

THE COURT'S RESPONSE TO COUNTERCLAIMS IN PROCEEDINGS FOR SUMMARY JUDGMENT

One of the more difficult tasks of a court when hearing an application for summary judgment is to assess the impact of a counterclaim. A variety of outcomes are possible as there is a broad range of legal and factual issues to be considered. The purpose of this article is to examine the state of law (which has become unnecessarily obscure in certain instances) with a view to proposing a clearer and more logical approach for considering the relief which ought to be granted.

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I. Issues for consideration

1 One of the more common considerations in proceedings for summary judgment is the effect of the defendant's counterclaim on the plaintiff's claim and the resulting order which the court should make. As the state of the law is not as clear as one might hope, the purpose of this article is to examine the developments in this area of practice and to propose a more certain and systematic approach in the interest of justice. The effect of a counterclaim on an application for summary judgment depends on a variety of important considerations.

2 In England, *United Overseas Ltd v Peter Robinson*¹ ("Peter Robinson") was the leading case on the approach of the court to counterclaims until the Rules of the Supreme Court were replaced by the Civil Procedure Rules in 1999.² As *Peter Robinson* has been applied in Singapore on several occasions in recent years,³ it is apposite to examine its significance and impact. Bingham LJ, in the leading judgment of the Court of Appeal,⁴ advocated a fourfold classification of circumstances which require different outcomes primarily according to the nature of

1 Civil Division, 26 March 1991, unreported (Transcript No 91/0297).

2 Some measure of the authority of the Bingham classification in England prior to the introduction of the Civil Procedure Rules in 1999 may be gleaned from its full inclusion in successive editions of the *Supreme Court Practice* until the introduction of the Civil Procedure Rules in 1999.

3 See paras 17–22 of this article.

4 Nolan LJ and Sir Nicholas Browne-Wilkinson V-C agreed.

the cross-claim and its relationship to the claim (“Bingham LJ’s classification”):

The first class of case is that in which the defendant can show an arguable set-off, whether equitable or otherwise. To the extent of such set-off the defendant is entitled to unconditional leave to defend. It is for the judge to decide whether such an arguable set-off is shown or not. If he decides that it is, he has no further discretion as to the order he makes. ...

The second class of case is where the defendant sets up a bona fide counterclaim arising out of the same subject-matter as the action and connected with the grounds of defence. In this class of case ... the order should not be for judgment on the claim, subject to a stay of execution pending the trial of the counterclaim, but should be for unconditional leave to defend even if the defendant admits the whole or part of the claim. ...

The third class of case ... is where the defendant has no defence to the plaintiff’s claim so that the plaintiff should not be put to the trouble and expense of proving it, but the defendant sets up a plausible counterclaim for an amount not less than the plaintiff’s claim. In such a case the order should not be for leave to defend, but should be for judgment for the plaintiff on the claim and costs until the trial of the counterclaim.^[5]

The fourth class of case is where the counterclaim arises out of quite a separate and distinct transaction or is wholly foreign to the claim or there is no connection between the claim and the counterclaim. The proper order should then be for judgment for the plaintiff with costs without a stay pending the trial of the counterclaim.

3 Bingham LJ’s classification was founded on a series of statements in the English *Supreme Court Practice 1991*⁶ (“*Supreme Court Practice 1991* commentary”), which conveniently summarise the case law concerning the effect of set-offs and non-set-off counterclaims in various factual situations. It appears from a literal reading of the *Supreme Court Practice 1991* commentary (as well as previous and successive editions of this work) that the editors merely intended to set out the effect of the case law in the form of convenient propositions rather than offer a fixed or circumscribed categorisation of principles. It will be suggested in the course of this article that Bingham LJ’s transmutation of the commentary into four distinct classes has the potential to cause uncertainty.⁷

5 His Lordship noted that the relevant passage in the *Supreme Court Practice 1991* was based on the judgment of Lord Esher in *Sheppards & Co v Wilkinson and Jarvis* (1889) 6 TLR 13.

6 *Supreme Court Practice 1991* (Sweet & Maxwell, 1990) at para 14/3-4/13.

7 Despite his Lordship’s qualification that as the demarcation lines between the second, third and fourth classes “are not clearly defined”, the court may “respond to what [it] sees as the justice of the individual case”.

4 Furthermore there are difficulties with the terminology within the classes. It is not surprising that May LJ, as the general editor of *The White Book Service 2001: Civil Procedure* (which superseded the *Supreme Court Practice* (concerning the former Rules of the Supreme Court) pursuant to the introduction of the Civil Procedure Rules in England in 1999), observed that the case law concerning the approach to counterclaims under the former Rules “was not coherent”.⁸ Bingham LJ himself raised a doubt about his own classification by questioning whether the *Supreme Court Practice 1991* commentary was “the practice which one would have devised if starting with a blank sheet of paper”.⁹ And Sir Nicholas Browne-Wilkinson thought that the current practice might be “a matter which the Rules Committee might like to consider”.

5 Various questions arise from the Bingham LJ’s classification, including the relationship between classes (1) and (2) (whether, in fact these categories should be separate), the terminology in classes (2) and (3), the nature of the connection necessary for a stay, the significance of the Singapore Court of Appeal’s observations in earlier case law concerning such issues,¹⁰ and other considerations such as whether the court should consider the respective circumstances of the parties and balance the merits of their respective cases, the strength of the counterclaim, the plaintiff’s ability to satisfy any judgment which the defendant might obtain, and the determination of what terms (if any) should be imposed when a stay of execution is ordered pursuant to O 14 r 3(2) of the Rules of Court.¹¹ These and other issues will be considered after a review of *Peter Robinson* and the series of cases in which *Peter Robinson* was applied. Following this, the scope of the doctrine of equitable set-off will be examined in the light of recent instructive observations by the High Court on the distinction between granting leave to defend and awarding judgment subject to a stay of execution pending the trial of the counterclaim. Finally, it will be suggested that a more precise model for determining the effect of counterclaims on applications for summary judgment may promote clarity in this complex area of the law.

8 *The White Book Service 2001: Civil Procedure vol 1* (Sweet & Maxwell, 2001) at para 24.2.6.

9 However, his Lordship considered that the courts “should be slow to disturb” the practice as it was “well-understood” and had been “followed for a considerable number of years”.

10 *Cheng Poh Building Construction v First City Builders* [2003] 2 SLR(R) 170 is considered in paras 30–32 of this article.

