IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2024] SGHC 105

Suit No 363 of 2022 (Summons No 249 of 2024)

Between

(1) Park Hotel CQ Pte Ltd (in liquidation)
(2) Aw Eng Hai (in his capacity as a joint and several liquidator of Park Hotel CQ Pte Ltd (in liquidation))
(3) Kon Yin Tong (in his capacity as a joint and several liquidator of Park Hotel CQ Pte Ltd (in liquidation))

… *Plaintiffs*

And

Law Ching Hung

… *Defendant*

Suit No 364 of 2022 (Summonses Nos 247 and 248 of 2024)

Between

(1) Park Hotel Management Pte Ltd (in liquidation)
(2) Aw Eng Hai (in his capacity as a joint and several liquidator of Park Hotel Management Pte Ltd (in liquidation))
(3) Kon Yin Tong (in his capacity as a joint and several liquidator of Park Hotel Management Pte Ltd (in liquidation))

… *Plaintiffs*

And

(1) Law Ching Hung
(2) Park Hotel Group Management Pte Ltd
(3) Good Movement Holdings Limited
(4) SG Inst of Hospitality Pte Ltd

… *Defendants*

JUDGMENT

[Insolvency Law — Winding up — Winding-up order — Plaintiff protected by moratorium under s 133(1) Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) — When counterclaim can be brought by defendant without leave of court]
[Insolvency Law — Insolvency set-off — Whether legal set-off or equitable set-off can be asserted against company in liquidation]
[Insolvency Law — Insolvency set-off — Whether claims based on defendant's misfeasance or wrongdoing are within the scope of insolvency set-off]

TABLE OF CONTENTS

BACKGROUND FACTS 3

THE DEFENDANTS' AMENDMENT APPLICATIONS...........................5

THE PARTIES' CASES..7

ISSUES TO BE DETERMINED 9

MY DECISION: THE DEFENDANTS' AMENDMENT APPLICATIONS ARE DISMISSED 10

WHEN LEAVE OF COURT IS REQUIRED FOR A COUNTERCLAIM TO BE BROUGHT AGAINST A PLAINTIFF COMPANY IN LIQUIDATION..........................10

WHETHER LEGAL SET-OFF AND EQUITABLE SET-OFF CAN BE ASSERTED AGAINST A COMPANY IN INSOLVENT LIQUIDATION 24

Should legal set-off be available against an insolvent company? 30

Should equitable set-off be permitted against an insolvent company? 32

Insolvency set-off is the only form of set-off that can be asserted against an insolvent company 39

MY DECISION ON THE DEFENDANTS' AMENDMENT APPLICATIONS 42

CONCLUSION...45

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Park Hotel CQ Pte Ltd (in liquidation) and others
v
Law Ching Hung and another suit

[2024] SGHC 105

General Division of the High Court — Suit No 363 of 2022 (Summons No 249 of 2024) and Suit No 364 of 2022 (Summonses Nos 247 and 248 of 2024)
Goh Yihan J
1 April 2024

22 April 2024 Judgment reserved.

Goh Yihan J:

1 There are three applications before me which arise from two underlying suits. These are as follows:

(a) In HC/SUM 249/2024 ("SUM 249"), the defendant in HC/S 363/2022 ("Suit 363"), Mr Law Ching Hung ("LCH"), seeks leave to amend his Defence and introduce counterclaims against the plaintiffs therein.

(b) In HC/SUM 247/2024 ("SUM 247"), the second defendant in HC/S 364/2022 ("Suit 364"), Park Hotel Group Management Pte Ltd ("PHGM"), seeks leave to amend its Defence and introduce counterclaims against the plaintiffs therein.

(c) In HC/SUM 248/2024 ("SUM 248"), the first defendant in Suit 364, also LCH, seeks leave to amend his Defence and introduce counterclaims against the plaintiffs therein.

The defendants, which I will use to refer to all of the relevant defendants in Suit 363 and Suit 364, base their applications on O 20 r 5(1) of the Rules of Court (2014 Rev Ed) ("ROC 2014").

2 The plaintiffs in the Suits, who are the liquidators of the companies in liquidation concerned, object to the applications. The plaintiffs do so on the premise that LCH and PHGM have not sought the court's permission pursuant to s 133 of the Insolvency, Restructuring and Dissolution Act 2018 (2020 Rev Ed) ("IRDA") to bring their counterclaims against the first plaintiff in Suit 363, Park Hotel CQ Pte Ltd (in liquidation) ("PHCQ"), and the first plaintiff in Suit 364, Park Hotel Management Pte Ltd (in liquidation) ("PHMPL"). Thus, although LCH and PHGM have brought the present applications under O 20 r 5(1) of the ROC 2014, the plaintiffs argue that this court should not endorse LCH's and PHGM's error of not having sought permission in the first place by permitting the amendments sought.

3 In essence, these applications come down to two interrelated questions. First, when, if ever, can a creditor advance a counterclaim in proceedings initiated by a company in insolvent liquidation without having to obtain leave of court under s 133(1) of the IRDA? Second, can a creditor rely on other forms of set-off known to the general law, such as legal and equitable set-off, against a company in insolvent liquidation?

4 Having considered the parties' submissions carefully, I conclude that the defendants' applications should be dismissed. In response to the two questions

Version No 1: 22 Apr 2024 (12:33 hrs)

at [3] above, my answer to the first question is that a creditor can only advance a counterclaim that amounts to a permissible set-off against an insolvent company without having to obtain leave of court under s 133(1) of the IRDA. My answer to the second question is that a creditor can only invoke insolvency set-off against an insolvent company. Given that none of the counterclaims sought to be introduced by the defendants fall within the scope of insolvency set-off, I dismiss their applications to amend their defences to bring the relevant counterclaims because they have not obtained leave under s 133(1) to bring any of these counterclaims.

Background facts

5 The first plaintiff in Suit 363, PHCQ, was placed into compulsory liquidation on 19 November 2021. The second and third plaintiffs in Suit 363 are the joint and several liquidators of PHCQ.[1]

6 The defendant in Suit 363, LCH, was the sole director and chief executive officer of PHCQ from 3 April 2013 (PHCQ's date of incorporation) until 16 March 2021. LCH is also the sole shareholder of PHMPL, which in turn owns all the shareholding of PHCQ.

7 PHMPL is the first plaintiff in Suit 364. PHMPL was placed into liquidation on 2 July 2021. The second and third plaintiffs (who are the same persons as the second and third plaintiffs in Suit 363) are the joint and several liquidators of PHMPL.

1 Plaintiffs' Written Submissions in SUM 249 dated 6 March 2024 at para 3.

Version No 1: 22 Apr 2024 (12:33 hrs)

8 LCH is also a defendant (specifically, the first defendant) in Suit 364. As for the second to fourth defendants in Suit 364 – respectively, PHGM, Good Movement Holdings Ltd, and SG Inst of Hospitality Pte Ltd – it suffices to note for the purposes of the present applications that they are companies alleged to have been under the control of LCH.

9 In Suit 363, PHCQ and its liquidators have brought claims against LCH, alleging that LCH had procured and/or arranged, for his own benefit, the payment of certain sums out of PHCQ to PHMPL at a time when PHCQ was unable to pay its debts and/or in a financially parlous state.[2] The effect of these payments was allegedly to substantially reduce the sums available to be distributed to PHCQ's creditors in the event of its liquidation.[3] In this regard, the causes of action relied on by PHCQ and its liquidators against LCH include breach of fiduciary duty, breach of trust, and the statutory clawback provisions under s 224 of the IRDA (transactions at an undervalue) and s 438 of the IRDA (transaction defrauding creditors).[4]

10 In Suit 364, PHMPL and its liquidators have brought claims against LCH and three other companies under his control. These claims are based on allegations that LCH had procured the transfer of virtually all of PHMPL's assets to himself personally and the three companies under his control shortly before PHMPL was placed into winding up. The effect of these transactions was allegedly to substantially reduce the sums available for distribution amongst

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[2] Plaintiffs' Written Submissions in SUM 249 dated 6 March 2024 at paras 4–5.

[3] Plaintiffs' Written Submissions in SUM 249 dated 6 March 2024 at para 6.

[4] Plaintiffs' Written Submissions in SUM 249 dated 6 March 2024 at para 7.

PHMPL's creditors in the event of its liquidation.[5] In this regard, the causes of action relied on by PHMPL and its liquidators include: (a) against LCH, breach of fiduciary duty, breach of trust and unlawful means conspiracy; and (b) against PHGM, s 224 of the IRDA (transactions at an undervalue), knowing receipt and unlawful means conspiracy.[6]

The defendants' amendment applications

11 Against the background facts that led to Suit 363 and Suit 364, I come to the defendants' present amendment applications. In this regard, SUM 249 is LCH's application to amend his Defence in Suit 363 to include the following:[7]

(a) First, to add a counterclaim for the sum of S$4.8m in respect of an alleged debt to LCH for a director's loan extended by him to PHCQ, in the event that two payments of S$2m each by PHCQ to him on 9 December 2020 and 4 January 2021 in partial discharge of PHCQ's debt under the director's loan are void and/or invalid.

(b) Second, to plead that, in the event that he is found liable to repay the aforementioned two payments of S$2m each, LCH should be entitled to set off the sum of S$4.8m (being the director's loan owing to him by PHCQ above) from his liability to the plaintiffs in Suit 363.

12 SUM 247 and SUM 248 are, respectively, PHGM and LCH's applications to amend their Defence in Suit 364. I summarise their proposed amendments below:

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5 Plaintiffs' Written Submissions in SUM 247–248 dated 6 March 2024 at paras 4–5.

