IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1995] SGHC 254

OS 275/1995

Between

Good Property Land Development Pte Ltd (in liquidation)

… *Plaintiff*

And

Societe-Generale

… *Defendant*

GROUNDS OF DECISION

Credit and Security — Mortgage of real property — Mortgagee’s rights

Version No 1: 29 Oct 2026 (23:45 hrs)

This judgment is subject to final editorial corrections approved by the court and/or redaction pursuant to the publisher's duty in compliance with the law, for publication in LawNet and/or the Singapore Law Reports.

Good Property Land Development Pte Ltd (in liquidation) v Societe-Generale

[1995] SGHC 254

OS 275/1995
Chao Hick Tin J
31 October 1995

1 The plaintiffs are a company (the company) which were ordered to be wound-up under an order of court of 28 July 1989. M/s Edwin Khoo Tian Soo, Tan Swan Jeng and Chan Ket Teck are the liquidators. The winding-up petition was presented by the defendants, Societe-Generale, a French bank carrying on business in Singapore.

2 By this originating summons, the liquidators of the company sought the court`s direction as to the validity of certain set-offs of unsecured loans, owing by the company to Societe-Generale, from the surplus proceeds of a mortgage sale effected by Societe-Generale.

3 **Facts**

4 In 1982, the company, who were the proprietors of lots 339 and 403 TS19 (the property), embarked on a development of the two plots of land into Hotel Merideen and Merideen Shopping Centre. The company applied for a syndicated loan of US$40m from Societe-Generale, who acted as the lead managers and agents. The loan was secured, inter alia, by a mortgage over the

property. However, before the grant of the syndicated loan from the various banks, bridging loans in different currencies amounting to US$4,500,000, DM1,700,000 and Swiss francs CHF25,213,029.36 were extended by the banks to the company between March 1982 and March 1983.

5 Upon the grant of the syndicated loan, the company made a first draw-down of CHF31,785,000 and applied it in the reduction of the outstanding bridging loan leaving a balance of CHF6,326,689.24. Societe-Generale did not insist upon the bridging loan being completely repaid because had that been insisted upon, what remained of the syndicated loan would have been insufficient to fund the completion of the development.

6 Subsequently, eight further draw-downs were made from the syndicated loan and they were utilized by the company for the development. In total, the nine draw-downs amounted to US$39m.

7 In or about March 1988, the company was unable to honour its loan repayment obligations to the syndicate of banks. Accordingly, on 12 November 1988, Societe-Generale in exercise of their power of sale as mortgagee sold the property for S$180,200,000. Completion of the transaction took place on 24 February 1989.

8 On 10 March 1989, a part of the mortgagee sale surplus funds in the amount of S$2,239,006.13 was credited into the company`s bridging loan account No 12-32970-0122 and set off against the outstanding bridging loan.

9 The subject of the present proceedings relate to six instances of set-off effected by Societe-Generale on the dates set out below:

Version No 1: 29 Oct 2026 (23:45 hrs)

No Amount Date of set-off Account

(1) S$ 28,744.98 13.6.89 bridging loan

(2) S$ 46,635.51 05.9.89 overdraft

(3) S$ 15,243.74 26.9.89 bridging loan

(4) S$ 1,455,270.05 26.9.89 bridging loan

(5) S$ 150,000.00 26.9.89 bridging loan

(6) S$ 10,449.05 26.9.89 bridging loan

S$ 1,706,343.33 (total)

10 The above amounts were the balance mortgagee sale surplus proceeds and were part of deposits earmarked for various payments.

