DERHAM ON THE LAW OF SET-OFF

Rory Derham
Barrister, New South Wales

OXFORD UNIVERSITY PRESS
CONTENTS

Table of Cases xxxi
Table of Legislation, Treaties, and Conventions cv

1. Introduction 1
   A. The Meaning of Set-off 1.01
   B. The Importance of Set-off 1.02
      (1) Insolvency 1.02
      (2) Counterclaim 1.03
      (3) Costs 1.06
      (4) Third party interests 1.07
      (5) Arbitration 1.08
   C. The Forms of Set-off 1.10
   D. Civil Procedure Rules 1.13
   E. Applicable Law for Determining the Existence of a Cross-Claim 1.15

2. Set-off Between Solvent Parties: Common Law 9
   A. Early Developments 2.01
   B. Statutes of Set-off 2.04
      (1) Introduction 2.04
         Australia 2.07
      (2) When must the set-off be available? 2.08
      (3) Mutuality 2.13
      (4) The requirement of debts 2.14
         What is a 'debt'? 2.15
         Alternative causes of action 2.18
         Demands closely analogous to debts 2.19
         Claims on guarantees 2.21
         Indemnities 2.25
      (5) Due and payable 2.29
      (6) Freight and negotiable instruments 2.32
      (7) Trustees 2.33
   C. The Statutes of Set-off as a Procedural Defence 2.34
      (1) The procedural nature of the defence 2.34
         Concepts inherent in describing the defence as procedural 2.37
         Parker v Jackson criticized 2.40
      (2) Cross-debt must be enforceable by action 2.46
         Limitation Act 2.47
         Unenforceable on other grounds 2.48
      (3) Cross-debt must be able to be determined in the plaintiff's action 2.51
Contents

D. Substantive Aspects of the Defence
   Acceleration and termination clauses 2.53
   2.57
E. Equitable Remedies
   Forfeiture and possession 2.58
   2.62
F. The Statutes of Set-off in Australia
   (1) New South Wales
      Civil Procedure Act 2005 (NSW), s. 21 2.63
      2.64
   (2) Criticism of the Stehar Knitting Mills case
      The defence is not wholly procedural 2.74
      2.76
   (3) Queensland 2.81
   (4) Victoria 2.83
G. Connected Cross-Demands at Common Law 2.87
H. Judgments
   (1) Pleading a judgment debt as a defence under the Statutes 2.90
   (2) Stay on enforcement of a judgment on the basis of an unlitigated cross-claim
      Equitable set-off 2.91
      2.92
      Cross-claim accruing after judgment 2.94
      2.97
   (3) Setting off judgments and orders
      The nature of the set-off 2.98
      2.99
      Mutuality 2.100
      Assignment 2.101
      2.103
      Bankruptcy 2.104
      Solicitor's lien 2.105
      Legal aid 2.107
I. Common Law Abatement
   (1) General principle 2.123
   (2) Substantive or procedural? 2.129
   (3) Abatement is distinct from equitable set-off 2.134

3. Set-off Between Solvent Parties: Equitable Set-off 73
   A. Introduction 3.01
      (1) Money claims 3.02
   B. The Forms of Equitable Set-off
      (1) Implied agreement 3.03
      (2) Equitable proprietary estoppel 3.04
      (3) Acting by analogy with the Statutes 3.07
      (4) Substantive equitable set-off 3.10

4. Substantive Equitable Set-off 79
   A. The Traditional Formulation 4.02
   B. New Approaches 4.08
   C. Equitable Set-off in Australia 4.19
D. The Substantive Nature of Equitable Set-off 4.29
   (1) What is meant by ‘substantive’? 4.30
   (2) Some possible problems 4.35
   (3) Is the set-off confined to litigation? 4.38
   (4) Right to take action consequent upon default 4.45
   (5) Action taken by a creditor before a set-off has been asserted 4.48
   (6) Estimating the value of the cross-claim 4.50
   (7) Statute of limitation 4.51
   (8) Arbitration and foreign jurisdiction clauses 4.55
   (9) Interest 4.56
   (10) Winding-up petition 4.57

E. Discretion 4.58

F. Liquidated Cross-claims 4.63
   (1) Contingent debts, and debts not yet payable 4.65

G. Mutuality 4.67
   (1) Is mutuality always necessary? 4.67
   (2) Misrepresentation inducing a contract with a third party 4.84
   (3) Guarantees and related parties 4.85
   (4) A deposit as security, where the depositor is not personally liable 4.88

H. Different Contracts 4.91
   (1) Overriding agreements 4.94

I. Creditor’s Conduct Affecting Debtor’s Ability to Pay 4.97

J. Repudiation of a Contract 4.103
   (1) Contracts requiring periodic performance 4.104
   (2) Repudiation of an overriding agreement 4.106