6 Plaintiffs' Written Submissions in SUM 247–248 dated 6 March 2024 at para 7.

7 8th Affidavit of Law Ching Hung dated 29 January 2024 at para 13.

Version No 1: 22 Apr 2024 (12:33 hrs)

(a) In SUM 248, LCH seeks to amend his Defence in Suit 364 to include the following:[8]

(i) First, to introduce a counterclaim for the sum of around S$4.3m, being the sum paid by LCH to United Overseas Bank Ltd ("UOB Bank") as a guarantor of a loan extended by UOB Bank to PHMPL, in the event that he is found liable for any of the sums claimed by the plaintiffs in Suit 364.

(ii) Second, to introduce a counterclaim for the sum of S$2.5m, in the event that he is found liable in Suit 363. This sum of S$2.5m represents a sum transferred from PHCQ to PHMPL, that was subsequently applied to the partial discharge of PHMPL's debt to UOB Bank. LCH takes the view that, if he is found liable to pay a sum of S$2.5m (in respect of this payment) to PHCQ in Suit 363, the net effect would be that he would have paid S$2.5m to UOB Bank in discharge of PHMPL's debt, such that he should be entitled to claim back the same from PHMPL.[9]

(iii) Third, to plead that, in the event that he is found liable to the plaintiffs in Suit 364, LCH should be entitled to a set-off of around S$6.8m (being the sum of S$4.3m and $2.5m above) against his liability to the plaintiffs on their claims.

(b) In SUM 247, PHGM seeks to amend its Defence in Suit 364 to include the following:[10]

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8 13th Affidavit of Law Ching Hung dated 29 January 2024 at para 12.

9 13th Affidavit of Law Ching Hung dated 29 January 2024 at paras 21–25.

10 Affidavit of Tan Shin Hui dated 29 January 2024 at para 12.

Version No 1: 22 Apr 2024 (12:33 hrs)

(i) First, to introduce a counterclaim for the sum of around S$345,000, being the total of certain sums owed to PHGM that were instead paid to PHMPL. For context, these are supposedly sums that were owed to PHGM in respect of services rendered by PHGM, but which were instead paid to PHMPL by the recipients of the services.

(ii) Second, to plead that, in the event that PHGM is found liable to the plaintiffs in Suit 364, PHGM should be entitled to a set-off of around S$345,000 (being the above sum due from PHMPL to PHGM) against its liability to the plaintiffs on their claims.

The parties' cases

13 As mentioned above, the plaintiffs resist all the amendment applications on the basis that the defendants' counterclaims are caught by the mandatory stay in s 133(1) of the IRDA, such that leave of court is required for the defendants to advance these counterclaims. The defendants have not obtained such permission under s 133(1), and an application for amendment of their Defences under O 20 r 5 of the ROC 2014 is no substitute for a leave application under s 133(1) of the IRDA.

14 More particularly, the plaintiffs take the position that only counterclaims amounting to permissible set-offs against their claims can be advanced by the defendants without obtaining leave under s 133(1) of the IRDA.[11] In this connection, they argue that none of the defendants' counterclaims amount to

[11] Plaintiffs' Written Submissions in SUM 247–248 dated 6 March 2024 at para 19.

Version No 1: 22 Apr 2024 (12:33 hrs)

permissible set-offs in the context of insolvency. Given this, the plaintiffs submit that the defendants' applications ought to be disallowed *in limine* without the court even having to consider the principles governing the amendment of pleadings.

15 Naturally, the defendants disagree. They argue that *any* counterclaim by a defendant in proceedings initiated by an insolvent company escapes the requirement of leave of s 133(1) of the IRDA, and there is no further requirement that the counterclaim must constitute a set-off. As such, they contend that no permission is required under s 133(1), and that the amendment applications should be determined solely based on the usual principles governing amendment of pleadings. In this regard, the defendants submit that these principles weigh in favour of allowing their amendment applications.

16 Before the hearing, I invited the parties to submit on the specific question on whether legal and/or equitable set-offs were permissible against a company in insolvent liquidation. This issue was prompted by the Court of Appeal's recent decision in *Kyen Resources Pte Ltd (in compulsory liquidation) and others v Feima International (Hong Kong) Ltd (in liquidation) and another matter* [2024] SGCA 7 ("*Kyen Resources (CA)*"), where the court left open the issue of whether insolvency set-off was the exclusive form of permissible set-off against a company in insolvent liquidation, even as it commented that it saw merit in the view that other forms of set-off should remain applicable (at [37]).

17 In response to my invitation, the plaintiffs tendered further written submissions, in which they took the position that (a) legal set-off was impermissible against a company in insolvent liquidation; and (b) while equitable set-off may be permissible in insolvency situations, its operation must

Version No 1: 22 Apr 2024 (12:33 hrs)

be consistent with the objectives of insolvency set-off.[12] Contrariwise, the defendants contended that (a) there was clear authority that equitable set-off may apply in an insolvency; and (b) while the position *vis-à-vis* legal set-off was less clear, they relied on the Court of Appeal's provisional inclination in *Kyen Resources (CA)* (see [16] above) towards allowing legal set-off to apply in the insolvency context as well.[13]

Issues to be determined

18 In my view, the main issues that would determine the success of the defendants' amendment applications arise in the following order:

(a) First, when can a defendant bring a counterclaim against a company in insolvent liquidation without leave of court under s 133(1) of the IRDA? This addresses the disagreement between the parties as to whether a counterclaim has to amount to a permissible set-off for the defendant to escape the requirement of obtaining leave of court under s 133(1) of the IRDA (see [14]–[15] above).

(b) Second, if the plaintiffs are correct that a counterclaim has to amount to a permissible set-off for leave of court under s 133(1) to not be required, what types of set-off fall within the scope of this proposition? Put differently, what types of set-off are permissible against a company in insolvent liquidation? If, for example, only equitable set-off is permissible in the insolvency context, the defendants would have to obtain leave of court under s 133(1) of the IRDA in

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12 Plaintiffs' Further Written Submissions dated 29 March 2024 at para 4.

13 Defendants' Letter to Court dated 28 March 2024 at paras 4–5.

Version No 1: 22 Apr 2024 (12:33 hrs)

respect of their intended counterclaims that amount only to legal set-offs. Again, this is an issue that the parties diverge on (see [17] above).

(c) The first and second questions above are entirely matters of substantive insolvency law and are hardly concerned with the principles of civil procedure governing the amendment of pleadings. It is only if the defendants' intended counterclaims survive both of these questions that the rules of civil procedure are engaged, as it is only then that I would have to consider the third question, which is whether the defendants ought to be granted leave to amend their Defences in the manners sought.

19 Having set out the issues in this order, I shall address them in turn.

My decision: the defendants' amendment applications are dismissed

When leave of court is required for a counterclaim to be brought against a plaintiff company in liquidation

20 I start with the first question, which is when a defendant to proceedings initiated by a plaintiff company in liquidation would require leave of court to bring a counterclaim in the same proceedings.

21 Broadly speaking, the onset of insolvency introduces new norms than that which prevails prior to it. A defining feature of insolvency proceedings is the paradigm shift from individualism to collectivism in creditor action against the company. As the leading treatise, *Goode on Principles of Corporate Insolvency Law* (Kristin van Zwieten gen ed) (Sweet & Maxwell, 5th Ed, 2018) ("*Goode on Insolvency*"), explains (at para 1-08):

> The primary purpose of insolvency law is to replace the free-for-all attendant upon the pursuit of individual claims by different

Version No 1: 22 Apr 2024 (12:33 hrs)

> creditors with a statutory regime in which creditors' rights and remedies are suspended, wholly or in part, and a mechanism is provided for the orderly collection and realisation of assets and the distribution of the net realisations of the assets among creditors in accordance with the statutory scheme of distribution.

In a similar vein, in *Kyen Resources (CA)*, Kannan Ramesh JAD eruditely observed that there is, upon insolvent liquidation, a shift from a "grab race" between individual creditors, to a "collective enforcement procedure that results in *pari passu* distribution of the company's assets" (at [32], citing Andrew R Keay, *McPherson & Keay: The Law of Company Liquidation* (Sweet & Maxwell, 5th Ed, 2021) at para 13-002).

22 Two integral features of our insolvent liquidation regime are engaged in the present case. The first is the mandatory stay of proceedings resulting from a winding-up order against the company, that has the effect of restraining any "action or proceeding" against the company unless the leave of court is obtained under s 133(1) of the IRDA. The second is insolvency set-off under s 218(2) of the IRDA which, broadly speaking, mandatorily sets off cross-claims between the insolvent company and its creditors with a view to generating a single balance that is either a sum due to the company from the creditor or a provable debt in the company's insolvency. As mentioned above, the difference between the parties lies in whether only a narrow class of counterclaims – *viz*, set-off – can be brought without obtaining leave under s 133(1).

23 It is apposite to begin by setting out s 133(1) of the IRDA given its centrality to the question at hand:

> **Effect of winding up order**
>
> **133.—**(1) When a winding up order has been made or a provisional liquidator has been appointed, no action or

Version No 1: 22 Apr 2024 (12:33 hrs)

> proceeding may be proceeded with or commenced against the company except —
>
> > (*a*) by the permission of the Court; and
> >
> > (*b*) in accordance with such terms as the Court may impose.

