IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1996] SGCA 25

CA 117/1995

Between

Good Property Land Development Pte Ltd (in liquidation)

… *Appellant*

And

Societe-Generale

… *Respondent*

GROUNDS OF DECISION

Companies — Winding up; Debt and Recovery — Right of set-off

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

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

[1996] SGCA 25

CA 117/1995
Goh Joon Seng J; Lai Kew Chai J; Yong Pung How CJ
17 April 1996

1 ***The facts***

2 In 1982, Good Property Land Development (GPLD) who were the proprietors of lots 339 and 403 TS19 , embarked on a development of the two plots of land into Hotel Meridien and Meridien Shopping Centre. GPLD applied for a syndicated loan of US$40m from the respondents, who acted as the lead manager and agent. 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$4.5m, DM1.7m and Swiss francs CHF25,213,029.36 were extended by the banks to GPLD between March 1982 and March 1983.

3 Upon the grant of the syndicated loan, GPLD made a first drawdown of CHF31,785,000 and applied it in the reduction of the outstanding bridging loans leaving a balance of CHF6,326,689.24. The respondents did not insist upon the bridging loans being completely repaid because, had that been insisted upon, what remained of the syndicated loan would have been insufficient to fund the completionof the development. Subsequently, eight further drawdowns were

made from the syndicated loan and they were utilized by GPLD for the development. In total, the nine drawdowns amounted to US$39m.

4 In or about March 1988, GPLD was unable to honour its loan repayment obligations to the syndicate of banks. On 12 November 1988, the respondents in exercise of their power of sale as mortgagees sold the property for S$180.2m. Completion of the transaction took place on 24 February 1989. On 10 March 1989, a part of the mortgagee sale surplus funds amounting to S$2,239,006.13 was credited into GPLD`s bridging loan account No 12-32970-0122 and set-off against the outstanding bridging loans.

5 The subject of this appeal concerned six instances of set-off effected by the respondents on the dates set below:

No	*Amount*	*Date of Set-off*	*Account*
(1)	S$28,744.98	13.06.89	bridging loan
(2)	S$46,635.51	05.09.89	overdraft
(3)	S$15,243.74	26.09.89	bridging loan
(4)	S$1,455,270.05	26.09.89	bridging loan
(5)	$150,000.00	26.09.89	bridging loan
(6)	S$10,449.05	26.09.89	bridging loan
	S$1,706,343.33	(total)	

6 The above amounts were the balance mortgagee sale surplus proceeds and were part of deposits earmarked for various payments, as reflected under items 17, 20 and 21 of the schedule of funds. On 22 April 1989, pursuant to a compromise reached, GPLD wrote to the respondents a letter in the following 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.*

7 On 26 April 1989, GPLD and the respondents executed the agreement (settlement agreement) whereby GPLD acknowledged that they owed the respondents, 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, the respondents 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 moneys due to GPLD from third parties and to pay such moneys into an account maintained by GPLD with the respondents. However, by mutual agreement, the respondents did not exercise the right to appoint any firm of accountants to collect the unsecured debts owing to GPLD and instead allowed GPLD to collect the receivables and to place the same in GPLD`s account with the respondents. On 29 June 1989, the respondents filed a petition to wind-up GPLD, and pursuant thereto, GPLD was wound up under an Order of Court dated 28 July 1989.

8 ***Issues in the appeal***

9 The appellants` case was that the set-offs applied after 26 April 1989 were wrongfully done. The settlement agreement of 26 April 1989 only ratified the respondent`s set-offs prior to 26 April 1989 and did not ratify set-offs after that date. In any event, the surplus proceeds of the mortgagee sale were trust moneysheld by the respondents for the benefit of GPLD under s 68(1) of the Land Titles Act (Cap 157, 1985 Ed) which could not be used for set-offs. The appellants also argued that the set-off agreement of 22 April 1989 merely

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acknowledged the respondents` rights as bankers and did not create any new rights for them. Finally, they contended that the respondents held the surplus funds as agents of the syndicate of banks. Since the debt was owed to the respondents and not the syndicate, there could be no set-off due to the absence of mutuality.