11 On 22 April 1989, pursuant to a compromise reached, the company wrote to Societe-Generale a letter in these terms:

> *In consideration of your agreeing to enter into an agreement with us, a copy of which is attached hereto and initialled for identification purposes, we hereby acknowledge that you shall be entitled to whatever banker`s rights applicable at law with regard to funds standing in our account with your bank.*

12 Hereinafter, this letter shall be referred to as `the set-off agreement`.

13 On 26 April 1989 the company and Societe-Generale executed the agreement (settlement agreement) whereby the company acknowledged that they owed Societe-Generale, inter alia, CHF4,761,173.64 in respect of the bridging loan account and S$236,159.12 on the overdraft account. By this agreement, Societe-Generale were given the right to appoint Price Waterhouse Intrust Ltd, or another firm of public accountants acceptable to both parties, to manage the collection of all monies due to the company from third parties and to pay such monies into an account maintained by the company with Societe-

Generale. However, by mutual arrangement, Societe-Generale did not exercise the right to appoint any firm of accountants to collect the unsecured debts owing to the company and instead allowed the company to collect the receivable and to place the same in the company`s account with Societe-Generale.

14 **Position of the liquidators**

15 The position of the liquidators is that Societe-Generale could not set-off the surplus proceeds of sale against the outstandings in the bridging account and the overdraft account because of s 74(1) of the Land Titles Act (Cap 157, 1994 Ed), which reads:

> *The money received by a mortgagee who has exercised his power of sale, after discharge of prior encumbrances to which the sale is not made subject (if any), or after payment into court under the Conveyancing and Law of Property Act of a sum to meet any prior encumbrances, shall be held by him on trust to be applied -*
>
> *(a) firstly, in payment of all costs and expenses properly incurred as incidental to the sale or any attempted sale, or otherwise;*
>
> (b) secondly, in discharge of the mortgage money, interest and costs, other money and liability (if any) secured by the mortgage; and
>
> (c) thirdly, in payment of subsequent mortgages and charges (if any) in the order of their priority.
>
> *And the residue of the money so received shall be paid to the person who appears from the land-register to be entitled to the mortgaged property or to be authorised to give receipts for the proceeds of the sale thereof.*

16 Since the surplus proceeds of sale were to be held on trust for the company, Societe-Generale were not entitled to effect a set-off.

17 **Case for Societe-Generale**

18 Societe-Generale submitted that they were entitled to effect the set-offs on two bases:

> (a) pursuant to s 41 of the Bankruptcy Act (Cap 20); and
>
> (b) by virtue of the set-off agreement and the settlement agreement.

19 Section 41(1) of the Bankruptcy Act provides as follows:

> *Where there have been mutual credits, mutual debts, or other mutual dealings between a debtor against whom a receiving order is made under this Act and any other person proving or claiming to prove a debt under the 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.*

20 Section 41(1) is made applicable to a company winding-up by virtue of s 327(2) of the Companies Act (Cap 50, 1994 Ed), which reads:

> *Subject to section 328, in the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and debts provable and the valuation of annuities and future and contingent liabilities as are in force for the time being under the law relating to bankruptcy in relation to the estates of bankrupt persons, and all persons, who in any such case would be entitled to prove for and receive dividends out of the assets of the company, may come in under the winding up and make such claims against the company as they respectively are entitled to by virtue of this section.*

21 **Consideration of the authorities**

22 A number of cases were cited by counsel for Societe-Generale on the application or interpretation of s 41(1) which I now propose to examine. The first is ***Atkinson v Elliot*** (1797) 7 TR 378; 101 ER 1030 where the debtor

bought two lots of tar each at six months` credit. After payment on the first lot became due, the debtor gave the creditor a bill of exchange which exceeded the price for the first lot. The creditor agreed to refund the surplus to the debtor. Later, the debtor became a bankrupt and the creditor sought to set-off the surplus funds against the price of the second lot which was not yet due. It was argued that such a set-off should not be allowed as the creditor held the surplus funds on trust for the debtor. There was then in operation a provision similar to our s 41(1) of the Bankruptcy Act. Lord Kenyon CJ said that `where there is a trust between both parties there is a mutual credit` and he held the set-off should be allowed. Similarly, Grose J said:

> *It has been objected that the defendants cannot set-off the Â£170 because it is contrary to their express agreement: but consider that the bankrupt by his agreement was bound to pay his acceptance for Â£230 at a future day, but that his bankruptcy disabled him; that was a credit on one side; and credit was constituted on the other by giving a bill which became due at a subsequent time. It is clearly therefore a case of mutual credit and it is just that one demand should be set-off against the other.*