K. Misrepresentation, Fraud, and Misleading or Deceptive Conduct 4.110
   (1) Misrepresentation inducing a contract 4.110
   (2) Fraudulent claim on a contract 4.113
   (3) Misleading or deceptive conduct in Australia 4.116

L. Limitation on Liability 4.119

M. Periodic Payments 4.120

N. Mortgages 4.125
   (1) The scope of equitable set-off 4.125
   (2) Mortgage to secure the unpaid price of property sold 4.126
   (3) Payment of the price by way of a loan from the vendor 4.128
   (4) Enforcing rights under the mortgage 4.130
   (5) Claim for possession, where possession does not depend on default 4.131
   (6) Remedies dependent upon default 4.136
      Restraining the exercise of a power of sale 4.137
      Restraining other remedies dependent upon default 4.141
      Action for possession, where possession depends upon default 4.142
   (7) Statutes of Set-off 4.147
   (8) Rent payable to a mortgagee in possession 4.148
Contents

5. Set-off Between Solvent Parties: Various Aspects 163

A. Charterparties and Bills of Lading 5.02
   (1) Equitable set-off and abatement - freight under a voyage charter or bill of lading 5.02
   (2) Equitable set-off - hire under a time charter 5.10
   (3) The justification for the freight rule 5.16
   (4) The Statutes of Set-off 5.17
   (5) Bill of lading freight when the vessel is chartered 5.23

B. Negotiable Instruments, Letters of Credit and Direct Debits 5.25
   (1) Negotiable instruments - equitable set-off 5.25
   Stay of execution 5.27
   Can 'exceptional circumstances' affect the entitlement to judgment? 5.30
   Circumstances which may provide a defence 5.31
   Debt on a negotiable instrument pleaded as a defence 5.32
   (2) Setting aside a statutory demand 5.33
   (3) Insolvency set-off 5.34
   (4) Negotiable instruments - Statutes of Set-off 5.35
   (5) Statutes of Set-off - set-off against a subsequent holder 5.42
   (6) Letters of credit 5.43
   (7) Direct debit 5.49

C. Building and Construction Contracts 5.50
   (1) General principle 5.50
   (2) Housing Grants, Construction and Regeneration Act 1996 5.51
   (3) ‘Security of payment’ legislation in Australia 5.58
   (4) Excluding or limiting equitable set-off and abatement by contract 5.62

D. Contracts of Employment 5.64
   (1) Failure to work 5.64
   (2) Claim for damages 5.65
   (3) Insolvency set-off 5.66

E. Landlord and Tenant 5.67
   (1) Equitable set-off 5.67
   (2) Forfeiture for non-payment of rent 5.73
   (3) Distress 5.74
   (4) Payment in satisfaction of an obligation of the landlord 5.75
   (5) Recoupment 5.77

F. Specific Performance 5.81

G. Set-off as a Sword 5.86
   (1) Equitable set-off 5.86
   (2) Statutes of Set-off 5.87

H. Foreign Currencies 5.88
   (1) Statutes of Set-off 5.89
   (2) Equitable set-off 5.91

I. Contracting out of Set-off 5.95
   (1) Equitable set-off and common law abatement 5.95
      General principle 5.95
### Contents

<table>
<thead>
<tr>
<th>Topic</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Payment 'without deduction'</td>
<td>5.101</td>
</tr>
<tr>
<td>The effect of specifying some deductions</td>
<td>5.107</td>
</tr>
<tr>
<td>Stay of execution</td>
<td>5.110</td>
</tr>
<tr>
<td>Negligence claims</td>
<td>5.111</td>
</tr>
<tr>
<td>Arbitration clauses</td>
<td>5.112</td>
</tr>
<tr>
<td>Conclusive evidence certificate</td>
<td>5.113</td>
</tr>
<tr>
<td>(2) Unfair Contract Terms Act 1977</td>
<td>5.114</td>
</tr>
<tr>
<td>(3) Misrepresentation Act 1967</td>
<td>5.121</td>
</tr>
<tr>
<td>(4) Building and construction contracts</td>
<td>5.122</td>
</tr>
<tr>
<td>Australia</td>
<td>5.124</td>
</tr>
<tr>
<td>(5) Statutes of Set-off</td>
<td>5.133</td>
</tr>
<tr>
<td>Clear words</td>
<td>5.134</td>
</tr>
<tr>
<td>Waiver</td>
<td>5.136</td>
</tr>
<tr>
<td>(6) Second ranking security, and subordination</td>
<td>5.137</td>
</tr>
<tr>
<td>(7) Agreement not to assign</td>
<td>5.138</td>
</tr>
<tr>
<td>(8) Estoppel, and credit notes</td>
<td>5.139</td>
</tr>
<tr>
<td>(9) Payment in advance</td>
<td>5.140</td>
</tr>
<tr>
<td>(10) Company under administration</td>
<td>5.141</td>
</tr>
<tr>
<td>J. Failure to Assert a Cross-claim as a Defence</td>
<td>5.142</td>
</tr>
<tr>
<td>(1) Introduction</td>
<td>5.142</td>
</tr>
<tr>
<td>(2) Australia</td>
<td>5.146</td>
</tr>
<tr>
<td>(3) Statutes of Set-off</td>
<td>5.147</td>
</tr>
<tr>
<td>(4) Common law abatement</td>
<td>5.150</td>
</tr>
<tr>
<td>(5) Equitable set-off</td>
<td>5.153</td>
</tr>
<tr>
<td>(6) Default judgments</td>
<td>5.160</td>
</tr>
<tr>
<td>(7) Dismissal of cross-claim for want of prosecution</td>
<td>5.161</td>
</tr>
<tr>
<td>(8) Discontinuance</td>
<td>5.162</td>
</tr>
<tr>
<td>K. Criticisms of the State of the Law of Set-off</td>
<td>5.163</td>
</tr>
</tbody>
</table>

