* stage of the proceedings had the same burden and the fact that it obtained the order at that stage does not mean it had discharged that burden. In our judgment, the same principle applies in this case.

83 This conclusion is also borne out by the wording of the provisions that apply when the garnishee disputes liability. Pursuant to O 49 r 5 of the Rules of Court (Cap 322, r 5, 2014 Rev Ed), a garnishee has the right to dispute liability to pay the debt to the judgment creditor after being served the provisional garnishee order. The rule provides as follows:

> **Dispute of liability by garnishee (O. 49 r. 5)**
>
> **5.** Where on the further consideration of the matter the garnishee disputes liability to pay the debt due or claimed to be due from him to the judgment debtor, the Court may summarily determine the question at issue or order in Form 104 that any question necessary for determining liability of the garnishee be tried in any manner in which any question or issue in an action may be tried.

84 Form 104 of the Rules of Court, referred to in that rule, in turn states that if the matter is ordered to be tried:

> … the said judgment creditor shall be the plaintiff and the said garnishee shall be defendant, and … the question to be tried shall be whether there was any debt due or accruing due … from the garnishee to the judgment debtor at the time the said provisional order was served.

85 We agree with the Judge that the wording of the O 49 r 5 and of Form 104 suggests that the issue of whether there was any debt due or accruing due from the garnishee to the judgment debtor is to be tried in the same manner as any other issue. In other words, the burden lies on the judgment creditor, who as set out in Form 104 is the plaintiff, to prove that the debt exists.

86 We accept that after a provisional garnishee order has been obtained, the legal burden to *show cause* as to why the court should exercise its discretion not to make the order absolute lies with the garnishee or the judgment debtor. As a garnishee order is a form of equitable remedy, the court may refuse to make the order absolute if it finds that the attachment of the debt would be inequitable (such as, if it would affect the interests of other persons, prejudice the rights of other creditors, or cause the judgment debtor to be liable for the same debt twice). However, this must be contrasted with a situation, such as the present, where the garnishee or the judgment debtor is disputing the liability of the garnishee as opposed to arguing that an attachment would be inequitable or unfair. In our judgment, where the primary

liability that governs the intended garnishee proceedings is being disputed, the burden of proof remains on the judgment creditor to prove that a debt as against the garnishee exists.

87 We should point out that we have not addressed the issue of the burden of proof between a judgment creditor and a *third party* who claims to be entitled to the debt sought (such as the Other Parties in this case). Pursuant to O 49 r 6 of the Rules of Court, a third party who claims to be entitled to the debt sought to be attached or claims to have a charge or lien upon the debt may also appear before the court to contest the issue after a provisional garnishee order has been granted, as the Other Parties have done in this case. The Judge found that in such an instance, the third party would bear the burden of proving that he has such entitlement to the debt sought to be attached (see [27]-[31] of the Judgment). As the Other Parties have not appealed this finding, there is no need for us to discuss this issue but we consider that the Judge was correct in his view that the third party would bear the burden of proving his claim to the debt.

Whether there is a debt due or accruing due from Deuteron to the Judgment Debtor

88 For the Judgment Creditor to succeed in obtaining a garnishee order against Deuteron, it must show that there is a debt owing from Deuteron to the Judgment Creditor. This is because garnishee proceedings is a form of enforcement mechanism that allows a judgment creditor be paid the *debt* that is owed to a judgment debtor by another through the attachment of that *debt*.

89 In the present case, the Judgment Creditor argues that Deuteron owes the Judgment Debtor a debt because it holds the Funds on a bare trust for the Judgment Debtor. For it to discharge its burden of proof in these proceedings,

the Judgment Creditor must prove two things: (a) that Deuteron holds the Funds on a bare trust for the Judgment Debtor; and (b) that this gave rise to a debt. We take each in turn.

Whether Deuteron holds the Funds on a bare trust for the Judgment Debtor

90 In our judgment, the only logical conclusion that can be drawn from the evidence before us is that the Funds have always been at the disposal of the Judgment Debtor, and that Deuteron holds the Funds on a bare trust for the Judgment Debtor.

91 We find it especially telling that Deuteron's audited financial statements from 1998 to 2008 contained a declaration that the Funds were excluded from Deuteron's accounts because they "belong[ed] wholly and exclusively" to the Judgment Debtor. For example, the notes to the financial statement for the year that ended on 30 June 1998 state:

> 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 the [Judgment Debtor], a shareholder of the company. …

92 Mr Gabriel sought to explain away those assertions in the financial statements on the basis that they were made in order to insulate the Funds from an internal dispute between the Judgment Debtor and Lim Poh Weng, who was the other director and shareholder in Deuteron before December 2005. We find this unpersuasive for several reasons.