23 Next, there is the case ***Rose v Hart*** (1818) 8 Taunt 499; 129 ER 477 and the interesting aspect of it is the interpretation given by the court to the expressions `mutual credits` and `mutual debts`. Briefly there the debtor had prior to bankruptcy deposited cloths with a fuller for the purpose of being dressed. Following the debtor`s bankruptcy, his assignee tendered payment to the fuller for work done on such cloths but the fuller required payment of the general balance for other work done by him for the debtor prior to bankruptcy before he would release the cloths. Gibbs CJ said:

> *Something more is certainly meant here by mutual credits than the words mutual debts import; and yet, upon the final settlement, it is enacted merely that one debt shall be set against another. We think this shews that the legislature meant such credits only as must in their nature terminate in debts, as where a debt is due from one party, and credit given by him on the other*

> *for a sum of money payable at a future day, and which will then become a debt, or where there is a debt on one side, and a delivery of property with directions to turn it into money on the other; in such case the credit given by the delivery of the property must in its nature terminate in a debt, the balance will be taken on the two debts, and the words of the statute will in all respects be complied with: but where there is a mere deposit of property, without any authority to turn it into money, no debt can ever arise out of it, and, therefore, it is not a credit within the meaning of the statute.*

24 Thus, he held that there was no mutual credit and the provisions for set-off did not apply.

25 The second limb enunciated in ***Rose v Hart*** was followed in ***Naoroji v Chartered Bank of India*** (1867-68) 3 LRCP 444 and ***Astley & Anor (assignees of Joyce & Co, bankrupts) v Gurney & Anor*** (1868-69) 4 LRCP 714.

26 In ***James Young v Bank of Bengal*** (1836) 1 Moore 150; 12 ER 771 the creditor realized company paper, which the debtor had deposited as security, after the debtor had become a bankrupt and the amount realized exceeded the debt owed. The creditor sought to set-off the surplus funds against the debtor`s unsecured indebtedness. The Privy Counsel disallowed the set-off as the security was not realized before the bankruptcy. The Privy Counsel opined that if the security had been realized before bankruptcy then the creditor would be a debtor for the surplus funds and there would be mutual debts and set-off would have been allowed. The second limb of ***Rose v Hart*** was not applicable presumably because, when the paper was deposited with the creditor, there was no authority to turn it into money. **James Young** may thus be contrasted with ***Palmer v Day & Sons*** [1895] 2 QB 618 where articles were held as security by creditor with power to sell. The sale was affected after the debtor`s bankruptcy. The court held this did not preclude the creditor from setting-off the surplus funds against the debtor`s unsecured indebtedness. Lord Russel CJ held that the

deposit of articles with authority to sell amounted to giving of credit and there were therefore mutual credits.

27 Then there is a trilogy of cases ***Spalding v Thompson*** (1858) 26 Beav 637; 53 ER 1044, ***Re Haselfoot`s Estate*** (1872) 13 LR Eq 327 and ***Re General Provident Assurance Co, ex National Bank*** (1872) 14 LR Eq 507 where the court held that where a security was given and the security was more than enough to cover the precise debt for which it was given, and there being a surplus in the hands of the creditors, the creditors could retain it to cover a general balance irrespective of that debt and need not pay it over to the mortgagor. These cases seem to have expanded the rule enunciated in ***Rose v Hart*** .

28 However, the above said three cases were not followed in ***Talbot v Frere*** (1878) 9 Ch D 568. There a mortgagor died insolvent and subsequently the mortgagee realized his security, which was more than the mortgage debt. The court held that the mortgagee could not retain the surplus in payment of unsecured debt due to him from the mortgagor and give himself a preference over other creditors. He must hand the surplus over to the mortgagor`s legal personal representative as part of his estate. The mortgagee was a trustee of the surplus funds. Jessel MR`s reason for saying that the mortgagee could not plead set-off was this: `He is a trustee of money for the estate, and his claim is only a simple contract debt against that estate.` His comments on the three cases were `I cannot make out any principle on which they were decided and I confess I do not understand them.` ***Talbot v Frere*** was followed in ***Re Gregson*** (1887) 36 Ch D 223 where a debtor mortgaged a life policy to creditor. After the death of the debtor the creditor received moneys from the life policy in excess of the secured debt and sought to set-off the surplus funds against an unsecured debt

as the estate of the debtor was insolvent. North J disallowed the set-off because there was no mutuality, one debt was due by the testator (the debtor) while the other debt was due to the testator`s executor. He further elaborated:

> *If the power of sale had been exercised in the testator`s lifetime, and the office had received a sum more than sufficient to satisfy what was due on the mortgage of the policy, and the testator had claimed the surplus, there might have been a set-off. Re Gregson did not deal with the bankruptcy set-off provision.*

29 In ***Re Gedney*** [1908] 1 Ch 804, Warrington J followed ***Talbot v Frere*** and ***Re Gregson*** and went further to consider the set-off provisions in s 38 of the Bankruptcy Act 1883. There, the creditor purchased after the testator`s death but before the judgment for administration (equivalent to adjudication in bankruptcy) certain mortgages and unsecured debts of the testator. On realization of the mortgages there were surplus funds which the creditor sought to set-off against unsecured debts. Warrington J said (at p 810):

> *In the present case there are, as it seems to me, no mutual credits, mutual debts, or other mutual dealings between Harvey (the creditor) and the testator, and for the reason which I have mentioned, namely, that one dealing gives rise to a debt due from the testator to Harvey, and the other gives rise to a debt due from Harvey, not to the testator, but to the testator`s devisee. The only answer which has been attempted to be given to that is that it is said that for the purpose of administration the word `debtor` in s 38 must be read as if it were `estate,` that is, the estate with all rights and liabilities which exist between the creditors and the property of the testator - all the rights and liabilities which result from the death of the testator. But, even so, still I do not think that there would be any mutual credits, mutual debts, or other mutual dealings within the meaning of the section. It may be true that eventually the money in the hands of Harvey will be divided among the creditors of the testator, but that is not enough to make mutual debts, mutual credits, or mutual dealings within the Act. I come, therefore, to the conclusion that in this case the Bankruptcy Act 1883 has made no difference in the law from what it was before the Judicature Act 1875.*

30 Then there is a line of cases which held that where money was held by the creditor for a specific purpose, there could not be any set-off. First, in ***Re Pollitt, ex p Minor*** [1893] 1 QB 455, a debtor owed a solicitor money for earlier services. The solicitor declined to act further unless he was furnished with money to meet future costs. The debtor placed money in his hands for that purpose. Later, the debtor was adjudicated a bankrupt. The solicitor sought, inter alia, to set-off the balance of the deposit money against costs incurred before the money was placed in his hands. The English Court of Appeal held this was not permitted. Lord Esher MR reasoned as follows:

> *If the money was given to the creditor for a specific purpose, then, as between him and the bankrupt, there could not be a set-off; nor as between them could there be any mutual credit. And, as regards the trustee in the bankruptcy, there is this difficulty, that the original credit was between the bankrupt and the solicitor and the new credit is between the trustee and the solicitor. In other words, the two credits are between different parties, and therefore, they are not mutual.*

31 This was followed in ***Re City Equitable Fire Insurance Co Ltd (No 2)*** [1930] 2 Ch 293, where there was a reinsurance agreement between two insurance companies under which the insuring company was entitled to retain and accumulate out of money due to the reinsurer a certain sum which was to remain as a deposit to secure the due performance of the reinsurer`s obligations until the termination of this agreement. Later, the reinsurer was wound up and the agreement terminated. After all obligations under the agreement had been satisfied, there remained in the hands of the insuring company a sum of Â£8,000 of the deposit and a further sum representing accrued interest. The liquidators sought to recover these two sums which the insuring company asserted they could set-off against unsecured debts owing to it by the reinsurers. Maugham J held, following ***Re Pollitt,*** that as the deposit was handed to the insuring company for a specific purpose, the remaining amount of deposit and the

interest earned could not be the subject of a set-off. On appeal, it was argued that the character of the interest earned did not necessarily follow that of the deposit. On that, Hanworth MR said that that was a debt which ought to be, and would be, brought into account between merchants and that the interest fell within the terms of s 31 of Bankruptcy Act 1914 (the successor provision to s 38 of Bankruptcy Act 1883 and in pari materia with our s 41). As regards the deposit he held that s 31 did not apply. He explained (p 312):

