Koh Lin Yee *v* Terrestrial Pte Ltd and another appeal
[2015] SGCA 6

Case Number	: Civil Appeals Nos 98 and 157 of 2013
Decision Date	: 23 January 2015
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; Judith Prakash J
Counsel Name(s)	: Govindarajalu Asokan (Gabriel Law Corporation) for the appellants; Thio Ying Ying and Tan Yi Yin Amy (Kelvin Chia Partnership) for the respondent.
Parties	: Koh Lin Yee — Terrestrial Pte Ltd

Civil Procedure – Summary Judgment

[**LawNet Editorial Note**: The decision from which this appeal arose is reported at [2014] 1 SLR 985.]

23 January 2015

Andrew Phang Boon Leong JA (delivering the grounds of decision of the court):

1 These were two appeals which arose from an application by the respondent, Terrestrial Pte Ltd ("Terrestrial"), for summary judgment against the appellants, Koh Lin Yee ("Koh") and Allgo Marine Pte Ltd ("Allgo") (collectively, "the Appellants"). The application was granted by an assistant registrar and was subsequently affirmed by the High Court Judge ("the Judge") in Registrar's Appeal No 101 of 2013 ("RA 101/2013"). The grounds of decision can be found at *Terrestrial Pte Ltd v Allgo Marine Pte Ltd and another* [2014] 1 SLR 985 ("the GD").

2 Before us, the Appellants mounted the same four arguments it had presented before the Judge, and did so with equally little success: we dismissed the appeals for much the same reasons as the Judge, and fixed the costs of the appeals as well as two summonses at $28,000, including disbursements.

3 In disposing of the case below, however, the Judge made certain observations on an important point of law, *viz*, whether a contractual clause excluding a right of set-off is capable of being subject to the requirement of reasonableness in the Unfair Contract Terms Act (Cap 396, 1994 Rev Ed) ("the UCTA"). It had been held in the earlier Singapore High Court decision of *Gao Bin v OCBC Securities Pte Ltd* [2009] 1 SLR(R) 500 ("*Gao Bin*") that such a clause would fall *outside* the ambit of the UCTA because it was not a clause that excluded or restricted liability, and therefore could *not* be subject to the reasonableness test; the Judge *disagreed* with *Gao Bin* on this point and thought that such a clause should in fact be subject to the UCTA. There was thus a difference of opinion on this point of law. Therefore, although this issue did not, strictly speaking, arise for decision before us as the appeals could be and were dismissed for other reasons, we thought it appropriate to not only amplify the reasons for our decision on the appeals but also, for the sake of clarity, set out our views on the aforementioned point of law.

Background

4 Koh is the sole director of, and owner of all but one share in, Allgo. By an agreement dated 25 May 2009, Allgo agreed to sell to Terrestrial a flat top barge for $1.2m. Terrestrial paid Allgo in full,

but Allgo failed to deliver the barge as it had, in turn, failed to pay its barge builder an outstanding balance of $350,000. By an agreement dated 3 January 2011 ("the Loan Agreement"), Terrestrial agreed to make two short term loans to Allgo of $300,000 and $50,000 so as to enable Allgo to pay its builder the outstanding sum. Koh also agreed unconditionally to guarantee Allgo's obligations to repay the two loans. Terrestrial later agreed to give a further loan of $56,000 ("the Additional Loan") to Allgo in relation to another vessel purchased by Terrestrial from Allgo. These three loans were all expressed to have become due and payable by certain stipulated dates; and it was not disputed that Allgo failed to repay any of these monies when they became due and payable. On 1 July 2011, Terrestrial served a letter of demand upon Allgo for the payment of the monies due and payable pursuant to the Loan Agreement and the Additional Loan. On 11 July 2011, Terrestrial served a letter of demand upon Koh for payment pursuant to the guarantee given in the Loan Agreement. The loans and the guarantee remained unpaid.

5 In its pleadings, Allgo accepted that the loans had become due and payable, but were unpaid. In their case on appeal, counsel for the Appellants, Mr Govindarajalu Asokan ("Mr Asokan") even went so far as to characterise Allgo's failure to pay the $350,000 under the Loan Agreement as done "[w]rongfully and in breach" of it. The Appellants' defence, instead, was that it was Terrestrial who had failed to pay monies owed under a separate contract with Allgo for the sale and purchase of a tug ("the Tug Contract"), and that this failure put the Appellants out of cash to repay the loans. The Appellants claimed that Terrestrial could not be permitted to benefit from its own breach of contract and that they were entitled to set off the monies due under the Loan Agreement and the Additional Loan against the sum owed to them for the Tug Contract.

6 The key obstacle to this argument, and which became the focus of the dispute in the present appeals, was cl 12.2 of the Loan Agreement ("cl 12.2") which reads as follows:

> All payments to be made by [Allgo or Koh] under the [Loan Agreement] shall be made *without set-off, counterclaim* or condition… [emphasis added]

7 Terrestrial subsequently took out Summons No 418 of 2013 for summary judgment against the Appellants for the outstanding monies. The claim for the monies due and payable under the Loan Agreement was against both the Appellants jointly and severally, whilst the claim for the monies owing under the Additional Loan was against Allgo. The assistant registrar granted summary judgment on 18 March 2013, and the Appellants appealed to the Judge *vide* RA 101/2013.

Decision below

8 The Judge was satisfied that Allgo had established a *prima facie* case for summary judgment as it was not disputed that the Appellants did not repay any part of the monies disbursed under the Loan Agreement or the Additional Loan. The Appellants thus had to establish a fair or reasonable probability that they had a real or *bona fide* defence, and this the Judge held they had failed to do.

9 The Appellants first argued that there was a right of equitable set-off arising from Allgo's breach of the Tug Contract. The Judge was of the view that the relevant clause, cl 12.2 (reproduced above at [6]), explicitly excluded the right to raise a set-off or counterclaim through the words "without set-off"; and those words were broad enough to encompass *both* legal *and* equitable set-offs.

10 The Appellants' second argument was that the defence of equitable set-off operated in the present proceedings as a rule of equity and therefore prevailed over any rule of the common law, pursuant to s 4(13) of the Civil Law Act (Cap 43, 1999 Rev Ed). The section states as follows:

> Generally in all matters not particularly mentioned in this section, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.

The Judge, however, found that there was no conflict between the rule of equity and common law such that s 4(13) had to be invoked, and that Mr Asokan had not in fact identified any such conflict. Section 4(13) also did not prohibit the contractual exclusion of the defence of equitable set-off.

11 The Appellants' third argument was that cl 12.2 was an unfair contract term within the meaning of the UCTA. This is an English Act which applies in Singapore (see below at [30]). The Judge found that the UCTA did not apply as the Appellants had failed to fulfil the prerequisites stated in s 3(1) of the UCTA of either "dealing as consumer" (see below at [19]) or contracting on Allgo's written standard terms of business. The Judge proceeded to observe that even if the UCTA did apply, cl 12.2 was a reasonable one and therefore did not fall foul of the UCTA.