93 First, there is no evidence at all that Lim Poh Weng had ever expressed any intention to contest the ownership of the Funds. On the contrary, he was a signatory of all the relevant statements, including the shareholder resolution

that we discuss at [97(a)] below, acknowledging that the Funds belonged to the Judgment Debtor. It does not accord with logic for Lim Poh Weng to have signed those documents which were supposedly meant to prevent *him* from asserting ownership over the Funds.

94 Even if we put this aside, we note that the assertion that the Funds belonged "wholly or exclusively" to the Judgment Debtor was repeated year after year, even *after* the Judgment Debtor had acquired all of Lim Poh Weng's shares and became the sole shareholder of Deuteron. This clearly militates against Mr Gabriel's submission that the statements had been made for the purpose of preventing Lim Poh Weng from asserting ownership over the Funds because by then there would no longer have been a possibility of any such internal dispute.

95 Further, even taken at its highest, Mr Gabriel's submission can only explain the motive or the reason for inserting the statements in the accounts. The Defendants have not gone so far as to suggest or assert that those statements were false. Such a suggestion would not, in any event, be persuasive for the reasons we have already outlined.

96 In our judgment, substantial weight ought to be accorded to those financial statements, which spanned more than a decade, given that they had been prepared contemporaneously and at a time when neither Deuteron nor the Judgment Debtor contemplated the present proceedings. Consistent with this, we find it noteworthy that Deuteron stopped filing its accounts and financial statements the year immediately after the Judgment Creditor pointed out in an affidavit filed on 14 July 2009 that repeated admissions by Deuteron had been made in those documents. In all the circumstances, we are satisfied that those

financial statements reflected the true state of affairs between Deuteron and the Judgment Debtor in respect of the ownership of the Funds.

97 Apart from the financial statements, declarations to the same effect can also be found in two other documents, namely:

(a) the April 1999 Resolution (see [37(b)] above] in which it was stated that the Funds and the interest or gains accrued "belong wholly and exclusively" to the Judgment Debtor; and

(b) the April 2001 Settlement (see [37(c)] above) in which the first article stated "[a]ll monies in [the Bank] belong solely to [the Judgment Debtor] --- Agreed".

98 In fact, even up to the early days of these garnishment proceedings, Deuteron was still maintaining that the Funds belonged to the Judgment Debtor. As we set out at [19] above, Deuteron's solicitors had sent two letters to the Judgment Creditor's solicitors and Lim Poh Weng had deposed an affidavit in November 2004 stating to the effect that the Funds were held on behalf of the Judgment Debtor.

99 The evidence also shows that Deuteron had, on at least two occasions, acted on the Judgment Debtor's instructions to try to withdraw some of the Funds from the Bank.

100 The first occasion was on 1 December 1995, when Deuteron wrote to the Bank asking it to transfer all the monies in its accounts (which amounted to approximately US$10m at that time) to a bank account of a company called Acedale Holdings Limited ("Acedale") in Hong Kong. Although Deuteron's letter to the Bank had been signed by Lim Poh Weng, and not by the directors

of the Judgment Debtor, it is clear from the circumstances and the correspondence with the Bank that this was done on the instructions and at the directions of the Judgment Debtor. First, it is wholly implausible that the Judgment Debtor, which held 51% of the shares in Deuteron and also controlled its board at that time, would have had no knowledge or say in the transfer. Second, the contents of Deuteron's replies to the Bank also indicate that the transfer had been directed by the Judgment Debtor and that the transfer was being done so as to return the monies to the Judgment Debtor. In Deuteron's letter to the Bank on 11 December 1995, Deuteron replied as follows in response to the Bank's request for proof that its three Yugoslav directors (who were the representatives of Judgment Debtor at the material time) were not Bosnian:

> Please note that Deuteron … was registered in 18th June 1991. The Yugoslavian Directors were all Serbian Serbs operating in Belgrade all the time …
>
> As United Nations have suspended the sanctions and banks in 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.
>
> [emphasis added]

Thereafter, Deuteron provided a certificate dated 15 December 1995 that was issued by the Judgment Debtor, and signed by the Judgment Debtor's then Director-General, Jovan Cekovic, who was also a director of Deuteron, to the Bank along with other documents to prove that the Yugoslav directors were not Bosnians. The irresistible inference from the evidence is that the Judgment Debtor not only knew of Deuteron's attempt to transfer the monies to Acedale, but had in fact directed and actively participated in the process and wished to have the money returned to it through Acedale.