10 ***The decision below***

11 The learned judge concluded that there was clearly mutuality within the meaning of s 41 of the Bankruptcy Act. The surplus proceeds were held by the respondents for GPLD before the intervention of the winding-up. The total sum of $1,706,343.33 was excess money held by the respondents for GPLD and to be paid over to GPLD. At the same time, GPLD was owing the respondents moneys in the overdraft account and the bridging loan account. Thus as at the date of the winding-up of GPLD, there were mutual credits or mutual debts between them. He further added that even if there were no mutuality, there was the set-off agreement which permitted the respondents to set-off the surplus sale proceeds against unsecured debts of GPLD. It would be to ignore commercial reality to hold that the two agreements did not extend to or cover the surplus funds held by the respondents under s 68 Land Titles Act. Accordingly, he held that the set-offs were valid.

12 ***The appeal***

13 Set-off after commencement of winding-up - Items 20 and 21

14 For convenience, we shall deal with items 20 and 21 before proceeding to item 17. The basic effect of GPLD`s winding-up is to vest its property in the liquidator. GPLD`s assets include, for liquidation purpose, all property

belonging to or vested in GPLD at the date of presentation of the petition for winding-up (see s 255(2) Companies Act (Cap 50)) or acquired by GPLD before dissolution. An amount standing to the credit of the customer`s account constitutes a debt owed to him by a bank. For the purposes of liquidation proceedings such a debt is deemed to be an asset due to the customer. The bank, however, is entitled to set off against the amount due to the customer any amount due to the bank from him, such as a sum accrued on an overdraft. This right of set-off, also known as the right to combine the customer`s accounts, exists precisely because, despite the various accounts, the whole is treated as one account. The balance which remains payable to the customer has to be paid over by the bank to the liquidator. Thus it is crucial that, in insolvency set-off, the mutuality must be present prior to the commencement of winding-up.

15 An instructive case dealing with insolvency set-off is that of ***MS Fashions Ltd & Ors v Bank of Credit and Commerce International SA (in liq) & Ors (No 2)*** [1993] 3 All ER 769. There Hoffman LJ gave a lucid exposition as to the principles governing set-off in companies` liquidation. Though the principles were in reference to the English Insolvency Rules, the principles enunciated are helpful. His Lordship, at p 775-776, stated as follows:

> *Insolvency set-off has been a creature of statute since the time of Queen Anne (4 & 5 Anne, c 17, s 11). The current provision applicable to companies is r 490 of the Insolvency Rules 1986, SI 1986/1925:*
>
> *`(1) This Rule applies where, before the company goes into liquidation there have been mutual credits, mutual debts or other mutual dealings between the company and any creditor of the company proving or claiming to prove for a debt in the liquidation.*
>
> (2) An account shall be taken of what is due from each party to the other in respect of the mutual dealings, and the sums due

> from one party shall be set off against the sums due from the other …
>
> (4) Only the balance (if any) of the account is provable in the liquidation. Alternatively (as the case may be) the amount shall be paid to the liquidator as part of the assets.`
>
> *This language is substantially the same as that used in earlier bankruptcy statutes going back to the Bankruptcy Act 1869. Between the Supreme Court of Judicature Act 1975 and the Insolvency Rules 1986, the bankruptcy rule was also applied in company liquidations.*

16 Certain principles as to the application of these provisions have been established by the cases. First, the rule is mandatory (the mandatory principle). If there have been mutual dealings before the winding-up order which have given rise to cross claims, neither party can prove or sue for his full claim. An account must be taken and he must prove or sue (as the case may be) for the balance. Secondly, the account is taken as at the date of winding-up order (the retroactivity principle). This is only one manifestation of a wider principle of insolvency law, namely, that the liquidation and distribution of the assets of the insolvent company are treated as notionally taking place simultaneously on the date of the winding-up order (see Oliver J in ***Re Dynamics Corp of America*** [1976] 2 All ER 669 at p 673, [1976] 1 WLR 757 at p 762). Thirdly, in taking the account, the court has regard to events which have occurred since the date of the winding up (the hindsight principle). The hindsight principle is pervasive in the valuation of claims and the taking of accounts in bankruptcy and winding up. A good example of the principle being applied outside the context of set-off is ***Re Northern Counties of England Fire Insurance Co, Macfarlane`s Claim*** (1880) 17 Ch D 337 in which the value of a claim under a fire insurance policy was determined by reference to the loss suffered in a fire which occurred a month after the insurance company had been wound up.