12 Finally, the Appellants' fourth argument was that Terrestrial had taken advantage of its own wrong in relation to the Tug Contract. Mr Asokan argued that the Appellant's impecuniosity was caused by the failure of Terrestrial to take delivery of a tug pursuant to the Tug Contract, and hence Terrestrial could not rely on that wrong to pursue a claim under the Loan Agreement. The Judge, however, found that the Tug Contract was a separate agreement, and the principle which Mr Asokan had sought to rely upon applied only to obligations under the same contract. Further, Allgo was not relying on the alleged breach of the Tug Contract to escape its obligations under the Loan Agreement as well as the Additional Loan. In his view, there was also "considerable doubt" (see the GD at [25]) as to the validity and enforceability of the Tug Contract. Also, as the Tug Contract was allegedly breached before the Loan Agreement was signed, the Appellants would, in any event, have been cognisant of the breach *before* signing the Loan Agreement in its present form.

13 The Judge accordingly dismissed the appeal as he found that there had not been a fair or reasonable probability of a real or *bona fide* defence.

The Appellants' arguments

The first, second and fourth arguments

14 The Appellants appealed against the Judge's decision and, effectively, made the same arguments they had mounted below again before us. For convenience, we will therefore refer to these arguments as numbered in the same order in which they were made before the Judge. From their submissions, we could only discern that further arguments were being made in relation to the third argument concerning the application of the UCTA. At the hearing, however, Mr Asokan focused on the first argument: that the equitable set-off had not been excluded by cl 12.2.

15 In respect of the first argument, we did not accept the Appellants' position that there was a right of equitable set-off arising from Allgo's breach of the Tug Contract. In accordance with the principle of the freedom of contract, it must be understood that parties can agree to contract out of the right of set-off and, if they intend to do so, clear words must be used. The defence of an equitable set-off can thus, equally, be contractually excluded. Whether or not the words in the contract amount to an exclusion of the right to set-off is thus a matter of interpretation, and much would turn on the actual wording and construction of the relevant clause itself (see generally Rory Derham, *Derham On The Law of Set-Off* (Oxford University Press, 2010) ("*The Law of Set-Off*") at paras 5.95–5.96; *Gilbert Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 at 717; *Coca-Cola Financial Corp v Finsat International Ltd and others* [1998] 1 QB 43 at 52; as well as

Elizabeth Macdonald, *Exemption Clauses and Unfair Terms* (Tottel Publishing, 2nd ed, 2006) ("*Exemption Clauses and Unfair Terms*") at pp 77–79).

16 As explained in *The Law of Set-Off* (at para 5.95), the general common law principle is one based on commercial logic and common sense as well as on giving effect to the agreement that the parties have signed; in the words of the learned author:

> It may be important for cash flow reasons that a party should receive payment in full under a contract so that, if the other party has a cross-claim which otherwise would give rise to an equitable set-off or a common law defence of abatement, that other party should not be entitled to rely upon it as a justification for tendering a reduced amount, but should be required to seek his or her remedy in separate proceedings. …

17 Looking at the words of cl 12.2, we did not see how they could be interpreted to refer only to legal set-offs and not equitable ones. In our view, cl 12.2 excluded *all* forms of set-off, with no distinction between the two. Mr Asokan argued that for an equitable set-off to be expressly excluded by the contract, the clause concerned had to state "without equitable set off". If this particular argument were correct, by parity of reasoning it would mean that for a legal set-off to be excluded, the clause would have to state "without legal set off" – an argument which we note Mr Asokan had not attempted to make. On the contrary, Mr Asokan's argument was, instead, based on the assumption that the words "without set-off" in cl 12.2 meant "without *legal* set-off". In our view, this was a pedantic as well as artificial argument that was wholly without merit, not least because it completely ignored the crystal clear language ("without set-off") utilised by the parties which evinced their equally crystal clear intention, as seen in the entire context of the agreement itself, to exclude all manner of set-offs, both legal and equitable. Indeed, Mr Asokan was *adding* to the words "without set-off" in cl 12.2 the word "legal" when the words "without set-off" were perfectly clear in stating what the parties had intended.

18 In respect of the other two arguments (*viz*, the second and fourth arguments), we agreed entirely with the Judge's reasons for rejecting them and therefore need say no more about these two arguments.

The third argument

19 In respect of the *third* argument, we set out for convenience the relevant provisions of the UCTA, *viz*, ss 3 and 12, which state, respectively, as follows:

> **Liability arising in contract**
>
> **3.** —(1) This section applies as between contracting parties where one of them deals as consumer or on the other's written standard terms of business.
>
> (2) As against that party, the other cannot by reference to any contract term —
>
> (*a*) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or
>
> (*b*) claim to be entitled —
>
> (i) to render a contractual performance substantially different from that which was reasonably expected of him; or

(ii) in respect of the whole or any part of his contractual obligation, to render no performance at all,

except in so far as (in any of the cases mentioned in this subsection) the contract term satisfies the requirement of reasonableness.

…

Dealing as consumer

12.

—(1) A party to a contract "deals as consumer" in relation to another party if —

(*a*) he neither makes the contract in the course of a business nor holds himself out as doing so;

(*b*) the other party does make the contract in the course of a business; and

(*c*) in the case of a contract governed by the law of sale of goods or hire-purchase, or by section 7, the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption.

(2) But on a sale by auction or by competitive tender the buyer is not in any circumstances to be regarded as dealing as consumer.

(3) Subject to this, it is for those claiming that a party does not deal as consumer to show that he does not.

20 The Appellants' third argument was that the Judge had erred in finding that they had not led any evidence on the fact that the Appellants were dealing "as consumer" *or* on Terrestrial's written standard terms as set out as legal prerequisites in s 3 of the UCTA read with s 12(1) and had thus erred in finding that the UCTA did not apply to cl 12.2. The Appellants submitted that they had fulfilled the requirements of s 3(1) of the UCTA: they were dealing "as consumer" as they were not represented at the time the Loan Agreement was signed and Terrestrial was engaged in financing or lending money to them; alternatively, the Loan Agreement contained standard terms of business.

21 For a party to be considered to be dealing "as consumer" within the meaning of the Act, s 12(1) of the UCTA requires, *inter alia*, (a) that a party neither makes the contract in the course of a business nor holds himself out as doing so, *and* (b) the other party does make the contract in the course of a business. These requirements are *cumulative* – a point that is of crucial importance in the context of the present appeals (as we shall see in the next paragraph). In this regard, having considered the parties' arguments as well as the case law, we did *not* accept that the Appellants were dealing with Terrestrial "as consumer".

