Cooperatieve Centrale Raiffeisen-Boerenleenbank BA (Trading as Rabobank International), Singapore Branch *v* Motorola Electronics Pte Ltd
[2010] SGCA 47

Case Number	: Civil Appeal No 52 of 2010
Decision Date	: 03 December 2010
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Gregory Vijayendran and Rachel Chow (Rajah and Tann LLP) for the appellant Tan Kay Kheng, Tan Shao Tong, Cheryl Fu, Daniel Chan and Chloe Mercy Lee (Wong Partnership) for the respondent
Parties	: Cooperatieve Centrale Raiffeisen-Boerenleenbank BA (Trading as Rabobank International), Singapore Branch — Motorola Electronics Pte Ltd

Evidence

Contract

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2010] 3 SLR 48.]

3 December 2010 Judgment reserved.

Chao Hick Tin JA (delivering the judgment of the court):

Introduction

1 This is an appeal against a decision of the trial judge ("Judge") who dismissed a claim for the recovery of certain unpaid debts on the ground that the claim by the plaintiff (as the assignee of the debt) was subject to a prior equity of the debtor, *viz*, a right to a contractual set-off.

The parties

2 The plaintiff in the action, and the appellant in this appeal, is Cooperatieve Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank International), Singapore Branch ("Rabobank"). It is the Singapore branch of a bank incorporated in the Netherlands. The respondent, the defendant in the action, is Motorola Electronics Pte Ltd ("MEPL"), which engages in the manufacture and marketing of telecommunication products. MEPL is a wholly owned subsidiary of Motorola Inc, which also wholly owns another entity, Motorola Trading Center Pte Ltd ("MTC").

Background facts

3 In 2003, Jurong Hi-Tech, a sole proprietorship owned by Jurong Hi-Tech Industries Pte Ltd ("JHTI"), began manufacturing electronic products for MEPL. On 28 July 2004, MEPL and JHTI entered into a Manufacturing and Assembly Agreement ("MAA") [note: 1]. Pursuant to this agreement, JHTI agreed to manufacture electronic products for MEPL using materials purchased from MEPL and/or suppliers approved by the MEPL. Clause 11.2 of the MAA allowed for the set-off of accounts between MEPL and JHTI on the following terms:

> Where Materials are purchased directly from [MEPL], [MEPL] shall have the right to offset payments due to it against amounts payable to [JHTI] for such Materials. The payment shall be made in arrears against correct invoices issued by [JHTI] for the same.

The agreement was for one year, subject to a further one year extension. However, there was no evidence that this agreement had been extended or otherwise renewed.

4 On 5 July 2005, MTC began to supply materials to, and purchase electronic products from JHTI. On 28 March 2006, Motorola Inc ("Motorola Inc") and JHTI entered into a Manufacturing Services Agreement ("MSA") [note: 2], for JHTI to manufacture Motorola Inc products. Under cll 6b and 6c of the MSA, JHTI was obligated to purchase materials from "Motorola" for the manufacture of the products. In cl 2 of the MSA, "Motorola" was defined as inclusive of Motorola Inc and its "affiliates":

> ... any corporation or other entity that controls, is controlled by, or is under common control with a party. A corporation or other entity shall be deemed to control another if it owns or controls more than fifty percent (50%) of the voting stock or other ownership interest of the corporation or entity. References herein to Motorola and Company shall be deemed to include references to their Affiliates unless otherwise specified or the context otherwise requires.

Unlike the MAA (which provided for a contractual right of set-off between MEPL and JHTI), the MSA *did not* provide for a contractual right of set-off between JHTI and "Motorola" as defined in MSA.

5 On 15 February 2007, Rabobank and JHTI entered into a Master Receivables Purchase Agreement ("MRPA") under which Rabobank contracted to provide JHTI with receivables financing facilities of up to US$20m. Pursuant to cl 2 read with cl 4 of the MRPA, Rabobank could from time to time be offered receivables owing from MEPL to JHTI, by way of a purchase request served by JHTI on Rabobank. Rabobank had the sole discretion to decide whether or not to accept the offer and acquire those receivables. Under cl 11(c) of the MRPA, JHTI represented itself as the legal and beneficial owner of each receivable offered for purchase, and also that it had not assigned or created any prior encumbrance over each receivable offered.

6 Pursuant to the MRPA, JHTI made various assignments of debt to Rabobank between 22 June 2008 and 6 October 2008. However, on 7 October 2008, Rabobank decided to focus its attention on corporate borrowers in the food and agricultural sector, and to exit from non-core markets such as the telecommunications, media and internet market, in which JHTI was trading. Thus, starting from 7 October 2008, Rabobank decided not to accept new purchase requests, grant further new drawings or allow a rollover of existing loans in order to facilitate an orderly exit from its business relationship with JHTI. On 13 November 2008, the MRPA was terminated.

7 On 17 November 2008, Rabobank notified MEPL of various assignments of receivables from JHTI. However, omitted from this notification were two assignments made on 28 July and 18 August 2008. Subsequently, Rabobank remedied the situation by a further notification of 17 December 2008. Thereafter Rabobank demanded repayment from MEPL in respect of all those assigned receivables. When no payment was forthcoming, Rabobank filed a claim against MEPL on 22 January 2009, claiming eventually (after amendments) for the total amount of US$5,178,212.41, which represented the total net value of those assigned receivables.

8 On 20 February 2009, JHTI was placed under judicial management. Its parent company, Jurong Technologies Industrial Corporation ("JTIC"), is presently also under judicial management.

The trial below

9 At the trial below, Rabobank pleaded a straightforward case that it was entitled to payment from MEPL, being the assignee of the receivables. In response to Rabobank's claim, MEPL pleaded that pursuant to an express and/or implied agreement entered into between MEPL, MTC and JHTI on or around 5 July 2005 allowing for the tripartite setting-off of accounts, the receivables in question had already been set-off on 22 October 2008 and 21 November 2008, prior to the receipt by MEPL of the notification of assignments. In the light of the position taken by MEPL, the existence of a tripartite set-off agreement of 5 July 2005 and the date of receipt by MEPL of the letter of notification of Rabobank dated 17 November 2008 were central issues to the trial below. The Judge found that MEPL received the letter only on 25 November 2008. In this appeal, the parties do not challenge this finding.

10 As mentioned before, the pleaded tripartite set-off agreement was an "express and/or implied" agreement. MEPL did not plead an alternative defence of equitable set-off. At the trial, MEPL argued that the express agreement to set-off was embodied in the MAA. The Judge found this argument unconvincing because the MAA only provided for a mutual set-off between MEPL and JHTI. MTC was not a party to that agreement.

11 On the alternative plea of an implied agreement, MEPL relied on the evidence of various alleged set-offs effected periodically between the parties since 5 July 2005. In this regard, there is the evidence of MTC's finance manager since 2005 (cost accountant prior to 2005), Mr Coimbatore Sahasranaman Lakshmanan's ("Lakshamanan") and Motorola (China) Electronics Pte Ltd's accounting manager, Mr Vincent Luo Chen's ("Luo") who said that there were regular bilateral set-offs between MEPL and JHTI, and tripartite set-offs between MEPL, MTC and JHTI. Luo, who took over the administration of the JHTI account (overseeing the external reconciliation, internal reconciliation and external set-off processes every month) from Ng Cheng Soon ("Ng") (previously MEPL's accountant) in October 2008, testified that every month, he would send an email to Lim Chai Lee ("Chai Lee"), JHTI's accountant, attaching a reconciliation statement that listed all outstanding invoices issued by JHTI to MEPL and MTC, and *vice versa*. If there were any inconsistencies, Chai Lee would contact Luo. After the external reconciliation, all the invoices issued by any of the three parties which had already fallen due would be removed from the reconciliation statement and placed in a separate set-off statement. A debit note would be raised by MEPL internally while a credit note would be raised by MTC internally for the cross-entity set-off to be approved. A debit note request form would then be raised by MEPL to set-off amounts owing by MEPL to JHTI against amounts owing by JHTI to MTC. A debit note request form (from MEPL) and a credit note request form (from MTC), both dated 24 June 2008 and referring to the "settlement" agreement between MEPL, MTC and the JHT group were adduced as evidence in court to prove the existence of such a process. This step was subsequently omitted to simplify the process. Under the simplified process, a credit note would be raised by MTC for every set-off of sums owed by MEPL to JHTI against sums owed by JHTI to MTC. MEPL would then pay to MTC the sums owed by JHTI to MTC. The said monies owed by JHTI to MTC would then be set-off against the sums owed by MEPL to JHTI, and the invoices which had already been "knocked off" in this process would be removed from the reconciliation statement for the following month.