### 6. Set-off in Bankruptcy and Company Liquidation

#### A. Set-off in Bankruptcy

- Leave to proceed not necessary                                   | 6.05 |

#### B. Companies

- Company liquidation                                               | 6.05 |
- Administration                                                    | 6.10 |
- Bank insolvency and bank administration under the Banking Act 2009| 6.16 |
- Company voluntary arrangement and individual voluntary arrangement | 6.17 |

#### C. The Rationale for Insolvency Set-off

- Early Development, and the Influence of Equity                    | 6.20 |

#### D. The Statutes of Set-off, Equitable Set-off and Counterclaim in Bankruptcy and Liquidation

- Counterclaim                                                      | 6.22 |
- Statutes of Set-off                                               | 6.23 |
- Equitable set-off                                                 | 6.25 |

#### E. Early Development, and the Influence of Equity

- Competing explanations                                            | 6.33 |

F. The Development of the Set-off Section

G. The Relevant Date for Determining Rights of Set-off
   (1) Bankruptcy, company liquidation and administration
   Company liquidation
   Administration
   (2) Australia — bankruptcy
   (3) Australia — company liquidation, administration and deeds of
      company arrangement
   (4) Claims accruing subsequent to the relevant date
      Receipt of money by an agent after the principal’s bankruptcy
      Unaware of the bankruptcy

H. Qualification to the Set-off Section
   (1) Onus
   (2) What constitutes notice?
   (3) Bankruptcy
   (4) Company liquidation
   (5) Administration
   (6) Australia — bankruptcy
   (7) Australia — company liquidation
   (8) The identity of the party asserting the set-off
   (9) The meaning of ‘due’ (England), and the time of giving credit (Australia)
   (10) Assignment of a debt

I. Assignment of a Debt as a Preference

J. Temporary Suspension of Mutual Credit

K. The Necessity for Cross-Demands

L. Enforceable Demands

M. Insolvency Set-off is Mandatory
   (1) Contracting out of insolvency set-off
   (2) Agreement not to prove
   (3) Subordinated debt
   (4) Ancillary liquidation

N. The Nature of Insolvency Set-off
   (1) Automatic or procedural?
      Company liquidation
      Administration
   (2) Advantages and disadvantages of the automatic theory
   (3) Pleading set-off as a defence to an action by a trustee in bankruptcy
   (4) Contingent debts and claims: the use of hindsight
      Hindsight and estimation
      The difficulty with hindsight as an explanation in bankruptcy
      ‘Hindsight’ has become a fiction
   (5) BCCI v Habib Bank criticized
   (6) Australia

O. Foreign Currencies
   (1) Proof of debts
9. Commensurable Demands 425

A. The Requirement of Commensurability 9.01
   (1) The principle 9.01
   (2) *Rolls Razor v Cox* criticized 9.02

B. Repudiation, and Specific Performance 9.04
   (1) Insolvency as a repudiation 9.05
   (2) Specific performance 9.06
   (3) The adequacy of damages 9.09

C. Foreign Exchange Contracts 9.11
   (1) Introduction 9.11
   (2) The nature of the foreign money obligation 9.14
   (3) Set-off consequences if the obligation is not a monetary obligation 9.17
   (4) A recent view – *Camdex v Bank of Zambia* 9.19

10. Trust Funds 437

A. Introduction 10.01

B. Insolvency Set-off 10.02
   (1) The general principle 10.02
   (2) Express stipulation for a trust 10.04
   (3) An exception 10.05

C. Statutes of Set-off 10.06

D. Dissipation of the Trust Fund 10.10

E. Equitable Set-off 10.12

F. Authority to Turn Property into Money – *Rose v Hart* 10.14
   (1) The general principle 10.14
   Set-off against a trust fund 10.18
   Proceeds received before the bankruptcy 10.21
   (2) The circumstances in which the set-off applies 10.22
   Authority to turn property into money 10.23
   Money claims 10.27
   Unrevoked authority 10.28
   Deposit of property 10.34