22 Terrestrial on the other hand, argued that the Appellants, in obtaining a loan to pay off its outstanding liabilities to its shipyard, had carried out a transaction in the course of Allgo's business. Terrestrial relied on the construction of the phrase "in the course of business" in the leading English Court of Appeal decision of *R & B Customs Brokers Co Ltd v United Dominions Trust Ltd* [1988] 1 WLR 321 (at 330–331) where Dillon LJ read the phrase to mean that the transaction in question was a "clearly integral" part of the company's business, as opposed to being merely incidental to such

business. However, applying the case to the facts of the present case, we were of the view that obtaining a loan would be, at its highest, *merely incidental* to Allgo's carrying on of its business. In the words of Dillon LJ, a "degree of regularity" is required before a particular transaction, here the obtaining of a loan, could be considered a "clearly integral" part of the business. Whilst Terrestrial relied on some e-mails which showed that Allgo intended to obtain financing from banks, these were only expressions of intent and were *not* evidence of the *regularity* just mentioned. Thus, we were of the view that s 12(1)(*a*) was fulfilled. *However*, in our view, the requirement in s 12(1)(*b*) was *not* fulfilled as *Terrestrial* did *not* make the Loan Agreement and Additional Loan in the course of a business either. It could *not* be said in the current circumstances that the Loan Agreement and Additional Loan were *integral* to Terrestrial's business. Terrestrial was *not* in the business of making loans and there was no degree of regularity that demonstrated that Terrestrial had made loans in the course of its actual business of purchasing barges and boats. In truth, the loans constituted a one-off transaction for *both* parties. It was also incorrect to characterise Terrestrial as a money lender, as argued by Mr Asokan, because it was clearly *not* in that business. It was clear, therefore, that the Appellants were *not* dealing with Terrestrial "as consumer".

23 We note that the Appellants had stated that they were not represented when the Loan Agreement was made. This was an assertion that was strongly objected to by Terrestrial who referred us to some evidence that the Appellants might have been represented by a solicitor from Haridass Ho and Partners. However, even if the Appellants were in fact unrepresented, we did not think that the Appellants were in any way prejudiced in respect of the insertion of cl 12.2 in the Loan Agreement. Clauses like cl 12.2 are commonly found in agreements for loan facilities and, as an experienced businessman, Koh would have been aware of the implications of cl 12.2 before he and his company agreed to the terms of the Loan Agreement.

24 We note further that the Loan Agreement did not contain any standard terms of business within the meaning of s 3(1) of the UCTA either (reproduced above at [19]). Although the terms there can be commonly found in loan documents, that did *not* mean that the Loan Agreement was one drawn out on the respondent's written "standard terms of business". In the English High Court decision of *Hadley Design Associates Ltd v The Lord Mayor and Citizens of the City of Westminster* [2003] EWHC 1617 (TCC), this phrase was explained at [78] to mean a set of terms in the written form existing prior to the making of the agreement which was intended to be adopted more or less automatically in respect of all transactions of a particular type without any significant opportunity for negotiations. This was certainly not the case here. The Loan Agreement was drawn up *specifically* to deal with certain circumstances that had arisen, *ie*, Allgo was unable to pay for the flat top barge and Terrestrial was willing to assist in the financing of it. This was clearly reflected in the recitals to the Loan Agreement. The purpose of the loan was also limited to Allgo paying the builder the outstanding sum. The Loan Agreement and the Additional Loan had thus arisen out of the specific circumstances of the Appellants negotiating with Terrestrial for a loan to be given to them. Therefore, it could *not* be said that the terms were part of Terrestrial's "standard terms of business". Also, since Terrestrial was not in the business of lending money or making loan agreements, we found it questionable that cl 12.2 was characterised as a standard term of Terrestrial's business by the Appellants.

25 As such, the UCTA could not apply to the present circumstances as the Appellants did not fulfil the threshold requirements. Furthermore, this was an issue which did not need to be tried because the objective evidence and the undisputed facts bore the case out. Therefore, we upheld the Judge's decision that s 3 of the UCTA did not apply in relation to the Appellants' third argument.

26 Before arriving at his decision, the Judge also made some observations in relation to the legal status of clauses excluding a *set-off* under the UCTA. The Judge briefly analysed the English Court of Appeal decision of *Stewart Gill Ltd v Horatio Myer & Co Ltd* [1992] 1 QB 600 ("*Stewart Gill*") and its

application of ss 3 and 13 of the Unfair Contract Terms Act 1977 (c 50) (UK) ("the UK UCTA"). The Judge then referred to the Singapore High Court decision of *Gao Bin* which had considered *Stewart Gill* and its application of the UCTA to its own facts. The Judge disagreed with the interpretation of *Stewart Gill* in *Gao Bin* on the central question of whether the decision in *Stewart Gill* (to the effect that where the UCTA applied, a clause which excluded a *set-off* fell within the ambit of the UCTA and was therefore subject to the reasonableness test therein) was still good law in Singapore. Put simply, the Judge in the present case thought it was, whereas the court in *Gao Bin* did not. In light of the analysis proffered above, the resolution of this question is not, strictly speaking, necessary in the present appeals as we have disposed of them on the grounds stated above. However, as there are two conflicting Singapore High Court decisions on this point, we think it would be appropriate to set out our views as to which view is correct. Briefly, we are of the view that *Stewart Gill* is good law in Singapore. However, as we shall see, the various questions involved are not easy by any means and this perhaps explains the two diametrically opposed views adopted by the Judge in the court below and by the court in *Gao Bin*. That having been said, we now elaborate on why we accept *Stewart Gill* as being good law in Singapore as well as the legal consequences which flow as a result.

Excluding set-offs and the UCTA

The issue

27 The issue now under consideration is as follows: what is the legal status of excluding a *set-off* in a term of the contract? In particular, does such an exclusion fall within the ambit of the UCTA and is the clause therefore potentially subject to the reasonableness test contained therein?

28 Put simply, one view (which was, in the main, adopted in *Gao Bin*) is that such a purported exclusion merely *defines the contractual obligation* between the parties and therefore falls *outside* the ambit of the UCTA. Conversely, the opposing view (adopted by the Judge in the court below) is that such a purported exclusion restricts the rights and remedies of the party who would otherwise have been entitled to rely on the set-off and therefore falls *within* the ambit of the UCTA. The latter view was that adopted by the English Court of Appeal in *Stewart Gill* and that is the decision to which our attention must now turn. Before proceeding to do so, two important preliminary points ought to be made.

29 First, we are *assuming* that the clause concerned *clearly excludes* the right to a *set-off* in the first place. Whether or not the clause indeed has this effect to begin with turns on the *precise language of the clause itself* (see above at [15], especially *The Law of Set-Off* at paras 5.95–5.109). Secondly, even if *Stewart Gill* is good law in Singapore, we are also assuming for the purposes of the present analysis that the UCTA has otherwise been triggered; put simply, we are assuming that *all other prerequisites have been met*. In the context of the present case, this entails an assumption that, *per* s 3, one of the contracting parties deals "as consumer" or on the other's written standard terms of business; and the analysis in the first part of this judgment is a clear illustration of a situation where the necessary prerequisites with respect to s 3 were *not* satisfied. If, in fact, the relevant provision of the UCTA has *not* been proven to apply in the circumstances, then as we shall see below, the no set-off clause would ordinarily be upheld by the court in accordance with contractual principles. Because of these two assumptions, for the avoidance of doubt, we will henceforth refer to the *potential* (as opposed to the actual) application of the reasonableness test in the UCTA.

