

Equitable Set Off of Claims in England: When Separate Contracts May Be Close Enough

by Raymond L. Sweigart and Steven P. Farmer

The recent UK Court of Appeal decision of Geldof Mettalconstructie NV v Simon Carves Limited (2010) EWCA Civ 667, reviews and provides much-needed guidance on the application of the doctrine of equitable set off. This important case clarifies that an express clause in a contract can extend the common law right of set off and has ramifications for those who are negotiating multiple contracts with a single party, whether that be a supplier, customer, or those seeking to rely on or refute a set off clause in a contract. Careful drafting and clear advice during and after the contracting process is key.

Equitable Set Off—a Whistle Stop

Generally speaking, this doctrine allows a defendant to use a counterclaim to reduce or defeat a contractual claim, providing the contract does not seek to limit or exclude this common law right. However, equitable set off can only be utilised if it would be “unjust” to enforce the claim without taking into account the counterclaim. Under the traditional common law doctrine, equitable set off is allowed only where “close connection” between the claim and counterclaim exists. Accordingly, it is more commonly used where the counterclaim arises out of the same contract as the claim, rather than where the claim and counterclaim arise out of different contracts. Previous case law suggests that it may be difficult to demonstrate the required “close connection” where the claim and counterclaim both arise from different contracts.

Geldof v Simon Carves

Nevertheless, *Geldof v Simon Carves* provides a clear-cut example of where it was possible to assert an equitable set off even though the claim and counterclaim arose separately from a supply contract and an installation contract that were concluded at separate times, were separately tendered, and were independent of each other. As is detailed below, it is now clear that parties can make contractual provision, expanding the equitable right of set off.

Summary of the Facts

- Simon Carves Limited (“SCL”) contracted Geldor Metaalconstructie NV (“Geldof”) to carry out commercial building work, entering into two subcontracts: one relating to the supply of items; the other relating to installation.
- The supply contract contained a clause headed “Right to Offset” which provided: “Purchaser, without waiver or limitation of any rights or remedies of Purchaser or Owner, shall be entitled from time to time to set off against the Purchase Order Price any amounts lawfully due from the Supplier to the Purchaser whether under this Purchase Order or otherwise”.
- SCL alleged that Geldof had breached the installation contract, issued a notice of default and failed to pay Geldof’s invoice for items supplied, relying on the “Right to Offset” clause. Geldof stated that it would not continue with the installation work unless SCL paid Geldof the amounts due under the supply contract and, consequently, SCL issued notice of termination under the installation contract.
- Geldof brought proceedings against SCL, claiming the price of the items supplied under the supply contract. SCL counterclaimed for damages for repudiation of the installation contract.
- SCL accepted that the supply and installation contracts were separate contracts but submitted that the counterclaim was inseparably connected with the dealings and transactions which gave rise to the claim and so should be set off against the claim.

The Judgment

The Court considered that both contracts were related to the same site, that both contracts were discussed together and that items to be supplied under the supply contract were of no use to SCL unless the installation work were properly performed by *Geldof*. It therefore decided that the claim under the installation could be set off against the claim under the supply contract in reliance on the “Right to Offset” clause without the need to satisfy the common law “close connection” test required for equitable set off.

Conclusion

Geldof illustrates that parties may agree by contract to extend the equitable right of set off beyond its traditional scope. Parties negotiating such clauses should take extreme care to ensure that they are not altering what would typically be their position under the common law to their detriment. This case serves as a useful reminder that legal advice is a must—even in respect of those terms which are traditionally perceived to be boilerplate—during negotiations, contracting and when relationships turn sour.

If you have any questions about the content of this client alert, please contact the Pillsbury attorney with whom you regularly work or the authors below.

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