> *The fund having been originally placed in the depositee`s hands for the particular purpose, the nature and quality of that purpose still attaches to the balance of the fund unless and until there has been some subsequent agreement releasing it from that specific purpose.*

32 There was no evidence of any such subsequent agreement.

33 Next, I turn to consider the ***Eberle`s Hotels and Restaurant Co Ltd v E Jonas & Brothers*** (1887) 18 QBD 459. There, although the court held that on the facts s 38 of the Bankruptcy Act 1883 could not apply, what is of interest are the views expressed by the Court of Appeal on the provision. There a company deposited cigars with the creditor as security for a debt. ***After the company was wound up*** , the creditor sought to set-off the value of the cigars against unsecured indebtedness of the company as the secured debt had been paid. The liquidator claimed a return of the cigars. The court held that s 38 was only applicable where the claims on each side were such as resulting in pecuniary liabilities and there the right of the debtor company was for the return of the goods in specie. The following passage of Esher MR illustrates how the provision should be construed (at p 465):

> *There are, no doubt, matters which give rise to claims, but are not dealings within the section. If one man assaults another or injures him through negligence, that gives rise to a claim, but is not a dealing; but I am disposed to think that whatever comes*

> *within the description of an ordinary business transaction would be a dealing within the section. I think it was a dealing where one party deposited goods with the other to secure a debt. It is obvious that the sale of goods by the defendants constituted a dealing. So I think there were mutual dealings between these parties. But we have to see whether even so the section applies. The section provides, where there are mutual dealings between the parties, that `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.` Although there may be mutual dealings, and the parties are such as come within the terms of the section, it is obvious that its provisions cannot apply unless the dealings are such that in the result the account contemplated by the section can be taken in the way described. If the claim on one side in the action and the counterclaim on the other were such as would both result in a money claim, so that for the purposes of the action there would be merely a pecuniary liability on each side, the case would, I think, come within the section. I should, speaking for myself, desire to give the widest possible scope to the section, and, in my opinion, wherever in the result the dealings on each side would end in a money claim, its provisions would be applicable.*

34 If the defendants had sold them before the debt was paid, I am disposed to think that the plaintiffs` claim for an account of their proceeds would then have been a mere money claim. A trifling portion of them was so sold, but substantially they were not sold, and still remain in the possession of the defendants, and the debt in respect of which they were deposited has been satisfied. It appears to me that according to law and the terms of the contract between the parties the defendants have no longer any right to sell the goods, but are bound to return them to the plaintiffs.

35 Another very instructive case is ***Re HE Thorne & Son Ltd*** [1914] 2 Ch 438, which followed ***Eberle`s Hotels*** . In ***Re HE Thorne*** , A Co mortgaged machinery to B Co and under the mortgage the machinery was insured against fire. The machinery was destroyed by fire. B Co received the insurance

compensation which sum was more than the sum secured. Later A Co was wound-up and found to be insolvent. As on the date of the winding up, Â£744 was due to B Co under the mortgage loan, with a surplus of Â£856. B Co sought to set off the surplus moneys against unsecured indebtedness of A Co of some Â£2,000 owed to B Co, pursuant to s 38 of the Bankruptcy Act 1883. The liquidator of A Co had contended that the surplus sum was held specifically by B Co in trust for A Co at the commencement of the winding-up and therefore there was no right of set-off. The court held that as the mutual dealings had resulted in cross money claims before the winding up of A Co, B Co was entitled to the set-off. In the case, Astbury J took the opportunity to review the earlier authorities. He commented on ***Talbot v Frere*** as follows (at p 444):

> *That was simply a decision under the old statutes of set-off, and Jessel MR merely held, apart altogether from any `mutual dealings` section in the Bankruptcy Act, that on the facts of that case there was no right of set-off.*

36 As regards ***Re Gregson*** , Astbury J said that was a case like ***Talbot v Frere*** , where the actual decision was that there was no set-off because the debtor`s death having supervened, the claim and the debt were not mutual. And both cases were not decided under s 38 at all.