12 The set-offs had to be approved by Lakshamanan, Ng, and John Kozlowski, the overall financial controller of Motorola Inc's businesses in Asia. Emails dated 22 October 2008 (sent by Luo to Ng) and 17 November 2008 (sent by Luo to Ng and Lakshamanan) show that Luo had sought approval by email from the relevant parties before effecting the set-offs. Credit notes to be issued by MTC to effect a set-off between MEPL and MTC were attached to these two emails from Luo.

13 Luo testified at the trial that the monthly reconciliation statements (as mentioned above, at [11]) would be uploaded on Motorola's Accounts Payables Inquiry Application ("APIA") [note: 3] which was accessible by JHTI. Extracts of information from this system were adduced before the court

below. The extract adduced contained records of invoices which documented MTC's accounts receivables and JHTI's receivables. The said monies owed by JHTI to MTC would then be set-off against the sums owed by MEPL to JHTI, and the invoices which have already been "knocked off" in this process would be removed from the reconciliation statement for the following month. Luo would extract the information from the Accounts Payables Inquiry Application ("APIA") database and compile a table which summarised the set-offs to be effected between the defendant, MTC and JHTI for a particular month.

14 However, no documentary evidence was led to show the genesis of the purported tripartite set-off agreement. MEPL argued that the email correspondence wherein Ng or Luo would send Chai Lee monthly reconciliation and/or "contra" statements (set-off statements) for the period of December 2007 to November 2008 was evidence of a course of dealings between MEPL, JHTI and MTC which gave rise to a tripartite set-off agreement. MEPL relied, in particular, on the following emails. On 25 October 2008, Luo emailed Chai Lee to inform him that he had taken over the job from Ng, for the "JHT[I] AR&AP offset". In an email dated 28 October 2008, Luo informed Chai Lee that "for the dued [*sic*] invoices as of 23 October 2008, it is a net receivable from Motorola to JHT[I]". Finally, there was another email dated 24 November 2008 written by Luo to Chai Lee, attaching another set-off statement, detailing the set-off of receivables against account payables among the three entities effected on 21 November 2008.

15 MEPL also relied strongly on three letters dated 22 June 2007 which referred to the "on going [*sic*]" reconciliation exercise. The three identical letters were sent to JHTI and another entity, Jurong Hi-Tech Corporation ("JHTC"), (which relationship with JHTI is not clear on the record), by Motorola Inc, MEPL and MTC respectively. The three letters were identical and the purpose of the letters was to inform JHTI and JHTC about the reconciliation exercise conducted. To each of these letters, a Final Reconciliation Statement was attached. JHTI's confirmation that no further sums were owed by Motorola Inc to JHTI and JHTC was sought in these letters. As the contents of the three identical letters are important to the question whether an implied tripartite set-off agreement existed, we set out the pertinent portions below:

> We refer to the on going [*sic*] exercise amongst the respective financial organizations of Motorola Inc., JHTI and JHTC over the past few weeks regarding the reconciliation of accounts payable by Motorola Inc. to JHTI and JHTC respectively, and the necessary adjustments that are required to be made by JHTI and JHTC respectively in relation to inaccurate and/or over stated amounts generally ("Reconciliation Exercise").
>
> This Reconciliation Exercise is in respect of all services, products and support that JHTI and JHTC have been providing to Motorola Inc. *up to and including 7 May 2007*.
>
> ...
>
> We also note your confirmation that we each waive all our respective rights to making any and all claims of any nature whatsoever in connection with, related to and/or arising from the subject matter of the Reconciliation Exercise. In this regard, we each confirm to the other that upon the payment of the amounts stipulated in the Financial Reconciliation Balance Statement such payment shall be in *Full and Final settlement of all claims* that we may have against each other in relation to the subject matter of the Reconciliation Exercise howsoever arising ...
>
> ...
>
> *To confirm your agreement with and acceptance of the terms set out in this letter agreement,*

please sign and return to us a copy of this document.

[emphasis added]

MEPL asserted at the trial that the existence of these three letters was indicative of the existence of a course of dealing commencing from 5 July 2005 wherein the three parties, MEPL, MTC and JHTI regularly effected tripartite set-offs.

16 In response, Rabobank denied the existence of the tripartite contractual set-off alleged by MEPL. Rabobank relied on the evidence of its managing director for relationship management (from August 2005 to September 2009), Mr Richard Lee Seow Hong ("Richard Lee"). On 11 November 2008, Richard Lee contacted Ms Lim Buay Eng Pauline ("Pauline Lim"), MEPL's Asia region credit director, to inquire to whom in MEPL the notifications of assignments ought be sent, but Richard Lee was not given any contact numbers. On 24 November 2008, after a notification was sent on 17 November 2008 addressed to MEPL, Pauline Lim informed Richard Lee that he could "attention" the assignments to Mr Ng Beng Chong, who was the financial controller of MEPL at the material time. When Richard Lee got in touch with Ng Beng Chong, the latter informed Richard Lee that MEPL, MTC and JHTI had an existing tripartite set-off agreement in place, and that MEPL would pay into a bank account in Rabobank as long as JHTI instructed accordingly. Richard Lee then called Mr Chung Siang Joon ("Chung"), JHTI's finance director, to verify the existence of the tripartite set-off agreement. In that phone call, Chung allegedly told Richard Lee that it was MEPL who had unilaterally imposed a set-off against JHTI, and that JHTI had persistently objected to the unilaterally imposed set-off.

17 On 25 November 2008, Rabobank's chief credit analyst, Mr Tan Wah Yam ("Tan"), Richard Lee and several JHTI representatives had a meeting. At the meeting, JHTI representatives once again asserted that MEPL had had liquidity problems since October 2008, and had unilaterally imposed a set-off against JHTI. According to Richard Lee and Tan, they were informed by JHTI representatives, its chairperson Joyce Lin, and finance director, Chung, that no such set-off was allowed. This point was reiterated again in two other meetings held on 3 December 2008 and 5 December 2008 respectively. It was only on 9 December 2008 that Joyce Lin informed Rabobank that there might have been a mistake and that there was a set-off arrangement in existence with MEPL. However, Rabobank was never informed in all of those meetings that the set-off arrangement was tripartite in nature involving MTC.

18 Although the case turned very much on whether a tripartite agreement to set-off accounts involving MEPL, MTC and JHTI had been made out, none of JHTI's employees had been called as witnesses for the trial by either Rabobank or MEPL.

The Judge's decision

19 The Judge accepted that MEPL had made out its defence that the receivables assigned by JHTI to Rabobank had been subject to a set-off effected pursuant to the *implied* tripartite agreement, and accordingly dismissed Rabobank's claim. The Judge held that the MRPA was a type of facultative agreement, which was only an agreement to assign debts at a future point in time. Debts were assigned under the MRPA only when purchase requests were submitted by JHTI and accepted by Rabobank. Such assignments had to comply with s 4(8) of the Civil Law Act (Cap 43, 1999 Rev Ed), which provides that an assignee of a debt or chose in action takes subject to equities which existed prior to the date of written notification to the debtor. The Judge held that since the set-offs effected on 22 October 2008 and 17 November 2008 were prior to 25 November 2008, the date on which MEPL received notification of assignment, the contractual set-offs amounted to prior equities to which Rabobank took subject.

20 In coming to the conclusion that a tripartite agreement to set-off existed, the Judge appeared to have accepted the proposition that a low evidentiary threshold was applicable to determine whether a set-off agreement should be implied. The Judge was satisfied that MEPL, MTC and JHTI were at *consensus ad idem* since July 2005. She first held that the MSA ought to be read together with the three letters dated 22 June 2007, referring to the "on going [*sic*]" reconciliation exercise between MEPL, MTC and JHTI (see above, at [15]). The Judge referred to records of invoices, in particular JHTI's accounts payables to MTC from 23 August 2005 to 3 October 2009, read together with JHTI's accounts payables to MEPL from December 2004 to March 2009. She also relied on set-off statements evidencing set-offs on 22 October 2008 and 21 November 2008, which were attached to correspondence between Luo and Chai Lee at the time.