101 The second occasion took place almost five years later in June 2000, Deuteron again wrote to the Bank asking it to apply to MAS for approval to release 6.278m Swiss Francs to an Egyptian entity, PSI Procurement Supply International ("PSI Procurement"). The fact that the letter was signed by Zoran Matic, a director of both Deuteron and the Judgment Debtor, again suggests that the Judgment Debtor had directed this transfer. The attempt to transfer the monies out again failed because MAS directed that the monies were to remain frozen. It is noteworthy that Zoran Matic admitted in cross-examination that this transfer was an attempt by the Judgment Debtor to get hold of a part of the Funds.

102 Furthermore, we are satisfied that the fact that the Judgment Debtor had the power to direct the transfers (which as it happened, did not succeed because of MAS's sanctions) and to use the Funds for its own purposes supports the Judgment Creditor's submission that the Judgment Debtor beneficially owned the Funds. In all the circumstances, we find that Deuteron held the Funds as a bare trustee for the Judgment Debtor, in that it had the obligation to hand over the Funds to the Judgment Debtor whenever it was called upon to do so.

103 Before we turn to the next issue, we make a brief comment on a submission that Mr Gabriel made during the hearing, in a final attempt to resist the finding that the Funds were in fact beneficially owned by the Judgment Debtor. Mr Gabriel submitted that the Funds were the residue of a sum of US$150m that had been transferred from Oslo, and were meant as working capital for Deuteron. He argued that Deuteron therefore owned the money and could spend it "whichever way it wants". We found this submission startling and, in the circumstances coming from a senior member of the Bar, disappointing. Not only was it completely unsupported by any

shred of evidence, it also went flatly against the case mounted by the Judgment Debtor and Deuteron in these proceedings that the Funds were related to the 1991 Documents and were in Deuteron's accounts for purposes relating to the sale of armaments. Even in the heat of making submissions for their client, counsel should be mindful that their paramount duty is to the court.

Whether a debt had thus arisen

104 The Judge having arrived at the same conclusion, declined to make the garnishee order against Deuteron absolute because he found that Deuteron does not owe a debt to the Judgment Debtor. He reached this conclusion because he considered that a trust cannot be construed as a debt (at [84] of the Judgment). We agree with the Judge that a trust is not, in and of itself, a debt. But in our judgment, the question is not whether trust monies can be garnished or whether a trust is a debt, but whether a trustee, in addition to holding the trust property on trust for the beneficiary, may also be found to be indebted to the beneficiary.

105 It is settled law that the term "debt" in the context of garnishee proceedings encompasses not only legal debts but also *equitable* debts (*Webb v Stenton and Others, Garnishees* (1883) 11 QBD 518 ("*Webb v Stenton*") and *Wilson v Dundas and Stevenson (Garnishees)* [1875] WN 232). An equitable debt is defined as "a debt enforceable only in equity" (*Ex parte Culley, In re Adams* (1878) 9 Ch D 307) and "a liquidated sum of money owing in equity from one person to another" (*Webb v Stenton* at 526).

106 The Defendants submit that a trustee does not owe his beneficiary a debt until and unless he has misapplied the property in breach of trust. The

Judgment Creditor, on the other hand, argues that an equitable debt does not only arise where the trustee is in breach of trust but may arise in other instances, in particular where the trust in question is a bare trust. The Judgment Creditor relies on two grounds to argue that Deuteron owed the Judgment Debtor a debt that can be garnished:

(a) First, it submits that Deuteron, as a bare trustee, came under an obligation to pay the trust monies over to the Judgment Debtor when the Judgment Debtor demanded that the monies be dealt with in accordance with its instructions in December 1995 and again in June 2000. The Judgment Creditor submits that this crystallised the obligation into an equitable debt, which can be garnished.

(b) The Judgment Creditor's second argument is pitched at a higher level. Relying primarily on the decision of the Saskatchewan District Court in *Bank of Montreal v Chantry and Chantry* [1979] 5 WWR 470 ("*Chantry*"), the Judgment Creditor argues that even where the beneficiary has yet to make a demand for the trust property, a bare trustee owes an equitable debt to the beneficiary by way of implied contract.