17 In so far as the local position is concerned, s 41(1) of the Bankruptcy Act (Cap 20) 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.*

18 Section 41(1) is made applicable to a company`s winding-up by virtue of s 327(2) of the Companies Act, which states:

> *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 inrelation 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.*

19 Section 255 of the Companies Act (Cap 50) states:

> *(1) Where before the presentation of the petition a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution, and, unless the Court on proof of fraud or mistake thinks fit otherwise to direct, all proceedings taken in the voluntary winding up shall be deemed to have been validly taken.*
>
> *(2) In any other case the winding up shall be deemed to have commenced at the time of the presentation of the petition for the winding up. [Emphasis added.]*

20 For our purposes here, we thought we should highlight the point that under the retroactivity principle, the relevant date is the date of presentation of

the petition for winding-up as opposed to the date of the winding-up order under the English position.

21 Focusing on items 20 and 21, it was clear from the schedule of funds that they came from the following sources:

> (1) Funds from deposit earmarked to pay outstanding maintenance charges from sale proceeds of Hotel;
>
> (2) Funds from deposits on excess provision in Final A/C for maintenance charges, legal costs/expenses and property tax rebate.

22 At the hearing before us, two facts became apparent with regard to the deposits. Firstly, it was not in dispute that the deposits were earmarked by the respondents ***unilaterally*** . Secondly, it appeared that such sums were earmarked precisely because the respondents contended that they had to discharge their obligations pursuant to s 68 of the Land Titles Act. The maintenance charges payable under the Land Titles (Strata) Act (Cap 158), legal cost and property tax were all covered by s 68(1) Land Titles Act, and there was nothing before us to show otherwise. The subsection reads:

> *The money received by a mortgagee who has exercised his power of sale, after discharge of prior encumbrance 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 encumbrance, 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, on 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.*

23 To recall events as from the sale of the mortgaged property, what transpired thereafter was that having applied the sale proceeds to pay off the syndicated loan, all the remaining funds continued to be held on trust by the respondents. The respondents then earmarked certain funds by placing them into two deposits accounts (items 20 & 21) to pay off creditors in accordance with their obligations under s 68 of the Land Titles Act. These funds in the deposit accounts were never released to GPLD, the mortgagor. After the creditors were paid off, excess funds were discovered and these leftover sums in the two deposit accounts were used for set-off.

24 It is of course not in dispute that if mutuality existed before the winding-up, the actual set-off could occur after liquidation. But to determine the issue of mutuality, it is necessary to ask to whom did these excess provisions in the deposit accounts belong? Where does the beneficial ownership in the surplus lie? Evidently, the excess funds did not belong to the respondents since they had already discharged their secured syndicated loan. Turning to s 68 Land Titles Act, it is clear that a mortgagee is a trustee of the proceeds of sale. But for whom? From a reading of the section, it would appear that he could be a trustee for all the subsequent encumbrancers coming after him (see ***Re Thomson`s Mortgage Trusts*** [1920] 1 Ch 508) or perhaps a trustee for the mortgagor, subject to his duties to apply the surplus funds in a certain way in accordance with priority. We were of the view that the answer to the question was immaterial to our present case. However, the latter position seemed to have been taken by counsel and hence the trust argument. We think that whether the surplus funds were held for the mortgagor or all subsequent encumbrancers, one

position is undoubted and it is this: the proceeds of sale were held on trust but the right of the mortgagor to any residue will only crystallize or, to phrase it in another way, the beneficial interest will only become clear and ascertained ***after*** all prior encumbrancers are paid. This is part of the wider principle that for mutuality to exist, two conditions must generally be satisfied. First, each claimant must be personally liable for the debt he owes to the other claimant. Mutuality sees through to the real beneficial ownership, regardless of who is the legal, nominal, titular or procedural holder of the claim or procedurally the appropriate plaintiff. Secondly, each claimant must beneficially own the claim which is owed to him by the other claimant and his ownership interest in that claim must be clear and ascertained without inquiry.