21 In addition, we should also state that the Judge relied on the following: (i) the correspondence between Luo and Chai Lee dated 28 October 2008 which clearly stated that for "dued [*sic*] invoices dated 23 October 2008, it was a net receivable from Motorola to JHT[I]" (see above, at [14]) and which presupposed that the set-off had already been effected; (ii) the correspondence between Luo and Ng on 22 October 2008 and 17 November 2008, proving the set-off of JHTI's debt to Motorola of $5,348,520.20 and $1,761,942.26 respectively; (iii) the existence of credit and debit notes issued from MEPL to MTC and *vice versa*, thus confirming Luo's account of the reconciliation process [note: 4] . Thus, the Judge accepted that on the totality of the evidence before her, there was more than sufficient evidence from which an ongoing tripartite contractual arrangement could be implied, although the agreement was not embodied in any particular document.

22 The Judge moreover held that since MEPL had adduced more than sufficient evidence to prove the existence of an implied tripartite agreement to set-off, there was no necessity for MEPL to call JHTI's personnel as witnesses to prove the same. The onus was on Rabobank to call witnesses from JHTI to prove its assertion that it had been repeatedly assured that there was no contractual set-off arrangement between the parties, and it must suffer from the consequences of its failure to call witnesses in support of its case. Thus, the alleged statements made by JHTI's employees to Richard Lee to the effect that there was no agreement to set-off between MEPL and JHTI, as well as a judicial manager's report to the same effect, were excluded by the Judge as hearsay evidence.

23 Since MEPL had made an offer to settle which was rejected by Rabobank, the Trial Judge ordered costs against the latter on a standard basis up to the date of the offer to settle, and indemnity costs thereafter.

The appeal

The appellant's arguments

24 Rabobank argues that the Judge had erred in several aspects. First, the Judge erred in finding that MEPL, MTC and JHTI were at *consensus ad idem*. Secondly, and more fundamentally, Rabobank submits that the Judge had erred in law by implying a contract without having examined whether the parties showed any contractual intention; while *consensus ad idem* is a necessary prerequisite to the formation of a contract, it alone is not sufficient to conclude that a contract has been entered into. Rabobank also contends that like in the case of implied terms, the implication of a contract is permissible only when it is necessary to do so. Rabobank submits that given that MEPL had entered into elaborate and sophisticated written agreements with JHTI such as the MAA and the MSA, it was incongruous to imply a separate unwritten agreement from the parties conduct. Furthermore, the three letters of 22 June 2007, which requested JHTI to "confirm [its] agreement with and acceptance of the terms set out in this letter agreement" were inconsistent with MEPL's defence of a larger, overarching tripartite agreement entered into between MEPL, MTC and JHTI on or about 5 July 2005

which would govern the monthly set-offs between them. Given the gaping omission in the evidence adduced by MEPL on the implied tripartite set-off contract that had allegedly crystallized in 2005, Rabobank submits that the Judge had erred in finding that MEPL had adduced "more than sufficient evidence" to discharge its burden of proof.

25 It is also Rabobank's contention that the Judge had, in the circumstances, erred in holding that the burden had shifted onto Rabobank to call witnesses from JHTI to disprove the existence of the tripartite set-off agreement.

The respondent's arguments

26 MEPL argues that the Judge did not err in law, but rightly applied a lower evidentiary threshold towards the implication of an implied contract to set-off from the parties' course of dealing. While MEPL accepts that contracts are not to be lightly implied, and must comply with the contractual rules governing the formation of a contract, it nevertheless contends that it was only just, on the facts, to imply a tripartite agreement to set-off, giving effect to the reasonable expectations of the parties, who had had a course of commercial dealings.

27 We note that at the hearing before us, counsel for MEPL was unable to say for certain what the precise terms of the alleged tripartite set-off agreement were. For instance, counsel for MEPL was unable to tell the court under what conditions this purported agreement might be terminated. Counsel for MEPL was also unable to indicate at which precise point the alleged tripartite agreement to set-off arose. Nevertheless, MEPL urges the court not to take an "overly mechanistic" [note: 5] approach, insisting on "ideal" or "perfect" documentation, or to rigidly adhere to the legal requirements for the formation of contract.

28 MEPL moreover avers that although it bore the legal burden of proving its defence on a balance of probabilities, it had adduced credible evidence establishing the existence of a defence to the claim, which shifted the evidential burden to Rabobank, whose failure to adduce rebuttal evidence was fatal to its claim. MEPL says that even without the testimony of JHTI personnel, the evidence adduced at trial was sufficient to discharge its burden of proof. MEPL urges this court to read the written agreements, *ie*, the MAA and MSA, together with the documentary evidence and the testimony of its witnesses, Lakshamanan and Ng, and to hold that on the totality of the evidence, the court ought to imply that a tripartite set-off agreement existed.

The issues

29 We will first deal with the preliminary issue of whether Rabobank or MEPL bore the burden of proving the existence of the tripartite set-off agreement. Thereafter, we will examine two related issues of what is the requisite standard of proof to establish an implied contract for tripartite set-offs, and whether in this case the party on whom the onus of proof lay has adduced sufficient evidence to prove such a contract.

Our decision

Whether MEPL or Rabobank bore the burden of proving a defence

General principles

30 It is now trite law that there is a distinction between the legal and evidential burden of proof. This court has explained the distinction between the two concepts in *Britestone Pte Ltd v Smith &*

Associates Far East Ltd [2007] 4 SLR(R) 855 ("*Britestone*") at [58]:

> 58 The term "burden of proof" is more properly used with reference to the obligation to prove. There are in fact two kinds of burden in relation to the adduction of evidence. The first, designated the legal burden of proof, is, properly speaking, a burden of proof, for it describes the obligation to persuade the trier of fact that, in view of the evidence, the fact in dispute exists. The obligation never shifts in respect of any fact, and only "shifts" in a manner of loose terminology when a legal presumption operates. The second is a burden of proof only loosely speaking, for it falls short of an obligation to prove that a particular fact exists. It is more accurately designated the evidential burden to produce evidence since, whenever it operates, the failure to adduce some evidence, whether in propounding or rebutting, will mean a failure to engage the question of the existence of a particular fact or to keep this question alive. As such, this burden can and will shift.

Sections 103 and 105 of the Evidence Act (Cap 97, 1997 Rev Ed) ("Evidence Act"), which place the burden of proving a fact on the party who asserts the existence of any fact in issue or relevant fact respectively, concern the legal rather than the evidential burden of proof. The evidential burden, whilst not expressly provided for in the Evidence Act, exists in the form of a tactical onus to contradict, weaken or explain away the evidence that has been led: *Britestone*, at [59]. It is the latter form of burden which may shift from one party to the other.

31 In civil trials, the pleadings are central in determining the occurrence of the burden of proof, because the pleadings state the material facts establishing the legal elements of a claim or a defence: Pinsler, *Evidence and the Litigation Process* (LexisNexis, 3rd Ed, 2010) at para 12.33; *Phipson on Evidence* (Hodge M Malek gen ed) (Sweet & Maxwell, 17th ed, 2009) ("*Phipson*") at para 6-06. The *legal* burden of proving a pleaded defence rests on the proponent of the defence, unless the defence is a bare denial of the claim: *Currie v Dempsey* [1967] 2 NSWR 532 at 539, followed by the Singapore High Court in *Wee Yue Chew v Su Sh-Hsyu* [2008] 3 SLR(R) 212 ("*Wee Yue Chew*") at [3]. This rule is consistent with the general principle underlying ss 103 and 105 of the Evidence Act, *viz*, that he who asserts must prove. As stated by Lord Maugham in *Constantine Line v Imperial Smelting Corporation* [1942] AC 154 ("*Constantine*") at 174:

> The burden of proof in any particular case depends on the circumstances in which the claim arises. In general the rule which applies is "*Ei qui affirmat non ei qui negat incumbit probatio*". It is an ancient rule founded on considerations of good sense and it should not be departed from without strong reasons.