11 Cap 322, R 5, 2006 Rev Ed. This rule is set out in para 8 of this article.

II. Background summary of court's approach

6 The following summary of the court's approach to counterclaims in proceedings for summary judgment is intended to set the background for the specific issues raised by the case law. Normally, the first consideration for the court is whether the counterclaim constitutes a set-off, which is a defence to the claim. The defendant will obtain unconditional leave to defend if the facts he presents establish an arguable set-off. A set-off is a claim for an ascertained or unascertained sum of money which constitutes a defence to the whole or part of the plaintiff's own claim for money. It only operates in response to the plaintiff's claim so that, if it is successful, it will extinguish or reduce the plaintiff's claim. The main forms of set-off which arise in proceedings for summary judgment include the independent or legal set-off, set-off by abatement and equitable set-off.¹² The first category of set-off is essentially concerned with mutual debts: the defendant alleges that the plaintiff owes him a debt or liquidated sum of money so that the plaintiff's liquidated claim is reduced by the defendant's liquidated claim. This is referred to as an independent set-off because the debts (the liquidated claims) may arise from wholly unconnected circumstances. It is also referred to as a legal set-off because the principle is traceable to statutory law centuries ago.¹³ Abatement concerns a cross-claim which arises from the same circumstances as the claim and directly impugns the latter by asserting its diminution in value.¹⁴ This defence is a common law development pertaining to contracts of sale¹⁵ and for the provision of services.¹⁶

7 The third and broadest category is the equitable set-off.¹⁷ Unlike independent (legal) set-off and set-off by abatement, it is not restricted to specific situations. Rather, it is governed by a general principle of

12 See *Hua Khian Ceramics Tiles Supplies v Torie Construction* [1991] 2 SLR(R) 901; *OCWS Logistics Pte Ltd v Soon Meng Construction Pte Ltd* [1998] 3 SLR(R) 888.

13 See, eg, s 13 of the repealed Insolvent Debtors Relief Act 1729 (2 Geo 11 c 22) and the Debtors' Relief Amendment Act 1735 (8 Geo II c 24). However, the principle continued to operate at common law. See *Axel Johnson Petroleum AB v MG Mineral Group AG* [1992] 1 WLR 270 at 272–274; *Aectra Refining and Manufacturing v Exmar NV* [1994] 1 WLR 1634. The historical perspective is further considered at para 37 of this article.

14 For a discussion of the origin of this principle, see *Mondel v Steel* (1841) 8 M & W 858 at 870–871. In *Gilbert-Ash (Northern) v Modern Engineering (Bristol)* [1974] AC 689, the House of Lords declared that abatement may not be extended to other categories.

15 For example, where the buyer of defective goods seeks to set off the amount of his loss against the seller's claim for the price.

16 For example, where a person seeks to set off the diminution in value of renovation work against the renovator's claim for the price.

17 Which was developed in response to the limited scope of the legal set-off (as pointed out by Staughton LJ in *Axel Johnson Petroleum AB v MG Mineral Group AG* [1992] 1 WLR 270 at 276).

justice rooted in equity. The Singapore Court of Appeal in *Pacific Rim Investment v Lam Seng Tiong*¹⁸ (“*Pacific Rim*”) endorsed Lord Denning MR’s pronouncement concerning the equitable set-off in *Federal Commerce and Navigation Co Ltd v Molena Alpha Inc*¹⁹ (“*The Nanfri*”): “... only cross-claims which go directly to impeach the plaintiff’s demands, that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim.”²⁰ The nub of the principle is that the connection between the claim and counterclaim must be significant enough to justify the conclusion that it would be obviously unjust to grant summary judgment without taking into account the cross-claim.²¹ In contrast to the independent set-off, the equitable set-off may operate when neither the claim nor the cross-claim are liquidated sums.²² The doctrine of equitable set-off is examined more closely in a subsequent part of this article.²³

8 If the defendant is unable to persuade the court that he is entitled to leave to defend, the court may grant summary judgment unconditionally or subject to a stay of execution. Order 14 r 3(2) of the Rules of Court states: “The Court may by order, and subject to such conditions, if any, as may be just, stay execution of any judgment given against a defendant under this Rule until after the trial of any counterclaim made or raised by the defendant in the action.” Whether the court stays the execution of the judgment depends on various considerations including, in particular, the nature of the counterclaim and its relationship with the claim. In the course of this article, it will be necessary to examine the degree of connection between the claim and counterclaim for the purpose of equitable set-off and a stay of execution (where judgment is granted).²⁴ Finally, if a stay is not granted, the

18 [1995] 2 SLR(R) 643 at [35]. Also see *Hanak v Green* [1958] 2 QB 9; *British Anzani (Felixstowe) Ltd v International Marine Management (UK)* [1980] 1 QB 137; *Hua Khian Ceramics Tiles Supplies v Torie Construction* [1991] 2 SLR(R) 901 and *Hiap Tian Soon Construction v Hola Development* [2003] 1 SLR(R) 667.

19 [1978] QB 927 at 974–975. The Court of Appeal also accepted (*Pacific Rim Investment v Lam Seng Tiong* [1995] 2 SLR(R) 643 at [36]–[37]) Lord Denning MR’s qualification that the right to equitable set-off may be excluded by contract and that there are various exceptions to the principle ([1978] QB 927 at 988).

20 Also see *Cooperatieve Centrale Raiffesisen-Boerenleenbank BA (Trading as Rabobank International), Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63. For another expression of this test, see *Bank of Boston Connecticut European Grain and Shipping Ltd* [1989] 1 AC 1056 (which is considered at para 26 of this article).

21 See *Abdul Salam Asanaru Pillai v Nomanbhoy & Sons Pte Ltd* [2007] 2 SLR(R) 856 (in which *Bim Kemi AB v Blackburn Chemicals Ltd* [2001] 2 Lloyd’s Rep 93 was considered). These and other cases are considered in paras 23–32 of this article.

22 *Axel Johnson Petroleum AB v MG Mineral Group AG* [1992] 1 WLR 270.

23 See paras 23–32 of this article.

24 See paras 23–32 of this article.

defendant would have to satisfy the judgment and pursue his counterclaim independently.

III. Analysis of *Peter Robinson*

A. Facts and decision

9 *Peter Robinson* involved an application for summary judgment for the return of the purchase price the plaintiffs had paid to the defendants for the supply of garments and for loss of profits. The claim was based on the defendants' failure to deliver the contractual quantity (200,000 items). The defendants sought to deliver 159,000 items but the consignment was rejected by the plaintiffs. The plaintiffs also alleged that the goods did not meet the required condition of quality. The defendants accepted the plaintiffs' rejection as a repudiation of the contract. The defendants counterclaimed for damages for non-acceptance and the cost of storage of the rejected garments. Bingham LJ, who delivered the main judgment for the Court of Appeal, noted the Master's view that the defendant had raised an arguable set-off and the High Court judge's reluctance to come to a conclusion on this issue. Bingham LJ found it unnecessary to hear argument on equitable set-off and added: "I therefore express no opinion whether the facts pleaded by the defendants do or do not disclose an arguable set-off" In affirming the High Court's decision to grant the defendants unconditional leave to defend pursuant to the second class, Bingham LJ considered both the plaintiffs' and defendants' respective positions: "While it is undeniably hard on the plaintiffs to be kept out of their money if they are right, it could be hard on the defendants to oblige them to disgorge the purchase price if they are right, the more so since the defendants stipulated that the price be paid in advance of delivery and the plaintiffs accepted that submission."