G. Surplus Proceeds After Realizing a Security 10.36
   (1) Mortgagee's right of retainer, and tacking 10.37
   (2) Set-off against a trust fund 10.38
   (3) Deceased's insolvent estate 10.39
   (4) Proceeds received before the debtor's insolvency 10.41
   (5) Proceeds received after the debtor's insolvency 10.44
   (6) Criticism of the cases 10.46

H. Special-Purpose Payments 10.47
   (1) Failure of the purpose 10.47
   (2) Residue remaining after the purpose is carried out 10.48
   (3) Collection of the proceeds of a negotiable instrument 10.49
   (4) The justification for denying a set-off 10.50
## Contents

11. Mutuality – Introduction

A. The Meaning of Mutuality
   (1) Mutuality defined 11.01
   (2) Double insolvency 11.03
   (3) The necessity for mutuality 11.12

B. Equitable Interests – Insolvency Set-off
   (1) Fundamental principle 11.13
   (2) Beneficial title acquired after the relevant date 11.15
   (3) Insolvent assignor or trustee 11.16
   (4) Insolvent beneficial owner 11.17

C. Statutes of Set-off 11.18

D. Ascertained Beneficial Interests
   (1) Proof of a presently existing beneficial interest 11.22
   (2) Mixed account 11.29
   (3) Insolvency set-off 11.34

E. Security Over a Debt
   (1) Introduction 11.37
   (2) Assignment by way of mortgage
      Assigned debt exceeds the secured debt 11.39
      Auctioneers lien 11.41
      Set-off between the mortgagee and the debtor 11.42
      Secured creditor has other security 11.43
   (3) Fixed charge
      Statutes of Set-off 11.47
   (4) Floating security 11.49
   (5) Redemption of the security 11.51

12. Mutuality – Same Parties

A. Introduction 12.01

B. Joint Claims and Liabilities
   (1) The general principle 12.02
   (2) Parties may act to bring about a set-off 12.03
   (3) Severance of a joint claim 12.04
   (4) Insolvency set-off and partnerships 12.05
   (5) Equitable interests 12.06

C. Exceptions
   (1) Surety made jointly liable 12.09
   (2) Judgments 12.10
   (3) Fraud 12.11
   (4) Dormant partner 12.15
   (5) Common partners in two partnerships 12.19
   (6) Setting off a joint creditor’s interest in the debt 12.20
D. Several Persons Separately Liable
   (1) Joint and several debt 12.21
   (2) Guarantees and bills of exchange 12.23
   (3) Re BCCI (No. 8) – a choice of remedy? 12.29
   (4) Ex p Stephens explained 12.35
   (5) Set-off between the creditor and the principal debtor as a discharge
       of the surety 12.40

E. Separate Depositor does not Assume a Personal Obligation 12.41
   (1) Obligation to set off 12.44

F. Deceased Insolvent Partner 12.45

13. Mutuality – Same Right 527

A. Introduction 13.01
   (1) Different personal capacities 13.02
   (2) Trustees in bankruptcy 13.03
   (3) The effect of company liquidation 13.05

B. Transactions Impugned by an Insolvency Office-Holder 13.07
   (1) Preferences 13.07
       Bankruptcy 13.07
       Company liquidation 13.08
       Administration order in relation to a company 13.09
       No preference if a set-off would have been available 13.10
       Other arrangements constituting preferences 13.11
       Desire to produce a preference 13.12
       Acting inconsistently with a right to avoid a transaction 13.13
       Right of proof 13.14
   (2) Australia – preferences in company liquidation 13.15
   (3) Other impugned transactions 13.17
   (4) Insolvent trading in Australia 13.20
   (5) Assignment of book debts 13.30
   (6) Set-off, after the avoidance of an assignment of a debt 13.31

