Hayate Investment Co Ltd *v* ManagementPlus (Singapore) Pte Ltd [2012] SGHCR 3

Case Number : Suit No 929 of 2011(Summons No 222 of 2012)

Decision Date : 09 May 2012

Tribunal/Court : High Court

Coram : Chan Wei Sern Paul AR

Counsel Name(s) : Chia Swee Chye Kelvin (Samuel Seow Law Corporation) for the plaintiff; Gregory Vijayendran and Zheng Sicong (Rajah & Tann LLP) for the defendant.

Parties : Hayate Investment Co Ltd — ManagementPlus (Singapore) Pte Ltd

Civil Procedure – setting aside of judgment

Debt and Recovery – right of set-off

Equity – defences – equitable set-off

9 May 2012 Judgment reserved.

Paul Chan AR:

Introduction

1 This is a judgment about the law of legal and equitable set-off.

2 The defendant, ManagementPlus (Singapore) Pte Ltd, was the manager of the Hayate Japan Equity Long-Short Master Fund (the "Master Fund"), a fund incorporated in the Cayman Islands. The Master Fund was established as an open-ended investment company, owned, at least beneficially, by its unitholders. Its source of investment capital was derived from a unit trust, the Hayate Japan Equity Long-Short Fund (the "Feeder Fund"), a fund which "feeds" capital into the Master Fund. Officially, these funds were established in early 2006 by a company known as Duet Research and Trading Pte. Limited who acted as the first manager of the funds. In September 2006, ManagementPlus took over from Duet as manager of the funds and, at the same time, appointed the plaintiff, Hayate Investment Co Ltd ("Hayate"), to provide investment advice in respect of the Master Fund.

3 The investment advisory agreement entitled Hayate to a substantial portion of the fee payable to ManagementPlus as manager. By the present suit, Hayate sued ManagementPlus to the tune of ¥46,869,291 for failure to make payment for advisory services rendered from 1 October 2009 to 15 October 2010. After the action was initiated, ManagementPlus failed to enter an appearance within the time period provided by the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("ROC"). Hayate consequently obtained a regular default judgment for its claim. ManagementPlus now seeks to set aside that judgment. It, however, does not deny the debt owing to Hayate. Rather, ManagementPlus contends that it is entitled to set-off various sums which it alleges Hayate owes against the ¥46,869,291 which it owes Hayate.

4 The issues, as I understand them, are as follows:

(a) Whether ManagementPlus's *quantum meruit* for work done in respect of two other companies, Bianco Capital Ltd ("Bianco") and Nero Partners Pte Ltd ("Nero"), entitles ManagementPlus to a set-off;

(b) Whether ManagementPlus's *quantum meruit* for managing the Master Fund entitles ManagementPlus to a set-off;

(c) Whether ManagementPlus's *quantum meruit* for Bloomberg services rendered to both the Master Fund and the Feeder Fund entitles ManagementPlus to a set-off;

(d) Whether any indemnity owing to ManagementPlus in respect of alleged acts of bad faith on the part of Hayate entitles ManagementPlus to a set-off; and

(e) Whether any damages resulting from an alleged unlawful conspiracy on the part of Hayate to injure ManagementPlus entitles ManagementPlus to a set-off;

(f) Whether an alleged compromise agreement struck between the parties for the sum of US$120,000 entitles ManagementPlus to a set-off.

The law

Setting aside of regular default judgments

5 The present application is brought pursuant to Order 13, rule 8 of the ROC which reads:

> The Court may, on such terms as it thinks just, set aside or vary any judgment entered in pursuant of this Order.

6 Where a regular default judgment is concerned, the Court of Appeal in *Mercurine Pte Ltd v Canberra Development Pte Ltd* [2008] 4 SLR(R) 907 ("*Mercurine*") has conclusively held (at [60]) that:

> ... in deciding whether to set aside a regular default judgment, the question for the court is whether the defendant can establish a *prima facie* defence in the sense of showing that there are triable or arguable issues.

The Court of Appeal went on to state that the test for setting aside a regular default judgment should not be any stricter than that for obtaining leave to defend in an Order 14 application.

7 It must be stated at the outset that the standard of a triable or arguable issue is not high at all. In fact, the Court of Appeal in *Mercurine* rejected the "real prospect of success" test which imposes upon the defendant a greater burden. In *Evans v Bartlam* [1937] AC 473, Lord Wright expressed the triable issue test (at 489) as the defendant having "merits to which the Court should pay heed". It is further said, in relation to an Order 14 application, that the test is satisfied if "a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence,

or even a fair probability that he has a *bona fide* defence": see *Habibullah Mohamed Yousuff v Indian Bank* [1999] SLR(R) 880 (at [21]).

8 Thus, all that ManagementPlus has to do to succeed in the present application is demonstrate that it has a *bona fide* defence which has some chance of success. This, however, does not mean that any assertion in an affidavit of any given situation will suffice. Given that it is the defendant who has failed to enter an appearance and is attempting to set aside a properly obtained judgment, the burden is generally on the defendant to provide sufficient, although not necessarily conclusive, evidence to anchor his putative defence. The court must be persuaded that the application is not merely one to delay or deny the execution of the judgment already obtained.

Set-off

9 As mentioned, ManagementPlus is endeavouring to set-off various sums that it claims Hayate owes it against the debt it owes Hayate. It is uncontroversial that a claim of set-off, although not a direct rebuttal against the initial claim made, constitutes a defence if properly established. This is reflected in Order 18, rule 17 of the ROC:

> Where a claim by a defendant to a sum of money (whether of an ascertained amount or not) is relied on as a defence to the whole or part of a claim made by the plaintiff, it may be included in the defence and set-off against the plaintiff's claim, whether or not it is also added as a counterclaim.

10 While the particular principles that are contested in the present application are necessarily discussed in detail later, it is useful to begin by briefly and broadly examining the contours of the law of set-off.

11 In *Engineering Construction Pte Ltd v Sanchoon Builders Pte Ltd* [2011] 1 SLR 681, Quentin Loh J defined a set-off (at [12]) as "the taking of two competing money cross-claims, setting off one against the other and producing a single balance..." It is of course important to be clear about the terminology used at the outset. As Andrew Ang J pointed out in *American International Assurance Co Ltd v Wong Cherng Yaw and Others* [2009] SGHC 89 (at [24]):

> The act of deducting from sums otherwise due is known variously as set-offs, counterclaims and cross-claims. Some of these terms carry different meanings. As far as legal terminology is concerned, the terms "cross-claim" and "counterclaim" are used interchangeably. It is important to appreciate, however, that set-off has a narrower meaning than cross-claim. All set-offs are cross-claims but not all cross-claims are set-offs.