We also refer to the commentary in *Phipson* on the above statement by Lord Maugham (at para 6-06):

> This rule is adopted principally because it is just that he who invokes the aid of the law should be the first to prove his case; and partly because, in the nature of things, a negative is more difficult to establish than an affirmative. The burden of proof is fixed at the beginning of a trial by the state of the pleadings, and it is settled as a question of law, remaining unchanged throughout the trial exactly where the pleadings place it, and never shifting.

32 However, in deciding whether a party is asserting an affirmative, regard must be had to the substance of the issue, and not merely to the manner in which a fact is grammatically stated in the pleadings: *Phipson* at para 6-06. We find helpful the observations made by Rix LJ in *BHP Billiton Petroleum Ltd v Dalmine SpA* [2003] EWCA Civ 170 ("*BHP Billiton*") at [28] that:

> ... we think, with Lord Maugham [in *Constantine*], that the pleadings are likely to be a more accurate guide to where the burden lies. It is true that they cannot be definitive, for a party does not, we think, take upon himself a burden which the law does not impose on him merely by volunteering a pleading which he could properly have covered by a mere denial; nor will a claimant free himself from a burden of proof which rests on him merely by pleading his case inadequately. However, in most cases the pleadings are likely to be a good guide, and *a fortiori* where, as here, no one has been able to complain that the pleadings have fallen below the mark.

In *BHP Billiton*, a defendant consultant had certified as compliant with the plaintiff's specifications certain pipes which had been manufactured by a third party for the plaintiff under a contract for the purposes of erecting a pipeline. However, the manufacturer in fact supplied the plaintiff with non-compliant steel pipes. It was not in issue that the defendant had made a fraudulent misrepresentation to the plaintiff. The issue was whether the defendant's fraudulent misrepresentation had caused the plaintiff's loss, and whether the plaintiff bore the burden of proving causation. The English Court of Appeal held that the court should eschew an over-technical approach, and construe the pleadings to determine which party was affirmatively asserting a particular fact, in order to determine on whom the burden of proof lay. Since the defendant's pleaded defence was that a pipeline built with compliant pipes would have failed in any event, the English Court of Appeal held that the pleaded defence was an affirmative which the defendant had to prove. *BHP Billiton*, in our view, is therefore illustrative of the principle that pleadings are central in determining the occurrence of the burden of proof in any case.

The burden of proving the tripartite set-off agreement in the present case

33 We now turn to construe the pleadings of the parties in the present appeal. Rabobank did not make any mention of the tripartite contractual set-off agreement in its pleadings, given that it was only making a straightforward claim for the repayment of a debt in its capacity as an assignee. In MEPL's defence it pleaded the existence of a tripartite agreement between MEPL, MTC and JHTI, and that set-offs pursuant to this tripartite contract amounted to prior equities to which the receivables which Rabobank took were subject. In this regard, it is necessary to scrutinise the relevant portions of MEPL's Defence (Amendment No. 2) to determine whether the burden of proof fell upon it. The relevant portions are as follows:

> 6 There was an express and/or implied agreement between [MEPL], [MTC] and [JHTI], to set-off, on a monthly basis, the sums owing by [MEPL] and MTC to [JHTI], being payment for the sale by [JHTI] of electronic products under the MSA, against sums owing by [JHTI] to [MEPL] and MTC, being payment for materials and components supplied by [MEPL] and MTC to [JHTI] under the MSA.
>
> ...
>
> c. On or around 5 July 2005, MTC also began to supply materials and components to, and purchase electronic products from, [JHTI]. *Since then, sums owing to and by [MEPL] and MTC to [JHTI] were set-off, on a monthly basis, against sums owing to and by [JHTI] to [MEPL] and MTC*.
>
> d. The set-offs typically took place in the last 10 days of each month. In particular, the set-offs which took place between [MEPL], MTC and [JHTI] on 22 October 2008 and 21 November 2008 included, but were not limited to, sums that were due from [MEPL] to [JHTI] under various invoices...

[emphasis added]

Also, at paragraph 10a of the Defence (Amendment No. 2), MEPL averred that:

> ... [MEPL] is not liable to Rabobank for sums owing under the invoices... totalling US$5,160,853.21, since the sums which were owed by [MEPL] to [JHTI] under these invoices had already been set-off against the sums owed by [JHTI] to [MEPL] and/or MTC on or around 22 October 2008 and 21 November 2008 respectively.

34 Thus, it would be seen that MEPL has asserted affirmatively the following facts in its defence:

i) that an express/implied agreement to contractually set-off debts on a tripartite basis existed;

ii) that such an agreement was validly formed;

iii) that set-offs pursuant to the tripartite contract which extinguished the debts due to Rabobank were effected prior to the dates of notification of assignment; and

iv) that the receivables which Rabobank took from JHTI were subject to prior equities, *ie*, the set-offs.

Since MEPL's defence was not one of bare denial, but the assertion of a state of facts, MEPL bore the legal burden of proving the existence of such facts.

What is the standard of proof in a case involving contractual set-off

35 We now turn to the issue of whether MEPL has adduced sufficient evidence to discharge its burden of proof. We would state that the standard of proof required of MEPL to prove the defence of an implied tripartite agreement of set-off was no different from proof of a fact in any other civil claims. Before proceeding on to our analysis proper, we would refer to Lord Brandon's statement in the House of Lords' decision of *Rhesa Shipping Co SA v Edmunds (The Popi M)* [1985] 1 WLR 948, with which we are in full agreement (at 955 - 956):

> No judge likes to decide cases on the burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course to take.

We note that under ss 3(3) – (5) of the Evidence Act, there are three possible conclusions which a court assessing the evidence before it may make, *viz*, that a fact is proved, disproved, or not proved, respectively. Where the evidence suffices to satisfy the court that a fact exists, that fact will be held to have been proved. Conversely, where the evidence suffices to satisfy the court as to the *non-existence* of a particular fact, that fact will be held to have been disproved: *Loo Chay Sit v Estate of Loo Chay Loo, deceased* [2010] 1 SLR 286, at [22]. However, the court is not bound to make a choice between finding that a fact is either proved or disproved. It is open to the court to select a third option, *i.e.*, that a fact is not proved. A statement that a fact is not proved simply

means that the court is unable to state affirmatively the existence or non-existence of a particular fact given the state of the evidence: *ibid* at [20].

The evidentiary threshold applicable to contracts to set-off

36 On the face of the judgment, it was not clear whether the Judge preferred the view that only slight evidence was required to prove the existence of a set-off agreement, or that contracts ought not to be lightly implied, two quite distinct concepts. The Judge first quoted the following statement made by the Master of the Rolls, Sir Jekyll in the rather dated decision of the Chancery Court, *Jeffs v Wood* [1723] 2 P Wms 128 ("*Jeffs v Woods"*) at 129:

> It is true, stoppage [the historical term for set-off] is no payment at law, nor is it, of itself, a payment in equity, but then a very slender agreement for discounting or allowing the one debt out of the other, will make it a payment, because this prevents circuity of action and multiplicity of suits, which is not favoured in law, much less in equity.
>
> ...*the least evidence of an agreement for a stoppage will do* ... and in these cases *equity will take hold of a very slight thing to do both parties right*. And it is still more reasonable, that where the matter of the mutual demand is concerning the same thing, there the Court should interpose, and make the balance only payable. [emphasis added]

37 The Judge then cited *Wallis v Bastard* (1853) 4 De G M & G 251 ("*Wallis v Bastard*") for the following proposition of law laid down by Lord Cranworth LC at 257:

> This much, however, I think may be stated as a very safe proposition, that the principle of set-off is quite consistent with natural equity, and that where it can be adopted, *it is an arrangement which this Court will be very ready to assist*, while it will look to any circumstances that occurred at the time when persons became reciprocally indebted, in order to say that a set-off did in fact take place. In the present case, from the circumstance that possession was taken in 1842 by the mortgagee, and that no claim was made for interest by either party, I infer that, *whether expressed or not, it was the agreement perfectly understood between the parties that the one debt should wipe off a portion of the other debt;* in effect, that there should *pro tanto* be a set-off. I do not, therefore, feel called upon to speculate as to the exact course this Court would have pursued if the parties had, in the year 1842, adversely asserted against each other their mutual rights; but not having done so, they must be understood, like reasonable persons, to have adopted an arrangement perfectly obvious and in conformity with what ought to have been done.
>
> [emphasis added]