37 Astbury J next noted that ***Re Gedney***

38 was decided on the basis that there was no mutuality - in the words of Warrington J `one dealing gives rise to a debt due from the testator to Harvey and the other gives rise to a debt due from Harvey, not to the testator, but to the testator`s devisee.`

39 As regards ***Re Pollitt*** and ***Re Mid-Kent Fruit Factory*** ,Astbury J observed that they were decided on the basis that there was a contractual

obligation on the part of the solicitor-creditor to return the remaining money to the debtor in so far as it was not used for the specific purpose for which it was paid. There was no consent that the balance could be used for another purpose. He said these two cases were distinguishable if regarded as cases in which the exercise of the right of set-off would have amounted to a breach of a specific contract. He did not agree, as suggested by the liquidator, that the two cases were to be extended to include all cases where a creditor held the balance of a realized security in trust for his debtor so that the creditor was not entitled to deal with it in his account. He felt such an extension would form a serious limitation on the general rule expounded in ***Eberle`s Hotels*** , and there was no justification for such a limitation.

40 In the Canadian case ***Re S Piscione & Sons Ltd*** [1965] 1 OR 515, following the debtor`s bankruptcy, the mortgagee realized the mortgage and sought to set-off the surplus proceeds against unsecured indebtedness. This was disallowed because of a lack of mutuality as the debtor was indebted to the creditor and the creditor to the trustee in bankruptcy. The fact that the mortgage was only realized after the bankruptcy made all the difference to the decision. This can be seen from the observation of that court that had the mortgagee realized the mortgage before the bankruptcy then, following the case ***Stephens v Boisseau*** (1896) 26 SCR 437, the position might have been different. I would add that ***Re S Piscione*** is consistent with the decisions in ***The Eberle`s Hotel*** and ***Re HE Thorne*** and the principles enunciated in those two decisions.

41 Finally, in ***Rolls Razor Ltd v Cox*** [1967] 1 All ER 397 a salesman (not a servant but an independent contractor) sought to set-off proceeds of sale in his hands (sale effected before the winding-up of his company) against commission due from the company to him. This was objected to by the liquidator who

contended that the sale proceeds were trust moneys and should be paid to the company. Denning MR said (at p 403):

> *Counsel for the company argued that the salesman received the moneys for a specific purpose, namely, to pay over to the company; and that moneys so received could not be set-off. I cannot accept this contention. When moneys are received for the very purpose of being handed over to the other party, they are properly the subject of set-off under the statute, so long as the dealings are mutual. Such was the case in* ***Naoroji v Chartered Bank of India.*** *It is only when the dealings are not mutual that there is no set-off, as in* ***Re Mid-Kent Fruit Factory, Ltd*** *and* ***Re City Equitable Fire Insurance Co Ltd (No 2)****. Here the dealings were clearly mutual.*

42 **Conclusion**

43 In the light of the above authorities, it is clear that there could be set-off if, before the intervention of any bankruptcy, there are mutual dealings between the parties and they result in credits being due from one party to the other and vice-versa. To that I must add two qualifications: (i) if at the time when bankruptcy intervenes, goods are still being held by the creditor they could nevertheless be used as set-off provided that the goods are being held by the creditor with authority to sell: second limb enunciated in ***Rose v Hart*** ; and (ii) moneys held by the creditor are not being held for a specific purpose as in ***Re Pollitt*** . The fact that the set-off was only effected after the making of the bankruptcy or winding-up order is immaterial: see also ***Re Daintrey ex p Mant*** [1900] 1 QB 546.