25 The second condition is most pertinent to our present case. We think that the most obvious rationale for this condition is that there must be no real risk of one person`s claim being used to pay another`s liability: see ***Jones v Mossop*** (1844) 3 Hare 568; 67 ER 506 at p 574. This rationale also forms the underlying principle on which mutuality is based. A set-off might involve the use of property to pay a debt where that property or part of it was allocated to the payment of prior creditors or to the payment of other beneficiaries, as under a mortgage trust. The following case, though not involving a mortgage trust, is illustrative of this rationale. In ***Bishop v Church*** (1748) 3 Atk 691; 26 ER 1197, a beneficiary of a will trust owed a loan to a bank and the bank in turn owed a credit balance to the trustee of the trust in which the beneficiary had an interest. As the estate was not fully administered, it was held that there could be no set-off because, if the bank were to set off the beneficiary`s loan against the credit balance, this might involve the credit balance being used to pay the beneficiary`s private loan in circumstances where the credit balance, or part of it, should be allocated to the payment of creditors entitled to pari passu payment out of the

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trust fund and to otherbeneficiaries. The size of the interest of the beneficiary in the credit balance would only appear on completion of the administration of the estate when all prior creditors and other beneficiaries had been paid (also see ***Re Willis Percival & Co, ex p Morier*** [1879] 12 Ch D 491 and ***Phillips v Howell*** (1901) 2 Ch 773). The same rationale could also apply, ***mutatis mutandi*** , to the present case of a mortgage trust. The mortgagor, GPLD, had a beneficial interest in the proceeds of sale which only became clear and ascertainable after all the relevant payments were made. It was only at this point that mutuality could exist. In the event that no surplus was left thereafter, then no interest would ever crystallize.

26 We were aware of a possible argument that if the mortgagee had, right at the beginning, taken an account and set aside all the relevant payments which were due to each encumbrancer such that the residue was clear and ascertainable, then it might be said that though the act of a physical transfer of the money had yet to be carried out, the mortgagor`s right to the residue had already crystallized. The basis of such an argument would be that there was no risk of a person`s property being used to pay another`s debt. However, we did not have to decide this point on the facts presented before us. It was obvious that the respondents were uncertain as to how much residue would remain. They had merely set aside deposits to meet certain payments without knowing the precise amount that was owing, hence the excess provision. This necessarily meant that the residue also could not be ascertained clearly. So long as the residue was unascertained or unclear, there could be no set-off.

27 Proceeding on the principles stated above, there could only be two possible outcomes with regard to the ownership of these excess funds under s 68 Land Titles Act. The first possibility was that after paying the creditors under

items 20 & 21, the respondents were under a duty to pay the next creditor in line, in accordance with their priority by virtue of s 68 Land Titles Act. During the hearing, counsel contended that the respondents did not know how much moneys would be required to pay the creditors under items 20 and 21, so they simply earmarked a lump sum for them. In the event of any leftover funds, these would be reconsolidated and used to pay the next creditor in line, if any (it was not in evidence whether there was a creditor in line). Assuming that there was another creditor in line under s 68 Land Titles Act, then such sums could not be subject to set-off because GPLD`s right to any excess provision had yet to crystallize. There was clearly no mutuality since a debtor and creditor relationship did not even exist. In fact, if such sums were used by the respondents to set-off their own debts, they would be acting in breach of trust. Thus the respondents were under an obligation to ensure that all parties under s 68 Land Titles Act were paid in accordance with their priority and the remaining surplus, if any, would be returned to the mortgagor (GPLD). It was only at this point that the respondents could exercise any right of set-off, subject to the pari passu principle if it should apply. On this possibility, any set-off was invalid.