The Judge also relied on *Lundy v McCulla* (1865) 11 Gr 368, where it was held that:

> *In the view of equity* the setting off one demand against another between the same parties is extremely just; and where there is any technical difficulty in the way of its being done without an agreement, the court *accepts slighter evidence of such an agreement than is usually required in order to establish disputed facts*.
>
> [emphasis added]

38 After citing the above authority for the proposition that a low evidential threshold is needed to show the existence of an agreement to set-off, the Judge went on to state (at [64] – [65] of her

judgment) that a contract to set-off is but a species of contract, which ought to be subject to the normal contractual rules such as offer and acceptance, consideration, certainty of terms and intention to create legal relations. The Judge then referred to Peel, *Treitel on the Law of Contract* (Sweet & Maxwell, 12th Ed, 2007) ("*Trietel*") at para 4-021, for the proposition that contracts were not to be lightly implied. With respect, we would at this juncture observe that "a low evidential threshold" to prove an implied agreement to set-off is hardly consistent with the principle that a contract should not be lightly implied. Indeed, it is settled law that a contract will only be implied if it is necessary to do so: see *The Aramis* per Bingham LJ at 224; *Baird Textiles Ltd v Marks & Spencer plc* [2002] 1 All ER (Comm) 737 at [18], [21] and [61]; and *Ilyssia Compania Naviera SA v Ahmed Abdul-Qawi Bamaodah (The Elli 2)* [1985] 1 Lloyd's Rep 107 at 115.

39 We also note that unfortunately, a great deal of uncertainty exists in the area of the law of set-off. In *OCWS Logistics Pte Ltd v Soon Meng Construction Pte Ltd* [1998] 3 SLR(R) 888, the High Court has set out the historical context of the development of the law of set-off (at [7]):

> The development of the law of set-off is far from satisfactory. Before 1873 two main sets of courts could claim jurisdiction over the same cause of action. However, they applied different rules. One applied common law and the other applied equity. The common law courts were less receptive to set-off than courts of equity ...

Following the Supreme Court of Judicature Act 1873 (36 & 37 Vict c 66) (UK), the courts of law and equity were fused, and equitable defences could be relied upon in actions at law, although the concepts of law and equity remained distinct: *Pacific Rim Investments Pte Ltd v Lam Seng Tiong and another* [1995] 2 SLR(R) 643 ("*Pacific Rim*") at [25].

40 In Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies* (Butterworths LexisNexis, 4th Edition, 2002), four types of set-offs recognised in equity are identified at para 37-035 (also recognised in Young, Croft and Smith, *On Equity* (Lawbook Co, 2009) at 993 – 995). They are:

(i) where a right of set-off exists at law, it will be recognised in equity;

(ii) an equitable set-off will exist by analogy with a legal set-off;

(iii) an equitable set-off may exist by agreement; and

(iv) where a party can show some equitable ground for being protected against his adversary's demand.

The first is a species of equitable set-off and is no more than an illustration of the general principle that all legal rights, titles and interests are recognised in equity, while the second illustrates the principle that equity follows the law. The third is markedly different from the fourth, which is also known as the "substantive" form of equitable set-off: see generally Rory Derham, *The Law of Set-off* (Oxford University Press, 3rd ed, 2003) ("*Rory Derham*") at chapter 4. In the third form of set-off, equity will take hold of very slight evidence of an agreement to set-off in order to establish a right to set-off between the two parties to an action. This is in order to do justice between the two parties

who have had mutual dealings, and where it would be unjust to permit one party to make a claim against another without allowing a set-off: see *Jeffs v Wood* (above, at [36]), *Wallis v Bastard* (above, at [37]) and Phillip Wood, *English and International Set-Off* (Sweet & Maxwell, 1989) ("*Wood*") at para 5-12. The equitable set-off of the fourth variety, on the other hand, arises when a claim and counterclaim arise out of the same set of facts and are so closely connected that it would be inequitable not to allow a set-off: *Pacific Rim* (above, at [39]).

41 We refer also to *Rory Derham*, at para 3.03, where the author recognises that a set-off by implied agreement in the case of insufficient evidence to prove a contractual set-off is equitable in nature:

> An equitable set-off can take a number of forms. There are some early cases in which debts were set-off in equity based upon an implied agreement that a set-off should occur, and indeed Sir Joseph Jekyll once said that "the least evidence of an agreement for a [set-off] will do", and that "equity will take hold of a very slight thing to do both parties right".

42 The author relied on the New Zealand decision of *Commercial Factors Ltd v Maxwell Printing Ltd* [1994] 1 NZLR 724. In that case, which was one of the cases which the Judge here had placed much reliance, two parties entered into a cheque swapping arrangement for a monthly settlement of their mutual dealings. Pursuant to the arrangement, either party could refuse to provide a cheque in respect of its indebtedness if it was not at the same time provided with a cheque in respect of what was owed to it. Hammond J held (at 740) that an implied contract to set-off mutual debts was made out on a balance of probabilities. However, Hammond J stated that even if such an arrangement could not amount to a contract at law, or a contract *strictu sensu*, it nevertheless was an arrangement that equity would recognise. Hammond J did not conflate the legal requirements for proof of a contractual set-off with an equitable set-off which arose by an implied agreement.

43 Reverting to the Judge's judgment of the present case, no distinction was made by the Judge between the rules applicable under the common law of contractual set-off, and those applicable to equitable set-off. The Judge appeared to have treated *Jeffs v Wood* as authority for the proposition that all contracts for set-off are subject to a lower standard of proof. However, *Jeffs v Wood* was in fact a case falling within the third category of equitable set-off (see [40] above), and was not authority for the modification of the common law on the standard of proof required to establish the existence of a contract to set-off. *Jeffs v Wood* was really concerned with the imposition of an equitable set-off against the plaintiff, because it would be unjust to ignore the defendant's cross-claim against the plaintiff. A court of equity would impose such an equitable set-off in the presence of slight evidence to ameliorate the harshness of the strict legal requirement of proof of a contract or agreement to set-off, implied or otherwise, even where there was in fact no such contract or agreement. The present case, however, is not such a situation. It concerns sophisticated and large commercial parties (indeed MEPL and its parent company are a multinational group) which have earlier defined their rights and obligations in relation to their dealings in clear written documents (*eg* the MAA and the MSA), or in correspondence. In this regard we are reminded of the following general comment made by the Privy Council in the case of *Meates v Westpac Banking Corporation Ltd* [1991] 3 NZLR 385 at 404 where their Lordships stated at 404:

> To say that, as a general rule, governments and large corporations intend to be bound only by formal written engagements assumed after matured consideration, reflection and negotiations may seem something of a truism.

Moreover, we must not lose sight of the fact that here, we are concerned with setting-off of debts not as between two parties (JHTI and MEPL) but three, the third being MTC. While the Judge did at

[64] note that the aforesaid cases, which she also considered, dealt with bilateral set-offs rather than tripartite set-offs (like in the present case), she nevertheless took the view that the "low evidential threshold in implying a contractual set-off agreement" which those cases expounded still applied to tripartite set-off because in both scenarios, the court is being asked to imply a contract. She relied, *inter alia*, upon para 4-021 of *Treitel* to reach this view, which we now quote:

> The question of contractual intention is, in the last resort, one of fact. In deciding it, a distinction must be drawn between implied and express agreements. Claims based on implied agreements are approached on the basis that "contracts are not to be lightly implied and that the court must therefore be able to "conclude with confidence that ... the parties intended to create contractual relations". The burden of proof on this issue is on the proponent of the implied contract …

But nothing in this passage suggests that "slight evidence" is sufficient to imply a contract. Indeed, on the contrary, the passage says that a contract should not be lightly implied (see also comment in [38] above).To imply a contract the court must be confident that the parties intended to create contractual relations. Cases such as *Jeffs v Wood* and *Lundy v McCulla* were decided on equitable principles in the factual context of two parties who had mutual debts. A case involving tripartite set-off is distinguishable from cases such as *Jeffs v Wood* and *Lundy v McCulla* in which it would have been unjust not to imply an agreement to set-off, despite only slight evidence to that effect, between two parties who owed mutual debts. In a tripartite situation where Company A owes a debt to Company B who in turns owes a debt to Company C, it is not at all clear why it would be unjust *not* to invoke equitable principles for the implication of a set-off agreement among all three parties. Company B could well have intended for Company A to be its debtor at law. Thus, we are of the view that a court should be slow to, and indeed should not apply *Jeffs v Wood* to a case where different circumstances and different considerations prevail.