12 Set-offs are a subset of counterclaims because they possess one additional quality. Counterclaims are essentially procedural in nature in that they afford a defendant a mechanism by which separate actions may be tried in the same proceedings. In contrast, set-offs have, in addition to this procedural quality, also a substantive aspect. At their best, set-offs allow the defendant a self-help remedy. Even if not, set-offs, at the very least, have the potential to affect the rights and interests of third parties. For that reason, set-offs are considered to constitute a proper defence to any claim while counterclaims in general are not.

13 There are various types of set-offs. The main ones I shall outline. To fully appreciate the development of set-offs, however, one must first have reference to the prior common law position. On this subject, Rory Derham, the learned author of *Derham on The Law of Set-off* (Oxford University Press, 4th Ed, 2010) ("*The Law of Set-off*") had this to say (at para 2.01):

> Prior to the enactment of the first Statute of Set-off in 1729, there was no general right of set-off available to a defendant in a common law action when he or she was being sued by a solvent plaintiff, as opposed to the assignees of a bankrupt. **This denial of a set-off has been explained as being consistent with the adoption by the common law courts of strict rules of pleading and of forms of action, which were designed to reduce the question to be decided by the court as far as possible to a single, well-defined issue. It would have been contrary to that approach to introduce collateral issues through consideration of a cross-claim.** [Emphasis added.]

14 Another motivation for the vintage common law disdain for set-offs is proffered in Philip Wood, *English and International Set-Off*, (Sweet & Maxwell, 1989) (at para 1-17):

> The English hostility to self-help set-off is in sharp contrast to many civil code jurisdictions... The policy informing the English exclusion of independent set-off as a self-help remedy would seem to be based on the proposition that **creditors are entitled to be paid by legal tender unless otherwise agreed and upon the need for predictability and certainty of payments in commercial transactions – the cash-flow principle.** [Emphasis added.]

Regardless of which explanation is accurate, it would not be unfair to say that the common law courts historically placed a premium on certainty in their attempts to achieve justice. It is a reaction to this starting position that doctrine of set-off was first developed.

The legal set-off

15 One of the most important types of set-off is what is today commonly called the legal set-off, so-called because it was applied by the English common law courts. It was originally derived from the Statutes of Set-off enacted in 1729 and 1735. The immediate purpose of these statutes appears, from the title of the first statute - 'An Act for the Relief of Debtors with respect to the Imprisonment of their Persons' - to be to provide relief from incarceration for debtors who were unable to pay their debts. Although the statutes were eventually repealed in 1879, the repeal was expressly stated to not affect any principle of law established prior. Accordingly, this form of set-off continued to be applied even after the repeal.

16 The distinctive feature of the legal set-off is the fact that it allows for the set-off of claims which may be entirely unconnected and independent. As a result, it is a very valuable right. On the other hand, there are at least three important requirements which must be met before a legal set-off will be applied. First, both reciprocal claims, unconnected as they may be, must be liquidated or, at least, ascertainable with certainty. As was stated by Lord Hoffmann in *Stein v Blake* [1996] AC 243 (at 251), the debts must be "either liquidated or in sums capable of ascertainment without valuation or estimation." Secondly, the two reciprocal claims must be matured. This means that the claims must be due and payable. The third requirement is that the two reciprocal claims must be mutual. At its simplest, this requirement may be summed up by the statement that "one man's money shall not be applied to pay another man's debt": see *Jones v Mossop* (1884) 3 Hare 568 (at 574). In other words, each party must be the sole beneficial owner of the claim he is owned and solely and personally liable on the claim he owes.

17 On a point which differs markedly from the civil law tradition, it is also notable that the legal set-off is not available as a self-help remedy. It is only available when litigation has commenced. This, to my mind, reflects the historical tension between the pre-Statute of Set-off position of certainty and the desire to assist debtors from being thrown into debtors' prison. Following on from this, the exercise of the legal set-off is not retroactive to the time that the reciprocal claims were first eligible

for set-off. It is only effective when exercised by the courts.

Abatement

18 Given that the Statutes of Set-off did not allow for unliquidated claims to be set-off, it was previously the case that a seller of goods could obtain judgment on the entire contractual price even if the goods delivered were defective. The buyer had to commence a separate action to obtain damages. In time, even the common law courts came to recognise the injustice of such a situation. The result was the development of the plea of abatement which was grounded on the quixotic rationale that there was, in effect, no cross-claim, merely a claim to reduce the debt to its proper quantum.

19 By the late 18th century, the plea of abatement was fairly established. Today, the doctrine of abatement is confined to contracts for sale of goods and for the performance of work and labour: see *Gilbert Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd.* [1974] AC 689. Even then, given the development of the equitable set-off, the scope of the equitable set-off now substantially overlaps with that of abatement, thereby severely neutering the utility of abatement as a legal doctrine. Whether abatement may now be cast aside as a historical relic is a matter of some academic dispute.

The equitable set-off

20 At the same time as, if not earlier than, the development of the legal set-off and abatement in the common law courts, the courts of equity independently developed principles of set-off as well. It was initially developed on a case by case basis with little to underpin the cases save for equity and justice. Eventually, however, different strands of equitable set-offs became discernible: see *Cooperatieve Centrale Raiffesisen-Boerenleenbank BA (trading as Rabobank International), Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63 (at [40]). The most important of these, today, is the substantive equitable set-off.

21 The circumstances which would give rise to a substantive equitable set-off has been explained by Lord Denning in *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc* [1978] 1 QB 927 ("*The Nanfri*") (at pp 974-975):

> [I]t is not every cross-claim which can be deducted. It is only cross-claims that arise out of the same transaction or are closely connected with it. And it is only cross-claims which go directly to impeach the plaintiff's demands, that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim.

In a similar vein, Goff LJ remarked in the same case (at p 981) that:

> The circumstances must be such as to make it unfair for the creditor to be paid his claim without allowing that of the debtor if and so far as well founded and thus to raise an equity against the creditor or, as it has been expressed, impeach his title to be paid.

The doctrine of equitable set-off has been accepted by the Singapore Court of Appeal in *Pacific Rim Investments Pte Ltd v Lam Seng Tiong & Anor* [1995] 2 SLR(R) 643.

22 Therefore, the substantive equitable set-off is, in one respect, narrower than the legal set-off. While the legal set-off allows for the aggregation of cross-claims that may be entirely unrelated, the substantive equitable set-off requires the two claims to be "closely connected". However, in other respects, the substantive equitable set-off is broader than its common law cousin. For instance,

there is no requirement for the claims to be liquidated before the substantive equitable set-off is permissible. Further, the substantive equitable set-off is exercisable as a self-help remedy and may be retroactive. In addition, it is also questionable whether the principles of maturity and mutuality must be strictly applied: see, for instance, the views of Rory Derham in *The Law of Set-off* (at para 4.65 – 4.83).