28 The second possibility was that if there were no subsequent encumbrancers, the excess funds in the two deposit accounts would belong to GPLD in accordance with s 68 Land Titles Act. Of course by this time, GPLD was already wound up and any residue would now belong to the liquidators instead. All along, the proceeds of sale were held on trust by the respondents. Counsel from both sides submitted various cases to support their proposition as to whether such trustmoneys could be subject to set-off by the respondents. Without even going through the authorities and assuming that such trust moneys were indeed capable of being set-off as contended by the respondents` counsel and that GPLD was the sole beneficiary to the residue, this still did not affect

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the position that GPLD`s interest in such trust moneys, on the facts here, only became clear and ascertainable after the commencement of the winding-up when the creditors in items 20 and 21 were paid. From the schedule of funds, it was evident that the excess provision became available after commencement of winding-up on 5 September 1989 and 26 September 1989. Prior to winding-up, no such ascertained interest existed.

29 In our opinion, once it was established that GPLD did not have a clear and ascertained interest in the surplus funds under items 20 and 21 before the commencement of winding-up, the matter was not so much whether trust moneys could be set-off. Rather, the issue to consider was when such an interest crystallized. And when it finally did, was it too late for a right of set-off to exist? In particular, we were concerned as to whether the surplus funds, when it crystallized, would vest in GPLD or the liquidators since this was an issue that went towards mutuality. The right of set-off cannot encompass amounts paid to the credit of the insolvent customer`s account after the commencement of the winding-up. Such amounts are not funds deposited to the credit of the bank`s customer but are funds belonging to the liquidator (see ***Re West Bay Sales Ltd*** (1979) 30 CBR (NS) 274 at p 280). In ***Re DW McIntosh Ltd v Royal Bank of Canada*** [1940] 3 DLR 782 at p 785, the following was reported:

> *Certain payments deposited in the bank since 3 December 1938 (date of bankruptcy), amounting to $1,329.81 remained to be considered. These sums had been paid to the bank between 3 December and 12 December instead of to the interim receiver who had been appointed by order of the registrar on the earlier date. No notice of the appointment had been given to the bank until 12 December, after which date the bulk of the above sum was deposited, the sum of $344.87 being deposited on 3 December, but whether before or after the petition for a receiving order was made did not appear. The judge said he would not charge the bank for the smaller sum but only for those sums deposited after notice of appointment of an interim receiver was given. The bank would therefore have to refund the sum of*

> *$984.94 to the trustee. The bank knew of an available act of bankruptcy upon receiving notice of the appointment of the interim receiver, as required by s 65 of the* ***Bankruptcy Act****.*

30 Likewise in ***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. No set-off was allowed due to the lack of mutuality as the debtor was indebted to the creditor and the creditor to the trustee in bankruptcy. Had the mortgage been realized before the bankruptcy, that would have made all the difference. Smily J held, at p 520-521, as follows:

> *With respect to the second issue, whether United [the chattel mortgagee] is entitled to apply any surplus realized from the sale of equipment covered by either or both of the chattel mortgages against the unsecured account owing to it by Piscione, this, of course, depends on whether United is entitled to set-off any surplus against the unsecured account. There does not appear to be any question apart from the rule of set-off, that United would not be entitled to apply such surplus against the other account. For such right of set-off to apply, there must of course be mutuality of debts. In the instant case this does not exist. At the time the trustee is entitled to receive the surplus from United, there is no indebtedness to be set off. The trustee is not indebted to United.*

31 The cases referred to by counsel for United were all cases where the mutual debt arose before the assignment in bankruptcy, including the case of ***Stephens v Boisseau*** (1896) 26 SCR 437, much relied upon by said counsel. ***Under the Bankruptcy Act, RSC 1952 (c 14) s 41(5), all the property of Piscione, the chattel mortgagor vests in the trustee and this of course would include any equity in the property covered by the chattel mortgage. So that while the unsecured account of United was against the estate of the bankrupt and not against the trustee, the indebtedness of United was a debt to the trustee. There is therefore no mutuality of debts, so the right of set-off does not apply and United was not entitled to apply any surplus realized from the***

sale of the equipment covered by either or both of the chattel mortgages against the unsecured account owing to it by the bankrupt. The liability or debt of United for the surplus did not arise until after the bankruptcy, which distinguishes it from the case of ***Stephens v Boisseau*** and other cases mentioned by counsel for United. [Emphasis added.]