B. Significance of classificatory approach

10 It has been argued that the propositions in the *Supreme Court Practice 1991* commentary²⁵ merely set out in successive paragraphs the case law concerning counterclaims put forward in proceedings for summary judgment.²⁶ The commentary, which is descriptive of the state of the law, is not classificatory in nature. The nature of a classification is that it imports distinctions between its categories so that separate principles may emerge which are inconsistent with the case law. For example, Bingham LJ's first and second classes are clearly distinct. The

25 See para 3 of this article.

26 See para 3 of this article.

first class concerns the set-off while the second class concerns other types of counterclaim which, though not set-offs, would justify leave to defend (the same outcome as the first class).

11 Bingham LJ's second class is based on a paragraph in the *Supreme Court Practice 1991* commentary which commences with the following sentence:

Moreover, where the defendant sets up a bona fide counterclaim arising out of the same subject-matter of the action, and connected with the grounds of the defence, the order ... should be for unconditional leave to defend, even if the defendant admits the whole or part of the claim. [emphasis added]

12 The terminology of this paragraph ("the indented paragraph") is actually an extension of the preceding paragraphs in the *Supreme Court Practice 1991* commentary concerning counterclaims which constitute set-offs. Apart from the first word "Moreover" in the indented paragraph (which links it to the preceding paragraphs in the *Supreme Court Practice 1991* commentary), the indented paragraph goes on to include cases involving the equitable set-off including *Morgan & Son Ltd S Martin Johnson & Co*,²⁷ *Hanak v Green*²⁸ and *Bankes v Jarvis*.²⁹ Indeed, *Hanak* is referred to in both the preceding paragraphs and indented paragraph. The preceding and indented paragraphs concern counterclaims which are *defences* (set-offs) as opposed to ordinary non-set-off counterclaims (the latter are the subject of the subsequent paragraphs in the *Supreme Court Practice 1991* commentary).

13 Therefore, rather than introducing a separate category of counterclaim, the indented paragraph (on which Bingham LJ based his second class) merely draws attention to the fact that an equitable set-off has been acknowledged in cases in which the defendant has wholly or partially admitted to the plaintiff's claim. The indented paragraph is sequential to the preceding paragraphs, all of which concern the different types of set-off. Although some of the cases cited in the indented paragraph may not have expressly addressed the doctrine of equitable set-off (whether due to the brevity of certain judgments or contemporary judicial practice³⁰), they do appear to have been decided in the context of equitable relief. Indeed, in *Peter Robinson*, the court could well have come to the conclusion that it would have been

27 [1949] 1 KB 107.

28 [1958] 2 QB 9.

29 [1903] 1 KB 549.

30 Many of these cases were decided in the 19th century.

manifestly unjust to allow the plaintiff to enforce his judgment without taking into account the defendant's cross-claim.³¹

14 If the second class is regarded as being distinct from equitable set-off, and is not anchored by some other principle, there is a real danger that it will be misunderstood and take on a significance never intended by the case law on which it was grounded. Bingham LJ's concern that he "cannot see any clear principle which distinguishes cases in the second class from those in the third" in his fourfold classification can be answered by pointing to the fact that his second class concerns defences (*ie*, "cross-claims which go directly to impeach the plaintiff's demands"),³² while his third class does not. The distinction is vital because the former may result in unconditional leave to defend (*ie*, the outright defeat of the application for summary judgment), while the latter can, at best, only lead to a stay pursuant to O 14 r 3(2).³³ Furthermore, although Bingham LJ did not regard counterclaims within his second class as set-offs, he declared that they would justify leave to defend. This view may not be consistent with the approach of the Singapore Court of Appeal, which has observed that a counterclaim may only constitute a substantive defence if it is within one of the traditional categories of set-off.³⁴ In particular, it has dismissed the argument that equitable set-off is merely a procedural right.³⁵ Accordingly, as a counterclaim which is not a set-off does not stand as a substantive defence, Bingham LJ's second class of counterclaims would not justify leave to defend unless they are acknowledged to be equitable set-offs.

C. Terminological issues

15 The difficulties arising from the relationship between Bingham LJ's first and second classes have been considered. Terminology is another issue raised by the second class, as it is by the third class. The words "*bona fide*" and "plausible" in these paragraphs respectively are not in themselves sufficient to convey the fullness of the

31 See *Federal Commerce and Navigation Co Ltd v Molena Alpha Inc* [1978] QB 927 (considered in paras 7, 26 and 27 of this article).

32 Lord Denning's words in *Federal Commerce and Navigation Co Ltd v Molena Alpha Inc* [1978] QB 927 (see paras 7 and 27 of this article) which were endorsed by the Court of Appeal in *Pacific Rim Investment v Lam Seng Tiong* [1995] 2 SLR(R) 643 at [27].

33 See para 8 of this article.

34 *Pacific Rim Investment v Lam Seng Tiong* [1995] 2 SLR(R) 643 [23]–[35].

35 *Pacific Rim Investment v Lam Seng Tiong* [1995] 2 SLR(R) 643 at [35] and [27] (where Lord Denning MR's examination of the distinction between the defence of set-off and a counterclaim in *Federal Commerce and Navigation Co Ltd v Molena Alpha Inc* [1978] QB 927 at 973–974 is set out). Also see *American International Assurance Co Ltd v Wong Cherng Yaw* [2009] SGHC 89 at [30] (which cites SR Derham, *The Law of Set-Off* (Oxford University Press, 3rd Ed, 2003) at para 1.04).

law in this area. A claim may be very weak but made in good faith (*ie*, it is *bona fide*). It is most unlikely that the court would grant unconditional leave to defend pursuant to the second class in these circumstances. It would construe “*bona fide*” as entailing a claim which has the merit of being at least arguable. However, the use of the word “plausible” in the third class may give rise to the assumption that the different words in these paragraphs require different considerations (in the sense there is no reason why “plausible” could not have been included in the second class). With regard to the third class, the omission of the words “*bona fide*” should not be interpreted to mean that a court will always grant a stay if the counterclaim is “plausible” regardless of whether the defendant has acted in bad faith (for example, by abusing the process of the court), or has otherwise failed to conduct himself properly.