23 Of course, with the enactment of the Supreme Court of Judicature Acts of 1873 and 1875, the courts of common law and equity were fused. Curiously, however, the doctrines of legal set-off, abatement and equitable set-off, continued to develop independently. Be that as it may, there also exists myriad other forms of set-offs – or principles which have an analogous effect - of more limited application. These include the combination of bank accounts, the insolvency set-off and the contractual set-off. I do not propose, for the purposes of the present application, to discuss those. The rough sketch I have provided will suffice as a backdrop to the more detailed discussion to follow.

Issues

Quantum meruit for work done in respect of Bianco and Nero

24 The first sum that ManagementPlus is seeking to set-off is an amount due, it alleges, from the work it performed in respect of two companies, Bianco and Nero.

25 As recounted earlier, ManagementPlus was appointed manager of the Master and Feeder Funds in 2006. By the middle of 2008, it realised that the subscription rates for the Funds were not as high as originally hoped for. This, of course, affected the remuneration received by ManagementPlus for its management services, especially since a large portion of that remuneration had to be passed on to Hayate as payment for advisory services rendered. ManagementPlus, by its own account, therefore wanted to revise the terms of its remuneration.

26 However, before it did so, ManagementPlus was requested to provide administrative and operational services to Bianco, a company established in the Cayman Islands, and Nero, a Singapore-incorporated company. Hayate assured ManagementPlus that ManagementPlus would be paid annual fees of US$100,000 for a minimum of 6 years if such services were provided. Accordingly, one Mr William Jones of ManagementPlus acted as the director of Bianco from 16 July 2008 to 28 June 2011 while Mr Nigel Stead acted as the director of Nero from 9 July 2008 to 1 August 2011. ManagementPlus averred that in reliance of the assurance of payment for the provision of services to Bianco and Nero, ManagementPlus did not actively pursue negotiation talks to increase its remuneration for management of the Funds. However, as it turned out, ManagementPlus was not paid, at least in part, for the work performed by Mr Jones and Mr Stead in respect of Bianco and Nero, respectively. An amount of US$77,397.38 is now being claim as appropriate payment for such work. On that basis, ManagementPlus claims both a legal and equitable set-off against Hayate's claim.

27 I must make clear that the above version of the facts is as recounted by ManagementPlus. For its part, Hayate argues that ManagementPlus was never directly involved with Bianco and Nero. Hayate further argues that Bianco and Nero should pay for the administrative and operational services, not Hayate. However, the objective evidence before me sheds little light on this matter. There are suggestions of a debt due but no direct evidence relating to the issue of who is to pay the debt to who. As such, this is in my estimation at least a triable issue of fact and ManagmentPlus' claim of a set-off should, at this point, be assessed on the premise that the facts recounted above are accurate.

Legal set-off – liquidated claims

28 There are, as mentioned earlier, at least three essential elements of a legal set-off: liquidated claims, maturity and mutuality. In the present case, ManagementPlus takes the position that its claim for US$77,397.38 as fees payable for services rendered to Bianco and Nero is liquidated. This is because of two main reasons. First, the claim is one for *quantum meruit.* Secondly, ManagementPlus is claiming for a specified sum, *i.e.*, US$77,397.38.

29 It is important to recognise at the outset that in order to qualify for a legal set-off, the requirement of liquidity is, strictly speaking, one "where the claims on both sides are in respect of liquidated debts, or money demands which can be readily and without difficulty ascertained": see *Stooke v Taylor* (1880) 5 QBD 569 (at p 575). However, the term "liquidated claims" is often used as a short-hand for the entire expression as a liquidated claim is often defined as "an amount which must either be already ascertained or capable of being ascertained as a mere matter of arithmetic" anyways: see Pinsler SC, *Singapore Court Practice*, (LexisNexis, 2009) ("*Singapore Court Practice*") (at para 6/2/2). Further, it is also pertinent that it is the claims which are subjected to this requirement, not the orders eventually granted. As was astutely pointed out by Hirst LJ in *Aectra Refining and Manufacturing v Exmar* NV [1994] 1 WLR 1634 ("*Aectra*") (at 1647):

> when Cockburn LJ in *Stooke v Taylor* spoke of 'money demands which can be readily and without difficulty ascertained', he was referring to ascertainment of the quantum of the demand, not to the amount which might ultimately be held recoverable after all defences put forward have been considered.

30 I do not agree with ManagementPlus that every claim for *quantum meruit* must, by its very nature, necessarily be a liquidated one. I do not think that the type of claim or the cause of action is necessarily determinative although some causes of action are admittedly more amenable to liquidated claims than others. Much depends on the facts of the case, as I will demonstrate in the following paragraphs. I do not believe that the principle can be further distilled beyond the rule that the demands must be ones which are "already ascertained or capable of being ascertained as a mere matter of arithmetic".

31 Neither do I agree with the submission that because ManagementPlus has claimed a fixed amount, the claim is therefore one that is liquidated. As was again perceptibly noted in *Singapore Court Practice* (at para 6/2/2):

> If the ascertainment of a sum of money, even though it be specified or named as a definite figure, requires investigation beyond mere calculation, then the sum is not a debt or liquidated demand but constitutes damages.

If ManagementPlus' argument is right, the requirement of liquidated claims ceases to exist as a real requirement. This is because all parties have to do to side-step the requirement is to pray for a specified amount, random or unreasonable as it may be. I am not of the view that, by requiring both claims to be liquidated, the law was merely inserting a false hurdle. This is not to say that a *quantum meruit* claim for a specified sum cannot be a liquidated claim. In fact, the converse is true; a *quantum meruit* claim *may* be a liquidated claim. All I am saying is that it is not true that a *quantum meruit* claim for a specified amount *must* be a liquidated claim.

32 The case of *Lagos v Grunwaldt* [1909] 1 KB 41 does not avail ManagementPlus. In that case, in order to obtain judgment, the plaintiff, a legal representative of the defendants, had to demonstrate that his claim for professional fees was a liquidated one. The claim was, as in the present, a *quantum meruit* claim for a specified sum. The English Court of Appeal held that it was a liquidated claim. However, what was particular about this case is the fact that the defendants did not dispute the

claim. In fact, the defendants agreed that they were indebted to the plaintiff for the sum so specified. In such circumstances, it is hardly surprising that the Court of Appeal arrived at the conclusion it did.