C. Performance of Contracts after Insolvency 13.32
   (1) Disclaimer 13.32
       Bankruptcy 13.33
       Company liquidation 13.34
   (2) Contract by insolvent to sell property or perform work 13.35
       Beneficial ownership had vested in the purchaser before the
       vendor’s insolvency 13.36
       Beneficial title had not passed before the vendor’s insolvency 13.37
       The Ince Hall case 13.39
       Criticism of Ince Hall 13.40
       Conclusion in relation to the Ince Hall case 13.56
       The relevance of the time that property passed 13.57
   (3) Contract to sell property to or to perform work for an insolvent 13.58
   (4) Options 13.59
D. Leases
   (1) Bankruptcy
   Mutuality
   Bankrupt landlord
   (2) Company liquidation
      Extent of the right of proof for rent
      Landlord in liquidation
E. Periodical Payment Obligations after Insolvency
F. Agency
   (1) Introduction
   (2) Set-off agreement between the agent and the third party
   (3) Undisclosed principals
      Insolvency set-off
      Equitable set-off
      Existing debts before notice
      Knowledge of the agency
      Duty of inquiry
      Basis of the set-off
   (4) Set-off between the principal and the third party
      Auctioneer's lien
      Undisclosed principal
      Unnamed principal
   (5) Set-off between the agent and the third party, where the agent can
      enforce the contract
      Insurance brokers in marine insurance
      Non-marine insurance
   (6) Set-off against an agent with a lien, where the agent cannot sue
   (7) Del credere commissions
   (8) Set-off between the agent and the third party, where the agent
      is personally liable as agent
   (9) Set-off between the principal and the agent
G. The Crown
   (1) General principle
   (2) Government departments
   (3) Criticism of Crown set-off
   (4) Public corporations
   (5) The federal system in Australia
H. Set-off in Relation to a Deceased's Estate
   (1) Executors and administrators
      Two cases in which a set-off was permitted
   (2) Set-off between a third party and a deceased's estate
      Equitable set-off, and the Statutes of Set-off
      Bankruptcy
      Debts incurred by the personal representative
      Charge on the estate for costs and expenses
   (3) Set-off by a beneficiary of the estate
14. The Rule in *Cherry v Boultbee*

A. Introduction
   (1) The nature of the principle

B. Executor's Right of Retainer

C. The Scope of the Rule
   (1) Bankruptcy and company liquidation
   (2) Equitable principle
   (3) The requirement of a fund
   (4) As a condition of equitable relief

D. Who May Invoke the Rule?
   (1) Can the contributor be required to pay in full?

E. Enforceable Rights and Obligations
   (1) Unenforceable obligation to contribute
   (2) Right to participate must be due and payable
   (3) Obligation to contribute must not have ceased to exist

F. Mutuality
   (1) Bankruptcy
   (2) The relevant date
   (3) Mutuality is concerned with the relationship to the fund
   (4) Same fund
   (5) Settlement involving two or more funds
   (6) Joint and separate rights and obligations

G. The Obligation to Contribute
   (1) Damages liability
   (2) Contingent, or not presently payable
   (3) Contribution need only be 'in aid of' the fund
   (4) There must be an obligation
   (5) Interest

H. The Right to Participate

I. Discretionary Relief

J. Suretyship, and the Rule against Double Proof

K. Waiver, and Proof of Debt

L. Assignments
   (1) The general principle
      Exceptions
      A competing principle
   (2) Presently existing rights and obligations
      Not presently payable at the date of notice
      Contingent obligation to contribute
   (3) Costs in pending proceedings
   (4) Assignee has an obligation to contribute
   (5) Agreement not to assert equities against assignees
   (6) Successive assignments
### Contents

M. Defaulting Trustee who is also a Beneficiary 14.79
  1. First formulation 14.81
  2. Second formulation 14.83
  3. Consequences of the formulations 14.84
  4. Non-monetary bequest 14.86
  5. Bankrupt defaulting trustee 14.87

N. The Method of Application of *Cherry v Boulbee* 14.92
  1. Right to participate is for a percentage of the fund 14.93
  2. Insolvent contributor 14.95
  3. Two insolvent estates 14.102