The applicable standard of proof on the facts

44 In this appeal, counsel for MEPL has conceded, in our view quite rightly, that it bore the legal burden of proving the existence of a tripartite agreement on set-off on a balance of probabilities. For the reasons stated above, as the Judge had in fact applied the "slight evidence" threshold, we are of the view that she has, with respect, erred. We ought to mention that the pleaded case of MEPL for a right of tripartite set-off is based on express or implied contract, (see [33] above) not on equity. Moreover, for the reasons alluded to in [43], we do not think the equity expounded in *Jeffs v Wood* can apply here. In any event, it is trite law that equitable defences must be specifically pleaded, and full particulars given: *Singapore Civil Procedure* (Sweet & Maxwell Asia, 2007) ("*White Book*") at p 270; *Singapore Court Practice* (LexisNexis, 2009) at p 411. We are of the view that a defence of equitable set-off is a matter which must also be specifically pleaded: see *White Book* at para 18/8/34. It seems to us that the requirement that an equitable set-off be specifically pleaded is but an application of the rule in O 18 r 8(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed), the object of which is to prevent unfair surprise to an opponent in litigation. O 18 r 8(1) states:

> **Matters which must be specifically pleaded (O. 18, r. 8)**
>
> **8**. —(1) A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality —
>
> (a) which he alleges makes any claim or defence of the opposite party not maintainable;

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading.

Whether MEPL has discharged its burden of proof on the requisite evidential threshold

45 We now turn to examine the issue of whether MEPL has proven the existence of such a valid implied contract, *ie*, a contract which satisfies all the elements for the formation of a contract on a balance of probabilities.

The legal elements of a tripartite contract to set-off

46 Contracts may in certain cases be implied from a course of conduct or dealings between the parties or from correspondence or all relevant circumstances. However, facts supporting the existence of implied contracts should be subject to the same level of scrutiny as express contracts. *Chitty on Contracts* (Sweet & Maxwell, 30th ed, 2008) Vol 1 ("*Chitty on Contracts*"), states at para 1-076 that:

> Contracts may either be express or implied. The difference is not one of legal effect but simply of the way in which the consent of the parties is manifested. Contracts are express when their terms are stated in words by the parties. They are often said to be implied when their terms are not so stated, as, for example, when a passenger is permitted to board a bus: from the conduct of the parties the law implies a promise by the passenger to pay the fare, and a promise by the operator of the bus to carry him safely to his destination ... Express and implied contracts are both contracts in the true sense of the term, for they both arise from the agreement of the parties, though in one case the agreement is manifested in words and in the other case by conduct. Since, as we have seen, agreement is not a mental state but an act, an inference from conduct, and since many of the terms of an express contract are often implied, it follows that the distinction between express and implied contracts have little importance.

It is also stated in *Trietel* that where it is alleged that an implied agreement exists, the court will scrutinise the facts to determine whether there was an intention on the part of the parties to create legal relations and here we would again cite the passage (at p 186):

> The question of contractual intention is, in the last resort, one of fact. In deciding it, a distinction must be drawn between implied and express agreements. Claims based on implied agreements are approached on the basis that "contracts are not to be lightly implied" and that the court must therefore be able to conclude with confidence that... the parties intended to create contractual relations". The burden of proof on this issue is on the proponent of the implied contract, and in a number of cases claims or defences based on implied contracts have been rejected precisely on the ground that contractual intention had not been shown by that party to exist.

This passage in *Treitel* is based on the comments of Bingham LJ in the *locus classicus* on implied contracts, *Blackpool and Fylde Aero Club v Blackpool Borough Council* [1990] 1 WLR 1195, where he stated that (at 1202):

> I readily accept that *contracts are not to be lightly implied*. Having examined what the parties said and did, the court must be able to conclude with confidence both that the parties intended to create contractual relations and that the agreement was to the effect contended for. It must also, in most cases, be able to answer the question posed by Mustill L.J. in *Hispanica de Petroles*

S.A. v. Vencedora Oceanica Navegacion S.A. (No. 2) (Note) [1987] 2 Lloyd's Rep. 321, 331: "*What was the mechanism for offer and acceptance?*"

[emphasis added]

Indeed, all the requirements for the formation of a contract, *viz*, offer and acceptance, consideration, intention to create legal relations, and certainty of terms must be satisfied before the court will imply the existence of a contract: *Modahl v British Athletic Federation Ltd* [2002] 1 WLR 1192 at [49] – [51].

47 Of course, the existence of offer and acceptance may be implied from conduct. The implication of contracts in the absence of direct evidence of an offer or an acceptance is permissible, because the parties' conduct may demonstrate *consensus ad idem*: *BHP Billiton* (above at [32]) at [134] – [140]. For example, in *British Bank for Foreign Trade v Novinex* [1949] 1 KB 623, the defendant wrote a letter to the plaintiff to introduce a client who was interested in purchasing oilskin suits from the defendant. In return, the defendant promised to pay the plaintiff a certain amount of commission on all trades on oilskins with the client. Following from the introduction, the defendant traded with the plaintiff's client in oilskins, and other products. The defendant refused to pay commission on those other trades (other than on oilskin), on the ground that the parties had not agreed on the quantum of commission for those trades. However, Cohen LJ held (at 629 - 630) that:

> I turn next to the main question: Is this an enforceable agreement? A number of authorities have been cited to us, to which I do not propose to refer in detail, because, in my view, the effect of the authorities is stated correctly in the learned judge's judgment where he said: "The principle to be deduced from the cases is that if there is an essential term which has yet to be agreed and there is no express or implied provision for its solution, the result in point of law is that there is no binding contract. In seeing whether there is an implied provision for its solution, however, there is a difference between an arrangement which is wholly executory on both sides, and one which has been executed on one side or the other. In the ordinary way, if there is an arrangement to supply goods at a price 'to be agreed,' or to perform services on terms 'to be agreed,' then although, while the matter is still executory, there may be no binding contract, nevertheless, if it is executed on one side, that is if the one does his part without having come to an agreement as to the price or the terms, *then the law will say that there is necessarily implied, from the conduct of the parties, a contract that, in default of agreement, a reasonable sum is to be paid*." With that statement of the principle of law, I respectfully agree. My difference with the learned judge is only on the question whether he has correctly applied that statement of principle to the facts of this case.

48 Principles similar to those outlined in the preceding paragraphs have been applied in the Straits Settlements as early as 1878. In *Mcgregor v Tanjong Pagar Dock Co Ltd* [1878] 1 Ky 461, certain wharfingers unloaded goods due for another port by mistake. The wharfingers were engaged by the vessel owners on an informal basis. This mistake was not notified to the vessel owner in a timely manner. As a result, the vessel owner sustained huge losses, and commenced proceedings against the wharfingers. The Straits Settlements Supreme Court held the wharfingers liable for breaching the implied contract between them and the vessel owner. The contract contained a term that the wharfingers were to use reasonable care and skill in unloading the goods from the vessels owned by the plaintiff, and to inform them within a reasonable time if any goods were unloaded by mistake. The Straits Settlements Supreme Court stated that:

> ... To use the words of Lord Tenterden, CJ, however, in *Mazette v Williams* 1 B & Ad 423:

> "The only difference between an express and implied contract is the mode, of substantiating it. An express contract is proved by an actual agreement, an implied contract by circumstances and the general course of dealing between the parties; but where a contract is once proved, the consequences resulting from the breach of it must be the same, whether it be proved by direct or circumstantial evidence."

49 More recently, in *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407, this court considered the question of whether a contract may be inferred from correspondence and contemporaneous conduct of the parties in the absence of an express written agreement and stated (at [40]):

> The principles of law relating to the formation of contracts are clear. Indeed the task of inferring an assent and of extracting the precise moment, if at all there was one, at which a meeting of the minds between the parties may be said to have been reached is one of obvious difficulty, particularly in a case where there has been protracted negotiations and a considerable exchange of written correspondence between the parties. Nevertheless, the function of the court is to try as far as practical experience allows, to ensure that the reasonable expectations of honest men are not disappointed. To this end, it is also trite law that the test of agreement or of inferring *consensus ad idem* is objective. Thus, the language used by one party, whatever his real intention may be, is to be construed in the sense in which it would reasonably be understood by the other.