33 Nor is the case of *Aectra* particularly helpful to ManagementPlus' cause. *Aectra* involved a situation where the plaintiffs chartered two vessels from the defendant. A number of disputes arose out of this relationship, some of which were settled amicably. In one outstanding dispute, however, the parties disagreed as to the number of days when the vessel was off-hire. The defendants claimed for $297,156 on the basis of a daily rate of hire and attempted to set-off the amount against another debt. Again, the English Court of Appeal held (at p 1647) that this was a liquidated claim but only because "the pleaded set-off is undoubtedly one for a liquidated debt for the stipulated daily rate of hire in respect of the four identified periods." In essence, since only the number of days when the vessel was off-hire was in dispute, and not the daily rate of hire, the claim is one that is capable of easy ascertainment as a mere matter of arithmetic.

34 In the present case, it is unclear how the sum of US$77,397.38 was derived. There is, in evidence, an email written on behalf of ManagementPlus which stated that "[ManagementPlus] would receive a fixed fee of US$100k for at least 6 years paid annually in advance from the Bianco deal". However, how that fixed fee, even if accepted to have been agreed upon, translates into the US$77,397.38 is a mystery to me. No explanation has been forthcoming. Accordingly, I agree with counsel for Hayate that the sum of US$77,397.38 appears to have been "plucked from the air" and until it is properly explained, it cannot be said to any degree of confidence that ManagementPlus' claim for the value of its work done in respect of Bianco and Nero is a liquidated one. On this basis, there can be no legal set-off.

Legal set-off – mutuality

35 The requirement of mutuality does not, as is often mistaken, require the two cross-claims to be related. Rather, there are two distinct facets to this requirement. First, the two claims must be made between the same parties. This facet is rarely contested. Secondly, the two claims must be held in the same capacity (or right or interest). Strictly speaking, for a legal set-off developed from the Statutes of Set-off, this principle is determined by reference to *legal* titles. This is unlike an insolvency set-off. However, for all practical purposes, it is the beneficial title that is paramount. This is because if there is mutuality at law but not in equity, equity may nevertheless act by analogy with the legal right of set-off and recognise a set-off. (To be exact, however, this is really an equitable set-off and not a legal set-off but this point is seldom appreciated in caselaw and such a set-off is often treated as a legal set-off.) If the converse is true, equity will not recognise the set-off even if there is legal mutuality. The end position is, therefore, that stated by Lord Hoffmann in *Secretary of State for Trade and Industry v Frid* [2004] 2 AC 506 at [26]:

> Mutuality requires that each party should be debtor and creditor in the same capacity. A claim by a trustee on behalf of a beneficiary cannot be set off against a debt owing to the trustee personally. The law is concerned with beneficial ownership and not mere legal title.

36 On behalf of Hayate, it is asserted that there is no mutuality because it is Mr Jones and Mr Stead who are entitled to payment for directorship services rendered to Bianco and Nero, respectively and that it is Bianco and Nero who should be liable for such payment, not Hayate. In short, Hayate argues that:

(a) ManagementFund is neither the legal nor beneficial owner of the debt claimed; and

(b) Hayate is not liable for the debt.

37 So couched, this dispute is really a factual one. The matter may be resolved by ascertaining who was the party (ManagementPlus or Mr Jones/Mr Stead) who agreed with who (Hayate or Bianco/Nero) to provide services to Bianco and Nero in return for payment. As I suggested earlier, what objective evidence there is on this matter is inconclusive. There are suggestions, an agreement even, that a debt is owned but no clarity as to who owes the debt to whom. Given the paucity of evidence, it can only be conjectured at this point that this issue is, at the very least, a triable one.

Equitable set-off

38 I turn now to address the claim for equitable set-off in respect of services provided to Bianco and Nero.

39 In *Abdul Salam Asanaru Pillai (trading as South Kerala Caashew Exporters) v Nomanbhoy & Sons Pte Ltd* [2007] 2 SLR(R) 856 ("*Abdul Salam*"), Sundaresh Menon JC helpfully extracted the relevant propositions in this area of law (at [26]):

(a) There is a general right to equitable set-off in cases where there is a close relationship or connection between the dealings and the transactions which give rise to the respective claims: see *Hanak v Green* [1958] 2 QB 9.

(b) It is not necessarily the case that the claim and the cross-claim must arise out of the same contract: see *British Anzani (Felixstowe) Ltd v International Marine Management (UK) Ltd* [1980] 1 QB 137.

(c) There is no universal rule that claims arising out of the same contract may be set against one another in all circumstances: see *The Government of Newfoundland v The Newfoundland Railway Company* (1888) 13 App Cas 199.

(d) In determining how close the connection needs to be, the court should not get bogged down in the nuances of differently expressed formulations, save that there must be a close and inseparable relationship between the claims. Beyond this, the outcome can be left to be governed by notions of fairness and whether the circumstances are such that it would be manifestly unjust to allow one claim to be enforced without regard to the other: see *Bim Kemi* ([25])supra) at [29].

He then added (at [28]) that there is no magic formula to determine if there is a sufficient degree of relationship between the claims in any particular case and each case must necessarily turn on its facts:

> The question of whether a sufficient degree of closeness is established in the connection between the respective claims is not determined by some sort of formulaic process. In each case, the question turns on whether the respective claims are so closely connected that it would offend one's sense of fairness or justice to allow one claim to be enforced without regard to the other.

40 While formulations expressed in terms of "fairness" or "justice", perforce, involve some degree of subjectivity, it goes too far to say, as many do, that equity varies with the length of the

Chancellor's foot. The court does not, and should not, decide cases *in vacuo*. Whether the two claims are sufficiently connected must be ascertained by a close study of precedents. In the present case, cases in which the claim and the cross-claim arose out of different contracts are particularly instructive. I will but mention four cases.

4 1 *British Anzani v International Marine* [1980] QB 137 ("*British Anzani*") is the authority for the proposition that an equitable set-off may arise out of cross-claims that are not grounded in the same contract. In that case, the plaintiffs entered into an agreement and, separately, a lease with the defendants. Pursuant to the agreement, the plaintiffs agreed to construct warehouses and, thereafter, grant an underlease to the defendants. The agreement also provided that the plaintiffs should make good at their own expense any defects which occurred in the floors of the buildings within two years of their completion. The warehouses were completed and the aforementioned lease was entered into. However, the lease had no provision for the plaintiffs to make good any defect in the floors. The plaintiffs brought an action against the defendant arising out of unpaid rent due on the leases. The defendants cross-claimed for damages for breaches of the agreement as a result of the condition of the floors. Even though the claim and cross-claim were based on the lease and the agreement, respectively, Forbes J held that there was a close connection between them because: 1. the agreement included a provision for the entering into of the lease, 2. the special provision relating to the floors was very much on the minds of the parties; and 3. a breach by the plaintiffs of the provision regarding the floors would, quite separate from the agreement, render the premises unfit for the purpose for which they were let. In the result, the defendants could set-off their cross-claim against the plaintiffs' claim for rent.