24 As a preliminary observation, I consider that there is some ambiguity as to whether s 133(1) of the IRDA requires a separate application under that section specifically for leave, or whether it would suffice if, as in an amendment application like the present case, the defendant's ability to pursue the counterclaim is controlled by judicial discretion. In this case, the plaintiffs have argued that a separate application is required. In the plaintiffs' submission, the defendants could not bring "their application for permission under s 133 of the IRDA in the applications herein, as applications for permission under s 133 of the IRDA are to be brought before the court that granted the winding up order" against PHCQ and PHMPL.[14] The defendants did not address this point specifically.

25 Although it was not raised by the parties, a recent decision of the English High Court in *Cargologicair Ltd v WWTAI Airopco 1 Bermuda Ltd* [2024] EWHC 508 (Comm) ("*Cargologicair*") appears to suggest that no separate application is required. In *Cargologicair*, the claimant was a company in administration – which is broadly the English law equivalent to the judicial management procedure here – and was therefore protected by a moratorium similar to s 133(1) of the IRDA. The case involved an application by the claimant to strike out the defendant's counterclaim and an application by the defendant to amend it. The main issue before the English High Court was

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14 Plaintiffs' Written Submissions in SUM 247-248 dated 6 March 2024 at para 27; Plaintiffs' Written Submissions in SUM 249 dated 6 March 2024 at para 25.

Version No 1: 22 Apr 2024 (12:33 hrs)

whether it should give permission to the defendant to advance its counterclaim in light of the moratorium in favour of the claimant.

26 In relation to the point under present consideration, it was accepted by both parties, as well as by the English High Court, that no separate application for permission was required. In other words, the court could in hearing the striking-out and amendment applications grant the requisite permission to the defendant, if necessary (see *Cargologicair* at [8], citing the English Court of Appeal decision in *Fabric Sales Ltd v Eratex Ltd* [1984] 1 WLR 863). Indeed, on the facts of the case, the court concluded that the defendant's counterclaim had actually been brought in breach of the moratorium but granted (retrospectively) the necessary permission to the defendant to bring its counterclaim. In doing so, the court declined the claimant's invitation to strike out the defendant's action (see *Cargologicair* at [2]).

27 If *Cargologicair* is applied in Singapore, it would, in principle, have been open for the defendants to seek permission under s 133(1) of the IRDA in their amendment applications without having to make a separate application. I note, however, that it is unclear if *Cargologicair* could only apply to obviate the need for a separate application if the defendant seeking to amend its pleadings makes an express prayer for leave under s 133(1) in the summons for amendment. Although it is not entirely clear, it does appear that such a specific prayer was made by the defendant in *Cargologicair* (see *Cargologicair* at [7]). Thus, even if I were to accept and apply *Cargologicair* to the present case, it would not assist the defendants who have not made any express request for leave under s 133(1). I observe, in this connection, that in *Hyflux Ltd v SM Investments Pte Ltd* [2020] 4 SLR 1265 ("*Hyflux*"), whilst the High Court did hold that leave of court was not required on the facts, it went on to state in *obiter* that an "oral application for leave was made at the hearing" (*viz*, the

Version No 1: 22 Apr 2024 (12:33 hrs)

hearing of the plaintiff's application to strike out the defendant's counterclaim for want of leave of court), such that even if leave of court were required, the court was minded to grant leave on that basis (at [24]–[25]). The situation in *Hyflux* would then seem to be consistent with the approach taken by the English High Court in *Cargologicair*, albeit that some actual request for leave under s 133(1) of the IRDA would have to be made by the defendant, whether as a prayer in the amendment summons (as in *Cargologicair*) or an oral application at the hearing (as in *Hyflux*). There is no need for a standalone application prior to taking out the amendment application.

28 Nevertheless, I make no conclusive decision on the correctness of the approach supported by *Cargologicair* in this case. Save for the brief observations above, I leave the point open for further arguments and to be decided on a future occasion.

29 Leaving the procedural point, I agree with the plaintiffs' position that only counterclaims amounting to a set-off fall outside s 133(1) of the IRDA (see [14] above). With respect, I consider the proposition put forward by the defendants – that *any* counterclaim can be brought without leave of court (see [15] above) – to be too broad. Interestingly, both parties have referred me to essentially the same few cases as supporting their diametrically opposed positions. Thus, the difference in opinion between the parties is a matter of interpretation as to what proposition can, and should, be distilled from these cases.

30 Both the plaintiffs and defendants take the High Court's decision in *Hyflux* as their starting point. In my view, they are correct in doing so, as *Hyflux* appears to be the only local authority that has substantially considered the issue of when a counterclaim can be brought by a defendant against a plaintiff

Version No 1: 22 Apr 2024 (12:33 hrs)

company protected by a moratorium under an insolvency (or insolvency-related) proceeding without obtaining prior leave of court. It is thus necessary for me to discuss this decision in detail.

31 In *Hyflux*, the plaintiff was an ailing company undertaking restructuring efforts. For this purpose, it had sought and been granted the protection of a moratorium under s 211B of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act"), which provided as follows:

> **Power of Court to restrain proceedings, etc., against company**
>
> **211B.—**(1) When a company proposes, or intends to propose, a compromise or an arrangement between the company and its creditors or any class of those creditors, the Court may, on the application of the company, make one or more of the following orders, each of which is in force for such period as the Court thinks fit:
>
> …
>
> (*c*) an order restraining the commencement or continuation of any proceedings (other than proceedings under this section or section 210, 211D, 211G, 211H or 212) against the company, except with the leave of the Court and subject to such terms as the Court imposes;

I note, in passing, that this provision is the direct predecessor (and thus unsurprisingly materially identical) to the current s 64 of the IRDA, having been sectioned off from the Companies Act to the IRDA as part of the bid to consolidate the insolvency and restructuring-related provisions into a single omnibus legislation.

32 The dispute in *Hyflux* arose out of an investment by the defendant in the plaintiff to assist the latter's restructuring efforts. The defendant undertook to subscribe for shares in the plaintiff, and as part of the agreement between the parties, deposited a sum of money into escrow. The agreement also contained

Version No 1: 22 Apr 2024 (12:33 hrs)

various conditions precedent, including that approval be obtained from the Public Utilities Board ("PUB") for the change of control of one of the plaintiff's subsidiaries. Although the PUB did give its consent, it imposed certain conditions. The imposition of these conditions led to a dispute between the parties as to whether the PUB's consent satisfied the condition precedent in their agreement. The defendant took the position that the condition precedent had not been fulfilled, and that it consequentially had the right to terminate the agreement. The plaintiff considered that the defendant had breached their agreement and brought proceedings against the defendant seeking the release of the sum placed in escrow to it. On the other hand, the defendant brought a counterclaim seeking the return of the escrow sum to it. The plaintiff then applied to strike out the defendant's counterclaim on the basis that it was in breach of the moratorium under s 211B of the Companies Act, as the defendant had failed to obtain leave of court prior to commencing its counterclaim.

33 Aedit Abdullah J dismissed the plaintiff's application to strike out, and held that the defendant was entitled to assert its counterclaim without obtaining prior leave of court to the extent that the defendant's counterclaim related to its entitlement to the escrow sum. Abdullah J opined that a defendant would be entitled to assert a counterclaim without leave of court if its counterclaim did not "go beyond a purely defensive stance", for instance, to seek damages and other reliefs against the claimant (see *Hyflux* at [9]). In the learned judge's view, the following general principle could be distilled from the authorities (see *Hyflux* at [17]):

> The rationale for allowing certain counterclaims to proceed even in the face of moratoria is clear. It would be inimical to allow a claim to proceed but not a counterclaim in respect of the same factual grounds: the defendant would be deprived of either a defence or a reduction of the claim based on the very same facts. Disregarding the counterclaim would tilt the balance too

Version No 1: 22 Apr 2024 (12:33 hrs)

> far in favour of the applicant company. This, I believe, is the basis of the various cases cited.

34 After citation to English authority (see *Hyflux* at [18]–[20]), Abdullah J went on to explain further and state his conclusion. Given the sharp distinction in the parties' understanding of the import of *Hyflux*, I find it necessary to set out in full what the learned judge said (see *Hyflux* at [21]–[23]):

> 21 What can be gleaned from these cases is that where a statutory moratorium is imposed in respect of the commencement of proceedings against a company, it would ordinarily not cover situations where the company itself commences proceedings and the defendant seeks, through a counterclaim, to reduce or extinguish any liability owed to the plaintiff.
>
> 22 While there does not appear to be any mention of an exception for counterclaims in any of the parliamentary debates relating to the enactment of s 211B of the CA, I do not find that the intention was manifested to require leave to be obtained for counterclaims. Clearer language would have been expected to be used had that been the intention. The position at common law in relation to the interpretation of similar statutes would have been well understood. … In the absence of express language to the contrary, the expectation is that Parliament intended to leave existing case law unaffected.
>
> 23 It follows that a counterclaim made in respect of a claim brought by a company undergoing s 211B restructuring would not require leave of court, but only in so far as it operates to extinguish or negate the claim, without affecting the position of the other creditors. Thus, any part of a counterclaim that goes beyond operating as a defence, such as a claim for damages or property, would require the leave of court.

35 In my judgment, to the extent that the defendants may suggest that *Hyflux* is authority for the broad proposition that *any* counterclaim is outside the scope of the moratoria in either s 211B of the Companies Act (as in *Hyflux* itself) or s 133(1) of the IRDA (as in the present case), I disagree.

Version No 1: 22 Apr 2024 (12:33 hrs)

36 Indeed, when Abdullah J's decision is read as a whole, it is reasonably clear that the learned judge did not intend to lay down such a broad proposition. This is for the following reasons.