50 In summary, while the outcome of each case would necessarily depend on the fact situation of the case, the above analysis shows that a contract implied from conduct must satisfy all the elements necessary for the formation of a contract, including, offer and acceptance, consideration, intention to create legal relations, and certainty of terms. As stated in paragraph 5-17 of *Wood* (above, at [40]), a passage also cited by the Judge;

> A contract to set-off must satisfy the normal contractual rules as to formation of contract, eg, offer and acceptance and communication of the acceptance, as to whether an offer is merely an invitation to treat, and as to certainty of terms and contractual intention.

However, the mechanism for offer and acceptance may be conduct rather than an express written or oral agreement. In a case where the court is faced with a claim that an agreement has been entered into by conduct, it ought to scrutinise the evidence before it carefully to determine whether the existence of a contract, compliant with all the requirements for contract formation, has been proven on a balance of probabilities. In other words, all the surrounding circumstances must be considered objectively to determine whether or not a contract may properly be implied. No assumptions should be made, since contracts are not to be "lightly implied". We would hasten to add that the fact that the existence of a contract may be implied from conduct does not mean that the legal requirement of offer and acceptance in the formation of a contract is in any way compromised. This is no more than recognition that offer and acceptance may be manifested in a variety of forms. Cooke J in *Meates v Attorney-General* [1983] NZLR 308 aptly put the position as follows (at 377):

> I would not treat difficulties in analysing the dealings into a strict classification of offer and acceptance as necessarily decisive in this field, although any difficulty on that head is a factor telling against a contract. The acid test in the case like the present is whether, viewed as a whole and objectively from the point of view of a reasonable person on both sides, the dealings show a concluded bargain.

Whether the Judge erred in finding that there was sufficient evidence to justify the implication of a

tripartite set-off agreement

51 We have noted that MEPL has adduced voluminous documentary evidence in the form of email correspondence between MEPL and MTC as well as emails between MEPL or MTC and JHTI, and reconciliation and set-off statements during the period from January 2008 to November 2008. However, the emails between MEPL and JHTI evidenced reconciliation of accounts and set-offs between them but nothing in these emails shows a tripartite arrangement for set-off which also involved MTC. The communications between MTC and JHTI were to similar effect. As the proponent of a defence that an agreement to set-off indebtedness on a monthly and tripartite basis existed from 5 July 2005, the burden was on MEPL to prove that such a tripartite set-off contract was indeed formed, had been regarded as binding, was complied with by the parties and had remained in force as at the date of the purported set-offs in question, *ie*, 22 October 2008 and 21 November 2008. MEPL's focus on showing to the court that the parties had taken steps to seek a set-off on a tripartite basis on these two material dates were insufficient to discharge its burden of proof. Two occasions of attempted set-off in late 2008, when things were turning bad for JHTI could hardly be adequate proof of an agreement which was supposed to have originated in July 2005. We do not see any evidence of the assertion that the tripartite set-offs were carried out on a monthly basis from July 2005. Only some isolated credit and debit invoices with the corresponding credit and debit note request forms dated June 2008 were produced. The excuse was made that MEPL did not want to inundate the court with voluminous documentation and thus only produced the recent ones and just those alone amounted to 43 arch-lever files. Of course the court would not expect the parties to produce every document generated during that period. But the court would have expected, bearing in mind the issues brought out in the pleadings, that only the most relevant documents to the issues, which show how the alleged implied agreement in July 2005 came about, should and need be produced. Selective production of pertinent documents over the entire period, from July 2005 to November 2008, should have been the course adopted. That was not done and the court cannot help but conclude that there were really no helpful documents during the relevant period.

52 Interestingly, reliance is placed by MEPL on the three letters dated 22 June 2007 (see [15] above) as evidence of the implied agreement. We say "interestingly" because these three letters had not been produced by MEPL, but rather by Rabobank who obtained them from JHTI's judicial managers. In any case, we are unable to see how they could be regarded as evidence of a tripartite agreement for set-off from July 2005. First, we note that the letter referred to the reconciliation exercise as being "over the past few weeks". Second, this exercise was in respect of services and products "up to and including 7 May 2007", a specific date; nothing suggested that it was a monthly exercise. Third, each party agreed to treat the financial statement pursuant to the exercise as final and that no further claims would be made by any party in respect of any matter covered by the exercise. We must observe that there was nothing in this letter to suggest that the reconciliation exercise was pursuant to any prior understanding or agreement between the three parties. On the contrary, its entire tone would suggest that it was a one-off exercise. Fourth, it is strange that if there was in existence a tripartite agreement, why did MEPL and MTC (and even Motorola Inc) write separately to JHTI on 22 June 2007? It should have been a joint letter by MEPL and MTC to JHTI. Fifth, Lakshamanan had conceded in his testimony in court that the three letters were not evidence of a broader agreement, given that none of the three letters expressly incorporated the three parties, JHTI, MEPL and MTC. Each letter at best formed a separate agreement between Motorola Inc, MEPL and MTC respectively with JHTI and JHTC.

53 We would, in this regard, point out that if, as alleged by MEPL, there was an implied tripartite set-off agreement between MEPL and MTC on the one side and JHTI on the other from July 2005, one would have expected the parties to incorporate the implied agreement into the MSA, a formal document executed some eight months later on 28 March 2006. The MSA defined the rights and

obligations governing the commercial relationship between Motorola Inc and its affiliates on the one part and JHTI and its affiliates on the other. That would have been the natural and logical thing to do. Instead, that was not done. Not only is the test of necessity to imply a contract not satisfied, this fact indeed militates against there being in existence an implied agreement for tripartite set-off. The objective inference from all the circumstances is that there was no such implied agreement. Moreover, there is one other pertinent factor which we must allude to. MEPL's pleaded case is that both the MAA and the MSA were alive in October and November 2008. As mentioned above (at [3]), the MAA has a clause for set-off as between MEPL and JHTI. It is wholly incongruous to suggest that there was a separate stand-alone unwritten implied agreement for tripartite set-off, a course completely out of line with the manner in which the parties had conducted themselves.

54 In the light of the foregoing, we find, with respect, difficulty with the reasoning in the following passage of the Judge at [78]:

> In the light of the evidence adduced read together with the set-off provision under clause 11.2 of the MAA between the defendant and JHTI, as well as the MSA which was a contract between, inter-alia, JHTI, MTC and the defendant, I have no doubt that the defendant has discharged its burden of proof on a balance of probabilities.

As we have stated at [54], MEPL's argument that there were then in operation the MAA and the MSA did not advance MEPL's case. As stated in [3] above, the MAA was only to operate for one year. There is no evidence that the term of the MAA had been extended. On MEPL's stand that it was extended, presumably implicitly, the MAA only provided for bilateral set-off between MEPL and JHTI. It is not in line with logic and common sense to suggest that the parties had also impliedly agreed to a tripartite set-off involving in addition MTC. Unlike bilateral set-offs , tripartite set-offs are certainly more involved, especially in a case like the present where there were running accounts between JHTI and MEPL and similar accounts between JHTI and MTC.

55 Finally, we would refer to the case of *Latreefers Inc. (In liquidation) v Tangent Shipping Co Ltd* [2000] BCLC 805 ("*Latreefers*") where the court held that, in the light of the correspondence between the parties accountants and solicitors, a tripartite arrangement was intended by the parties and authorised by their representatives. There, Tangent owed a debt to Latreefers and Latreefers owed a debt of a larger sum to Latstrand. Tangent was a subsidiary of Latstrand. Both Latstrand and Latreefers were subsidiaries of Latmar and Latmar was a subsidiary of Latvian Shipping Company. All three parties to the tripartite set-off agreement were related or affiliated companies. The case concerned inter-company indebtedness. The court held that there was a duly authorised tripartite set-off. Two points about the case should be noted. First, the tripartite set-off was a one-off transaction unlike the present case where running accounts were involved: see [55] above. Second, there was a lapse of some five years after the set-off and it would not be difficult to imagine this fact could also give rise to other defences *eg* estoppel. Clearly, the facts in *Latreefers* are quite distinct from those in the present case.