Stewart Gill

30 Before proceeding to consider the case proper, it might be appropriate to set out the relevant

provisions which were the focus in *Stewart Gill* itself, *viz*, ss 3 and 13 of the UK UCTA. The provisions of the UK UCTA are *in pari materia* with the provisions of our UCTA as we adopted it (with the necessary modifications) pursuant to our Application of English Law Act (Cap 7A, 1994 Rev Ed).

31 Section 3 of the UCTA has already been set out above (at [19]) and s 13 of the UCTA reads as follows:

> **Varieties of exemption clause**
>
> 13. —(1) To the extent that this Part prevents the exclusion or restriction of any liability it also prevents —
>
> (*a*) making the liability or its enforcement subject to restrictive or onerous conditions;
>
> (*b*) excluding or restricting any right or remedy in respect of the liability, or subjecting a person to any prejudice in consequence of his pursuing any such right or remedy;
>
> (*c*) excluding or restricting rules of evidence or procedure,
>
> and (to that extent) sections 2 and 5 to 7 also prevent excluding or restricting liability by reference to terms and notices which exclude or restrict the relevant obligation or duty.
>
> (2) But an agreement in writing to submit present or future differences to arbitration is not to be treated under this Part as excluding or restricting any liability.

32 In *Stewart Gill*, the plaintiffs agreed to supply and install an overhead conveyor system at the defendants' premises. The plaintiffs sought summary judgment against the defendants to recover the final 10% of the contract price for the conveyor system. The defendants resisted the application on the basis that it had a valid counterclaim for the plaintiffs' alleged breaches of the contract and that any restriction on its right of set-off imposed by cl 12.4 of the plaintiffs' general conditions of sale, to which the contract was subject, was rendered ineffective by the UK UCTA. Clause 12.4 of the plaintiffs' general conditions of sale stated as follows:

> The customer shall not be entitled to withhold payment of any amount due to the company under the contract by reason of any ***payment credit set off*** counterclaim allegation of incorrect or defective goods ***or for any other reason whatsoever which the customer may allege excuses him from performing his obligations hereunder*** . [emphasis added in bold italics and underlined bold italics]

33 The arguments by parties centred on the interpretation of the UK UCTA. The English Court of Appeal decided that s 13 of the UK UCTA, *as an extension of the scope of s 3*, subjected cl 12.4 to the reasonableness test in that Act. According to Lord Donaldson of Lymington MR, cl 12.4 excluded the defendants' *"right"* to set off their claims against the plaintiffs' claim for the price and further excluded the *"remedy"* which they would otherwise have of being able to enforce their claims against the plaintiffs by means of a set-off. In his view, this fell squarely within s 13(1)(*b*) of the UK UCTA. Furthermore, cl 12.4 also excluded or restricted the procedural rules as to set-off *per* s 13(1)(*c*) of the UK UCTA (see *Stewart Gill* at 606). According to Stuart-Smith LJ in a concurring judgment, cl 12.4 prevented the defendants from relying on the right of set-off and thus was an exemption clause for the purposes of s 3 of the UK UCTA.

34 Lord Donaldson admitted that the extension that s 13 of the UK UCTA effected with regard to

(in *Stewart Gill* itself) s 3 did not "leap out of the print and hit one between the eyes", but observed that a closer attention to the phrasing of s 13 (in particular, "[t]o the extent that this Part prevents the exclusion or restriction of any liability it also prevents") revealed that such an extension was indeed intended (see *Stewart Gill* at 605–606).

35 This led to the second (and closely related) issue in *Stewart Gill*: given the fact that cl 12.4 fell within the ambit of the UK UCTA and, hence, was subject to the reasonableness test in that Act, would the *whole* of that clause be subject to the reasonableness test *or* could it be *severed* for the purposes of applying this test? The court unanimously held that the *whole* of cl 12.4 was subject to the reasonableness test and that that clause could *not* be severed when considering the reasonableness test. The court then proceeded to find that the words "credit" and "payment" were *prima facie* unreasonable (see *Stewart Gill* at 606 and 608), and that the clause could potentially extend to a defence based on fraud (see *Stewart Gill* at 608). As the plaintiffs had argued for the severance of the clause and had failed to convince the court on that point, the court did not hear arguments about the reasonableness of the exclusion of the right of set-off, and cl 12.4 was thus rendered ineffective.

36 To recapitulate, the court in *Stewart Gill* held, first, that (where the UK UCTA applies) a clause excluding the other party's right to a *set-off* would fall *within* the ambit of the UK UCTA because of how ss 3 and 13 of that Act were interpreted. *However*, that clause would *not necessarily* be rendered unenforceable. It would be subject to the reasonableness test under the UK UCTA. In *Stewart Gill* however, the court held that the clause concerned (*ie*, cl 12.4) did *not* meet the requirement of reasonableness but this was, as we have seen, due to the fact that cl 12.4 did *not* exclude the defendants' right to a set-off *only*: cl 12.4 attempted to exclude "payment" as well as "credit" and as these parts could not be severed the court held that this rendered the *entire* clause unreasonable and hence unenforceable under the UK UCTA. Put another way, cl 12.4 might conceivably have been held by the court to have been *reasonable if* it had *only* excluded the defendants' right to a *set-off and no other right*. In a similar vein, Mance J (as he then was) observed thus in the English High Court decision of *Skipskredittforeningen v Emperor Navigation* [1998] 1 Lloyd's Rep 66 ("*Skipskredittforeningen*") (at 76):

> I n *Stewart Gill* the clause contained express provisions which were so wide and obviously unacceptable as to invite over-all rejection of the clause.

Reference may also be made, in this regard, to the English High Court decision of *United Trust Bank Limited v Dalmit Singh Dohil* [2011] EWHC 3302 ("*United Trust Bank Limited*") at [66] as well as the English High Court decision of *F G Wilson (Engineering) Limited v John Holt & Company (Liverpool) Limited* [2012] EWHC 2477 (Comm) ("*F G Wilson Engineering*") at [103] (reversed on appeal in *Caterpillar (NI) Ltd (formerly known as F G Wilson (Engineering) Ltd) v John Holt & Co (Liverpool) Ltd* [2013] 2 CLC 501 ("*Caterpillar*") without the court considering this particular point).

37 Admittedly, whether or not a clause is (or is not) reasonable under the UCTA would depend not only on the various factors enunciated in the UCTA itself as well as in the case law (which will be referred to below) but also (and perhaps most importantly) on *the precise facts* of the case itself. However, what *is* of the first importance in the context of the present discussion is whether or not the *first* holding in *Stewart Gill* (hereafter "the first holding") ought to be adopted in Singapore – *ie*, that *a clause seeking to exclude a party's right to a set-off falls within the ambit of the UCTA and is therefore potentially* (see above at [29]) *subject to the reasonableness test under the same*. At this juncture, it would be apposite first to turn to the subsequent treatment of *Stewart Gill* in England. We will then consider the persuasiveness (or otherwise) of *Stewart Gill* based on *general logic and principle*, before explaining why (as already indicated) *Stewart Gill* is indeed good law in Singapore.