42 The case of *Bim Kemi AB v Blackburn Chemicals Ltd* [2001] 2 Lloyd's Rep 93 ("*Bim Kemi*") involved a defendant who contracted with a plaintiff in 1984 to provide the plaintiff with a licence to use certain technology and supply it with certain products. Ten years later, in 1994, both parties entered into a different contract relating to new products. The defendant later refused to supply the plaintiff with the new products, upon which the plaintiff sued for a repudiation of the 1994 agreement. The defendant claimed, as a response, that the plaintiff was itself in breach of the 1984 agreement. Potter LJ found that set-off could be applied to the two claims. This was because he was of the view that "the two agreements are inseparably connected within the continuum of the parties' trading relationship" and which "both contemplated a continuing expansion and exploitation of the market for Dispelair products in Scandinavia": *Bim Kemi* (at [37]. Further, he felt that the alleged conduct against the plaintiff would, if true, constitute a breach of both agreements.

43 In contrast to the first two mentioned cases, Sundaresh Menon JC did not allow a set-off between two claims based on different contracts in *Abdul Salam*. In gist, the parties were involved in three separate dealings, all of which involved the sale of raw cashew nuts. The plaintiff made a claim against the defendant in relation to the first set of dealings where the plaintiff alleged there was a shortfall of cashew nuts delivered. The defendant made cross-claims relating to the other two sets of dealings. Sundaresh Menon JC held that the first set of dealings was a self-standing transaction, quite separate from the other two. The fact that the parties were in a commercial relationship of some duration and that the claims all relate to cashew nuts, involved the same parties and were shipped on the same vessel was not sufficient to persuade him otherwise.

44 To establish the outer parameters of what would constitute a sufficiently close connection to qualify for an equitable set-off, it would be prudent to mention the case of *Rawson v Samuel* (1839) 1 Cr & Ph 161 ("*Rawson*"), from which the "impeachment test" originated. This was a case where no set-off was found even though the claim and the cross-claim were based on the same contract. In that case, the plaintiff was suing for a breach of contract. The defendant sought an account of transactions under the contract and an injunction to restrain the plaintiff from executing any

judgment until he had given credit for any balance that may be found to be due to the defendant on the account. Even though the two claims arose out of the same contract, Lord Cottenham found that "[t]he object and subject matters are ...totally distinct": *Rawson* (at 178).

45 In the present case, counsel for ManagementPlus argued that Hayate's claim for **¥**46,869,291 as payment for advisory services rendered is inextricably linked with ManagementPlus' claim for US$77,397.38 for directorial services rendered to Bianco and Nero. This is primarily because ManagementPlus had undertaken work on Hayate's instructions and on the assumption that ManagementPlus would be suitably remunerated. In fact, ManagementPlus alleges that it suspended its negotiations with Hayate for an increment in its proportion of management and performance fees for managing the Funds on this basis.

46 Aligning the present case along the equitable barometer established by, *inter alia*, the decisions cited above, I am not of the view that Hayate's claim and ManagementPlus' claim are sufficiently connected to qualify for an equitable set-off. While they may have involved the same parties (if the facts alleged by ManagementPlus are to be believed), the contracts were plainly for different services. One was for Hayate to provide advisory services to ManagementPlus in respect of the Master Fund while the other was for ManagementPlus to provide directorial services in respect of Bianco and Nero. Nothing in the first agreement impacted or impinged upon the second. In this respect, the present case differed from the cases of *British Anzani* and *Bim Kemi*. Similar to the situation in *Abdul Salam*, the contracts in the present case were self-standing and independent, the intricate and long-standing relationship between the parties notwithstanding.

47 It is critical to recognise that, even on ManagementPlus' account of the facts, Hayate did *not* promise to pay ManagementPlus US$100,000 a year (for directorial services rendered to Bianco and Nero) on condition that ManagementPlus' remuneration (for managing the Master Fund) was not augmented. While Hayate did promise to pay the US$100,000, the decision to not seek an increase in management fees was taken by ManagementPlus itself. The following portion of the supporting affidavit filed on behalf of *ManagementPlus* is illuminating, not just for what it said but also what it did not say:

> In reliance on these assurances [of being paid US$100,000 annually for services rendered to Bianco and Nero)] by the Plaintiff and Mr Sugihara, **the Defendant did not actively pursue negotiation talks** for the upward adjustment of its share of the management and performance fees payable out of the Feeder Fund and instead, continued to manage the Funds on the original terms of remuneration. Taking into consideration the prospective payments agreed with the Plaintiff and Mr Sugihara in respect of Bianco, **the Defendant decided** that this arrangement would result in a commercially acceptable working relationship between the Defendant and Mr Sugihara and the Plaintiff. [Emphasis added.]

48 The nuances in the carefully drafted affidavit can hardly be missed. It is apparent to me that Hayate never linked the two issues – payment for directorial services rendered to Bianco/Nero and payment for advisory services rendered to the Master Fund – together. It was ManagementPlus itself who linked the two issues together and decided that, holistically, this commercial situation would suffice. Since it was ManagementPlus who made a poor assessment of the situation, it can hardly be said that fairness or justice demands that Hayate should be made to bear the consequences thereof. Nothing in the present situation requires the intervention of equity.

Quantum meruit for managing the Master Fund

49 The next sum that ManagementPlus is attempting to set-off is one it alleges is due because it

had incurred substantial expenses in winding up the Master Fund.

50 According to ManagementPlus, by August of 2010, the relationship between the two parties had become untenable and Hayate asked ManagementPlus to resign as manager of the Funds. To this request, ManagementPlus agreed under the impression that it would be stepping down from both the Master Fund as well as the Feeder Fund. However, one day before the appointed date of resignation, ManagementPlus learnt that Hayate had restructured the Feeder Fund into a standalone fund. As mentioned earlier, the capital of the Master Fund is primarily derived from the Feeder Fund. With this new restructuring, the Master Fund would be choked of its main, if not only, source of capital. More crucially, ManagementPlus also learnt that it was to remain as manager of the now impotent Master Fund while another company was to take over the management of the Feeder Fund.