It further argues, in the alternative, that Deuteron owed the Judgment Debtor a "legal" debt as the Judgment Debtor was entitled to recover the Funds from it by an action for money had and received.

107 We accept the Judgment Creditor's first argument (as set out at [106(a)] above). In the words of the learned authors of *Underhill and Hayton*, *Law Relating to Trusts and Trustees* (David Hayton gen ed) (LexisNexis, 18th Ed, 2010) at para 4.3, a bare trustee is a "mere repository of the trust property". He owes no active duties to his beneficiary save to convey the trust

property as and when the beneficiary directs him to do so (see *Snell's Equity* at para 21-027). A bare trustee is thus obliged to convey the monies it holds on trust for the beneficiary as and when the beneficiary demands for them. We accept the Judgment Creditor's submission that a bare trustee owes the beneficiary a debt in equity once the beneficiary has demanded that the trust monies be handed over to him or to be dealt with in accordance with his instructions. This is because once such a demand is made, the bare trustee is placed under an obligation to dispose of the trust monies in accordance with those instructions and thus, a liquidated sum of money in equity accrues to the beneficiary. From that point, the bare trustee and the beneficiary are simultaneously in a debtor and creditor relationship and a trustee and beneficiary relationship. The observations of Lindley LJ in *Webb v Stenton* at 526-527 are pertinent:

> …I do not doubt that the power of attachment is extended to equitable debts. But is a trustee a debtor to his cestui que trust? You cannot say he is *unless he has got in his hands money which it is his duty to hand over to the cestui que trust*; then of course you can say he is a debtor and there is no difficulty in attaching such a debt … You cannot possibly say that a trustee is a debtor to the cestui que trust *before he has*, or but for some fault of his might have had, *the money which it is his duty to hand over.*[emphasis added]

It is clear from those observations that where a trustee has trust monies in his hands *and* is under a duty to hand over the trust monies to the beneficiary or at his direction to a third party, the trustee, at that point, becomes a debtor to the beneficiary. In a bare trust situation, such a duty arises once the beneficiary makes a demand for the trust monies or directs its disposal.

108 In the present case, the Judgment Debtor had called upon all the monies in Deuteron's accounts in December 1995. Deuteron wrote to the Bank on 1 December 1995 asking the Bank to withdraw and transfer all the monies

in its bank accounts to a Hong Kong bank account belonging to Acedale. As noted at [100] above, we are satisfied that that transfer was directed by the Judgment Debtor, who was hoping to use Acedale as a vehicle to circumvent MAS's sanctions to obtain the Funds. In any event, even if Acedale was not being used as a vehicle and the transfer to Acedale was a legitimate transaction, the fact remains that the Judgment Debtor had directed the Funds to be dealt in accordance with its instructions.

109 The obligation on Deuteron to apply the monies in accordance with the Judgment Debtor's instructions or to pay the trust monies over to the Judgment Debtor arose at the point it was directed by the Judgment Debtor to arrange for the transfer, and the obligation has subsisted from then onwards. From that point, Deuteron was both a trustee and an equitable debtor to the Judgment Debtor and it was and is obliged to pay over the monies in its bank accounts to the Judgment Debtor or in accordance with its instructions as and when it is able to do so, which would be upon the lifting of the sanctions and injunction, so long as there were no other impediments to such a transfer. Our analysis is unaffected by the fact that owing to MAS's sanctions or the existence of the Mareva injunction, Deuteron has not been able to carry out the direction of the Judgment Debtor. What is material is whether the debt in equity had crystallised as between the Judgment Debtor and Deuteron and we are satisfied that by seeking the disposal of the Funds, the debt did crystallise in equity. In these circumstances, we find that Deuteron owes an equitable debt to the Judgment Debtor, which can be garnished.

110 The Judgment Creditor's second argument (see [106(b)] above) is pitched at a higher level, and is premised on a trustee owing the beneficiary an equitable debt by way of implied contract once he ceases to have active duties to perform and merely awaits instructions to transfer the money to the

beneficiary (that is to say, a bare trustee). The Judgment Creditor argues that a bare trustee would, on this basis, owe the beneficiary a debt in equity even before a demand is made. This appears to be the position in Canada (see *Chantry*, which has been endorsed by the Saskatchewan Court of Appeal in *Canadian Imperial Bank of Commerce v Madelyn Grotsky, International Brokers Co. Ltd, Samuel Grotsky and Joel Grotsky* [1994] 8 WWR 191 and followed by a consistent line of Canadian cases such as the decision of the Ontario Superior Court of Justice in *Ikram v Joo* [2009] OJ No 37). Given our finding that the Judgment Creditor succeeds in proving that Deuteron owes the Judgment Debtor a debt in equity, there is no need for us to examine this alternative argument. Equally, there is also no need for us to deal with the Judgment Creditor's other argument that it was owed a debt at law (see [106] above).