16 Furthermore, the third class does not include any indication of connection between the plaintiff’s claim and defendant’s counterclaim. The clue is given incidentally by the fourth class, which provides that the court will not grant a stay of execution if the counterclaim “arises out of a quite separate and distinct transaction or is wholly foreign to the claim or there is no connection between the claim and counterclaim”. This means nothing more than that there has to be a connection (the degree is not specified) for the purpose of a stay under the third class. Clearly, there has to be a significant difference between the strength of connection for the purpose of the equitable set-off and the ordinary counterclaim. In the case of the equitable set-off, the degree of connection must be sufficient to make it “manifestly unjust” not to take the amount of the counterclaim into account. In the case of an ordinary counterclaim, the court has to ask itself whether, in all the circumstances, it would be just to prevent the plaintiff from obtaining the proceeds of his judgment immediately (by imposing a stay pursuant to O 14 r 3(2)).³⁶ Although the fourth class refers to connection as the sole criteria, there are a variety of considerations which the court should take into account (as appropriate) in determining whether a stay of execution is appropriate.³⁷

IV. Application of classificatory approach in Singapore

17 Between 2008 and 2010, the Singapore High Court endorsed Bingham LJ’s classification in *Peter Robinson* in three cases. In *Hawley & Hazel Chemical Co (S) Pte Ltd v Szu Ming Trading Pte Ltd*³⁸ (“*Hawley*”), the plaintiff (a manufacturer of dental products) applied for summary

36 See paras 23–32 of this article.

37 See paras 23–32 of this article.

38 [2008] SGHC 13.

judgment against its Singapore distributor for the price of goods sold and delivered to the latter. In its initial defence and counterclaim, the defendant contended that the plaintiff had failed to prevent and/or stop parallel imports of the same product contrary to its promise to do so. An amended defence and counterclaim was filed two days prior to the hearing of the application for summary judgment. Among other contentions, the defendant raised a set-off against the plaintiff for wrongful termination of the distributorship agreement.³⁹ The defendant sought unconditional leave to defend on the authority of *Peter Robinson*. The registrar's decision to grant the defendant unconditional leave pursuant to Bingham LJ's second class was reversed on appeal. The High Court determined that summary judgment should be granted subject to a stay of execution pursuant to Bingham LJ's third class. In reaching this decision, the court concluded that the defendant's arguments were not supported by the facts and that the real issue was that it was unable to pay the plaintiff the sums to which the latter was entitled.⁴⁰ The court found that the registrar had erred in concluding that there was a valid counterclaim which could justify leave to defend. Nevertheless, the court granted a stay in case its decision was wrong "so as not to prejudice the defendant on its counterclaim".⁴¹

18 Normally, where a claim is made under a distributorship agreement and the defendant presents an arguable counterclaim arising from that agreement, the court will grant the defendant unconditional leave to defend on the basis of equitable set-off.⁴² Accordingly, Bingham LJ's first class was not satisfied. To have come within the second class, it would have been necessary to show that that counterclaim was "*bona fide*". Although the court was clearly of the view that the counterclaim lacked merit, the issue of good faith was not addressed. The second class refers to "*bona fide*" (which emphasises the intentions of the defendant), while the third class engages the term "plausible" (which is solely concerned with the merits of the counterclaim). One of the weaknesses of Bingham LJ's classification is that it is quite possible for an unmeritorious counterclaim to be put forward in good faith (as when the defendant wrongly but honestly believes that he has a valid case). Literally interpreted, the second class would encompass such a counterclaim (because it is *bona fide*). As it would be unjust to give unconditional leave to defend on the basis of a meritless counterclaim, the terminology of the second class should be modified to include a threshold standard (such as "arguable" or

39 The distribution agreement, which had been entered into in 1951, was oral in nature.

40 See *Hawley & Hazel Chemical Co (S) Pte Ltd v Szu Ming Trading Pte Ltd* [2008] SGHC 13 at [28] (especially sub-para (f)) and [29].

41 *Hawley & Hazel Chemical Co (S) Pte Ltd v Szu Ming Trading Pte Ltd* [2008] SGHC 13 at [32].

42 See, eg, *Silberline Asia Pacific Inc v Lim Yong Wah Allan* [2006] SGHC 27.

“plausible”) in the second and third classes respectively. In *Hawley*, the court also referred to the Court of Appeal’s pronouncement in *Cheng Poh Building Construction v First City Builders*⁴³ to the effect that a counterclaim which is unconnected to the claim would not justify a stay of execution even if it is “*bona fide*” in the absence of “special circumstance[s]”.⁴⁴ However, it is not clear what special circumstances justified the stay of execution in *Hawley*.⁴⁵

19 As has been pointed out, the court in *Hawley* granted a stay in case its decision was wrong “so as not to prejudice the defendant on its counterclaim”.⁴⁶ However, as the third class requires the counterclaim to be “plausible”, it is unclear how the defendant’s claim in *Hawley* (which the court considered to be unmeritorious on the facts) met this requirement. The decision to grant a stay might have been justified because the link between the claim and counterclaim was so close (they arose from the same transaction) that it was arguably just to give the defendant the chance of proving it at trial prior to the execution of the summary judgment. However, such an argument would not apply where it is clear on the affidavit evidence that the defendant has no prospect of succeeding at trial.⁴⁷ Another approach which might have been taken in *Hawley* was to have denied a stay if the court was satisfied that the plaintiff had (and would continue to have) the financial resources to comply with any judgment which the defendant might obtain on its counterclaim.

20 Bingham LJ’s classification arose for consideration in a different context in *Nanyang Law LLC v Alphomega Research Group Ltd*⁴⁸ (“*Nanyang*”). The plaintiff (a law practice) obtained a judgment in default of appearance against its former client in respect of its claim for work done until the termination of the retainer in the course of trial. The client filed an application to set aside the default judgment and one of the several defences it put forward was that it had inappropriately paid money to the plaintiff for its services to the defendant’s directors in their personal capacities. The High Court concluded the defendant had

43 [2003] 2 SLR(R) 170. In this case, the defendant’s counterclaim in respect of previous building projects was not regarded as being sufficiently connected to the plaintiff’s claim in the dispute to justify a stay). *Cheng Poh Building Construction v First City Builders* is considered in paras 30–32 of this article.

44 The High Court in *Hawley & Hazel Chemical Co (S) Pte Ltd v Szu Ming Trading Pte Ltd* [2008] SGHC 13 at [34] made reference to *Cheng Poh Building Construction v First City Builders* [2003] 2 SLR(R) 170 at [17] and [18].

45 In which the court determined that the counterclaim (which it regarded as implausible) came within the third class.

46 *Hawley & Hazel Chemical Co (S) Pte Ltd v Szu Ming Trading Pte Ltd* [2008] SGHC 13 at [31].