15. Combination of Bank Accounts 675

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Introduction</td>
<td>15.01</td>
</tr>
<tr>
<td>B. The Nature of the Right of Combination</td>
<td>15.03</td>
</tr>
<tr>
<td>1. Distinguished from lien and set-off</td>
<td>15.03</td>
</tr>
<tr>
<td>2. The cases</td>
<td>15.06</td>
</tr>
<tr>
<td>3. Cases supporting the contrary view</td>
<td>15.16</td>
</tr>
<tr>
<td>C. Criticisms</td>
<td>15.18</td>
</tr>
<tr>
<td>1. Interest</td>
<td>15.20</td>
</tr>
<tr>
<td>2. <em>Clayton's Case</em>, and the order of combination</td>
<td>15.21</td>
</tr>
<tr>
<td>3. Guarantees and securities</td>
<td>15.24</td>
</tr>
<tr>
<td>4. Notice of combination</td>
<td>15.28</td>
</tr>
<tr>
<td>5. The bank's right, and different branches</td>
<td>15.32</td>
</tr>
<tr>
<td>6. Time bars</td>
<td>15.36</td>
</tr>
<tr>
<td>D. Banker and Customer Relationship</td>
<td>15.41</td>
</tr>
<tr>
<td>1. Banking business</td>
<td>15.42</td>
</tr>
<tr>
<td>2. Guarantor of another customer's debt</td>
<td>15.44</td>
</tr>
<tr>
<td>3. Joint account</td>
<td>15.45</td>
</tr>
<tr>
<td>4. Different names</td>
<td>15.46</td>
</tr>
<tr>
<td>E. The Scope of Combination</td>
<td>15.48</td>
</tr>
<tr>
<td>1. Not confined to current accounts</td>
<td>15.48</td>
</tr>
<tr>
<td>2. Bills of exchange and promissory notes</td>
<td>15.50</td>
</tr>
<tr>
<td>3. Presently matured obligations</td>
<td>15.51</td>
</tr>
<tr>
<td>F. Express and Implied Agreements to Keep Accounts Separate</td>
<td>15.52</td>
</tr>
<tr>
<td>1. Current account and a loan account</td>
<td>15.54</td>
</tr>
<tr>
<td>2. Current account and other accounts</td>
<td>15.56</td>
</tr>
<tr>
<td>3. Deposit account upon which cheques cannot be drawn</td>
<td>15.57</td>
</tr>
<tr>
<td>4. Termination of the banker/customer relationship</td>
<td>15.58</td>
</tr>
<tr>
<td>5. Freezing an overdrawn account and opening a new account</td>
<td>15.61</td>
</tr>
<tr>
<td>6. Agreement to exclude set-offs</td>
<td>15.62</td>
</tr>
<tr>
<td>7. Bank's conduct precluding combination</td>
<td>15.63</td>
</tr>
<tr>
<td>8. Deposit for a specific purpose</td>
<td>15.64</td>
</tr>
<tr>
<td>9. Consequences of an agreement to keep accounts separate</td>
<td>15.65</td>
</tr>
</tbody>
</table>
## Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>G. Combination and Nominee Accounts</td>
<td>15.66</td>
</tr>
<tr>
<td>(1) Collecting a cheque for another person</td>
<td>15.72</td>
</tr>
<tr>
<td>H. Agreements Permitting Combination</td>
<td>15.73</td>
</tr>
<tr>
<td>(1) Contingent obligation</td>
<td>15.75</td>
</tr>
<tr>
<td>(2) Account subject to an assignment or a trust</td>
<td>15.76</td>
</tr>
<tr>
<td>(3) Customer’s liquidation</td>
<td>15.77</td>
</tr>
<tr>
<td>I. Different Currencies</td>
<td>15.78</td>
</tr>
<tr>
<td>J. Freezing Injunctions and Restraint Orders</td>
<td>15.83</td>
</tr>
<tr>
<td>K. Preferences</td>
<td>15.86</td>
</tr>
<tr>
<td>L. Trust Accounts</td>
<td>15.88</td>
</tr>
<tr>
<td>(1) Introduction</td>
<td>15.88</td>
</tr>
<tr>
<td>(2) The requirement of a trust</td>
<td>15.90</td>
</tr>
<tr>
<td>(3) The defence of <em>bona fide</em> purchaser for value</td>
<td>15.93</td>
</tr>
<tr>
<td>Knowledge of the trust</td>
<td>15.95</td>
</tr>
<tr>
<td>Trust moneys paid directly into an overdrawn account</td>
<td>15.97</td>
</tr>
<tr>
<td>The bank as 'recipient'</td>
<td>15.99</td>
</tr>
<tr>
<td>The degree of knowledge required</td>
<td>15.100</td>
</tr>
<tr>
<td>The relevant time for knowledge</td>
<td>15.105</td>
</tr>
<tr>
<td>Value</td>
<td>15.107</td>
</tr>
<tr>
<td>(4) Set-off agreement</td>
<td>15.111</td>
</tr>
<tr>
<td>(5) Labelling an account as a trust account, where the customer is not a trustee</td>
<td>15.113</td>
</tr>
<tr>
<td>(6) Account containing both trust and personal moneys</td>
<td>15.117</td>
</tr>
<tr>
<td>(7) Overdrawn trust account</td>
<td>15.119</td>
</tr>
<tr>
<td>M. Assignments</td>
<td>15.121</td>
</tr>
<tr>
<td>N. Deceased Customer</td>
<td>15.122</td>
</tr>
<tr>
<td>O. Banker's Lien Over a Negotiable Instrument</td>
<td>15.123</td>
</tr>
</tbody>
</table>