51 As this discovery was made late in the day, ManagementPlus had little alternative but to proceed to resign as manager of the Feeder Fund. Thereafter, it had to continue to discharge its fiduciary duties to the investors of the Master Fund as manager of the same. Eventually, the Master Fund was wound up but not before expenses were incurred. ManagementPlus now seeks the recovery of US$36,000 as management fees for managing the Master Fund's liquidation by way of set-off.

Legal set-off

52 Where legal set-off is concerned, the arguments made from [30] to [34] in respect of the Bianco and Nero claim may be repeated here. The fact that the claim is one for *quantum meruit* and is for a specified sum is not, either singularly or cumulatively, sufficient to establish that the present claim is a liquidated one. In the present claim, it is again quite unclear how the figure of US$36,000 was arrived at. This is particularly so when the managerial fee received by ManagementPlus for the management of the Master Fund was not a fixed figure but depended, as ManagementPlus averred to, on the subscription rates for and performance of the Master Fund. (It should be noted that the exact document setting out how ManagementPlus was to be paid was not produced before me; thus I cannot be absolutely certain on this point.) In any case, no explanation for the US$36,000 claim was attempted. If so, how does one value the work done in respect of a period when the Master Fund was being wound up? This is unlike the case of *Aectra* when the claim was pegged to an established daily rate of hire. No such rate has been pleaded in the present case. If so, the value of the work done by ManagementPlus in respect of the liquidation of the Master Fund remains to be assessed. In short, ManagementPlus' claim for management fees for managing the Master Fund's liquidation is, as currently pleaded, an unliquidated claim.

53 A further question may be asked as to mutuality. Who is liable for the debt, if any, owing to ManagementPlus? Counsel for ManagementPlus argues that it is Hayate for it was Hayate who requested that ManagementPlus be the manager of the Master Fund. This is not borne out by objective evidence. The Master Fund Management Agreement stated beyond peradventure that it was the Master Fund who appointed ManagementPlus to be its manager. More crucially, it also appears that it was the unitholders of Master Fund who were the beneficiaries of the fund. Clause 4 of the Trust Deed which established the Master Fund unequivocally stated:

> Trust Deed to bind and benefit Unitholders and other persons
>
> 4. **The terms and conditions of this Deed shall enure for the benefit of and be binding on each Unitholder and all persons claiming through or under it (including all persons on whose behalf such Unitholder holds Units)** as if each Unitholder and other such persons had been a party to and had executed this Deed, and as if each Unitholder and other such persons had covenanted to observe and be bound by all the terms of this Deed and had thereby

authorised the Trustee and the Manager to do all such acts and things as this Deed may or shall require the Trustee or the Manager, as the case may be, to do or which the Trustee or the Manager, as teh case may be, shall do in accordance with the terms hereof. [Emphasis added.]

54 No argument has been made before the court that the unitholders were holding onto their units for the benefit of Hayate and that Hayate was the true beneficial owner of the Master Fund. Nor has any argument been made that the Hayate agreed to pay the liquidation costs on behalf of the Master Fund or the unitholders. In the absence thereof, ManagementPlus must look to the unitholders for payment. As such, it is hard to see how the requirement of mutuality is satisfied.

Equitable set-off

55 In respect of the claim for equitable set-off, I consider ManagementPlus' claim for remuneration for managerial services performed in respect of the Master Fund to be closer in connection to Hayate's claim than the previous claim for payment for services rendered in respect of Bianco and Nero. This is because at the heart of the present claims are services provided for the benefit of the Master Fund. Even so, I do not consider the relationship to be sufficiently close to justify an equitable set-off. Again, like those of the case of *Abdul Salam*, the two claims are self-standing and independent of each other. First, the parties to the underlying agreements are different. In respect of Hayate's claim, it is Hayate and ManagementPlus. In respect of ManagementPlus' claim it is ManagementPlus and the Master Fund (or its beneficial owners). Secondly, the services provided were quite different. One was for advisory services, the other managerial services. Most importantly, the two underlying contracts did not impact or impinge upon one another in the way those in *British Anzani* and *Bim Kemi* did.

Quantum meruit for Bloomberg services rendered to both the Master Fund and the Feeder Fund

56 The claim for Bloomberg services is a very poorly explained one. In fact, the first - and only - time ManagementPlus' supporting affidavit mentions Bloomberg is when ManagementPlus claimed "US$12,000, representing the costs and expenses incurred by the Defendant for subscription to Bloomberg services towards the Defendant's fulfilment of its functions as Manager of the Funds." No other explanation has been provided regarding the circumstances surrounding this claim. I am, thus, left to conjecture at the substance of this claim from the documentary evidence produced.

57 In that regard, the only clue about this claim is one from an email dated 22 September 2010 in which Mr Jones, on behalf of ManagementPlus, wrote to representatives of Hayate:

> *Bloomberg to be paid by Hayate*
>
> Bloomberg is a 2 year renewable contract which has just rolled over. The two year cost is approx $50k – termination charge is 50% of the outstanding so Hayate has to (i) keep the contract and pay for it through its end date or (ii) cancel it and pay 50% of the remainder, so approximately $25k
>
> ...
>
> We see the end result as follows:
>
> ...

- Hayate to take on Bloomberg agreement or pay $25k to cancel. As a good will gesture, we would propose to assume the Bloomberg contract.

58 In the circumstances, it is impossible for me to ascertain if this claim qualifies for a legal or equitable set-off. Many questions, including the following, abound:

(a) Who contracted with Bloomberg to provide services? Specifically, was it ManagementPlus or was it the Master Fund?

(b) For whose benefit was Bloomberg to provide services?

(c) What was the nature of those services?

(d) If there was a contractually stipulated rate for the services rendered, in what way is the present claim a *quantum meruit* claim?

(e) If the cost of the service was $50,000 or, in the case of termination, approximately $25,000, how is the figure of US$12,000 arrived at?

(f) Did ManagementPlus "assume the Bloomberg contract"? If so, how is the figure of US$12,000 determined? If not, what happened to the contract?

59 As this claim is wholly unsubstantiated and unexplained, any claim for a set-off on this basis must be dismissed.

Indemnity in respect of alleged acts of bad faith on the part of Hayate

60 ManagementPlus avers that Hayate had committed at least two separate instances of bad faith.

61 First, Hayate had, in about May of 2010, requested that one Mr Daisuke be seconded to ManagementPlus for training in fund management operation procedures. To this request ManagementPlus acceded. Little did ManagmentPlus expect that Hayate had already by that time incorporated another entity known as Hayate Partners for the express purpose of engaging in fund management activities. Hayate Partners was therefore a potential competitor of, and did eventually take over management of the Feeder Fund from, ManagementPlus; further, Mr Daisuke was also in fact a director of Hayate Partners. By not revealing Mr Daisuke's relationship with Hayate Partners, Hayate had tricked ManagementPlus into training Mr Daisuke in ManagementPlus' internal processes and procedures.