37 First, the breadth of [22], which the defendants may rely on, can be contrasted with the subsequent paragraph at [23], in which Abdullah J stated that "a counterclaim made in respect of a claim brought by a company" protected by a s 211B moratorium did not require leave of court. In my view, the phrase "in respect of" in this statement is highly significant, because it suggests that, at the very least, there must be some link or connection between the company's claim and the defendant's counterclaim. This would exclude, for example, a counterclaim based on an entirely separate transaction that has nothing to do with the transaction upon which the company mounts its claim.

38 Second, I find the various references to the defendant being entitled to raise a "defence" to be instructive (see *Hyflux* at [9], [19], and [23]). Again, it suggests that there must be some connection between the company's claim and the defendant's counterclaim. To illustrate, it would stretch the concept of "defence" beyond breaking point if one were to say, for example, that a defendant, being the employee of a company, could raise a counterclaim he might have against the company for unpaid salary as a "defence" to a claim by the company against him for his tortious act of setting the company's warehouse on fire.

39 Third, the need for some connection between the counterclaims is made even clearer by phrases such as "reduction of the claim based on the very same facts" (see *Hyflux* at [17]), "reduce or extinguish any liability owed to the plaintiff" (see *Hyflux* at [21]), and "extinguish or negate the claim" (see *Hyflux* at [23]). The notion of the defendant's counterclaim "eating into" the company's

Version No 1: 22 Apr 2024 (12:33 hrs)

claim, such that it can be said to "extinguish" or "negate" the company's claim, is highly evocative of the doctrine of equitable set-off. This is because of the underlying rationale of equitable set-off, which in traditional terms, has been expressed as the defendant's counterclaim being so closely connected with the plaintiff's claim that it impeaches the plaintiff's demands (see the English Court of Appeal decision in *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc* [1978] 1 QB 927 at 974–975 *per* Lord Denning MR; see also, Rory Derham, *Derham on the Law of Set-Off* (Oxford University Press, 4th Ed, 2010) ("*Derham on the Law of Set-Off*") at para 4.03). At this point, I do not go so far as to say that the claim must be an *equitable* set-off specifically to fall outside the scope of s 133(1) of the IRDA, as that is an issue that would arise for consideration under the second question framed at [18(b)] above. For present purposes, the point is simply that language allusive to the test of equitable set-off indicates that, not only must there be *some* connection between the company's claim and the defendant's counterclaim, the connection must also be a relatively close one at least. This militates strongly against any suggestion from the defendants that *any* counterclaim falls outside the scope of s 133(1) of the IRDA.

40 For these reasons, I am of the view that *Hyflux* is not authority for a general proposition that any counterclaim raised by the defendants is sufficient to escape the stay under s 133(1) of the IRDA. Instead, the plaintiffs are correct that Abdullah J's decision in *Hyflux* is better characterised as laying down a proposition that no leave is required "where the counterclaim is sought to be utilised to set-off against the plaintiff's claim".[15] Indeed, whilst the defendants

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15 Plaintiffs' Written Submissions in SUM 247–248 dated 6 March 2024 at para 19; Plaintiffs' Written Submissions in SUM 249 dated 6 March 2024 at para 17.

Version No 1: 22 Apr 2024 (12:33 hrs)

have stated in a header to their written submissions the broad proposition that "[l]eave of Court is not necessary to bring a counterclaim in suits commenced by companies in liquidation",[16] they do in the body of their submissions to this point retain Abdullah J's statements in *Hyflux* (which I have picked out at [37]–[39] above) which seem to qualify the breadth of this proposition.

41 I am fortified in my interpretation of *Hyflux* by reference to the foreign authorities that Abdullah J referred to in his decision. In the English Court of Appeal decision in *Langley Constructions (Brixham) Ltd v Wells* [1969] 1 WLR 503 ("*Langley Constructions*"), the plaintiff, a company in liquidation, brought a claim against the defendant. The defendant denied his indebtedness to the plaintiff and also contended, in the alternative, that in so far as he might be indebted to the plaintiff, he was entitled to set off against the sum claimed by the plaintiff a larger sum that was supposedly owed to him by the company, such that he was a net (unsecured) creditor of the company and entitled to prove in the plaintiff's liquidation for the balance. In response, the plaintiff issued a summons to strike out the defendant's counterclaim on the ground that it had been brought in breach of s 231 of the Companies Act 1948 (c 38) (UK), which provided as follows:

> **231 Actions stayed on winding-up order**
>
> When a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose.

[16] Defendants' Written Submissions dated 6 March 2024 at p 10.

Version No 1: 22 Apr 2024 (12:33 hrs)

It can be seen that s 231 of the English Act is identically worded to s 133(1) of the IRDA, save that the word "shall" in s 231 has been substituted with the word "may" in our s 133(1).

42 I leave aside for a moment the separate, but certainly nonetheless important, question of the correct characterisation of the claimed set-off in *Langley Constructions*. That is an issue that I will return to below when addressing the second question framed at [18(b)] above. It suffices, for present purposes, for me to observe that the English Court of Appeal *expressly* stated a requirement that the counterclaim amounting to a set-off could be brought by the defendant without obtaining leave of court under s 231 of the English Act. Widgery LJ (as he then was) said that (see *Langley Constructions* at 508):

> It is not disputed, and never has been disputed, that the defendant is entitled to use his cross-demand *by way of set-off to reduce or extinguish the company's claim* in the present action. The plaintiff company's argument is that that is as far as he can go, and that, if and so far as he wishes to claim in respect of an amount whereby his cross-demand over-tops the claim, he must do it by proof in the liquidation in the ordinary way.
>
> [emphasis added]

43 After Widgery LJ referred to some authority – including a relatively unequivocal statement by Cotton LJ in *Ogle v Earl Vane* (1868) LR 3 QB 272 that "[a]s a trustee in bankruptcy cannot be sued, a counterclaim is not maintainable against him, *except so far as it is reduced to a set-off*" [emphasis added] – he went on to restate the principle as follows (see *Langley Constructions* at 510):

> [There is] clear authority, if authority were required, for the proposition that, *notwithstanding section 231 of its equivalent in the Bankruptcy Act, a cross-demand can be used as a set-off, namely, as a shield to reduce or exclude the plaintiff's claim*, but I find no word in it to suggest that the counterclaim can be

Version No 1: 22 Apr 2024 (12:33 hrs)

> proceeded on as a counterclaim, that is to say, so as to give the defendant some right beyond the right of defence to the claim.
>
> [emphasis added]

Finally, Widgery LJ pithily surmised that "a cross-demand pleaded by way of counterclaim is not bad on that account but can take effect only as a set-off" (see *Langley Constructions* at 512). For completeness, I note also that Widgery LJ was not alone in this view. Davies LJ, in his concurring judgment, affirmed the principle articulated by Widgery LJ that "any cross-claim can only be used as a set-off, or (as it has been said) as a shield and not as a sword" (see *Langley Constructions* at 513).

44 The copious references to "set-off" in *Langley Constructions* thus provides ample support for the proposition contended for by the plaintiffs. However, the defendants appear to read *Langley Constructions* as authority for the proposition that any counterclaim can be maintained without leave of court so long as the quantum of the asserted counterclaim is smaller than the plaintiff company's claim against it.[17] With respect, I do not think that is accurate. A counterclaim is not simply a "set-off", so as to come within *Langley Constructions*, by reason of the pursued quantum happening to be less than the plaintiff's claim. It is well-settled that there are different types of set-off that are constituted by different elements, and it is not merely – if at all – the quantum that is determinative of whether a counterclaim is a set-off. In my view, although the English Court of Appeal in *Langley Constructions* did refer to the quantum of the counterclaim, I do not understand the court to mean that that was determinative of whether the counterclaim amounted to a set-off. It seems to me that the point made was that *if* a counterclaim satisfied the *substantive*

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[17] Defendants' Written Submissions dated 6 March 2024 at para 30.

Version No 1: 22 Apr 2024 (12:33 hrs)

requirements of constituting a set-off, the defendant would be entitled to assert a set-off up to the value of the plaintiff's claim against him. Put differently, the question of quantum only arises after the logically anterior question of whether the counterclaim amounts to a recognised form of set-off has been answered in the affirmative. It would be surprising if the English Court of Appeal had actually intended to abrogate the substantive requirements of set-off in favour of an arbitrary and unprincipled test of quantum.

45 For the avoidance of doubt, I stress again, at this juncture, that I do not yet delve into the question of what the specific type of set-off in *Langley Constructions* was, as I shall only do so below. The simple point is that both *Langley Constructions* and *Hyflux* indicate that it is not just any counterclaim, but only counterclaims amounting to a set-off, that fall outside the requirement of obtaining leave of court under s 133(1) of the IRDA. The scope of permissible set-offs against a company in insolvent liquidation that come within the scope of this proposition is a different matter.

46 As a final observation, I note that my analysis of *Hyflux* above would seem to rule out *in limine* the possibility of legal set-off falling within the range of set-offs that fall outside the scope of s 133(1) of the IRDA, such that one does not even have to consider whether, in this case, a legal set-off can in principle be asserted against a company in liquidation (since the defendants have not obtained leave of court in respect of their intended counterclaims constituting legal set-offs). This is in light of the various allusions to a requirement of some *connection* between the plaintiff company's claim and the defendant's counterclaim in *Hyflux* (see [37]–[39] above). In the face of such a requirement, it would flow as a matter of logic that legal set-off would be excluded given that it enables the set-off of "entirely unconnected and independent claims" – indeed, it is because of this characteristic that legal set-off is sometimes referred

Version No 1: 22 Apr 2024 (12:33 hrs)

to as "independent set-off" (see, *eg*, the High Court decision in *Re Ocean Tankers (Pte) Ltd (in liquidation)* [2023] SGHC 330 ("*Ocean Tankers*") at [83]–[85]).