16. Set-off Agreements

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>A. Introduction</td>
<td>16.01</td>
</tr>
<tr>
<td>(1) Contingent debts</td>
<td>16.04</td>
</tr>
<tr>
<td>B. Insolvency</td>
<td>16.05</td>
</tr>
<tr>
<td>(1) Preferences and other impugned transactions</td>
<td>16.06</td>
</tr>
<tr>
<td>(2) Preferences in Australia – bankruptcy</td>
<td>16.10</td>
</tr>
<tr>
<td>(3) Preferences in Australia – company liquidation</td>
<td>16.17</td>
</tr>
<tr>
<td>C. Set-off Agreement Taking Effect Contrary to the <em>Pari Passu</em> Principle</td>
<td>16.21</td>
</tr>
<tr>
<td>(1) The 'British Eagle' principle</td>
<td>16.21</td>
</tr>
<tr>
<td>(2) Legislation in relation to investment exchanges and clearing houses</td>
<td>16.27</td>
</tr>
<tr>
<td>Australia</td>
<td>16.28</td>
</tr>
<tr>
<td>(3) Contractual set-off against an insolvent's liability</td>
<td>16.29</td>
</tr>
<tr>
<td>D. Close-out Netting</td>
<td>16.30</td>
</tr>
<tr>
<td>E. Regulations Giving Effect to EC Directives in Relation to Netting</td>
<td>16.45</td>
</tr>
<tr>
<td>F. Netting in Australia</td>
<td>16.52</td>
</tr>
</tbody>
</table>
Contents

(1) Payment Systems and Netting Act 1998 (Cth) .................................................. 16.52
Close-out netting, where a set-off would not otherwise have been available .......... 16.65
Multilateral netting ................................................................................................. 16.66

G. An Administrator's Indemnity and Lien in Australia ......................................... 16.68

H. Partnerships ........................................................................................................ 16.72

I. Taking a Charge Over One's own Debt ............................................................... 16.73
(1) The conceptual impossibility argument ....................................................... 16.73
(2) Charge-backs and mutuality ............................................................................ 16.83
(3) Charge-back and combination of accounts .................................................... 16.89
(4) Registration ....................................................................................................... 16.90

J. A Set-off Agreement as a Charge ....................................................................... 16.93

K. Flawed Asset ...................................................................................................... 16.108

17. Assignees, and Other Interested Third Parties .................................................. 807

A. Introduction ......................................................................................................... 17.01