We then turn to consider whether, on the facts of the present appeal, the clause concerned meets the requirement of reasonableness under the UCTA. *However*, before proceeding to do so, we should consider briefly the English Court of Appeal decision of *Continental Illinois National Bank & Trust Company of Chicago v Papanicolaou (The Fedora)* [1986] 2 Lloyd's Rep 441 ("*The Fedora*") – if nothing else, because the court in *Gao Bin* relied heavily upon it in arriving at its decision to the effect that *Stewart Gill* was *not* to be followed in the Singapore context.

A slight interlude – The Fedora

38 In *The Fedora*, the bank sued the defendants as personal guarantors for the indebtedness of the principal debtors under three loan agreements. It was not disputed that the amounts claimed were properly due from the defendants under their guarantees but the defendants contended that they had valid cross-claims for damages in respect of the loans on the ground that the bank had acted negligently in relation to one aspect of the loan agreements. In each loan agreement, it had been provided that all payments by the borrower were to be made "without set-off or counterclaim", while the guarantee documents provided that all amounts would be paid "full free of set-off or counterclaim" or "without set-off or counterclaim" (at 443).

39 The court rejected the argument that the clauses should be treated in the same way as exception or exclusion clauses and that they did not apply to claims by way of set off or counterclaim based on negligence. A no set-off clause *did not touch on liability at all* and was unlike an exclusion clause which purported to exclude liability altogether (at 444): "[t]he guarantors can still prosecute their claims to judgment. They are, if the clauses are effective, merely prevented from holding up payments admittedly due under the guarantees whilst disputed cross-claims are litigated." As was pertinently observed with regard to *The Fedora*, "[t]he debtor can still prosecute the cross-claim to judgment, but in a separate action" (see *The Law of Set-Off* at para 5.111). Therefore, a no set-off clause did not restrict or exclude the liability in the claim that the other party was seeking to rely on to set-off part of the present claim. The no set-off clause also did not restrict the other party from bringing a separate claim. The set-off clause thus simply defined the payment obligation in the contract.

40 The court in *The Fedora* considered closely the commercial purpose of the transaction which was that the bank would be paid quickly upon default by the borrower and the natural meaning of the words was that all set-offs and counterclaims were excluded (at 444). In effect, parties could agree to a no set-off clause in the agreement, and in this case it was interpreted as also covering no set-offs in relation to claims for damages for negligence.

41 At this juncture, a few important observations ought to be made. Although *The Fedora* had referred to – and rejected – the characterisation of a no set-off clause as an exclusion clause, that was in the context of the defendants' reliance on the general principle of interpretation that an exclusion clause should state clearly that which is sought to be excluded, and their subsequent attempt to argue, by analogy, that a no set-off clause should be construed with similar rigour. The key point is that the UK UCTA was *not expressly mentioned and*, a fortiori, *its applicability to the facts was also not canvassed*. Hence, the mention of "exclusion clauses" in the judgment in this particular decision *cannot* be taken to be a clear reference to the application and interpretation of the UK UCTA as such, and, in particular, when a clause is one that excludes or restricts any right or remedy in respect of a liability within the meaning of the UK UCTA. What *The Fedora* did hold is that parties can agree to include no set-off clauses in the contract that cover specific circumstances; and whether or not the clauses have such an effect is a matter of the construction and interpretation of the clause concerned. If the parties have indeed agreed to such a no set-off clause, the court is likely to give effect to the parties' intention and therefore give effect to it. Further, the no set-off

clause defines the payment obligation and *does not address* the issue of the *liability* of parties *in the cross-claim*. Thus, the holdings in *The Fedora did not impact* the issue which fell squarely for decision in *Stewart Gill*, *viz*, whether a no set-off clause could fall within the ambit of the UCTA and could therefore be subject to the reasonableness test therein.

42 Further, *The Fedora* was decided *before Stewart Gill* and (perhaps more importantly) *Stewart Gill* did *not* refer to *The Fedora* in analysing whether or not a no set-off clause did indeed fall within the ambit of the UCTA. This is not surprising in view of what *The Fedora* in fact decided (as set out briefly in the preceding paragraphs). Put simply, these were two cases dealing with *distinct* areas of the law.

43 Indeed, there is *no reason* in principle why *The Fedora* and *Stewart Gill* should be viewed as being *in opposition* to each other. Rather, *The Fedora* and *Stewart Gill* can be harmoniously interpreted and applied. As already mentioned above, *The Fedora* endorses the possibility of contractual inclusions of no set-off clauses, legal or equitable (see also, for example, the Singapore High Court decision of *Empire International Holdings Ltd v Mok Kwong Yue and another* [2004] 4 SLR(R) 820 at [13] (in which *The Fedora* is cited to this effect)), whereas *Stewart Gill* relates to the legal status of such clauses in so far as the UCTA is concerned. As we shall see below (at [48]), *The Fedora* has, in fact, been applied in cases concerning the reasonableness of no set-off clauses in the context of the UCTA, and there has been no criticism of such an application of *The Fedora* in the case law.

The subsequent treatment of Stewart Gill

In the textbooks

44 There has been *no discernible criticism* of the first holding in *Stewart Gill* in the major textbooks. On the contrary, it has been cited as good law (see, for example, *Exemption Clauses and Unfair Terms* at p 102; Richard Lawson, *Exclusion Clauses and Unfair Contract Terms* (Sweet & Maxwell, 10th ed, 2011) ("*Lawson*") at para 7.04; and *Chitty on Contracts* (Sweet & Maxwell, 31st ed, 2012) vol 1 at para 14-062).

In the English case law

45 Turning to the English case law, there has similarly not been any discernible criticism of the first holding in *Stewart Gill* either. On the contrary, the cases generally tend to *accept* the first holding in *Stewart Gill without more*. In, for example, in the English Court of Appeal decision of *Schenkers Ltd v Overland Shoes Ltd* [1998] 1 Lloyd's Rep 498 ("*Schenkers*"), Pill LJ noted thus (at 506):

> In *Stewart Gill Ltd.*, it was established, *and is not in dispute in this case*, that the effect of s. 13 of the 1977 Act, dealing with exemption clauses, is to apply s. 3 of the Act inter alia to "no set-off" clauses. [emphasis added]

46 And in the English Court of Appeal decision of *AXA Sun Life Services Plc v Campbell Martin Ltd* [2011] 2 Lloyd's Rep 1 ("*AXA Sun Life Services*"), Stanley Burnton LJ observed (at [52]) thus:

> In *Stewart Gill Ltd v Horatio Meyer & Co Ltd* [1992] 1 QB 600 the Court of Appeal held that a provision materially identical to [the clause under review] was within the scope of section 3 of UCTA as *extended by section 13. That decision is binding on us, even if I disagreed with it*, ***which I do not*** . The [clause under review] is valid only to the extent that it is reasonable. [emphasis added in italics and bold italics]