62 The second instance related to the resignation of ManagementPlus as manager of the Feeder Fund. Initially, ManagementPlus had agreed to resign as manager of both the Master and Feeder Fund. However, as recounted earlier, Hayate had surreptitiously restructured the Feeder Fund into a

standalone fund and had transferred most of the assets in the Master Fund to the Feeder Fund. Hayate had also planned for ManagementPlus to resign as manager of the Feeder Fund but to remain as manager of the Master Fund. ManagementPlus was only aware of these plans the day before the appointed resignation. In the circumstances, ManagementPlus felt compelled to go along with Hayate's plans.

63 As a result of these acts of bad faith, ManagementPlus claims it is entitled to an indemnity for all losses arising thereto. As its basis, ManagementPlus cites the advisory agreement signed between the two parties:

> [Hayate] shall indemnify and hold harmless [ManagementPlus] against all losses, costs, liabilities, obligations, claims, taxes, penalties, fees and demands...that may be suffered or sustained by or made against [ManagementPlus] resulting or arising in any way from...the wilful default, bad faith, fraud, negligence or reckless disregard of [Hayate].

64 ManagementPlus quantified its losses in this respect at US$127,000, representing the management and performance fees that it would have earned as manager of the Feeder Fund from 13 October 2010 (the date of resignation) to the date of the hearing before me on 19 March 2012 (based on a rate of US$7,500 a month) and/or damages to be assessed. It now seeks for such sum to be set-off against Hayate's claim.

Causation

65 Again, ManagementPlus' argument runs into difficulties with the requirements for set-off. Where the legal set-off is concerned, the satisfaction of the requirement of liquidated claims is questionable. So too the equitable test that the claim and cross-claim must be so closely connected that it would offend one's sense of fairness or justice to allow one claim to be enforced without regard to the other. However, there is no need to analyse these difficulties in detail for ManagementPlus faces a prior issue in respect of this claim.

66 In order to apply a set-off, the cross-claim must itself be proved on a balance of probabilities. This is in addition to the fact that the set-off requirements must be met. At the present time, however, I am of course not adjudicating on the merits of ManagementPlus' claims *per se*. Even so, ManagementPlus must, at this early stage, satisfy the court that there is some merit to its cross-claim, that it is not obviously unsustainable. Otherwise, there would be no reason to set aside the judgment obtained by Hayate.

67 In my view, the present claim as laid out by ManagementPlus is bound to fail for failure of causation. In order to rely on the indemnity clause, Hayate's acts of bad faith, even if taken to be true, must be the cause of ManagementPlus' losses. Or phrased a different way, it must be shown that but for Hayate's acts of bad faith, ManagementPlus would not have suffered the losses it is presently claiming. In the present case, the losses are described as losses resulting from ManagementPlus' resignation as manager of the Feeder Fund. As such, in order to succeed in its claim, ManagementPlus must demonstrate that if not for Hayate's acts of bad faith, would not have resigned as manager of the Feeder Fund. However, it cannot to me be gainsaid that ManagementPlus resigned of its own volition.

68 It must be recalled the relationship between the parties. Hayate was but an adviser to ManagementPlus. ManagementPlus was appointed as manager of the Master Fund by the Master Fund itself, an entity with a separate legal personality from Hayate. This state of affairs is confirmed by the agreement made between the Master Fund and ManagementPlus for the latter to act as the manager

of the former. Clause 9 of that agreement sets out the situations whereby ManagementPlus may terminate or be terminated from its role as manager. In clause 9.2, it states that "[t]he Master Fund may terminate the appointment of the Manager..." Nowhere in that agreement does it allow for Hayate to terminate the appointment of ManagementPlus as manager.

69 Of course, ManagementPlus' argument is a more subtle one. It argues that while it had resigned in form, the substance of the matter was that Hayate had caused ManagementPlus to resign because of the alleged acts of bad faith. I do not accept this argument. While I accept that there was some pressure on ManagementPlus to resign, I do not see how Hayate could have forced ManagementPlus to resign if it was not in ManagementPlus' interests to do so. ManagementPlus is no babe in the woods. Nor did it appear to me that there was any inequality of bargaining power. There was no reason why ManagementPlus could not protect itself against adverse positions.

70 The truth of the matter, in my view, is that ManagementPlus itself wanted to resign. There were ample reasons for ManagementPlus to do so. These include the fact that ManagementPlus had not been paid many sums which in its view was due from Hayate and such a situation looked likely to persist, Mr Jones/Mr Stead/ManagementPlus was not being adequately remunerated for providing services to Bianco and Nero and ManagementPlus' relationship with Hayate had soured and it wanted to sever all ties with Hayate. Which of these is the straw that broke the camel's back is immaterial. In the end, it is a fact that the decision to resign was made far in advance of ManagementPlus learning that the Feeder Fund had been restructured. In truth, the decision to resign as manager of the Feeder Fund was made by ManagementPlus alone.

71 ManagementPlus now suggests that, even as it made an earlier decision to resign, it would not have actually done so had the restructuring been brought to its attention earlier. This self-serving cavil I am disinclined to believe. There is no evidence to support this bare averment. Given the wealth of reasons for resignation, and the fact that the parties had made significant preparations for the resignation and the transfer of duties, it is highly unlikely that knowledge of the restructuring would have provided anything more than a pause for thought. To say that but for the late notice of the restructuring, ManagementPlus would not have resigned is a meretricious argument, divorced from reality. To my mind, the evidence against ManagementPlus is so overwhelming that this is not even a triable issue.

72 Given the above view, there is no reason to set aside Hayate's judgment on this ground.

Unlawful conspiracy on the part of Hayate to injure ManagementPlus

73 The facts alleged at [61] to [62] were again relied upon in support of the claim of unlawful conspiracy. Further, in addition to the US$127,000 claimed in the previous instance, ManagementPlus claims an additional US$36,000 representing the management fee it would have earned from managing the liquidation of the Master Fund. However, the problem of causation previously described also plagues this claim.

74 In any case, counsel for ManagementPlus conceded that this claim is not a liquidated one. Therefore, no legal set-off may be applied. Where equitable set-off is concerned, I am also not of the view that the two claims are sufficiently connected. As reasoned above, the engagement of Hayate as an advisor is self-standing and independent from the engagement of ManagementPlus as manager of the Master Fund. It is difficult to see how one would impact and impinge upon the other.