56 To reiterate, MEPL's pleaded case is that an agreement arose by virtue of the conduct of MEPL, MTC and JHTI sometime around 5 July 2005. The burden is on MEPL to adduce evidence to show that the parties have behaved in a manner which gave rise to an implied agreement and that the parties have regarded themselves as being bound thereby. However, MEPL has adduced no evidence to substantiate that. With respect to the Judge, she appeared to have applied an equitable rule governing bilateral set-off in implying the existence of a tripartite set-off agreement. MEPL's omission or inability to adduce evidence of the genesis of the agreement, and its mere reliance on the set-off statements and the email correspondence generated during the period of December 2007 to December 2008, as well as the testimony of its employees, were hardly adequate to discharge its burden of

proof. We would further add that those documents, except in respect of the period from October to November 2008, do not evidence any tripartite set-off arrangement. The totality of the evidence in fact militates against the existence of any unwritten tripartite agreement to set-off debts which arose from the parties' course of dealing. In this regard, we are especially swayed by the following two factors.

57 First, no explanation was offered for the parties' failure to put the alleged tripartite contractual agreement to set-off in writing. As stated in [43] above, one would have expected that sophisticated commercial parties like MEPL and JHTI would not have agreed to deal with each other without ensuring that their contractual arrangements have been comprehensively evidenced by proper legal documentation. All the more so in a case like the present where the tripartite set-off was not in relation to a single debt but on-going accounts. The fact that the only hint of an agreement to set-off is found in cl 11.2 of the MAA, which provided only for a mutual set-off between MEPL and JHTI, is more consistent with the absence of such a tripartite agreement to set-off rather than with its existence. MEPL explained that it was only logical that the MAA provided for a bilateral set-off, since at the time of its conclusion on 28 July 2004, MTC had yet to be JHTI's supplier of manufacturing materials. Thus, MEPL argued that the MAA ought not to be treated as a factor negating the existence of a tripartite set-off agreement formed by the conduct of MEPL, MTC and JHTI. Be that as it may, it still does not explain why the parties had not put the tripartite contractual arrangement down in writing, especially bearing in mind that Motorola Inc and JHTI had thought it fit to enter into the MSA, and earlier MEPL had executed the MAA with JHTI. Here we are not dealing with two individuals, or small entities, which have carried on their business relationship in an informal manner. We are instead talking about large, commercially-savvy parties who have been dealing with one another at arm's length on the basis of written contracts, and who would, had that been their intention, have surely taken care to enshrine the purported tripartite set-off agreement in writing. They would not have left their intended course to be inferred from their conduct.

58 MEPL also explained that the MSA was only a broad umbrella agreement governing dealings of Motorola Inc and/or its "affiliates" as defined in cl 2 of the MSA (see above at [4]) and suppliers generally. Thus, the MSA could not have provided for specific terms governing the tripartite relationship between MEPL, MTC and JHTI, and its existence therefore should not have prevented the Judge from finding that a separate contract could be implied from the three parties' conduct. Again, we find this argument unsustainable. Clause 1a contemplates the conclusion of more specific agreements between parties, which would override the terms of the MSA in the event of inconsistency:

> **1. Scope of this MSA**
>
> a. This MSA establishes the terms and conditions which will apply each time Motorola engages Company to render manufacturing services for a Product. The parties will enter into a separate Product Specific Agreement ("PSA") for each Product (or for each group of Products that shares common characteristics) to establish the specific terms and conditions applicable to that Product or group of Products. The terms and conditions of this MSA will be incorporated into each PSA with or without express reference to this MSA ...

In particular, the MSA contemplates parties entering into more specific written agreements on payment terms. Clause 5a of the MSA provides that the pricing of products will be confirmed in the Product Specific Agreement. Clause 5b provides that the MSA incorporates the payment terms stated in the "FCA Company's Factory (Incoterms 2000)", unless otherwise agreed by the parties in writing. It seems to us that if at all there was an arrangement for a tripartite set-off, it would at least have been provided for in the Product Specific Agreement, or the "FCA Company's Factory (Incoterms

2000)". The alleged implied tripartite set-off agreement is clearly inconsistent with these terms.

59 Secondly, as mentioned above at [53], the letters dated 22 June 2007 (which are relied upon by MEPL) in fact undermine rather than support MEPL's defence. This is because the letters not only made no reference, either direct or indirect, to the purported overarching tripartite agreement which was formed on or about 5 July 2005, they also showed that the arrangement proposed therein was really an ad hoc arrangement and this was evidenced by the fact that JHTI was asked to give its written consent.

60 In the result, we hold that although the documentary evidence showed that moves were afoot by MEPL, MTC and JHTI to effect set-offs on the relevant dates of 22 October 2008 and 21 November 2008, there is no evidence that the set-offs were undertaken *pursuant* to an implied tripartite agreement between the three parties which arose by a course of dealing sometime around 5 July 2005. No evidence at all was adduced to prove the existence of two crucial elements necessary for the formation of a contract, *consensus ad idem* and an intention to create legal relations. Moreover, quite apart from its pleaded case and even if we were minded to consider whether those two set-offs could be regarded as completed set-offs independent of the implied tripartite agreement, the fact remains that there is no evidence that JHTI had given its final consent to the reconciliation statements in connection with the set-offs of 22 October 2008 and 21 November 2008. The 22 June 2007 letters showed that that was how the parties effected set-offs.

Observations on the calling of witnesses from JHTI

61 There was some controversy as to who should have called the management of JHTI as witnesses at the trial. Undeniably, the legal burden was on MEPL to prove the existence of an implied tripartite agreement for set-off. For that purpose, it could, if it wished, have called witnesses from JHTI. It is only when MEPL has proven that fact on a balance of probabilities that an evidential burden will arise for Rabobank to rebut. Rabobank could do so by calling either witnesses from JHTI or any other relevant person. As we have found (see above, at [61]) that MEPL had failed to prove its assertion that an implied tripartite contract to set-off existed from July 2005, it is thus immaterial that Rabobank did not call witnesses to prove a negative, *ie*, that no such tripartite agreement to set-off was in existence.

62 In the light of the above, there is no necessity for this court to consider the issue of whether certain evidence relied upon by Rabobank to prove the non-existence of an implied tripartite set-off agreement was properly excluded as hearsay.

The issue of costs

63 On 6 January 2010 (approximately 1 week before the trial date), MEPL made an offer to settle to Rabobank in the following terms ("offer to settle"):

1. The Plaintiff shall discontinue this Suit with no order as to costs. The Plaintiff shall file a Notice of Discontinuance in respect of this Suit within seven (7) days of the date of acceptance of the Offer to Settle.

2. Each party shall bear its own costs arising out of or in connection with this Suit, save where the Court has expressly ordered costs in favour of one party against the other prior to the date hereof;

3. The terms in this Offer to Settle constitute a full and final settlement of all the Plaintiff's

claims made in this Suit *and all claims relating to and/or arising out of and/or in connection with the assignments of receivables between the Plaintiff and Jurong Hi-Tech Industries Pte Ltd, whether or not such assignments had been made pursuant to the Master Receivables Agreement dated 15 February 2007 between them, and whether or not any claim based on any such assignment has been made in this Suit*.

[emphasis added]

64 Given that Rabobank is successful in this appeal, the issue of whether Rabobank ought to bear the adverse cost consequences in accordance with O 22A r 9(3) of the Rules of Court is now academic. It is also unnecessary for this court to pronounce its views on whether Rabobank has acted reasonably in rejecting the offer to settle which seemingly encompasses the settlement of disputes other than that which is the subject of the present appeal.

Conclusion

65 In the light of the above, we allow the appeal. Rabobank is thus entitled to the amount of US$5,150,853.21, which is the difference between the US$5,178,212.41, the sum claimed by Rabobank and the amounts rightly excluded by the Judge for being invoices not subject to the MRPA, which is US$17,359.20. Interest at the usual rate of 5.33 % will apply on the judgment sum from the date of the writ. MEPL is to bear the costs here and below.

[note: 1] CB 130 – 146

[note: 2] CB 147 to 197

[note: 3] See example at CB 301 - 309

[note: 4] See CB 226, 230 and 267

[note: 5] RC [43]