

ASC-10-0054

In the lawsuit of

Claimants/Appellants

1. [REDACTED] from Preoce/Preoc village,
Prishtinë/Priština
2. [REDACTED] from Preoce/Preoc village, Prishtinë/Priština
3. [REDACTED] from Preoce/Preoc village, Prishtinë/Priština
4. [REDACTED] from Preoce/Preoc village, Prishtinë/Priština
5. [REDACTED] from Ugljare/Uglar village, Kosovo Polje/
Fushë Kosovë
6. [REDACTED] from Donja Brnica/Bërnice e Poshtme
village, Prishtinë/Priština

All represented by [REDACTED] from Preoce/Preoc village,
Prishtinë/Priština

Vs.

Respondents

1. **Privatization Agency of Kosovo (PAK)**, Ilir Konushevci 8, Prishtinë/Priština
2. **SOE** [REDACTED], Fushë Kosovë/ Kosovo Polje, (aka **SOE** [REDACTED]
[REDACTED], Gornje Dobrevo/Miradi të Epërme)
3. **NewCo** [REDACTED],
Prishtinë/Priština

The Appellate Panel of the Special Chamber of the Supreme Court of Kosovo on
Kosovo Trust Agency Related Matters (SCSC), composed of Richard Winkelhofer,

President of the SCSC, as Presiding Judge, Torsten Frank Koschinka and Mr.sc Sahit Sylejmani, Judges, on the appeal of the Claimants/Appellants against the decision of the SCSC of 29 June 2010, SCC – 09 – 0248, after deliberation held on 1 December 2010, delivers the following

DECISION

1. The appeal is partly grounded. As regards the rejection of the claim against the 1st and the 2nd Respondent, the decision of the Trial Panel is confirmed.

2. As regards the rejection of the claim against the 3rd Respondent, the decision of the Trial Panel in the case SCC – 09 – 0248 dated 29 June 2010 is set aside.

3. The Trial Panel – in its full composition - is ordered to retry the case as regards the 3rd Respondent.

4. The Appellants are conjointly obliged to pay court fees in an amount of 60 Euros for the appeals proceedings to the Special Chamber.

Procedural and factual background

On 31 December 2009, the Claimants filed a claim with the SCSC seeking confirmation of their property rights over land parcel 434, location "Bare", cadastral zone "Preoce" with the surface area of 0.83,82 ha.

On 28 August 2009, the PAK filed a submission referring to an earlier request from the Kosovo Trust Agency (KTA) for the suspension of all the proceedings in relation to SOE [REDACTED] from Miradi e Epërme, also known as the SOE [REDACTED] from Gornje Dobrevo indicated by the Claimants as the main Respondent to this claim. The PAK maintained that, in 2007, the KTA notified the SCSC of the liquidation of the second Respondent and requested the suspension of all cases pending against it.

However, the PAK failed to provide any prove in support of the alleged earlier notification and the Registry of the Special Chamber does not have such record.

Therefore, the Trial Panel considered that the notification that the second Respondent is under liquidation and the request for suspension of all cases pending against it was registered with the SCSC for the first time on 28 August 2009.

On 29 June 2010 the Trial Panel rejected the claim against the second Respondent as inadmissible, based on Section 9 UNMIK Regulation 2005/18 in conjunction with UNMIK Regulation 2005/48, as interpreted by the Appellate Panel of the SCSC in its decisions ASC-10-0014 and ASC-09-0075.

The Trial Panel rejected the claim also against the first Respondent, arguing that "the fact that the claim against the second Respondent is to be rejected as inadmissible consequently leads to the rejection of the claim against the first Respondent, being the de facto administrator of the second Respondent which does not have any other separate passive legitimacy apart from the one the second Respondent has", and also against the third Respondent, the NewCO, arguing that the SCSC has no jurisdiction over "privately owned companies which are not currently or formerly under the administrative authority of the Agency (...)".

The Trial Panel decision was duly served onto the Claimants on 10 July 2010.

On 4 August 2010 the Claimants filed an appeal to the Appellate Panel of the SCSC, requesting to annul the challenged decision and to decide on the case.

Legal Reasoning

The appeal is grounded. The challenged decision has to be **partly** set aside and the Trial Panel has to be ordered to retry the case according to the Appellate Panel's legal opinion as given below.