4 7 *Stewart Gill* has also been applied in other decisions (see, for example, the English High Court decision of *Electricity Supply Nominees Ltd v IAF Group Ltd* [1993] 1 WLR 1059 at 1063; the English Court of Appeal decision of *Fastframe Franchises Limited v Lohinski* (Unreported, 3 March 1993, transcript available on Lexis); *Skipskredittforeningen*; *United Trust Bank Limited* at [57]; the English Court of Appeal decision of *WRM Group Ltd v Wood & Ors* [1998] CLC 189 ("*WRM*") at 196; the English Court of Appeal decision of *Röhlig (UK) Ltd v Rock Unique Ltd* [2011] EWCA Civ 18 ("*Röhlig*") at [10]; as well as *F G Wilson Engineering* at [93] (reversed on appeal in *Caterpillar* but without considering this particular point); though *cf* the English Court of Appeal decision of *The Society of Lloyd's v Leighs* [1997] CLC 1012 ("*Society of Lloyd's*") at 1032 (which, however, was stated in *Lawson* (at para 7.04) as possibly turning on the "interpretation of the clause rather than an attack on the notion that s.13 did not apply to set-off clauses")).

48 It is also significant, in our view, that *The Fedora* has in fact been cited together with *Stewart Gill*, with no hint that they are inconsistent with each other. In fact, these cases have considered the reasoning in *The Fedora* to help in determining the reasonableness of the no set-off clause (see, for example, *Skipskredittforeningen*; *United Trust Bank Limited*; and *WRM*). Indeed, as we have already noted above (at [41]–[43]), there is no reason in principle why these cases are inconsistent with each other.

The consideration of Stewart Gill based on logic and principle

49 Whilst we acknowledge that a set-off (whether legal or equitable in nature) is (in and of itself) a separate cause of action, a clause seeking to exclude a set-off can, in principle, be viewed not only as defining the parties' contractual obligations but *also* as "excluding or restricting any right or remedy in respect of the liability [the party claiming or relying on the set-off is subject to]" within the meaning of s 13(1)(*b*) of the UCTA. We think that this is clear on a *literal* level. We note that, in *Stewart Gill*, the plaintiffs' counsel submitted that the various paragraphs of s 13(1) of the UK UCTA only applied to a situation where the clause concerned, by falling within one or more of the said paragraphs, "*indirectly* achieved the exclusion or restriction of liability which, *if achieved directly*, would fall within the scope of *other* sections" (see *Stewart Gill* at 605 [emphasis added]). However, the court in *Stewart Gill* rejected his argument and instead agreed with the defendants that s 13 had a wider scope.

50 We acknowledge that the plaintiffs' argument in *Stewart Gill* is not without force as it could also be argued that s 13(1) was intended to be a "definition section" of sorts and therefore has no substantive effect in itself and has instead to be read together with the previous substantive provisions. However, if we have regard to the general policy of the UCTA which tends, *ceteris paribus*, against the enforcement of exception clauses, there is no reason in principle why a clause excluding a set-off ought not to be at least potentially (see above at [29]) subject to the reasonableness test under the UCTA (reference may also be made to the approach adopted in the English Court of Appeal decision of *Johnstone v Bloomsbury Health Authority* [1992] 1 QB 333).

51 In this regard, the following observations by two joint authors, whilst made in a slightly different context (of exclusion of liability for negligence), might nevertheless also be usefully noted (see Lau Kwan Ho & Tan Ben Mathias, "Basis Clauses and the Unfair Contract Terms Act 1977" (2014) 130 LQR 377 at 381 (which was a comment on a decision of this court whose observations in relation to the application of the UCTA should also be noted (see *Deutsche Bank AG v Chang Tse Wen and another appeal* [2013] 4 SLR 886 at [60]–[68])):

> It is however impossible to overlook the fact that UCTA is designed to be a deliberate incursion into the freedom to contract. The intent appears to be to capture any and all attempts at

> exoneration from liability for negligence, even extending to clauses which would effectively prevent a duty of care from arising in the first place. … [T]he core of the matter really is that UCTA focuses on the ultimate *effect* of a clause, and so s.13(1) as framed appears to be simply unconcerned with whether the effective excision of a duty is deliberate or circumstantial, or whether the clause itself is definitional or exclusionary in nature. There is no sign in the *Second Report* [on Exemption Clauses] that ***s.13(1)*** was meant to be anything other than ***a broad scythe wrought in iron*** – although in retrospect this might have been a scythe that failed to appreciate the nuances of its potential targets. [emphasis in italics in original; emphasis added in bold italics]

52 Thus, because such a clause does have the effect of attempting to exclude or restrict any right of remedy in respect of that liability by way of a set-off pursuant to s 13(1)(*b*) of the UCTA, it could potentially (see above at [29]) be subject to the reasonableness test under the UCTA (as to which see generally *The Law of Contract in Singapore* (Academy Publishing, 2012) at paras 07.134–07.146).

Reasonableness of a no set-off clause

53 Turning then to the factors relevant to determining the reasonableness of a no set-off clause, such a clause is not one that is *ipso facto* irrational, let alone unreasonable. As the learned author of *The Law of Set-Off* points out at para 5.95, in a passage part of which we have already cited above at [16] but which is here repeated for convenience and further emphasis:

> It may be important *for cash flow reasons* that a party should receive payment in full under a contract so that, if the other party has a cross-claim which otherwise would give rise to an equitable set-off or a common law defence of abatement, that other party should not be entitled to rely upon it as a justification for tendering a reduced amount, but should be required to seek his or her remedy in separate proceedings. There is no ground of public policy which would preclude parties from agreeing to exclude defences of equitable set-off and abatement, including in relation to a cross-claim based on fraud. [emphasis added]

It is thus apparent that the commercial sense of entering into a contract with a no set-off clause is important in the consideration of the reasonableness of the clause. Reference may also be made to *Schenkers* (at 504, *per* Deputy High Court Judge Mr Geoffrey-Brice QC (at first instance)) and *Röhlig* (at [8]) which articulated similar reasoning. And, in *F G Wilson Engineering* (reversed in *Caterpillar* but without considering this particular point), Popplewell J observed (at [99]), as follows:

> (1) … [The defendant] was consistently one of [the plaintiff's] top ten customers between 2001 and 2010. This is a case in which it can fairly be said that the cashflow to be derived from payment of the price of products delivered to [the defendant]Liverpool *was a significant aspect of the cashflow forming the life blood of [the plaintiff's] business. It is reasonable and legitimate for [the plaintiff] to seek to protect that cashflow* with a no set-off clause.
>
> (2) The no set-off clause is not unusual. No set-off clauses *protecting a supplier's entitlement to the price of goods or services without deduction are common in many commercial contexts*. …
>
> (3) The no set-off clause is not particularly onerous in scope. *It is confined in its application to the payment of the price for the goods and services supplied; as such it seeks to protect [the plaintiff's] cash-flow.* By reason of the extended credit terms agreed between the parties, it would not bite until many months after delivery of the goods, and after the point at which[the

defendant] had had the opportunity to be paid by [the defendant's subsidiary] (and in at least some if not all cases, [the defendant's subsidiary] to be paid by its customers). I do not see anything essentially unfair or unreasonable in a seller in these circumstances requiring the buyer to pay in full, leaving any disputed cross claim to be resolved by subsequent negotiation or determination rather than being used as a ground to withhold payment of the undisputed price of goods which the buyer has received many months previously.