111 For these reasons, we allow the Judgment Creditor's appeal in CA 134 and make the provisional garnishee order against Deuteron final and absolute.

Whether the provisional order against the Bank should have been made absolute

112 This leaves us with the third and final issue: whether the Judge was correct to have made absolute the provisional order against the Bank.

113 The Judge made the garnishee order against the Bank absolute on the basis that the Judgment Creditor, as a garnishor, steps into the shoes of the Judgment Debtor, and thus has the right to collapse the bare trust as against Deuteron. He found that this would then allow the Judgment Debtor to acquire Deuteron's chose in action against the Bank, so that the Bank would then owe the Judgment Debtor a debt, which could be garnished by the Judgment Creditor (at [83] of the Judgment).

114 With respect, we do not agree with the Judge. None of the statutory provisions provide that a judgment creditor has a power to do a positive act to *create* a debtor-creditor relationship between the judgment debtor and the garnishee. Further, this goes against the very nature of garnishee proceedings, where a pre-existing debt must be shown to exist and where a judgment creditor merely *intercepts* the debt that is already owed to the judgment debtor. The relevant provisions of the Rules of Court do not give the judgment creditor any further power to do anything save to attach debts owed to the judgment debtor by others for the purpose of enforcing his judgment.

115 We turn to examine whether the Judge's decision to make absolute the provisional garnishee order in respect of the Bank could be justified in the alternative on the basis of the Judgment Creditor's submissions. The Judgment Creditor makes two arguments in this regard:

(a) First, it argues that the Bank owes the Judgment Debtor a debt because the Judgment Debtor has the right to sue and recover the Funds from the Bank by adding Deuteron as a party to those proceedings through a procedure analogous to the *Vandepitte* procedure.

(b) Alternatively, it argues that if the garnishee order against Deuteron were made absolute, the court should exercise its discretion to grant the order against the Bank to avoid prolonging the case further as the Judgment Creditor would otherwise have to bring a separate application against the Bank.

We deal with each in turn.

116 It is clear that a beneficiary under a trust cannot sue a third party in relation to the trust property because he does not have a claim at law against the third party and thus has no cause of action against him (*see Parker-Tweedale v Dunbar Bank Plc and Others* [1991] Ch 12 ("*Parker-Tweedale*") at 19 and Philip H Pettit, *Equity and the Law of Trusts* (Oxford University Press, 12th Ed, 2012) at p 414). The *Vandepitte* procedure was devised as an exception to this general rule. The *Vandepitte* procedure, despite its name, did not actually begin with the eponymous decision in *Vandepitte v Preferred Accident*. The procedure originated from cases where the courts exceptionally allowed an action against a third party regarding a deceased person's property to be maintained by a person who was interested in the estate in place of the personal representative of the deceased (see Marcus Smith, "Locus Standi and the Enforcement of Legal Claims by Cestuis Que Trust and Assignees" (2008) 3 TL 140). The procedure was thereafter extended to the context of trusts.

117 It must be noted, however, that the *Vandepitte* procedure is a rule of procedure, and not a rule of substance. Its purpose is to serve as a procedural "short-cut" to avoid the multiplicity of actions. In a normal case where the trustee refuses to sue a third party, a beneficiary under a trust would have to bring an action against the trustee to compel him to begin an action against the third party, or to replace the trustee. The *Vandepitte* procedure allows instead for the conflation of the two actions, such that the beneficiary can bring an action against the third party in his own name, while also joining the trustee as a defendant. But the *Vandepitte* procedure does not affect the substantive rights of the parties. The right that the beneficiary enforces under such an action is the right of the trustee. This was made clear by Nourse LJ in *Parker-Tweedale* at 19-20:

> It is important to emphasise that when a beneficiary sues under the exception he does so in right of the trust and in the

> room of the trustee. He does not enforce a right reciprocal to some duty owed directly to him by the third party.