47 Nevertheless, in the event that I am wrong in this observation, I shall go on to consider whether, as a matter of general principle, *both* legal set-off and equitable set-off can be asserted against a company in insolvent liquidation. It is to this issue, being the second question that I have framed in this case (see [18(b)] above), that I now turn.

Whether legal set-off and equitable set-off can be asserted against a company in insolvent liquidation

48 Having determined that at least certain types of set-off could be pursued without leave of court under s 133(1) of the IRDA under the first question, I come now to the logically subsequent question of the scope of set-offs that come within this exception. As mentioned above, this is an issue that I invited parties to submit further on.

49 I start with some general observations that I consider must be at the forefront of the court's mind in addressing this issue. In this regard, in approaching this question, one must start from the *pari passu* principle. *Pari passu* distribution is the default rule in insolvent liquidation, and anything that provides for some other form of distribution is an exception to the default rule. So, the question, properly framed, is whether legal or equitable set-off should be recognised as a legitimate exception to the *pari passu* principle.

50 It is well-established that there are exceptions to the *pari passu* principle. But, to my mind, it is necessary to delineate between what is a *true* exception to the *pari passu* principle, and what is not. I can illustrate this point

Version No 1: 22 Apr 2024 (12:33 hrs)

by reference to security interests. A security interest, such as a mortgage, is sometimes thought of as an exception to the *pari passu* principle. But it is not a *true* exception properly so-called. This is because a security interest does not alter the *distribution* of the insolvent company's assets; rather, it bites at the logically anterior stage of determining what, in the first place, constitutes the company's assets that would be liable to be distributed *pari passu*. The encumbered asset falls outside the company's estate such that the said asset cannot even be distributed *pari passu* as between its unsecured creditors.

51 In this connection, I find to be a weighty consideration the fact that *true* exceptions to the *pari passu* principle seem to be exclusively – or at least almost exclusively – prescribed by statute. This makes sense, given that the *pari passu* principle is entrenched and put into place by statute (see s 172 of the IRDA):

> **Distribution of property of company**
>
> **172.** Subject to the provisions of this Act as to preferential payments, the property of a company must, on its winding up, be applied pari passu in satisfaction of its liabilities, and subject to that application, must, unless the constitution of the company otherwise provides, be distributed among the members according to their rights and interests in the company.

I pause to observe that, as a matter of construction, it is arguable that s 172 of the IRDA in fact *expressly* recognises that any *true* exception to *pari passu* distribution must be on a statutory footing. This is the import of the opening phrase, "Subject to the provisions of this Act as to preferential payments". The upshot of this is that, other than any provision contained in the IRDA varying *pari passu* distribution, no other exception can be admitted to under the common law.

Version No 1: 22 Apr 2024 (12:33 hrs)

52 The most straightforward example of a statutory exception to the *pari passu* principle is the class of preferential debts set out in s 203(1) of the IRDA. These are, generally speaking, unsecured claims against the company that, due to some underlying policy reason, Parliament has deemed fit to be accorded priority treatment over general unsecured claims, as well as even certain security interests (see s 203(6) of the IRDA, which provides that certain preferential debts in s 203(1) are to be paid in priority to the claims of a floating chargee).

53 Another example of a statutory (true) exception to the *pari passu* principle, and that which is most germane to the question at hand, is insolvency set-off. Insolvency set-off is an exception to the *pari passu* principle as it allows an unsecured creditor to use his own indebtedness to the company as *de facto* security by setting it off against the company's claim(s) against him, if the requirements of insolvency set-off are met *vis-à-vis* his and the company's cross-claims. As Ramesh JAD explained in *Kyen Resources (CA)* (at [35]):

> An insolvency set-off is an exception to the *pari passu* rule. To illustrate, suppose an unsecured creditor lodges a proof of debt for the sum of $1,000 and the company has a crossclaim against the creditor for the sum of $500 that satisfies the requirements of an insolvency set-off. The crossclaim for $500 must be set-off against the creditor's proof of debt for $1,000. In this way, the creditor gets satisfaction of its claim to the full extent of the set-off, thereby illustrating the exception to the *pari passu* rule. This contrasts with how, ordinarily, the unsecured creditor is only entitled to a *pro rata* distribution of dividend based on the claim that has been admitted. As the insolvency set-off is an exception to the *pari passu* rule, its ambit is narrowly circumscribed by statute.

54 It is with the above general principles in mind that I come to the question at hand.

Version No 1: 22 Apr 2024 (12:33 hrs)

55 It is apposite that I start with the current position under Singapore law. As the parties have rightly pointed out, the position under Singapore law is not settled. As mentioned above, in *Kyen Resources (CA)*, the Court of Appeal expressed the view that there was some merit in allowing other forms of set-off other than insolvency set-off to apply in the insolvency context, but it caveated that it would leave this open for consideration in a more appropriate future case (at [37]). As regards equitable set-off, there is some support that it should in principle remain available against a company in insolvent liquidation. In *Jurong Aromatics Corp Pte Ltd (receivers and managers appointed) and others v BP Singapore Pte Ltd and another matter* [2018] SGHC 215 ("*Jurong Aromatics (HC)*"), the High Court made the following comments (at [141]):

> I accept that equitable set-off is not excluded by the statutory provisions on insolvency set-off. There is nothing in the Singapore statutes that expressly precludes the operation of equitable set-off, and I do not see anything in the actual operation of either form of set-off that would render one incompatible with the other as a matter of principle. The possible effect of equitable set-off on third parties, including other creditors of a bankrupt individual or insolvent company, may be a reason for the court not to effect equitable set-off. However, that is a matter of considering the specific circumstances which is the type of question that courts are constantly faced with in cases dealing with equitable remedies. I agree with the commentary in *Derham on the Law of Set-Off* at paras 6.25–6.32 that insolvency set-off should not bar equitable set-off as a matter of principle.

56 The court went on to find that equitable set-off did not apply on the facts of the case (at [142]). For completeness, although the court's decision went on appeal to the Court of Appeal in *BP Singapore Pte Ltd v Jurong Aromatics Corp Pte Ltd (receivers and managers appointed) and others and another appeal* [2020] 1 SLR 627, the Court of Appeal expressly declined to decide the issue of whether equitable set-off was available against an insolvent company, and was content to work on the assumption that it did (at [50]).

Version No 1: 22 Apr 2024 (12:33 hrs)

57 It is thus clear that the point remains open for me to decide in the present case as there is no Court of Appeal authority that is binding on me. While the High Court in *Jurong Aromatics (HC)* has expressed a view on the issue, and this view should no doubt be accorded weight, it does not preclude me from considering the matter afresh. This is especially because, as seems to have been the case, the matter was not extensively argued in *Jurong Aromatics (HC)*.

58 In my judgment, it follows from the general principles above, and the more specific reasons that I will set out below, that insolvency set-off should be taken to displace all other forms of set-off, including legal set-off and equitable set-off, against a company in insolvent liquidation.

59 First, I start by reiterating the points I began with above, on the primacy of the *pari passu* principle and that true exceptions to it have been legitimised by statute. Neither legal nor equitable set-off have a statutory foundation, being doctrines developed in judge-made law. This, as a starting point, weighs against legal or equitable set-off being able to operate in the insolvency context as an exception to the *pari passu* principle.

60 In this regard, I respectfully depart from the view expressed by the Court of Appeal of the Supreme Court of Western Australia in *Hamersley Iron Pty Ltd v Forge Group Power Pty Ltd (in liq) (recs and mgrs apptd)* [2018] WASCA 163 that the statutory provision on insolvency set-off does not operate as a "code" – in the sense of being exhaustive in scope – of rights of set-off against an insolvent company. In my view, I find that this approach does not give sufficient recognition, at least in our local context, to the fact that the *pari passu* principle has been put into place *by statute*, and that as a general matter, only statutory exceptions to the rule can be legitimate. I have already observed above that the wording of s 172 of the IRDA arguably precludes any

Version No 1: 22 Apr 2024 (12:33 hrs)

judge-made exception to the *pari passu* principle (see [51] above). For similar reasons, I also, with the greatest respect, entertain doubt with respect to the High Court's observation in *Jurong Aromatics (HC)* that nothing in our insolvency legislation precludes the operation of equitable set-off.

61 Second, I find that, allowing legal set-off or equitable set-off to apply when insolvency set-off may not be available produces anomalous outcomes that undermine the *pari passu* principle and its underlying policy.

62 To illustrate this, consider the position *vis-à-vis* non-provable claims against the company. The insolvency legislation expressly contemplates the possibility that not all claims against an insolvent company would be provable in the company's liquidation. This is the natural consequence of the legislation prescribing specific criteria as to the provability of claims (see s 218 of the IRDA). For instance, if a claimant having an unliquidated claim against the company is unable to fit his claim into one of the prescribed categories of legal events set out in s 218(3) of the IRDA, his claim would be an unprovable claim in the company's liquidation. Another example is the status of claims the value of which cannot be fairly estimated for some reason. In this instance, the statute expressly deems such claims to be non-provable in the company's winding up (see s 218(6) of the IRDA). I accept, of course, that there is a general inclination on the court's part to allow as many claims to be admitted to proof as the words of the statute can bear (see the UK Supreme Court decision in *Re Nortel GmbH (in administration) and related companies* [2014] AC 209 ("*Nortel*") at [90] and [93] *per* Lord Neuberger of Abbotsbury PSC). But the fact of the matter is that there *are* in principle non-provable claims (see, *eg*, *Nortel*; and the subsequent UK Supreme Court decision in *Re Lehman Brothers International (Europe) (in administration) (No 4)* [2018] AC 465).