47 This seemed to be the position in *Hawley & Hazel Chemical Co (S) Pte Ltd v Szu Ming Trading Pte Ltd* [2008] SGHC 13.

48 [2010] 3 SLR 914.

raised an arguable defence as its claim for money had and received by the plaintiff constituted an independent (or legal) set-off.⁴⁹ Although both claims arose in unconnected matters (the defendant's claim related to a different suit involving the directors), they involved liquidated sums.⁵⁰ Accordingly, the judgment was set aside on the merits.

21 *Nanyang* is a significant case because of the court's observations on Bingham LJ's first and second classes. Apart from legal set-off, the court was also of the view that the facts gave rise to an arguable case for equitable set-off⁵¹ (which, as in the case of legal set-off, comes within the first class). The difficulty with this conclusion is that equitable set-off, which was introduced to mitigate the limitations of the legal set-off,⁵² does not operate in respect of unconnected claims.⁵³ As will be shown,⁵⁴ the historical development of legal and equitable set-off and set-off by abatement resulted in separately created rules which may not extend to every situation in which justice may demand a conjunctive consideration of the plaintiff's claim and the defendant's counterclaim. So, for example, if either the plaintiff's claim or the defendant's claim in *Nanyang* had been unliquidated, the legal set-off would not have been applicable either. The court also considered that the defendant might have an arguable case for a defence within the second class. However, the second class requires the defendant's claim to arise from the same transaction as the plaintiff's claim. This was not the position in *Nanyang*.

22 Bingham LJ's classification was considered in a more appropriate context in *United Overseas Bank Ltd v Tru-Line Beauty Consultants Pte Ltd*⁵⁵ ("Tru-line"), a case which involved a claim by the plaintiff bank against a borrower and two guarantors (the defendants) for sums due under two banking facilities. In response to the plaintiff's application for summary judgment, the defendants argued that the borrower had a counterclaim (which constituted a set-off) against the plaintiff for failing to honour a letter of credit. The High Court ruled that the counterclaim was not sufficiently proximate to the plaintiff's claim to

49 *Nanyang Law LLC v Alphomega Research Group Ltd* [2010] 3 SLR 914 at [18].

50 The nature of the legal set-off is considered above in para 6 of this article. Also see para 37 of this article.

51 *Nanyang Law LLC v Alphomega Research Group Ltd* [2010] 3 SLR 914 at [19].

52 See paras 6 and 37 of this article.

53 The court itself indicated that the plaintiff's and defendant's claims were wholly separate (*Nanyang Law LLC v Alphomega Research Group Ltd* [2010] 3 SLR 914 at [18]). However, it is quite possible for both a legal set-off and an equitable set-off to arise from the same claim. For example, in *Axel Johnson Petroleum AB v MG Mineral Group AG* [1992] 1 WLR 270 at 274, Leggatt LJ considered that the defendant might have argued for an equitable set-off in addition to legal set-off in view of the connection between the claims.

54 See para 37 of this article.

55 [2011] 2 SLR 590.

justify a set-off.⁵⁶ Summary judgment was granted without a stay of execution because the counterclaim “was suspect and it might even turn out fraudulent” (this was the primary reason), the lack of connection between the claim and counterclaim and the fact that the bank would undoubtedly be able to satisfy any judgment given in favour of the borrower on its counterclaim at trial. A key aspect of *Tru-Line* is the willingness of the court to consider factors beyond Bingham LJ’s classification (such as the likely ability of the plaintiff to satisfy judgment on the counterclaim if the defendant is successful). The court also pointed out that these are only “some of the considerations which the court may take into account” in deciding whether or not to grant a stay.⁵⁷ The principles governing stay of execution will be considered subsequently.⁵⁸

V. Equitable set-off and stay of execution: A tale of two relationships

23 Thus far, this article has focused on the relationship between Bingham LJ’s first and second classes and uncertainties in the third and fourth classes. In this section, an analysis will be offered of the nature of the connection between a claim and counterclaim which is necessary to justify equitable set-off (in the first class) and an order staying the execution of a judgment given summarily (the concern of the third class). Obviously, there is a significant difference in the degree of relationship between the claims necessary for the purpose of equitable set-off and a stay of execution. However, as intimated in the earlier discussion concerning the terminological weaknesses in the classification,⁵⁹ the criteria are not as clear as they ought to be.

24 Equitable set-off is a flexible doctrine⁶⁰ not bound by technical rules or formulas but applied through the court’s sense of justice. Accordingly, an equitable set-off may arise even if the cross-claim does not emerge from the same transaction as the claim.⁶¹ Correspondingly, the cross-claim may not constitute an equitable set-off even though it does spring from the same contract.⁶² Nor does the mere fact that the

56 The claim by the bank did not include any sum in respect of the letter of credit and the borrower’s counterclaim in respect of the letter of credit was separate from the bank’s claim.

57 *United Overseas Bank Ltd v Tru-Line Beauty Consultants Pte Ltd* [2011] 2 SLR 590 at [45].

58 See paras 23–32 of this article.

59 See paras 15–16 of this article.

60 The doctrine is introduced in para 7 of this article.

61 See *British Anzani (Felixstowe) Ltd v International Marine Management (UK)* [1980] 1 QB 137; *Bankes v Jarvis* [1903] 1 KB 549; *Hanak v Green* [1958] 2 QB 9 at 24.

62 See *Government of Newfoundland v Newfoundland Railway Co* (1888) 13 App Cas 199 at 212; *Hanak v Green* [1958] 2 QB 9 at 30–31.

parties have an established trading relationship involving a series of transactions concerning the same product and other common elements mean that a cross-claim arising from one transaction may be set off against a claim in respect of another in the absence of a sufficient connection. In *Abdul Salam Asanaru Pillai v Nomanbhoy & Sons Pte Ltd*⁶³ (“*Abdul Salam*”), the fact that the claims and cross-claims related to several shipments of the same product (cashew nuts) on the same vessel, pursuant to contracts between parties who had a close and long-standing relationship in this trade, was not sufficient to establish an equitable set-off in the absence of the necessary degree of closeness. Sundaresh Menon JC (as he then was) pointed out that the connection between a claim and cross-claim is not to be determined “by some sort of formulaic process”: “In each case, the question turns on whether the respective claims are so closely connected that it would offend one’s sense of fairness or justice to allow one claim to be enforced without regard to the other.”⁶⁴ In the circumstances of the case, the contracts between the plaintiff and the defendant in the course of their commercial relationship were too distinct to have the necessary degree of closeness to establish an equitable set-off.⁶⁵ However, the circumstances of the dispute did justify an order to stay the execution of the summary judgment granted to the plaintiffs.⁶⁶

25 In the course of reaching his conclusion, Sundaresh Menon JC distinguished *Bim Kemi AB v Blackburn Chemicals Ltd*⁶⁷ (“*Bin Kemi*”) and addressed the intricacy of making an appropriate determination on the facts. In *Bim Kemi*, the defendant entered into a contract with the plaintiff in 1984 to provide the latter with a licence and technical assistance concerning the production of chemicals manufactured by the defendant. A new agreement was reached between the same parties in 1994 relating to the supply of a new range of products. Subsequently, the plaintiff brought an action against the defendant under the 1994 agreement and the defendant raised a set-off under the 1984 agreement. The Court of Appeal upheld the defendant’s right to equitable set-off. Potter LJ, who delivered the judgment of the court, referred to authority establishing that an equitable set-off may arise where the cross-claim stems from a different contract or transaction.⁶⁸ His Lordship concluded that there was “a close and inseparable relationship between the claims” and that it would be “manifestly unjust to allow one claim to be

63 [2007] 2 SLR(R) 856.