B. Assignments ....................................................................................................... 17.02
(1) Equitable assignment ........................................................................................ 17.03
(2) Statutory assignment ......................................................................................... 17.04
(3) Australia: Personal Property Securities Act 2009 (Cth) ................................ 17.05
(4) Cross-demand must be available as a set-off against the assignor ............... 17.06
  Claim for freight, and claim on a negotiable instrument .................................. 17.10
  Australia: Personal Property Securities Act 2009 (Cth) ................................ 17.11
(5) Statutes of Set-off ............................................................................................. 17.13
  Date of notice ....................................................................................................... 17.13
  Presently payable ................................................................................................. 17.14
  Subsequent debt arising out of a prior contract .............................................. 17.15
(6) Set-off in Australia ............................................................................................ 17.16
  New South Wales and Queensland .................................................................. 17.16
  Victoria .................................................................................................................. 17.17
(7) Notice to the debtor .......................................................................................... 17.19
  Australia: notice under the Personal Property Securities Act 2009 (Cth) .... 17.22
(8) Assignment of a future debt ............................................................................. 17.25
  Prior contract ....................................................................................................... 17.25
  An expectancy not derived from a present contract ....................................... 17.28
  Australia: Personal Property Securities Act 2009 (Cth) ................................ 17.31
(9) Equitable set-off ............................................................................................... 17.32
(10) Insolvency ......................................................................................................... 17.39
  Insolvent assignor ............................................................................................... 17.39
  Insolvent debtor ................................................................................................. 17.41
  Insolvent assignee .............................................................................................. 17.43
(11) Agreement not to assert set-offs .................................................................... 17.45
(12) Conduct of the debtor ...................................................................................... 17.49
(13) A set-off agreement as an equity .................................................................... 17.51
  Set-off simply by virtue of the agreement ....................................................... 17.52
  Option to effect a set-off .................................................................................... 17.53
### Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Transaction entered into before notice</td>
<td>17.54</td>
</tr>
<tr>
<td>Transaction entered into after notice</td>
<td>17.55</td>
</tr>
<tr>
<td>Security over a debt</td>
<td>17.58</td>
</tr>
<tr>
<td>Subsequent set-off agreement</td>
<td>17.59</td>
</tr>
<tr>
<td>(14) Successive assignments</td>
<td>17.60</td>
</tr>
<tr>
<td>(15) Marshalling</td>
<td>17.64</td>
</tr>
<tr>
<td>Different rights</td>
<td>17.65</td>
</tr>
<tr>
<td>(16) Assignment merely of the proceeds of a debt</td>
<td>17.66</td>
</tr>
<tr>
<td>(17) Assignment of part of a debt</td>
<td>17.68</td>
</tr>
<tr>
<td>(18) Debts transferable at common law in their own right</td>
<td>17.69</td>
</tr>
<tr>
<td>Negotiable instruments</td>
<td>17.70</td>
</tr>
<tr>
<td>(19) Leases and mortgages</td>
<td>17.72</td>
</tr>
<tr>
<td>Mortgage of leased premises – <em>Reeves v Pope</em></td>
<td>17.73</td>
</tr>
<tr>
<td>Sale of leased premises</td>
<td>17.77</td>
</tr>
<tr>
<td>Breach of covenant by the mortgagee or purchaser</td>
<td>17.90</td>
</tr>
<tr>
<td>Mortgages in Australia</td>
<td>17.91</td>
</tr>
<tr>
<td>Tenant’s right of recoupment against a mortgagee or purchaser</td>
<td>17.93</td>
</tr>
<tr>
<td>(20) Freight payable to a mortgagee or purchaser of a ship</td>
<td>17.96</td>
</tr>
<tr>
<td>(21) Transfer (or sub-mortgage) of a Torrens mortgage in Australia</td>
<td>17.97</td>
</tr>
<tr>
<td>(22) Judgments and orders</td>
<td>17.98</td>
</tr>
<tr>
<td><strong>C. Security Over a Debt</strong></td>
<td>17.99</td>
</tr>
<tr>
<td>(1) Introduction</td>
<td>17.99</td>
</tr>
<tr>
<td>(2) Australia: Personal Property Securities Act 2009 (Cth)</td>
<td>17.102</td>
</tr>
<tr>
<td>(3) Statutes of Set-off</td>
<td>17.105</td>
</tr>
<tr>
<td>The general principle</td>
<td>17.105</td>
</tr>
<tr>
<td>Cross-debt arising after notice pursuant to a prior contract</td>
<td>17.106</td>
</tr>
<tr>
<td>Set-off asserted by the company</td>
<td>17.107</td>
</tr>
<tr>
<td>Debt to the company arising after notice but pursuant to a prior contract</td>
<td>17.109</td>
</tr>
<tr>
<td>Contract entered into after notice</td>
<td>17.112</td>
</tr>
<tr>
<td>(4) Equitable set-off</td>
<td>17.113</td>
</tr>
<tr>
<td>(5) Debt owing to the company exceeds the secured debt</td>
<td>17.114</td>
</tr>
<tr>
<td>(6) Liquidation</td>
<td>17.115</td>
</tr>
<tr>
<td>(7) Preferential debts</td>
<td>17.116</td>
</tr>
<tr>
<td><strong>D. Court-Appointed Receiver on the Application of a Secured Creditor</strong></td>
<td>17.119</td>
</tr>
<tr>
<td>(1) Manager appointed by a leasehold valuation tribunal</td>
<td>17.121</td>
</tr>
<tr>
<td><strong>E. Trusts</strong></td>
<td>17.122</td>
</tr>
<tr>
<td>(1) Set-off between the trustee and a third party</td>
<td>17.122</td>
</tr>
<tr>
<td>Equitable set-off</td>
<td>17.122</td>
</tr>
<tr>
<td>Abatement</td>
<td>17.123</td>
</tr>
<tr>
<td>Statutes of Set-off, and insolvency set-off</td>
<td>17.124</td>
</tr>
<tr>
<td>(2) Taking subject to equities</td>
<td>17.128</td>
</tr>
<tr>
<td>(3) Receipt of trust moneys in breach of trust</td>
<td>17.129</td>
</tr>
<tr>
<td>(4) Set-off between a beneficiary and a third party</td>
<td>17.130</td>
</tr>
<tr>
<td>Beneficiary has a personal claim against a trust creditor</td>
<td>17.130</td>
</tr>
<tr>
<td>Beneficiary personally liable to a trust debtor</td>
<td>17.132</td>
</tr>
<tr>
<td>(5) Set-off between trustee and beneficiary</td>
<td>17.134</td>
</tr>
</tbody>
</table>
F. Execution of Judgments
   (1) Introduction
   (2) Third party debt order
       Cross-debt payable at a future date
       Trust money
       Debt owing by the judgment creditor
       Insolvency
   (3) Charging orders
   (4) Appointment of a receiver by way of equitable execution

G. Notice Under Section 260-5 of the Taxation Administration Act in Australia

H. Subrogation
   (1) Insurance subrogation
   (2) Subrogation in other situations

I. Contracts (Rights of Third Parties) Act 1999
   18. Sureties
      A. Principal Debtor's Right to Require a Set-off
      B. Set-off Available to the Guarantor
      C. Guarantor's Right to Rely on the Principal Debtor's Set-off
         (1) Set-off agreement
         (2) Solvent set-off – the various approaches
         (3) Equitable set-off and common law abatement
             Explanation of the set-off
             An objection that has been raised
             Joinder of the principal
         (4) Statutes of Set-off
         (5) Cross-action not available as a set-off
         (6) Insolvency set-off
             Two debts owing to the creditor
         (7) Contract excluding the defence
             Insolvency set-off in the debtor's bankruptcy or liquidation
      D. Mortgage Given to Secure Another Person's Debt
      E. Surety's Right to Rely on a Co-Surety's Set-off
      F. Set-off Between the Surety and the Principal Debtor

Bibliography
Index