32 We did not see how our present case was any different. The right of set-off can only apply to amounts paid to the credit of the account before the commencement of winding-up but not to those after. The rationale for this, as explained earlier, is that at the date of the commencement of the winding-up, these funds did not represent a credit in the customer`s account with the bank. Hence they did not form part of the customer`s assets. Consequently, even assuming that trust moneys could be subject to a set-off, no account could be taken of the excess provision in items 20 and 21 because these sums could not be regarded as part of GPLD`s assets. Prior to the commencement of winding-up, GPLD only had an unascertained interest to such excess provision. When such an interest finally became ascertainable so as to be regarded as part of GPLD`s assets, it was already after winding-up. It was, therefore, too late for a right of set-off to exist. No mutuality could exist because the debt owing to GPLD arose after its liquidation. The debt (ie the residue) owed by the respondents was to the liquidator whereas the unsecured debt of the respondents was against GPLD. Since there was no accrued right of set-off, the set-off effected after winding-up was invalid. Besides, to allow a set-off now would represent a circumvention of the pari passu principle, bearing in mind that these debts owed by GPLD to the respondents were unsecured.

33 On both possibilities, the set-offs under items 20 and 21 were invalid.

34 Set-off before commencement of winding-up - Item 17

35 The basic relationship between banker and customer is that of a debtor and creditor: see ***Foley v Hill*** (1848) 2 HL Cas 28; 9 ER 1002). This relationship governs all accounts of a customer regardless of their type, despite the slight variations in the rights of the parties in different types of accounts. As there is only one contract of banker and customer, when the bank becomes the customer`s creditor it can exercise a right of set-off as regards mutual dealings with him. This fundamental position was stated by James LJ in ***Re European Bank, Agra Bank Claim*** (1872) LR 8 Ch App 41 at p 44 where he emphasized that it would be wrong to treat three different accounts as `distinct matters`:

> *It was only for convenience that the loan account was kept separately ... . In truth, as between banker and customer, whatever number of accounts are kept in books, the whole is really but one account, and it is not open to the customer, in the absence of special contract, to say that the securities which he deposits are only applicable to one account.*

36 Thus, despite the various accounts held by GPLD, there was in essence only one account and this right to combine all the accounts existed at common law, irrespective of whether there was a set-off agreement or not. The set-off agreement merely reaffirmed this right which already existed at common law. In any case, the banker`s right to set-off is further entrenched under s 41 Bankruptcy Act by virtue of s 327(2) Companies Act. This right of set-off is only qualified by three exceptions (see ***Greenwood Teale (T & H) v William Williams, Brown & Co*** (1894) 11 TLR 56):

> (1) the right to combine would be abrogated by a special agreement;
>
> (2) it would be inapplicable where a special item of property was remitted to the bank and appropriated for a given purpose (also

> see ***Re Pollitt, ex p Minor*** [1893] 1 QB 455; ***Re City Equitable Fire Insurance Co Ltd (No 2)*** [1930] 2 Ch 293);
>
> (3) a bank could not combine a customer`s private account with one known to the bank to be a trust account or to be utilized for operations conducted by the customer as trustee.

37 Taking events from the sale of the property by the mortgagee (the respondents) under its power of sale, part of the proceeds of sale was used to pay off the syndicated loan in full in the first instance, in accordance with s 68 (1)(b) Land Titles Act. Thereafter, all surplus funds continued to be held on trust by the respondents. Therefore, it was clear that even if s 68 Land Titles Act was not in existence to create an express trust, such a trust would in any event be implied.