64 *Abdul Salam Asanaru Pillai v Nomanbhoy & Sons Pte Ltd* [2007] 2 SLR(R) 856 at [28]. Also see [30]–[34].

65 *Abdul Salam Asanaru Pillai v Nomanbhoy & Sons Pte Ltd* [2007] 2 SLR(R) 856 at [34].

66 *Abdul Salam Asanaru Pillai v Nomanbhoy & Sons Pte Ltd* [2007] 2 SLR(R) 856 at [35]. The discretion to stay the execution of a judgment is considered at [29]–[32].

67 [2001] 2 Lloyd’s Rep 93.

68 See *British Anzani (Felixstowe) Ltd v International Marine Management (UK)* [1980] 1 QB 137.

enforced without regard to the other”.⁶⁹ Although the defendant’s cross-claim in *Bim Kemi* arose from what was ostensibly a distinct transaction (the 1984 agreement), this was essentially a situation in which the 1984 agreement was replaced by the 1994 agreement as opposed to circumstances involving separate contracts. The two agreements, which actually continued in parallel for a period of time, were “inseparably connected within the continuum of the parties’ trading relationship ... which both contemplated a continuing expansion and exploitation of the market ...”.⁷⁰ The connection between the transactions in *Abdul Salam* did not meet this degree of closeness and they could not have been said to be inseparable. Accordingly, *Bim Kemi* was justifiably distinguished in *Abdul Salam*.

26 The test of “a close and inseparable relationship between the claims” applied in *Bim Kemi* and in *Abdul Salam*⁷¹ was formulated by the Privy Council in *Government of Newfoundland v The Newfoundland Railway Co*⁷² and affirmed by Lord Brandon of Oakbrook in *Bank of Boston Connecticut European Grain and Shipping Ltd*.⁷³ In *Bim Kemi*, Potter LJ preferred this test because it precisely identifies the degree of connection (*ie*, it has to be inseparable) and leaves no doubt that the cross-claim may arise from a different transaction.⁷⁴ A question which arises is whether Lord Brandon’s inseparable connection test is consistent with Lord Denning’s criteria in *The Nanfri*:⁷⁵ “... only cross-claims which go directly to impeach the plaintiff’s demands, that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim.” In *Abdul Salam*, Sundaresh Menon JC did not consider Lord Brandon’s formulation as changing the established principles. Referring to Potter LJ’s reliance on Lord Brandon’s test, his Honour stated:⁷⁶

I do not consider that [Potter LJ’s observations on Lord Brandon’s test] add to the understanding of the applicable principles when considering whether an equitable set-off may be raised. The question

69 *Bim Kemi AB v Blackburn Chemicals Ltd* [2001] 2 Lloyd’s Rep 93 at [29]–[30]. The test of a “close and inseparable relationship” is considered in the following paragraph.

70 *Bim Kemi AB v Blackburn Chemicals Ltd* [2001] 2 Lloyd’s Rep 93 at [37].

71 *Abdul Salam Asanaru Pillai v Nomanbhoy & Sons Pte Ltd* [2007] 2 SLR(R) 856 at [34].

72 (1888) 13 App Cas 199.

73 [1989] 1 AC 1056.

74 *Bim Kemi AB v Blackburn Chemicals Ltd* [2001] 2 Lloyd’s Rep 93 at [29].

75 See para 7 of this article.

76 *Abdul Salam Asanaru Pillai v Nomanbhoy & Sons Pte Ltd* [2007] 2 SLR(R) 856 at [28]. Some elements of this pronouncement have been cited above. It is fully reproduced here for convenience. The pronouncement has been applied or acknowledged in later cases including *American International Assurance Co Ltd v Wong Cherng Yaw* [2009] SGHC 89 at [25]; *Gao Bin v OCBC Securities Pte Ltd* [2009] 1 SLR(R) 500 at [10].

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

27 These observations reflect the pronouncement of Lord Denning in *The Nanfri*, which was endorsed by the Court of Appeal in *Pacific Rim*.⁷⁷ Accordingly, Lord Brandon's and Lord Denning's tests may be viewed as different expressions of the same principle.⁷⁸ If the claim and counterclaim are so close that the counterclaim impeaches the plaintiff's claim⁷⁹ or the claim and counterclaim are inseparably connected⁸⁰ (in which case, the claim would be similarly impeached by the counterclaim), equity would require the former to take into account the latter.

28 In *Abdul Salam*, the High Court granted summary judgment in respect of the plaintiff's claim for the shortfall of quantity under the contracts with the defendant.⁸¹ However, given the defendant's counterclaim, the court ordered the execution of the judgment to be stayed until the trial of the counterclaim or further order.⁸² Although the circumstances of the case would not have brought the defendant's claims within Bingham LJ's second class (because those claims did not arise from the transactions which justified the plaintiff's claim), it is significant that, in contrast to the later cases,⁸³ Bingham LJ's classification was not referred to. In fact, Sundaresh Menon JC approached the issues in the established manner of determining whether the counterclaim constituted a set-off justifying leave to defend, or did not defeat the application for summary judgment, but warranted a stay of execution.

29 A stay of execution is normally ordered pursuant to O 14 r 3(2) of the Rules of Court⁸⁴ because it would not be in the interests of justice to permit the plaintiff to enforce his judgment in the face of a counterclaim which (although it does not qualify as a set-off),⁸⁵ by

77 See para 7 of this article.

78 This is intimated by the extract of the judgment in *Abdul Salam Asanaru Pillai v Nomanbhoy & Sons Pte Ltd* [2007] 2 SLR(R) 856 at [28] above. Also see *American International Assurance Co Ltd v Wong Cherng Yaw* [2009] SGHC 89 at [25].

79 *Ie*, Lord Denning's test.

80 *Ie*, Lord Brandon's test.