Version No 1: 22 Apr 2024 (12:33 hrs)

63 Given that the scope of insolvency set-off is confined to provable debts against the company (see s 219(3)(*a*) of the IRDA), a creditor of a non-provable claim would not be able to rely on insolvency set-off. Assume, then, that the insolvent company in liquidation brings an action against the creditor such that he is now a defendant. Assume also that the creditor's non-provable claim against the company satisfies the requirements of legal set-off or equitable set-off under general law. In this situation, can the creditor, through asserting legal or equitable set-off, in substance obtain satisfaction of his non-provable claim against the company? I find it difficult to accept that he can, despite having been disqualified by statute from proving in the liquidation, improve his position through asserting a set-off in this manner. If he were allowed to do so, it would circumvent the legislative policy underlying the recognition of the class of non-provable claims.

Should legal set-off be available against an insolvent company?

64 For the reasons above, I find that a legal set-off *cannot* be asserted against a company in insolvent liquidation. The simple reason for this is that in a legal set-off, the creditor would be circumventing the proof of debt mechanism that is put in place as the proper mode of enforcement of debts against an insolvent company. If legal set-off were available, but for the insolvent company bringing an action against the creditor, the only course of action available to the creditor would be to prove in the liquidation for a dividend that is likely cents on the dollar. I struggle to see any principled reason why a creditor's position should be vastly improved in this way – *ie*, being able to obtain *de facto* payment of his debt through set-off – by the wholly fortuitous circumstance that he happens to be a defendant in litigation brought by the plaintiff insolvent company against him.

Version No 1: 22 Apr 2024 (12:33 hrs)

65 It should also be borne in mind that legal set-off is decidedly procedural in nature. In the English High Court decision in *Fuller v Happy Shopper Markets Ltd and another* [2001] 1 WLR 1681, Lightman J explained that legal set-off is "a procedural device designed to avoid circuity of actions and enabling the parties to have their various disputes tried in one action instead of two or more" (at [21]). Statements to similar effect are legion. In the landmark House of Lords decision in *Stein v Blake* [1996] 1 AC 243, Lord Hoffmann contrasted the procedural nature of legal set-off with the substantive nature of insolvency set-off with his characteristic lucidity (at 251):

> … the two forms of set-off are very different in their purpose and effect. Legal set-off does not affect the substantive rights of the parties against each other, at any rate until both causes of action have been merged into a judgment of the court. It addresses questions of procedure and cash-flow. As a matter of procedure, it enables a defendant to require his cross-claim (even if based upon a wholly different subject matter) be tried together with the plaintiff's claim instead of having to be the subject of a separate action. In this way it ensures that judgment will be given simultaneously on claim and cross-claim and thereby relieves the defendant from having to find the cash to satisfy a judgment in favour of the plaintiff (or, in the 18th century, go to a debtor's prison) before his cross-claim has been determined.
>
> Bankruptcy set-off, on the other hand, affects the substantive rights of the parties by enabling the bankrupt's creditor to use his indebtedness to the bankrupt as a form of security. Instead of having to prove with other creditors for the whole of his debt in the bankruptcy, he can set off pound for pound what he owes the bankrupt and prove for or pay for only the balance. So in *Forster v Wilson* (1843) 12 M & W 191, 204, Parke B said that the purpose of insolvency set-off was "to do substantial justice between the parties". …

66 These statements make it clear that legal set-off is an expedited method of enforcing a claim against the claimant that is made available to the defendant in the interests of procedural efficiency. That being the case, it becomes clear how allowing it to be used as a mode of enforcement against an insolvent company would undermine the proof of debt regime. To put the point a different

Version No 1: 22 Apr 2024 (12:33 hrs)

way, to allow for legal set-off in the context of an insolvency would effectively allow a defendant to gain priority at the expense of other creditors through a procedural device. There is no doubt in my mind that this cannot be right.

Should equitable set-off be permitted against an insolvent company?

67 Turning to equitable set-off, although the same general points on circumventing Parliament's decision to legislate specifically for a set-off mechanism (see [59]–[63] above) could also be made in respect of equitable set-off, I acknowledge that the position is considerably less straightforward on a conceptual level because of the peculiar nature and underlying rationale of equitable set-off. This point was, in fact, alluded to by the High Court in *Jurong Aromatics (HC)* (at [141]) through the court's citation to commentary in *Derham on the Law of Set-Off*.

68 Equitable set-off has been said to operate to obviate the injustice that would result in allowing the claimant to assert his claim without giving account for a closely related counterclaim of the defendant (see the High Court decision in *Abdul Salam Asanaru Pillai (trading as South Kerala Cashew Exporters) v Nomanbhoy & Sons Pte Ltd* [2007] 2 SLR(R) 856 at [28]). As I have mentioned above, this has been traditionally expressed in the English authorities as the concept of "impeachment of title", that is to say, that the cross-claim goes directly to impeach the plaintiff's demands (see [39] above). Thus, in contrast to legal set-off which is procedural in nature, it is well-settled that equitable set-off *is* a substantive defence to a claim.

69 Proponents of the view that equitable set-off ought to remain available against an insolvent company draw on the imagery of "impeachment of title" to argue, based on what may be described loosely as a quasi-proprietary analysis,

Version No 1: 22 Apr 2024 (12:33 hrs)

that the company's claim against the defendant is encumbered by the defendant's right of equitable set-off in a similar way to how charged assets of the company are encumbered by a charge. Seen in this light, one can draw an analogy to the position *vis-à-vis* security interests to argue that an equitable set-off is inherently contained within the company's right of action such that it must remain available even after the company passes into insolvent liquidation. This argument has been advanced by the learned author of *Derham on the Law of Set-Off*, in commentary that was cited with approval by the High Court in *Jurong Aromatics (HC)* at [141], in the following manner (at para 6.26):

> As a matter of principle, bankruptcy or liquidation should not preclude the application of the equitable doctrine. The traditional ground for an equitable set-off is impeachment of title. If a debtor's title to sue was impeached before bankruptcy, so should the title of the debtor's trustee in bankruptcy, given that the trustee steps into the shoes of the debtor and takes the debtor's property subject to all clogs and fetters affecting it in the hands of the debtor. Similar reasoning should apply in company liquidation. If a company's title to sue was impeached before liquidation, it should continue to be impeached during liquidation.

70 Thus, based on an ingenious analogy to property rights, the learned author's argument relies on the well-established proposition that "the liquidator stands in no better position than the company itself; he takes them as he stands, warts and all" (see the explanation of this general principle in *Goode on Insolvency* at para 3-05), to argue that an equitable set-off binds the liquidator of an insolvent company in the same way that it binds the same company when solvent.

71 While this appears to be a formidable argument, I do not, with respect, consider it to be unanswerable.

Version No 1: 22 Apr 2024 (12:33 hrs)

72 The first answer to this is that the intuitive and technical force of this argument is significantly diminished when one considers it in the context of the fact that there *is* a statutory set-off mechanism under the insolvency legislation. A majority, if not the vast majority, of claims that could amount to equitable set-offs – and, for that matter, legal set-offs as well – would already be subject to the mandatory operation of insolvency set-off. Thus, the spectre of visiting unfairness onto a creditor from his inability to rely on equitable set-off post-liquidation is more apparent than real. Indeed, the learned author does, in fairness, acknowledge this point (see *Derham on the Law of Set-Off* at para 6.26). I note that the availability of insolvency set-off is also cited by other leading scholars in this field who take the contrary view that insolvency set-off displaces all other forms of set-off under general law (see *Goode on Insolvency* at paras 3-05, 6-20, 8-19, and 9-13; *Goode and Gullifer on Legal Problems of Credit and Security* (Louise Gullifer ed) (Sweet & Maxwell, 7th Ed, 2022) at para 7-99).

73 The second answer to the learned author's argument is that it is questionable whether such a quasi-proprietary analysis of the nature of equitable set-off is correct as a matter of principle. Insolvency law has drawn quite a bright line between actual pre-insolvency proprietary rights in the company's assets and personal rights against the company that mimic the effects of proprietary rights in some way. While insolvency law has a clear respect for and leaves untouched the former, it has rarely had any qualms on striking down the latter.

74 This point is clearly illustrated by the treatment given to contractual rights of set-off. In the well-known decision of the House of Lords in *British Eagle International Air Lines Ltd v Compagnie Nationale Air France* [1975] 1 WLR 758 ("*British Eagle*"), it was held that a netting arrangement

Version No 1: 22 Apr 2024 (12:33 hrs)

between various airlines that involved the interposition of a clearing house between them was void upon one of the member airlines entering insolvent liquidation. In brief, each member airline had an account with the clearing house. Under the clearing house arrangement, debts were not payable between the members *inter se*, but were netted off in the clearing system such that only a balance was payable either to the clearing house by the member airline, or from the clearing house to the airline. This arrangement was put in place prior to the insolvency of any member airline.