[emphasis added]

54 In relation to *the relevant factors* which could guide the court concerned in deciding whether the clause in question meets the requirement of reasonableness under the UCTA, regard may also be had by the court to Schedule 2 of the UCTA ("Schedule 2"). Although the guidelines for the application of the reasonableness test in Schedule 2 apply, strictly speaking, only to contracts covered by ss 6 and 7 of the UCTA, the case law has (correctly, in our view) adopted a commonsensical approach by holding that these guidelines can also be taken into account *generally* in applying the reasonableness test under the UCTA (see, for example, *Stewart Gill* at 608; *Schenkers* at 505; and *United Trust Bank Limited* at [61]).

55 In so far as the factor relating to the strength of the bargaining position of the parties is concerned, whether or not the party impugning the exception clause concerned is experienced in commercial matters is a significant factor which the courts will take into account. Put simply, a party who is experienced in commercial matters is not likely to have been at a significant disadvantage in so far as the relative bargaining positions of the respective parties are concerned (see, for example, *United Trust Bank Limited* at [62]).

56 In a similar vein, in *AXA Sun Life Services*, an important factor which led to the court finding that the clause concerned was reasonable was the fact that "the agreements were made between commercial organisations and in a commercial context" (see *AXA Sun Life Services* at [59]). Similarly, in *Schenkers*, the finding that the clause was in common use and well known in the freight trade following "comprehensive discussions between reputable and representative bodies mindful of the considerations involved" and that it reflected a general view as to what was reasonable in the trade concerned tilted the balance in favour of the reasonableness of the clause (see *Schenkers* at 507).

57 Separately, in *Skipskredittforeningen*, it was noted (at 76) that the party who was arguing that the clause concerned was unreasonable had the opportunity to seek to negotiate its deletion or amendment, but had suggested neither. Also, the presence or absence of legal advice is another consideration which the courts will take into account (see, for example, *United Trust Bank Limited* at [64]). Naturally, all the factors that present themselves in the case will be considered in the whole by the courts and the aforementioned factors are obviously not exhaustive; neither is it the case that the mere presence of any one or several of these factors would *necessarily* be decisive.

58 We pause here to note that, assuming a clause excluding a set-off is found to be reasonable by the court concerned, it does *not* follow that the defendant seeking to resist the application of the clause (here, the Appellants) is without remedy. On the contrary, the defendant can *still enforce* his right to a set-off, *albeit in an independent cause of action*. Reference may also be made to the admission to this effect by the defendants in *Stewart Gill* itself (at 604).

Our views on the applicability of Stewart Gill in Singapore

59 We have already stated that we are of the view that *Stewart Gill* is good law in Singapore in so far as it holds that a clause which excludes a set-off falls within the ambit of the UCTA and is

therefore potentially (see above at [29]) subject to the reasonableness test therein. However, we have also noted that there are conflicting High Court decisions in the Singapore context, with the Judge in the present case endorsing the aforesaid principle in *Stewart Gill*, whilst the court in *Gao Bin* was of a different view. In this regard, it might be apposite if we consider the reasoning in *Gao Bin* and demonstrate why, with respect, it ought *not* to be followed.

The decision in Gao Bin

60 In *Gao Bin*, the plaintiff, the chairman of a listed company, claimed that the defendant, a brokerage company, had breached its contract and was negligent in the handling of the plaintiff's securities accounts. The defendant counterclaimed for outstanding amounts due on the accounts. The defendant applied for summary judgment for the amounts and the plaintiff argued that he had, *inter alia*, a right of equitable set-off against the defendant. The plaintiff relied on *Stewart Gill* and argued that the no set-off clause in the defendant's standard terms and conditions was unenforceable. The court held that the UCTA did not apply and distinguished *Stewart Gill*. The court stated (at [13]):

> I do not think that the UCTA could apply to [the no set-off clause]. A key prerequisite under the UCTA is that a contractual term must be one which "exclude[s] or restrict[s] any liability". In *Stewart Gill*, the clause in question had two additional items, namely, "payment" and "credit". Lord Donaldson of Lymington MR thought that "payment" would mean overpayment under another contract and "credit" meant "credit note" or an admitted liability under another contract. As for *Esso Petroleum*, the clause in question had the additional item "unpaid debts", which is essentially a crystallised liability. Thus, it might be possible to construe "any liability" under the UCTA to include a crystallised or admitted liability under another contract or transaction. This is however not the case here, as the purported liability was disputed and related to a liquidated claim.

61 The court then proceeded to find that the no set-off clause did not exclude or restrict liability and instead applied the principles iterated in *The Fedora*. Summary judgment was thus granted against the plaintiff.

62 The Judge found that the reasoning in *Gao Bin* at [13] (quoted above) was unsatisfactory and disagreed with it. In this regard, the Judge observed as follows (see the GD at [21]):

> With due respect to the learned judge, I find myself unable to agree with the suggestion. In my view, such a construction put on the word "liability" an unwarranted qualification that it be "crystallised" or "admitted". Lord Donaldson MR in *Stewart Gill* considered the words "payment" and "credit" when determining the *reasonableness* of the clause in question (see [19] above) and not in the context of deciding whether the UK UCTA was applicable. Therefore, in deciding whether the UCTA applied to [the no set-off clause], I did not think it entirely apropos to draw a distinction between admitted and disputed liabilities based on Lord Donaldson's reasoning in connection with the words "payment" or "credit". It was also unnecessary in my view to restrict the phrase "any liability" in s 3 of the UCTA to a "*crystallised or admitted* liability". [emphasis in original]

63 In our view, the court in *Gao Bin* had not, with respect, considered that part of the reasoning in *Stewart Gill* to the effect that s 13 of the UCTA extended the exclusion or restriction of any liability to no set-off clauses in the appropriate circumstances. If it had, it would not have needed to have focused on the interpretation of "any liability" in s 3 of the UCTA and then distinguished the facts on the basis that it was an issue of disputed liability and related to a liquidated claim. Notably, the issue

of disputed liability arising in relation to a claim for set-off is not a new issue. For example, in *WRM*, although there was a dispute that misrepresentations had been made, this did not prevent the court in that case from deciding that the reasoning in *Stewart Gill* was applicable to the case and that a no set-off clause would be caught under s 13 of the UCTA. In *Stewart Gill* itself, the defence to the claim was based upon alleged breaches of the contract by the plaintiffs and therefore liability in the cross-claim was not yet proven. This, however, was not a point that that court focused on. Likewise, that the purported liability related to a liquidated claim does not seem to be a factor in an analysis of the applicability of s 13 of the UCTA.