81 There was also a claim for alleged quality defects.

82 *Abdul Salam Asanaru Pillai v Nomanbhoy & Sons Pte Ltd* [2007] 2 SLR(R) 856 at [22].

83 See paras 10–14 of this article: "Significance of classificatory approach".

84 This provision is set out in para 8 of this article.

85 Whether a legal or equitable set-off or a set-off by abatement (see paras 6–8 of this article).

reason of its circumstances (or more specifically, its connection to the claim), demands that execution be delayed until the trial of the counterclaim. The decision to stay the execution of the judgment often has considerable significance for the parties as the plaintiff has to wait for his funds (which may be reduced or extinguished if the counterclaim is successful at trial), and bears the risk that the defendant may not be able to pay him if the latter's circumstances change.⁸⁶ In *Invar Realty v Kenzo Tange Urtec*,⁸⁷ Chan Sek Keong J (as his Honour then was) confirmed that if the defendant raises a valid counterclaim which is not a defence but is connected to the main claim, the order should be summary judgment subject to a stay of execution pending the adjudication of the counterclaim or until further order.⁸⁸ As the power to grant a stay of execution is an entirely discretionary matter, the defendant must be able to satisfy the court that this is the appropriate order to make: "It is axiomatic that a defendant who invites the court to exercise the discretionary power must produce sufficient relevant material for the court to justify a decision in his favour. Granting a stay of execution is not a matter of course."⁸⁹

30 The issue of whether a stay should be granted is not necessarily straightforward. In *Cheng Poh Building Construction Pte Ltd v First City Builders Pte Ltd*⁹⁰ ("Cheng Poh"), the Court of Appeal reached a different conclusion from the High Court, which had granted a stay of execution of the judgment pending trial of the counterclaim.⁹¹ The claim was made by a subcontractor against the main contractor for non-payment in respect of a building project. The main contractor admitted the claim but raised a counterclaim in respect of sums alleged to be due under the same project as well as two other projects. The registrar granted the subcontractor summary judgment on its claim less the amount of the counterclaim concerning the same project. The main contractor was given leave to defend the balance of the subcontractor's claim. On appeal by the main contractor, the court decided that there should be a stay of execution of the judgment sum pending the trial of the counterclaim for amounts allegedly due under the other projects. The court took the view that there was a sufficient interconnection between

86 For example, the defendant might become bankrupt or dissipate his assets.

87 [1990] 3 MLJ 388 at 391. A stay was appropriate in the circumstances of the case.

88 Also see *Cheng Poh Building Construction v First City Builders* [2003] 2 SLR(R) 170 (stay not granted because connection between claims insufficient and there were no special circumstances); *PH Grace v American Express International Banking* [1985–1986] SLR(R) 979 (stay of execution ought to have been granted); *Koshida Trading (S) v Limco Products Manufacturing* [1990] 1 SLR(R) 190 (case did not justify a stay because of lack of connection between the claim and counterclaim).

89 *Hua Khian Ceramics Tiles Supplies v Torie Construction* [1991] 2 SLR(R) 901 at [24] per Selvam J.

90 [2003] 2 SLR(R) 170.

91 [2002] SGHC 272.

the subcontractor's claim and the main contractor's counterclaim because of their business relationship (as builders). It concluded that no prejudice would result from the stay as the case would be heard shortly and, furthermore, the immediate enforcement of the judgment could cause severe disruptions to the business of the main contractor.⁹²

31 On further appeal by the subcontractor, the Court of Appeal ruled that the main contractor's counterclaim in respect of the other projects was insufficiently connected to the claim and lifted the stay of execution. It concluded that "special circumstances" must be shown for there to be a stay of execution: "The mere fact that a defendant has a *bona fide* counterclaim arising out of another contract with the plaintiff, unconnected with the contract which forms the subject matter of the action, will not of itself constitute a 'special circumstance' justifying a stay of execution."⁹³ The Court of Appeal did not think the judge's reasons for granting a stay could be supported in the absence of a clear connection between the claims. It pointed out that if the main contractor and subcontractor had maintained a "running account", the position may have been different.⁹⁴ The Court of Appeal considered that a sufficient connection between the claim and cross-claim is a critical requirement. However, its use of the terminology "special circumstances" is broad enough to enable a court to take into account any relevant consideration (in addition to the degree of connection) for the purpose of determining whether it is just to order a stay of execution.⁹⁵

32 It is instructive to compare the outcomes in *Abdul Salam* (in which a stay was granted) and *Cheng Poh*. Although in both cases the respective claims and counterclaims arose from separate contracts between the parties, the circumstances were not identical. In *Abdul Salam*, the separate contracts stemmed from a close and long-standing commercial relationship between the parties, which involved the same goods (the sale of cashew nuts) and other common arrangements (such as shipment of the goods on a particular vessel). Moreover, the defendant had "plausible counterclaims" for an amount in excess of the

92 *Cheng Poh Building Construction Pte Ltd v First City Builders Pte Ltd* [2002] SGHC 272 at [9]–[11].

93 *Cheng Poh Building Construction Pte Ltd v First City Builders Pte Ltd* [2003] 2 SLR(R) 170 at [18].

94 *Cheng Poh Building Construction Pte Ltd v First City Builders Pte Ltd* [2003] 2 SLR(R) 170 at [25]. Even an informal running account had not been established by the facts (at [22]).

95 For example, the court may take into account the terms of the contract in order to determine whether the parties had addressed the issue of stay. See *International Factors Leasing v The Personal Representative of Tan Hock Kee, deceased* [2003] 2 SLR(R) 1; *PH Grace Pte Ltd v American Express International Banking Corp* [1985–1986] SLR(R) 979. Also see *Singapore Court Practice 2009* (LexisNexis, 2009) at para 14/4/3 or *Singapore Civil Procedure 2007* (Sweet & Maxwell, 2007) at para 14/4/10 for a consideration of the case law on this point.

plaintiff's claim.⁹⁶ However, in *Cheng Poh*, the counterclaim arose from separate building projects which, in the view of the Court of Appeal, were not sufficiently linked to the claim.⁹⁷ Additionally, while the defendant had admitted to the claim,⁹⁸ its counterclaim was highly questionable as a result of critical substantive issues.⁹⁹ The Court of Appeal also took into account the special needs of the construction industry: "prompt payment to contractors/subcontractors is the lifeblood of their trade".¹⁰⁰ The court considered that the plaintiff subcontractor's five-month delay in pursuing its right to be paid was not unreasonable, although it intimated that inordinate delay might have been a consideration to be taken into account.¹⁰¹ In the court's view, as the plaintiff's claim was clearly established by the admission of the defendant,¹⁰² it should be entitled to immediate payment.¹⁰³ *Abdul Salam* and *Cheng Poh* show that the decision to grant a stay is often a difficult one which is dependent on a thorough examination of all the circumstances of the case, including the relationship between the claim and counterclaim, their relative strengths, the conduct of the parties and any policy consideration which might be applicable.