75 A dispute arose after one of the member airlines, British Eagle, went into liquidation. The liquidators of British Eagle argued that the netting arrangement was invalid as it gave the members of the clearing house priority over British Eagle's other creditors. In a controversial bare majority decision, the House of Lords agreed. Lord Cross of Chelsea, with whom Lord Diplock and Lord Edmund-Davies agreed, first drew a clear distinction between the rights of secured creditors – who have proprietary interests in the company's assets – and the effect of the clearing house (see *British Eagle* at 780):

> It is true that if the respondents are right the "clearing house" creditors will be treated as though they were creditors with valid charges on some of the book debts of British Eagle. But the parties to the "clearing house" arrangements did not intend to give one another charges on some of each other's future book debts. *The documents were not drawn so as to create charges but simply so as to set up by simple contract a method of settling each other's mutual indebtedness at monthly intervals.* Moreover, if the documents had purported to create such charges, the charges – as the judge saw (see [1973] 1 Lloyd's Rep 433) – would have been unenforceable against the liquidator for want of registration under section 95 of the Companies Act 1948. *The "clearing house" creditors are clearly not secured creditors. They are claiming nevertheless that they ought not to be treated in the liquidation as ordinary unsecured creditors but that they have achieved by the medium of the "clearing house" agreement a position analogous to that of secured creditors without the need for the creation and registration of charges on the book debts in question.*

Version No 1: 22 Apr 2024 (12:33 hrs)

> [emphasis added]

76 Lord Cross then went on to find that an attempt to "contract out" of insolvency legislation in this manner, falling short of creating an actual proprietary interest in the insolvent entity's assets, was contrary to the public policy underpinning the statutory scheme of *pari passu* distribution in the insolvency legislation (see *British Eagle* at 780–781):

> … what the respondents are saying here is that the parties to the "clearing house" arrangements by agreeing that simple contract debts are to be satisfied in a particular way have succeed in "contracting out" of the provisions contained in section 302 for the payment of unsecured debts "pari passu". In such a context it is to my mind irrelevant that the parties to the "clearing house" arrangements had good business reasons for entering into them and did not direct their minds to the question how the arrangements might be affected by the insolvency of one or more of the parties. Such a "contracting out" must, to my mind be contrary to public policy. The question is, in essence, whether what was called in argument the "mini liquidation" flowing from the clearing house arrangements is to yield to or prevail over the general liquidation. I cannot doubt that on principle the rules of the general liquidation should prevail.

77 The principle in *British Eagle* has been affirmed and applied in Singapore, by the High Court in *Joo Yee Construction Pte Ltd (in liquidation) v Diethelm Industries Pte Ltd and others* [1990] 1 SLR(R) 171 ("*Joo Yee*"). In that case, a contractor to the Government had entered into insolvent liquidation. There was a clause, cl 20(e) of the contract between the insolvent contractor and the Government, that purported to allow the Government to make direct payment to nominated subcontractors of the insolvent contractor in the event of the latter's insolvency. Applying *British Eagle*, L P Thean J (as he then was) held that cl 20(e) was an impermissible attempt at achieving a non-*pari passu* distribution of an asset of the insolvent contractor – *ie*, the debt owed to it by the Government – by paying certain unsecured creditors – *ie*, the nominated subcontractors – in priority to the general pool of unsecured creditors (at [21]).

Version No 1: 22 Apr 2024 (12:33 hrs)

78 What I glean from *British Eagle* and *Joo Yee* is that, so long as a creditor does not have a proprietary interest in the company's asset *stricto sensu* prior to the company's insolvency, he would remain an unsecured creditor and there is no basis for him to be accorded priority treatment over other unsecured creditors. For completeness, I note that a different result was reached, on essentially identical facts as *British Eagle*, by the High Court of Australia in the subsequent case of *International Air Transport Association v Ansett Australia Holdings Ltd* [2008] HCA 3 ("*Ansett*"). However, I do not consider that the decision in *Ansett* casts any doubt on the correctness of the earliest decision in *British Eagle* on the level of principle, as the difference in result between *Ansett* and *British Eagle* turns on differences in the drafting of the clearing house rules effected following the earlier decision in *British Eagle* (see the commentary in *Derham on the Law of Set-Off* at paras 16.25–16.26)

79 I have in the preceding paragraphs endeavoured to make the point that a sharp distinction is drawn between proprietary and non-proprietary rights. The significance of this is that, in my view, it is difficult to see how an equitable set-off can constitute or fall to be treated in the same way as a proprietary interest in the company's assets. Ultimately, it is in the nature of a counterclaim, which is a personal right of action against the company. It follows from this that, if the question is framed in terms of whether equitable set-off should be placed in the same box of rights as a security interest or contractual rights of set-off, the answer must be the latter. Since insolvency law has long restrained prior contractual rights of set-off, there is little difficulty in the same approach being taken with respect to equitable set-off.

80 For these reasons, I consider that, as a matter of principle, there is no scope for equitable set-off to operate against a company in insolvent liquidation.

Version No 1: 22 Apr 2024 (12:33 hrs)

81 As a final point, whilst the High Court in *Jurong Aromatics (HC)* did take the view that there was no bar as a matter of principle to equitable set-off applying (which I have respectfully disagreed with), I find that I can nevertheless draw some support for my conclusion from the court's prescient observation that, even if equitable set-off were to operate in the insolvency context, "[t]he possible effect of equitable set-off on third parties, including other creditors of a bankrupt individual or insolvent company, may be a reason for the court not to effect equitable set-off" (at [141]).

82 The plaintiffs argue that, in this statement, the court was clearly alive to a need to tailor the application of equitable set-off to the insolvency context.[18] I agree. Indeed, I would go so far as to suggest that any difference in opinion between the High Court in *Jurong Aromatics (HC)* and I is really a matter of degree rather than kind. The reason for this is that basically every application of equitable set-off against an insolvent company would have an adverse effect on third parties, *viz*, the creditors of the insolvent company. The effect of an equitable set-off is the same as the effect of paying a preference, because the beneficiary of the set-off in substance gets full payment of his debt to the extent of the set-off. This results in the unjust enrichment of the preferred creditor (in the case of a preference) or the beneficiary of the set-off (in the case of equitable set-off) at the expense of the other unsecured creditors of the insolvent company (see the High Court decision in *Re Eng Lee Ling and another matter* [2024] SGHC 52 at [31], citing the UK Supreme Court decision in *Stanford International Bank Ltd (in liquidation) v HSBC Bank plc* [2023] AC 761 at [48]). Thus, even if the approach in *Jurong Aromatics (HC)* is taken, it would

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18 Plaintiffs' Further Written Submissions dated 29 March 2024 at para 4(2).

Version No 1: 22 Apr 2024 (12:33 hrs)

be an exceedingly rare case that an equitable set-off could apply against an insolvent company.

83 Viewed in this light, it seems to me that the conclusion in *Jurong Aromatics (HC)* is really a more conservative approach than my conclusion in this case. Instead of rejecting equitable set-off altogether, the court in *Jurong Aromatics (HC)* was content to leave open a theoretical – albeit, in my mind, likely non-existent – possibility that it might apply. It is therefore unlikely that the differing view I have taken in this case would lead to a different outcome in practice.

Insolvency set-off is the only form of set-off that can be asserted against an insolvent company

84 My conclusions above that neither legal set-off nor equitable set-off can be asserted against an insolvent company mean that insolvency set-off is the only form of set-off that can be asserted against an insolvent company. Tying this back to the first question above (see [18(a)] above), it follows that it is only where the defendant is relying on an extinguishment of the plaintiff's claim against him through the operation of insolvency set-off that leave of court under s 133(1) of the IRDA would not be required.

85 For completeness, I will now explain how my conclusion is, in fact, consistent with the authorities on when leave is required under s 133(1) of the IRDA.

86 First, my conclusion is consistent with the decision in *Langley Constructions*. I have set out the facts of this case at [41] above and shall not repeat them here. To briefly recapitulate, the defendant did not require leave of court under s 231 of the Companies Act 1948 (c 38) (UK) to assert a set-off

Version No 1: 22 Apr 2024 (12:33 hrs)

against the plaintiff company in liquidation. I had, in my analysis above, deferred consideration of the specific nature of the set-off that was allowed in that case (see [42] and [45] above). But taking the point here, the set-off that the defendant in *Langley Constructions* relied on was, as it happened, none other than insolvency set-off. It suffices for me to quote from the headnote summary of the case in the law report (see *Langley Constructions* at 505):

> *Held*, refusing leave to appeal in each case, that the defendant's counterclaims could not realistically be regarded as proceedings brought by the companies; that the words of section 231 of the Act of 1948, given their literal and ordinary meaning, required leave to be obtained before the counterclaims were made; that the counterclaims were not bad merely by being pleaded as such but that ***the right given by section 31 of the Act of 1941 did not go beyond a right of set-off by way of defence to the extent of the sum claimed by the plaintiff companies***; and that the proper course of dealing with a case in which costs would be saved by allowing a defendant to counterclaim in the full sense was by application under section 231 of the Act of 1948 to the Companies Court in the ordinary way.
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> [original emphasis in italics; emphasis added in bold italics]

87 One finds in the above summary a reference to a right of set-off under "section 31 of the Act of 1941". The relevant Act is the Bankruptcy Act 1914 (c 59) (UK), and the text of the relevant section reads as follows:

> **Mutual credit and set-off**
>
> **31.** Where there have been mutual credits, mutual debts or other mutual dealings, between a debtor against whom a receiving order shall be made under this Act and any other person proving or claiming to prove a debt under the receiving order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings, and the sum due from the one party shall be set off against any sum due from the other party, and the balance of the account, and no more, shall be claimed or paid on either side respectively; but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a debtor in a case where he had, at the time of giving credit to the debtor,

Version No 1: 22 Apr 2024 (12:33 hrs)

> notice of an act of bankruptcy committed by the debtor and available against him.

There is no mistake that this is a provision on insolvency set-off. Thus, *Langley Constructions* is, in actuality, a decision standing for the proposition that the defendant does not require leave of court to raise a counterclaim based on his right of insolvency set-off under the insolvency legislation.