118 Therefore, in our judgment, even if the Judgment Debtor was able to employ the *Vandepitte* procedure to sue the Bank, the Bank would not owe a debt directly to the Judgment Debtor. In short, the Bank only owes a debt to the legal owner of the accounts – who in this case is Deuteron – and not to the Judgment Debtor, despite its beneficial ownership of the Funds. The fact that a legal *procedure* for joining the Bank as a party to the action may be available does not have the effect of making the Bank the debtor of the Judgment Debtor, and therefore cannot be a basis on which a garnishee order can be sustained.

119 We are also not persuaded by the Judgment Creditor's alternative submission. We accept that the Judgment Creditor is entitled to bring *another* set of garnishee proceedings hereafter to garnish the debt that the Bank owes to Deuteron if Deuteron breaches the garnishee order that we have granted against it in *this set* of proceedings. In the subsequent set of proceedings that could arise, Deuteron (and not the Judgment Debtor) would be the judgment debtor and the Bank, the garnishee. But this does not detract from the fact that there is presently no existing debt due or accruing due from the Bank to the Judgment Debtor that can be attached in the present set of proceedings. In these circumstances, we reverse the Judge's order that the garnishee order against the Bank is to be made absolute and in this regard, allow the Judgment Debtor and Deuteron's appeals in CA 117 and CA 118.

Temporary continuance of the Mareva injunction

120 There remains a further issue, which pertains to the Mareva injunction that was granted over the Funds. In the light of the history of proceedings

between the Judgment Debtor and the Judgment Creditor and the fact that Deuteron is a wholly-owned subsidiary of the Judgment Debtor, there remains a real risk that Deuteron may dissipate its assets, in particular the Funds, to frustrate the enforcement of the garnishee order that we have granted against it. A possible way to avoid this would be for the Judgment Creditor to apply for the injunction that is presently in place to subsist after this judgment until further enforcement proceedings against Deuteron are brought, should this prove necessary (see *Hitachi Leasing (Singapore) Pte Ltd v Vincent Ambrose and another* [2001] 1 SLR(R) 762).

121 In the interests of justice, we order that the Mareva injunction that is presently in place over Deuteron's assets (including the Funds) is to *temporarily* continue for 30 days from the date of this judgment. During this period, the Judgment Creditor may apply for a further continuance of the injunction, if necessary. If such an application is brought, we will hear the parties to decide whether the injunction should be allowed to subsist.

Conclusion

122 In summary, we find as follows:

(a) The Other Parties' claim to beneficial ownership in the Funds is dismissed (see [49]-[78] above).

(b) The provisional garnishee order against Deuteron should have been made final and absolute as Deuteron owes the Judgment Debtor a debt in equity (see [79]-[111] above).

(c) The provisional garnishee order against the Bank should not have been made final and absolute as no debt is due or accruing due from the Bank to the Judgment Debtor ([112]-[119]).

123 The effect of our findings is that:

(a) CA 121, which is the Other Parties' appeal against the Judge's decision to dismiss its claim to the Funds, is dismissed in its entirety;

(b) CA 117 and CA 118, which are the Judgment Debtor's and Deuteron's appeals against the Judge's decision to make the garnishee order against the Bank absolute, are allowed.

(c) CA 134, which is the Judgment Creditor's appeal against the Judge's refusal to make the garnishee order against Deuteron absolute, is allowed.

Additionally, the Mareva injunction that is presently in place over Deuteron's assets is to subsist for a period of 30 days from the date of this judgment, pending further application, if any.

124 We will hear the parties on costs. The parties are to furnish written submissions limited to 10 pages each on the questions of the liability and the quantum of costs in each of the appeals, and are to do so within two weeks of this judgment.

Sundaresh Menon Chief Justice	Andrew Phang Boon Leong Judge of Appeal	Steven Chong Judge

Gabriel Peter, Kevin Au, Shehzhadee Abdul Rahman (Gabriel Law Corporation) for the appellants in CA 117 and 118, 2nd and 3rd respondents in CA 121 and the 1st and 2nd respondents in CA 134;
Francis Xavier SC, Amy Seow, Tng Sheng Rong, Ang Tze Phern and Joseph Lau (Rajah & Tann Singapore LLP) and Suresh Damodara and Clement Ong Ziying (Damodara Hazra LLP) for appellants in CA 121 and the 4th and 5th respondents in CA 134;
Giam Chin Toon SC, Tan Hsuan Boon and Seow Ai Lin (Wee Swee Teow & Co) for the appellant in CA 134 and the 1st respondent in CA 117, 118 and 121;
Yap Yin Soon (Allen & Gledhill LLP) for the 3rd respondent in CA 121 and CA 134; and
6th respondent in CA 134 not in appearance.