A summary

64 To summarise our foregoing analysis: our view is that based on the case law that has developed from both *Stewart Gill* and *The Fedora and* in relation to a case where a no set-off clause is found in a contract where s 3 of the UCTA applies, s 13 of the UCTA *extends* s 3 inasmuch as the no set-off clause in the contract excludes or restricts any right or remedy in respect of the liability and/or excludes or restricts the procedural rules as to set-off. Following *Stewart Gill*, the clause would be subject to the reasonableness test under the UCTA.

65 As an aside, although the issue of whether an unreasonable part of an offending clause may be severed so that the whole of it is not rendered ineffective (see *Stewart Gill* at 607–609) has engendered greater and more significant academic debate, this was *not* a point that was submitted upon by the parties, and was *not* a point that the Appellants had relied on for their case; hence we say no more about it (see, for example, Edwin Peel, *Treitel: The Law of Contract* (Sweet & Maxwell, 13th ed, 2011) at para 7-076; Ian Brown and Adrian Chandler, "Unreasonableness and the Unfair Contract Terms Act" (1993) 109 LQR 41 at p 44; Lee Beng Tat, "Where an Exclusion Clause in Unreasonable Only in Part" [1992] SJLS 557; and Edwin Peel, "Making More Use of the Unfair Contracts Terms Act 1977" (1993) 56 Mod L Rev 98 at pp 100–102).

66 It should also be noted that in the examination of the reasonableness of the clause, the courts should not be too ready to focus on remote possibilities or to accept arguments that a clause fails the test by reference to relatively uncommon or unlikely situations (see *Skipskredittforeningen* at 76).

67 Further, the decision in *The Fedora* is relevant to the assessment of the reasonableness of the clause inasmuch as due regard must be given to the fact that a no set-off clause, whilst fully within the ambit of s 13 of the UCTA, does *not* restrict or exclude liability in so far as *the cross-claim* is concerned, which can thus continue as *an independent cause of action* by the party. *The Fedora* also stands for the proposition that there are legitimate commercial expectations of the claiming party being paid in full without the need to litigate a cross-claim (see above at [40]). These would be factors that the court would also take into account in applying the reasonableness test under the UCTA alongside a consideration of the other factors listed above at [53]–[57]. The Second Schedule of the UCTA would also provide further helpful guidance in applying the reasonableness test.

Whether the clause in the present appeal was reasonable

68 As stated earlier, we were of the view that the Appellants did not meet the threshold requirement that s 3 of the UCTA was applicable. Strictly speaking, therefore, there was no need for us to go on to consider the reasonableness of cl 12.2. However, for the sake of argument, *assuming* that the Appellants did fulfil the criteria in s 3 of the UCTA, and did prove that cl 12.2 was a no set-off clause, that clause would be caught by s 13 and be considered an exemption clause, and would have to be proven to be reasonable in the circumstances, per *Stewart Gill*.

69 In this regard, we would adopt Mance J's description of the similarly worded clause in *Skipskredittforeningen* and find that cl 12.2 was a familiar type of provision and would have been eminently understandable in the context of a loan facility. As mentioned earlier, cl 12.2 would have been found in a typical loan agreement if the Appellants had decided to borrow from a bank. As this court had informed the Appellants at the hearing, cl 12.2 *did not close the doors* on the Appellants bringing a claim against Terrestrial for the alleged breaches under the Tug Contract or other contracts: the clause did not operate to exclude or limit liability of Terrestrial in relation to any other contracts that the parties might have entered into and Terrestrial did not contest this. As Terrestrial also pointed out, it had been kept out from the monies for some three years since the same became due and cl 12.2 was meant to prevent such an issue from arising.

70 Further, we did not find that this was a case where the bargaining positions of the parties were so unequally balanced. Of note is the fact that the Appellants had approached Allgo for the loan and the terms of the agreement were drafted specifically for the circumstances. Moreover, the Appellants knew or ought reasonably to have known of the existence and extent of the clause given that it was a clause commonly used in loan agreements.

71 In the hearing before us, Mr Asokan raised the additional argument that because the Appellants were not legally represented when the Loan Agreement was entered into, they did not have the benefit of legal advice to take into account the fact that Terrestrial had allegedly breached the Tug Contract. Apart from the fact that the breach of the Tug Contract was disputed by Terrestrial, there were a few difficulties in accepting Mr Asokan's argument. First, the Tug Contract was formed sometime in October 2009 and was subsequently (and allegedly) breached although, we do note, the date of breach was not stated by Mr Asokan. Even so, there would have been a significant span of time before the Loan Agreement was signed in which the Appellants could have claimed damages for Terrestrial's breach but did not do so. Secondly, and curiously, the Appellants proceeded to borrow money from Terrestrial with cl 12.2 in place with full knowledge that there was allegedly a breach of the Tug Contract, and did not think (for instance) to protect their rights to assert a set-off. We were thus not convinced by his argument.

72 In conclusion, *even if* cl 12.2 was subject to the UCTA, we did not find it unfair or unreasonable for Terrestrial to rely on it to claim the outstanding sums that were due and owing.

Stay of execution

73 Finally, Mr Asokan asked this court to grant a stay of execution on the judgment while the counter-claim was litigated. We decided not to exercise our discretion to grant the stay as we did not think that that it was an appropriate order to make in the circumstances. In *The Fedora*, the court held (at 445) that the purpose of having a no set-off clause was so that immediate payment could be obtained while proceedings for alleged counterclaims were litigated:

> … It would defeat the whole commercial purpose of the transaction, would be out of touch with business realities and would keep the bank waiting for a payment, which both the borrowers and the guarantors intended that it should have, whilst protracted proceedings on the alleged counterclaims were litigated. …

74 Effectively, allowing for a stay of execution would defeat the purpose of the no set-off clause to a significant extent as it would still keep the creditor waiting for a payment that should have been made without dispute (see *The Law of Set-Off* at para 5.110). On this point, *The Fedora* has also been applied in subsequent cases. In *Society of Lloyd's*, the court noted (at 1036) that the insulation of the set-off and counterclaim was intended to achieve the speedy discharge of the indebtedness,

which intention would be avoided and the whole function of the clause subverted by a stay of execution – a point which applies equally in the context of the present appeals. We also note that, although the Appellants insisted on the legitimate counterclaim based on the Tug Contract as well as other contracts which Terrestrial had allegedly breached, the Appellants did not institute proceedings which would have begun sometime before Terrestrial could have even commenced their action for the late payment of the sums lent. We were therefore of the view that Terrestrial had been kept out of the monies for a significant amount of time and it would have been unfair to keep them out of it any longer than it was necessary given that cl 12.2 was operative.

Conclusion

75 Based on the foregoing reasons, we dismissed the appeals. At the end of the hearing, we were inclined to fixed costs for the hearing. Counsel brought our attention to two other summonses relating to the stay of execution of the judgment below, *ie*, Summons No 404 of 2014 and Summons No 4545 of 2013. After hearing arguments from both parties, we fixed the costs of the summonses and the appeals at $28,000 including disbursements.

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