88 Indeed, the limitation put in place by the English Court of Appeal, that the defendant could not bring a counterclaim in excess of the plaintiff's claim against him, is not a disparate principle of law but merely an incident of insolvency set-off. The purpose of insolvency set-off is to generate a balance that is either a sum due from the creditor to the company, or a sum due from the company to the creditor. If it is the latter, the proper course of action for the creditor is to lodge a proof with the liquidator for the balance owing to him. If the creditor were to instead seek to take out legal proceedings in respect of his claim, s 133(1) of the IRDA requires that he obtain leave of court to do so.

89 Second, my decision is also not inconsistent with the result in *Hyflux*. Although *Hyflux* does appear to take *Langley Constructions* (along with other cases) as authority for a more broadly-worded proposition that no leave is required for any steps that do not "go beyond a purely defensive stance" (at [9]), and the wording used by the court (at [17]) is allusive of equitable set-off by requiring a connection between the claim and counterclaim (see [37]–[39] above), the High Court's decision to allow the defence to be raised without leave of court was, with respect, undoubtedly correct on the facts.

90 Crucially, *Hyflux* involved a moratorium in the context of a scheme of arrangement and *not* a winding-up order. Historically, insolvency set-off has only applied to winding-up (see s 219(1)(*b*) of the IRDA, and previously s 88

Version No 1: 22 Apr 2024 (12:33 hrs)

of the Bankruptcy Act (Cap 20, 2009 Rev Ed), applied to companies through s 327(2) of the Companies Act (Cap 50, 2006 Rev Ed)). It has only, more recently, been extended to judicial management with the entry into force of the IRDA (see s 219(1)(*a*) of the IRDA; *Ocean Tankers* at [95]–[96]).

91 In contrast, insolvency set-off is not applicable in the scheme of arrangement context. Consequentially, concerns of undercutting the statutory insolvency set-off mechanism that are relevant to liquidation (and judicial management), and which therefore preclude the operation of other forms of set-off in these contexts, do not arise *vis-à-vis* a scheme of arrangement. As such, I consider *Hyflux* to be distinguishable to the extent that it might suggest, at least implicitly, that other forms of set-off – in particular, equitable set-off – are applicable as against a company protected by a scheme moratorium.

My decision on the defendants' amendment applications

92 Given my conclusion that no counterclaim other than one susceptible to insolvency set-off can be advanced without leave of court under s 133(1) of the IRDA, it does not suffice, as the defendants have generally done, for them to characterise their intended counterclaims as either legal or equitable set-offs. Neither type of counterclaim escapes the effect of s 133(1) of the IRDA. As the defendants have not sought and/or obtained leave under s 133(1), they are not permitted to raise their counterclaims as legal or equitable set-offs at this stage.

93 The success of the defendants' amendment applications in the present case thus turns solely on whether any of their intended counterclaims fall within the scope of insolvency set-off.

94 Having chosen to justify their intended counterclaims predominantly as legal or equitable set-offs, the defendants have made no submissions on this

Version No 1: 22 Apr 2024 (12:33 hrs)

issue. In contrast, the plaintiffs make the global submission – covering all the defendants' amendment applications – that none of their claims against the defendants fall within the scope of insolvency set-off. In short, because their claims against the defendants are based on the defendants' wrongdoing, their claims fall outside the scope of insolvency set-off as such claims do not satisfy the requirement of "mutual dealings". In support of this general proposition, the plaintiffs rely on the observation by the High Court in *Feima International (Hongkong) Ltd v Kyen Resources Pte Ltd (in liquidation) and others* [2022] SGHC 304 ("*Kyen Resources (HC)*") that "misfeasance cannot constitute a 'dealing' for the purposes of set-off" (at [69]–[70]).[19]

95 I accept the plaintiffs' submission. In *Goode on Insolvency*, it is stated that one of the conditions of insolvency set-off is that "the company's claim must not have been based on the creditor's wrongdoing" (at para 9-22). The text then goes on to explain the rationale for this condition as follows (see *Goode on Insolvency* at para 9-29):

> The creditor cannot escape from the consequences of a misfeasance or other wrongdoing for which the company is making a claim by invoking a right of set-off against the claim. So the creditor cannot set off the debt owed to him by the company in liquidation against a claim by the company by way of misfeasance proceedings for the recovery of misappropriated funds or for damages for conversion or recovery of a sum paid to him by way of a voidable preference or settlement. Any other conclusion would enable the wrongdoer to benefit from his wrongdoing by recovery through set-off instead of having to prove in the winding-up in competition with other creditors.

This passage, albeit from an earlier edition of *Goode on Insolvency*, was cited with approval by the Court of Appeal in *Parakou Investment Holdings Pte Ltd*

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[19] Plaintiffs' Written Submissions in SUM 247–248 dated 6 March 2024 at para 24(2); Plaintiffs' Written Submissions in SUM 249 dated 6 March 2024 at para 22(2).

Version No 1: 22 Apr 2024 (12:33 hrs)

and another v Parakou Shipping Pte Ltd (in liquidation) and other appeals [2018] 1 SLR 271 (at [67]).

96 In Suit 363, the plaintiffs' claims against LCH include causes of action such as breach of directors' duties, breach of trust, transactions at an undervalue, and transactions defrauding creditors.[20] These are clearly claims based on LCH's wrongdoing and are therefore caught within the ambit of the principle articulated in *Kyen Resources (HC)*.

97 LCH is a former director of PHCQ. In this regard, there is clear authority in the context of errant former directors that insolvency set-off is of no application *vis-à-vis* their companies' claims against them (see *Company Directors: Duties, Liabilities and Remedies* (Mark Arnold KC ed) (Oxford University Press, 4th Ed, 2024) at para 19.114). The English Court of Appeal decision in *Manson v Smith (liquidator of Thomas Chaisty Ltd)* [1997] 2 BCLC 161, which was cited with approval by the High Court in *Kyen Resources (HC)* (at [69]), is instructive. In that case, the defendant, Mr Manson, had been a director of a company and had lent it significant sums as a director's loan. After the company went into insolvent liquidation, the liquidator discovered that certain improper payments to Mr Manson out of the company's director loan account had been made. As a result, the liquidator brought misfeasance proceedings against Mr Manson. Mr Manson sought to argue that he was entitled, through insolvency set-off, to set off the company's claim against him against the balance on his director's loan that remained unpaid. Millett LJ (as he then was) did not accept this submission. Indeed, the learned judge said that it had been settled for more than a century that "there is no set-

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20 Plaintiffs' Written Submissions in SUM 249 dated 6 March 2024 at para 22(1).

Version No 1: 22 Apr 2024 (12:33 hrs)

off available between a debt due to a misfeasant and his liability to repay the moneys which he has been ordered to pay in misfeasance proceedings" (at 164).

98 In Suit 364, the plaintiffs' claims against LCH and PHGM include causes of action such as breach of fiduciary duty, breach of trust, unlawful means conspiracy, transactions at an undervalue and knowing receipt.[21] These are also claims based on LCH's and PHGM's wrongdoing and/or complicity to wrongdoing, such that they also fall squarely within the principle articulated in *Kyen Resources (HC)*.

99 Given that the plaintiffs' claims are not amenable to insolvency set-off, the defendants are not, subject to any further arguments in the future, entitled to rely on insolvency set-off to advance their counterclaims without obtaining leave of court under s 133(1) of the IRDA.

Conclusion

100 In conclusion, for the overarching reason that none of the defendants' intended counterclaims can be brought without leave of court under s 133(1) of the IRDA, I dismiss their applications to amend in SUM 247, SUM 248, and SUM 249.

101 Given the length of this judgment, I outline and summarise the key steps in my reasoning to the above conclusion as follows:

(a) Only a counterclaim amounting to a permissible set-off can be brought by a defendant to proceedings against a company in insolvent

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[21] Plaintiffs' Written Submissions in SUM 249 dated 6 March 2024 at para 24(1).

Version No 1: 22 Apr 2024 (12:33 hrs)

liquidation without obtaining leave of court under s 133(1) of the IRDA (see [20]–[47] above);

(b) Statutory insolvency set-off is the only permissible set-off against a company in insolvent liquidation (see [48]–[83] above);

(c) The sum of (a) and (b) above is that only a counterclaim that is within the scope of insolvency set-off can be brought without leave of court under s 133(1) of the IRDA (see [84]–[91] above).

(d) None of the counterclaims that the defendants intend to introduce are within the scope of insolvency set-off (see [92]–[99] above).

(e) As a result, the sum of (c) and (d) is that none of the defendants' intended counterclaims can be brought without leave of court under s 133(1) of the IRDA.

(f) Since the defendants have not obtained leave under s 133(1) of the IRDA, they are not permitted to advance their counterclaims at this stage.

102 Unless the parties are able to agree on the costs of these applications, they are to file written submissions on the appropriate costs order, limited to seven pages each, within seven days of this decision.

Version No 1: 22 Apr 2024 (12:33 hrs)

103 In closing, I thank counsel for the plaintiffs, Ms Lee Bik Wei, and counsel for the defendants, Ms Nanthini d/o Vijayakumar, as well as their respective teams, for their very helpful submissions.

Goh Yihan
Judge of the High Court

Ong Boon Hwee William, Lee Bik Wei, Chew Jing Wei and Kay Tan Jia Xian (Allen & Gledhill LLP) for the plaintiffs in Suit 363 and Suit 364;
Thio Shen Yi SC, Nanthini d/o Vijayakumar, Nguyen Vu Lan, Terence Yeo and Ng Qiheng Glenn (TSMP Law Corporation) for the defendants in Suit 363 and Suit 364.

Version No 1: 22 Apr 2024 (12:33 hrs)