38 There is no doubt that a bank may combine two current accounts at any time without giving notice to the customer, even if the accounts are held at different branches (see ***Halesowen Presswork & Assemblies Ltd v National Westminster Bank Ltd*** [1971] 1 QB 1 at p 34). But where it involves a combination of a current account and a loan account, the position would depend on whether there had been notice with regard to the combination of accounts. It would be useful to refer to Lord Cross`s House of Lords judgment in ***Halesowen*** `s case [1972] AC 785 at p 809 where his Lordship said the following:

> *If a banker permits his customer to have two accounts, one - sometimes called a `loan account` - which records the indebtedness of the customer to the bank in respect of advances made to him and the other a current account which the customer keeps in credit and uses for the purpose of his trade or business or ordinary expenditure, then, unless the bank makes it clear to the customer that it is retaining the right at any moment to apply the credit balance on the current account in reduction of the debt on the loan account, it will be an implied term of the arrangement that the bank will not, so long as it lasts, consolidate the two accounts. As Scrutton LJ pointed out in* ***Bradford Old Bank Ltd***

> ***v Sutcliffe*** *[1918] 2 KB 833, at p 847, unless such a term is implied no customer could feel any security in drawing a cheque on his current account if he had a loan account greater than the credit balance on his current account.*

39 On the facts here, we concluded that notice was not a problem. From item 3 of the schedule of funds, it was clear that as early on as 30 March 1989, proceeds from the mortgagee`s sale were credited into the current account (No 30035-0081-01-5) to enable consolidation of available funds to be applied against GPLD`s outstanding bridging loans. So even before the set-off on 13 June 1989, GPLD already had notice that its moneys in the current account were used to set off debts owed under the bridging loan account. In fact, on 10 March 1989, a part of the mortgagee salesurplus funds in the amount of S$2,239,006.13 was credited into GPLD`s bridging loan account for the purpose of set-off. Besides, under the set-off agreement and the settlement agreement made in April 1989, it was evident that funds would to be placed in an account of GPLD for the purpose of setting-off any debts due to the respondents. Thus there was nothing to suggest that GPLD was unaware that the respondents were using proceeds from the mortgagee`s sale to set-off the debt owed in the bridging loan account.

40 From the schedule of funds, it was evident that item 17 which formed part of the disputed sum in the present appeal, came from excess provision on claims by Charming Garden & Kingrich. Significantly, item 17, in the amount of $28,744.98 was part of the credit balance in GPLD`s current account (No 30035-0081-01-5) with the respondents. Hence this amount was a debt owed by the respondents as bankers to GPLD as customers. Prima facie, it seemed that this sum could be used to set-off the debt owed under the bridging loans. However, as can be recalled, we have earlier stated that the residue would only become clear and ascertainable when the creditors under items 20 and 21 were

paid. Even then, we were assuming that there were no subsequent encumbrancers. We were of the view that although this amount of $28,744.98 was credited into GPLD`s current account, these moneys were not unquestionably theirs. If GPLD had any entitlement to this sum, it was because it might form part of the residue eventually but as at the date of set-off, the residue was still unascertainable and did not belong to GPLD. In ***Arab Banking Corp v United Overseas Ltd*** [1991] 2 MLJ 84 , a similar issue arose before this court. There sums were due and payable to the respondents under a guarantee. The mortgaged property was sold by the respondents with surplus funds left from the sale. LP Thean J, at p 91, held the following:

> *...the last issue, namely, whether the respondents were entitled to set [off] the amount owing by Sng [the bankrupt] against the surplus proceeds of sale does not arise.* ***The respondents at the date of completion became obliged to hold the surplus amount in trust for the appellants; that amount does not belong to Sng and no question of any set-off arises.*** *[Emphasis added.]*

41 Likewise, GPLD`s right to the sum of $28,744.98 had not crystallized. This amount did not belong to it. Hence there was no mutuality and the set-off was invalid.

42 ***Conclusion***

43 For the reasons stated above, all the set-offs effected were invalid. Accordingly, we would allow this appeal with costs here and below. The orders below are set aside.

Good Property Land Development Pte Ltd (in liquidation) v Societe-Generale [1996] SGCA 25

Goh Joon Seng J
Lai Kew Chai J
Yong Pung How CJ

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

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