Compromise agreement struck between the parties for the sum of US$120,000

75 This leaves the compromise agreement to be dealt with.

76 This claim is simple. ManagementPlus alleges that in settlement of monies due to ManagementPlus - including some of the claims outlines above - Hayate had agreed to pay ManagementPlus a sum of US$120,000. Accordingly, this sum should be set-off against Hayate's claim.

77 It must first be noted that it appears that Hayate does not agree that there is a binding and enforceable settlement agreement. Hayate averred that after a general consensus had been reached for payment of US$120,000 in settlement of various debts, ManagementPlus sought to charge an additional fee which ManagementPlus asserted was for an item not included in the US$120,000 settlement sum. Hayate, however, took the view that the US$120,000 earlier discussed covered all monies owing to ManagementPlus. No resolution of this matter being forthcoming, Hayate, accordingly, took the view that the eventual outcome was that "there was no agreement to restructure the fee arrangement in the Investment Advisory Agreement."

78 On the evidence before me, it is not clear whether there was ever proper contract formation. Certainly, the evidence suggested that there was an offer to settle by ManagementPlus on 21 September 2010 in respect of various items but that was for the sum of US$105,000. How that morphed into US$120,000 is not clear to me. The immediate emails consequent to that offer to settle were not produced before me. The next documentary evidence I have of the matter is an email of 23 March 2011 from Hayate to ManagementPlus questioning why certain fees were added to the US$120,000. Accordingly, there is no direct evidence before me that there was proper contract formation. However, I take the view that there is sufficient evidence - particularly cogent evidence indicating that parties had assumed at some point that there was a binding contract - to suggest that there *might* have been such formation. This is, therefore, at the least a triable issue which will suffice for ManagementPlus' purposes for the present application.

Legal set-off

79 If there was indeed a contract between Hayate and ManagementPlus to settle various debts for the total amount of US$120,000, this is clearly a liquidated claim to enforce that contract that is also matured and mutual. The requirements of a legal set-off are therefore satisfied.

80 Counsel for Hayate makes various objections to this claim, none which of derogates from the conclusion that the settlement agreement qualifies for a legal set-off. In particular, counsel suggests that, pursuant to the Master Fund Management Agreement, expenses should be borne by ManagementPlus and that was some mathematical miscalculation. It must be remembered that the factual basis on which I am proceeding is an *agreement* between the parties for Hayate to pay ManagementPlus US$120,000. Even if the points by counsel are fairly made, these are points which Hayate should have considered prior to the agreement. Having so agreed, it cannot now resile from the contract.

81 Another point which counsel for Hayate makes is that a sum of US$30,591 had already been allocated to ManagementPlus as payment for its management services rendered to the Master Fund in the computation of Hayate's claim. In other words, ManagementPlus has already been paid pursuant to the terms set out in the contract for management services. There is no avenue, therefore, for ManagementPlus to be paid for management services under any compromise agreement. This objection does not entirely negate the force of ManagementPlus' counterclaim. First, if the compromise agreement is a binding contract, it would supersede the management contract agreed between ManagementPlus and the Master Fund. Thus, ManagementPlus has, in principle, every right

to countersue under the compromise agreement instead of relying on the management contract. Secondly, and quite obviously, the sum of US$30,591, even if accurately calculated, does not cover the entire counterclaim for US$120,000, whether in quantum or in substance. Finally, it is not at all clear how much of the US$120,000 was in settlement of monies due for management services rendered by ManagementPlus. Accordingly, that sum not being severable, the entire counterclaim must proceed.

82 Given the above conclusion, there is strictly speaking no need to examine the equitable set-off. However, since I am in blood stepped in so far, I will go on to do so for the sake of completeness.

Equitable set-off

83 Again, the litmus test is that the claim and cross-claim must be so closely connected that it would offend one's sense of fairness or justice to allow one claim to be enforced without regard to the other. Not unlike the previous conclusions on the issue of equitable set-off above, I am not of the view that there is a sufficient degree of connection between Hayate's claim and ManagementPlus' cross-claim to warrant the intervention of equity. It is important that none of the settlement talks or discussion raised the issue of Hayate's claim. The compromise agreement was for settle of sums due to ManagementPlus. There was no compromise of Hayate's claim. Thus, regardless of what the exact debts that were compromised for the sum of US$120,000 were, the US$120,000 had nothing to do with Hayate's present claim for ¥46,869,291. In the result, it would not be unfair to allow Hayate to enforce its judgment and have ManagementPlus assert its claims in a different forum.

Reasons for not entering appearance

84 It would be prudent to put on record that I am not of the view that there was an intentional attempt by ManagementPlus not to comply with the ROC by not entering an appearance. Instead, it appears to me that circumstances had conspired against it in this regard.

85 The Writ of Summons was served on ManagementPlus' corporate secretary on 22 December 2011. This meant that, pursuant to Order 12, rule 4 of the ROC, ManagementPlus had to enter an appearance by 30 December 2011. However, as a result of the Christmas holidays, the earliest ManagementPlus had sight of the Writ was on 29 December 2011. On 30 December 2011, the senior adviser of ManagementPlus attempted to secure legal representation but was unable to do so because of the festive season. This led to Hayate filing for judgment on 31 December 2011. ManagementPlus finally managed to obtain legal representation on 3 January 2012. On the same day, it attempted to file an appearance but was rejected. ManagementPlus then filed the present application less than two weeks later.

86 It is my opinion that, in the circumstances, ManagementPlus' failure to enter an appearance is forgivable.

Conclusion

87 On no less than three occasions, the Singapore courts have registered dissatisfaction with the law of set-off: see *OCWS Logistics Pte Ltd v Soon Meng Construction Pte* Ltd [1998] 3 SLR(R) 888 (at [7]), *Engineering Construction* (at [12]) and *Rabobank International* (at [39]). I believe the present application illustrates well the reason for such dissatisfaction. Apart from antiquity, it is difficult to discern a reasoned basis for the different conclusions arrived at by the law of legal set-off and equitable set-off on the same issue. That, however, is the case at hand.

88 Given my analysis outlined above, I am of the view that ManagementPlus has an arguable defence of a legal set-off based on the US$120,000 compromise agreement. All other arguments of set-off are rejected. I will therefore vary the judgment obtained by Hayate on 3 January 2012 by allowing ManagementPlus leave to defend the sum of US$120,000 and granting Hayate judgment on the residue.

89 Consequent to the above order, ManagementPlus is also granted leave to enter an appearance within two weeks of this order.

90 Further, parties are to agree on costs, failing which they have liberty to apply for a further hearing.