The decision of the Trial Panel to reject the claim against the 3rd Claimant as inadmissible, had to be set aside. The legal opinion of the Trial Panel concerning the admissibility of the claim against the 2nd Respondent was correct (ASC-10-0014, ASC-09-0075, as properly quoted by the Trial Panel). The decision to reject the claim against the first Respondent was, in the result, but not in the reasoning, also correct. The decision concerning the 1st and the 2nd Respondent therefore is to be upheld.

The Trial Panel wrongfully decided to reject the claim *in toto* as inadmissible considering that the claim was filed after the notification of the Privatisation Agency of Kosovo dated 28 August 2009 about the request for suspension of the proceedings.

The Trial Panel in its decision does not sufficiently take into consideration the issue of who can be Respondent in the case at hand as well as the distinction between admissibility and merits of a claim. If it did that, it would have rejected the claim as inadmissible only against the second Respondent.

The Claimants in their claim are requesting the SCSC to oblige the Privatisation Agency of Kosovo, the SOE [REDACTED] and the NewCo to recognise their property rights over a specific parcel of land.

As for the first Respondent, the "Agency" (and, following the interpretation given by the Appellate Panel in a number of precedents, this goes also for the PAK) can stand as a Respondent on its own only in claims as per section 4.1 lit a), b) and e) UNMIK Regulation 2008/4.

In the claim at hand, the claim is for recognition of property rights, therefore falling under lit. d), in which the Respondent can only be an Enterprise or Corporation, with the Agency being only the Administrator (as per Section 5.2 UNMIK REG 2008/4).

Thus, the Agency cannot be a respondent in the case in any way; therefore it was correct to reject the claim against the PAK as inadmissible, but not based on

a lack of passive legitimation (in this case it would have to be rejected as ungrounded), but based on Section 28.2 lit.c UNMIK AD 2008/6.

As for the third Respondent the opinion of the Trial Panel about the lack of jurisdiction of the SCSC over private enterprises cannot be followed.

The SCSC can have jurisdiction also over NewCos, as per Sec. 4.1 lit d) UNMIK Regulation 2008/4. A NewCo is set up by the Agency in the following way: The Agency, as representative/administrator of the SOE that shall be "transformed" into a NewCo takes care for the Registration of the NewCo according to UNMIK Regulation 2001/6. The shares of the NewCo are in the ownership of the respective SOE. The Agency, again acting as representative/administrator of the SOE now transfers the assets of the SOE, including real estate property, to the NewCo. Only after this transferral of the assets, the shares of the NewCo are sold/transferred to the new owners. Thus, during the transfer of the real estate property, the NewCo, as an asset of the SOE itself, was under the administrative authority of the Agency. It follows logically that even if the claim was filed at the Special Chamber after the time such enterprise (NewCo) was subject to the administrative authority of the Agency, the issue at stake (the property claim) arose during the time that such Enterprise was subject to the administrative authority of the Agency, as the property claim of the alleged "real" owner against the NewCo arises in the very moment the property title is transferred to the NewCo. The alleged "real" owner has, from the moment of the transfer of the property title from the SOE to the NewCo (which is, at this moment in time, still owned by the SOE) no other option, if he wants to claim his property back, than to sue the one who is registered as owner/possessor.

Therefore the claim against the third Respondent should not have been rejected as inadmissible but continued in front of the Trial Panel of the SCSC, taking into consideration that the third Respondent is the actual (registered) possessor of the claimed property.

Costs / Court fees

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The following court fees for the appeals proceedings apply (see ASC – 09 – 0072 et al.):

Court Fee Tariff Section 10.11 (filing of the appeal)	30 Euros
Court Fee Tariff Section 10.15 in conjunction with 10.21 (Decision on second instance)	30 Euros
Total	60 Euros

These court fees are to be preliminarily and conjointly borne by the Appellants, who are therefore obliged to pay the mentioned amount to the Special Chamber.

Richard Winkelhofer, EULEX Presiding Judge signature

Torsten Koschinka, EULEX Judge signature

Mr.sc. Sahit Sylejmani, Judge signature

Tobias Lapke, EULEX Chief Registrar signature