VI. Proposal for a new model

33 It is evident from the foregoing discussion that there are three potential outcomes in summary proceedings involving a counterclaim. First, the respondent may be granted leave to defend.¹⁰⁴ Secondly, the applicant may be granted summary judgment subject to a stay of execution until the trial of the counterclaim or further order.¹⁰⁵ Thirdly, the applicant may be granted summary judgment without qualification,

96 *Abdul Salam Asanaru Pillai v Nomanbhoy & Sons Pte Ltd* [2007] 2 SLR(R) 856 at [35].

97 *Cheng Poh Building Construction Pte Ltd v First City Builders Pte Ltd* [2003] 2 SLR(R) 170 at [19]. As mentioned above, if the parties had a running account which straddled the various projects, the decision may have been different (at [22] and [25]).

98 *Cheng Poh Building Construction Pte Ltd v First City Builders Pte Ltd* [2003] 2 SLR(R) 170 at [5].

99 *Cheng Poh Building Construction Pte Ltd v First City Builders Pte Ltd* [2003] 2 SLR(R) 170 at [19].

100 *Cheng Poh Building Construction Pte Ltd v First City Builders Pte Ltd* [2003] 2 SLR(R) 170 at [24].

101 *Cheng Poh Building Construction Pte Ltd v First City Builders Pte Ltd* [2003] 2 SLR(R) 170 at [23].

102 *Cheng Poh Building Construction Pte Ltd v First City Builders Pte Ltd* [2003] 2 SLR(R) 170 at [5].

103 The High Court, in granting a stay, took the view that the plaintiff would not suffer "significant prejudice" as the action was due for hearing "very soon". The Court of Appeal did not consider this to be a relevant consideration (*Cheng Poh Building Construction Pte Ltd v First City Builders Pte Ltd* [2003] 2 SLR(R) 170 at [25]).

104 On terms or conditions which the court deems just to impose.

105 On terms or conditions which the court deems just to impose.

in which case the respondent will have to pursue his counterclaim separately at trial.

34 Two fundamental and sequential questions underlie these three outcomes. The first question is whether the counterclaim is acknowledged by law as an independent (legal) set-off, a set-off by abatement or an equitable set-off. The scope of the first two categories of set-off is clear enough. With regard to equitable set-off, it has been shown that the critical issue is whether the nature of the counterclaim and its link to the claim is such that it would be manifestly unjust to grant summary judgment without taking the amount of the counterclaim into account. If it would be manifestly unjust to do so, the second question is whether it would be just to stay the execution of the judgment.

35 Both questions involve a consideration of the nature of the counterclaim and the relationship between the claim and counterclaim. However, as a matter of justice, the degree of closeness between the claims must correspond to the impact of the remedy sought. While the effect of an equitable set-off is to reduce or extinguish the claim,¹⁰⁶ a stay does not defeat any part of the claim; it merely postpones the enforcement of the judgment. The degree of connection for the purpose of equitable set-off must be sufficient to make it “manifestly unjust” not to take the amount of the counterclaim into account. With regard to a counterclaim which is not a set-off, the court has to ask itself whether, in all the circumstances, it would be just to prevent the plaintiff from obtaining the proceeds of his judgment immediately (by imposing a stay pursuant to O 14 r 3(2)). The question requires a consideration of all the circumstances of the case, including the degree of the connection, the validity of the counterclaim, the parties’ respective positions and interests, the plaintiff’s likely ability to satisfy any judgment which the defendant might obtain on his counterclaim at trial,¹⁰⁷ the existence of any special factors which would justify a stay,¹⁰⁸ and the imposition of appropriate terms if a stay is granted.

36 In this suggested approach, the terminological difficulties addressed earlier – *ie*, whether the counterclaim is “*bona fide*” or “plausible” (the distinction made between Bingham LJ’s second and third classes based on the *Supreme Court Practice 1991* commentary)¹⁰⁹ – would be resolved by the simple requirement that the defendant must at the least show a counterclaim which is arguable on the merits (*ie*, that it

106 *Ie*, to the extent of the amount set-off.

107 See para 22 of this article.

108 See para 32 of this article.

109 See paras 15–16 of this article.

is plausible and not a sham).¹¹⁰ Such a counterclaim would normally satisfy both conditions of being “*bona fide*” and “plausible”. There would be no place for Bingham LJ’s second class (which his Lordship himself could not justify on any independent principle),¹¹¹ as this would be subsumed under the doctrine of equitable set-off.¹¹²

37 Of course, as the Court of Appeal recently observed in *Cooperatieve Centrale Raiffesisen-Boerenleenbank BA, Singapore Branch v Motorola Electronics Pte Ltd*,¹¹³ the law of set-off is not satisfactory. It has been said over the years that the principles “lack logic and sense” and have to be “discovered in a number of diverse rules based on no coherent line of reasoning”.¹¹⁴ The doctrine is largely the result of early 18th century statutes¹¹⁵ and the historical developments in the courts of common law and equity prior to the Supreme Court of Judicature Act 1873.¹¹⁶ Statute and the common law recognised the concept of independent set-off involving mutual debts but not unliquidated claims or cross-claims.¹¹⁷ This restrictive approach apparently led to the plea of abatement although the relief it offers is limited to actions for the price of goods and services.¹¹⁸ Equity took a broader approach by acknowledging unliquidated claims and cross-claims if they were significantly connected and it would be manifestly unjust to ignore the latter.¹¹⁹ However, where the claim and cross-claim are unliquidated and unconnected, no set-off arises in law or equity¹²⁰ despite the justiciability of considering both claims conjunctively. As it stands, the law constitutes different groups of rules based on the statutory and judicial proclivities of a bygone era. It may be time for the doctrine of set-off to be set free from historical strictures of the English courts and for its systemisation through the formulation of a single comprehensive set of principles squarely based on issues of justice.

110 As mentioned above, the merit of the counterclaim would be considered together with other factors in the case.

111 See para 14 of this article.

112 See paras 10–14 of this article.

113 [2011] 2 SLR 63 at [39].

114 *Axel Johnson Petroleum AB v MG Mineral Group AG* [1992] 1 WLR 270 at 276 per Staughton LJ. Also see *OCWS Logistics Pte Ltd v Soon Meng Construction Pte Ltd* [1998] 3 SLR(R) 888 at [7].

115 See n 13 above.

116 36 & 37 Vict c 66.

117 See para 6 of this article.

118 See para 6 of this article.

119 See para 7 of this article.

120 As Leggat LJ pointed out in *Axel Johnson Petroleum AB v MG Mineral Group AG* [1992] 1 WLR 270 at 264.