44 The only point advanced by counsel for the liquidators to argue that set-off could not apply in the present case is the fact that here we are dealing with an express trust not an implied trust. I was unable to see how that distinction could make a difference. A trust is a trust, whether express or implied and whether it arises under common law or by statute. There is no doubt that when

a mortgagee exercises his power of sale, the proceeds, less the debt due to the mortgagee, is held by the mortgagee in trust for subsequent mortgagee or the owner. Section 74(1) of the Land Titles Act effectively reflects that common law rule which was stated by Kay J in ***Charles v Jones*** (1887) 35 Ch D 544 at p 549 as follows:

> *I have never heard it doubted that where a mortgagee sells, and has a balance in his hands, he is a trustee of that balance for the persons beneficially interested. He takes his mortgage as a security for his debt, but, so soon as he has paid himself what is due, he has no right to be in possession of the estate, or of the balance of the purchase-money. He then holds them, to say the least, for the benefit of somebody else, of a second mortgagee, if there be one, or, if not, of the mortgagor. What, then, is he to do? Surely he has a duty cast upon him. His duty is to say, `I have paid my debt; this property which is pledged to me, and in respect of which I now hold this surplus in my hands, is not my property. I desire to get rid of this surplus, and hand it back to the person to whom it belongs.`*

45 Our present situation should be distinguished from that in ***Re Pollitt*** where money was placed by the debtor in the hands of the creditor for a specific purpose and when bankruptcy of the debtor intervened that purpose had still not been revoked. Thus there was no mutuality as explained in ***Re Pollitt*** itself as well as in ***Re Gregson*** and ***Re Gedney*** . The meaning of mutuality was further amplified by the Australian High Court in ***Gye v McIntyre*** (1991) 171 CLR 609 at p 623 as follows:

> *It does not mean `identical` or `the same`. So understood, there are three aspects of the section`s requirement of mutuality. The first is that the credits, the debts, or the claims arising from other dealings be between the same persons. The second is that the benefit or burden of them lie in the same interests. In determining whether credits, debts or claims arising from other dealings are between the same persons and in the same interests, it is the equitable or beneficial interests of the parties which must be considered: see, eg* ***Hiley*** *(1938) 60 CLR 497. The third requirement of mutuality is that the credits, debts, or claims arising from other dealings must be commensurable for the*

> *purposes of set-off under the section. That means that they must ultimately sound in money.*

46 The requirement that the credits, the debts or the claims arising from other dealings be commensurable does not mean they must be vested, liquidated or enforceable at the decisive date, that is to say, at the time of the sequestration order or special resolution accepting the composition. Provided they exist as contingent at that date and are of a kind which will ultimately mature into pecuniary demands susceptible of set-off, the requirement of the section may be satisfied in relation to them.

47 In the present case there was clearly mutuality. The surplus proceeds were held by Societe-Generale for the company before the intervention of the winding-up. The total sum of $1,706,343.33 was excess money held by Societe-Generale for the company and to be paid over to the company. At the same time, the company was owing Societe-Generale moneys in the overdraft account and the bridging loan account. Thus as at the date of the winding-up of the company, there were mutual credits or mutual debts between them. Set-off in such circumstances clearly falls within s 41.

48 However, should I be wrong in taking that view and that explicit consent of the company was required before Societe-Generale could set off the surplus of sale proceeds against unsecured debts of the company, then I was of the view that such consent was given in the set-off agreement and/or the settlement agreement. The word `acknowledge` in the set-off agreement should be construed to mean that the company `agree`. It seems to me clear that the two documents constituted a comprehensive repayment scheme by the company to Societe-Generale. They empowered Societe-Generale to do two things: (i) to set off money which was held by Societe-Generale for the company against the

debts of the company to Societe-Generale (ii) to collect debts due from third parties to the company and to set them off against debts due from the company to Societe-Generale. It would be to ignore commercial reality to hold that the two agreements did not extend to or cover the surplus funds held by Societe-Generale under s 74(1).

49 For the reasons above, I dismissed the application.

50 Application dismissed.

Chao Hick Tin J

Woo Bih Li and Ng Hweelon (Bih Li & Lee) for the plaintiffs
Timothy Kho (David Lim & Pnrs) for the defendants

Version No 1: 29 Oct 2026 (23:45 hrs)