IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 106

Civil Appeal No 45 of 2019

Between

Ma Hongjin

… *Appellant*

And

SCP Holdings Pte Ltd

… *Respondent*

In the matter of HC/Suit No 765 of 2016

Between

Ma Hongjin

… *Plaintiff*

And

(1) SCP Holdings Pte Ltd
(2) Biomax Technologies Pte Ltd

… *Defendants*

GROUNDS OF DECISION

[Contract] — [Consideration] — [Necessity]

[Contract] — [Consideration] — [Failure]
[Contract] — [Variation] — [Consideration]
[Civil Procedure] — [Pleadings]
[Civil Procedure] — [No case to answer]

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v
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9 July 2020

28 October 2020

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

Introduction

1 This was an appeal against the decision of the High Court judge ("the Judge") in *Ma Hongjin v SCP Holdings Pte Ltd and another* [2019] SGHC 277 ("the GD"). The entire appeal centred on various aspects and/or applications of the doctrine of consideration. We dismissed the appeal and now give the detailed grounds for our decision.

2 Amongst all the doctrines of the common law of contract in the Commonwealth, perhaps the most academic ink has been spilt on the doctrine of consideration. Yet, modern cases at least that involve the invocation of the doctrine are few and far between. This is one of the rare decisions in the Singapore context; the last major decision, the decision of this court in *Gay*

Choon Ing v Loh Sze Ti Terence Peter and another appeal [2009] 2 SLR(R) 332 ("*Gay Choon Ing*"), was handed down over a decade ago. Viewed from a *practical* perspective, this is not surprising. As we shall see, the existing case law renders it relatively easy to demonstrate the presence of valid or sufficient consideration in practice. On an *academic* level, though, it is understandable why there is a continued fascination with the doctrine. Its historical roots continue to remain obscure (for a very perceptive and recent essay from historical as well as comparative points of view, see Susan Kiefel, "The Doctrine of Consideration in Contract: Some Historical and Comparative Perspectives" in *Contract in Commercial Law* (Simone Degeling, James Edelman and James Goudkamp gen eds) (Lawbook Co, 2016) ("*Contract in Commercial Law*") at Ch 4), and its very existence continues to be a topic of fascination amongst legal academics – particularly whether it ought to be superseded by other contractual doctrines. Significantly, though, the burgeoning literature on the doctrine has brought us no nearer to a solution on an academic level. For this reason alone, it is inadvisable for courts to enter the various debates (interesting though they may be on the academic plane), particularly when the practical yield is so paltry. Indeed, this is the approach that this court adopted in *Gay Choon Ing.*

3 In *Gay Choon Ing*, this court decided that the doctrine of consideration continued to be part of the Singapore contractual landscape. That case related, on its *facts*, to the operation of the doctrine in so far as the ***formation*** of contracts was concerned. The present appeal raises, *inter alia*, a different issue as to whether the doctrine of consideration ought nevertheless to continue to operate in so far as the ***variation or modification*** of contracts is concerned (indeed, this was an *additional* argument which was not canvassed in the court below but

which the appellant raised in the present appeal (and which itself raised a procedural question which will be dealt with below)).

4 Although the observations in *Gay Choon Ing* were *general* in nature ***and*** the case itself endorsed the leading decision of the English Court of Appeal in *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 ("*Williams*") (which confirmed the need for consideration in respect of the *variation* of an existing contract in a situation where it was sought by the promisee to enforce a promise to *pay more*, albeit in a more "dilute" form), given the fact that *Gay Choon Ing* related, strictly speaking, to the operation of the doctrine of consideration in relation to the *formation* (as opposed to a *variation or modification*) of the contract concerned, it could be argued that the issue as to whether consideration is required for the *variation or modification* of an existing contract has *not* been (at least wholly) foreclosed in the Singapore context. As we shall see, there is some case law and (not surprisingly) academic writing that suggests that the doctrine ought to be dispensed with in the latter situation, *viz*, the *variation or modification* of contracts. However, this would, *inter alia*, entail *departing from* not only *Williams* but also the longstanding House of Lords decision in *Foakes v Beer* (1884) 9 App Cas 605 ("*Foakes*") (which held that consideration was required in a situation where it was sought by the promisee to enforce a promise to *take less*). We will touch briefly on this particular legal issue below.

5 In addition to the issue of the doctrine of consideration in the context of the variation or modification of contracts, there was also a procedural issue in the court below that centred on the relevant test to apply upon a submission of no case to answer. That procedure and substance have an integrated and symbiotic relationship with each other cannot be denied (see the decision of the Singapore High Court in *United Overseas Bank Ltd v Ng Huat Foundations Pte*

Ltd [2005] 2 SLR(R) 425, especially at [8]). Although this particular issue was not raised in the present appeal, we will nevertheless make some observations on it as it has general significance beyond this case.

6 So much by way of preliminary observations. Let us now turn to the background and the decision of the court below.

Background

7 The appellant in this appeal, Mdm Ma Hongjin, is an investor. The respondent, SCP Holdings Pte Ltd, is an investment holding company, and the ultimate holding company of a group of companies known as the Biomax Group. The respondent owns and controls Biomax Holdings Pte Ltd ("Biomax Holdings"), which in turn owns and controls Biomax Technologies Pte Ltd ("Biomax Technologies"). Biomax Technologies was the second defendant in the trial below, but was not named as a party to the appeal.

8 The dispute between the parties arose out of a convertible loan of S$5m extended by the appellant to the respondent pursuant to a Convertible Loan Agreement ("the CLA") dated 6 January 2015. While the appellant was the investor on record, the CLA was negotiated by Mr Han Jianpeng ("Mr Han"), the appellant's husband, and Mr Sim Eng Tong ("Mr Sim"), the controlling shareholder of the respondent.

9 Under cl 3 of the CLA, the S$5m loan was extended for a period of two years. In return, the respondent would have to pay interest at the rate of 10% per annum. The interest was to be paid in two instalments: the first interest payment of S$500,000 was due on 5 January 2016 and the second interest payment of the same amount was due on 5 January 2017 together with repayment of the principal, making a total of S$5.5m payable on that date. Additionally, the

appellant was granted an option to require the respondent to procure a transfer of 15% of the shares in Biomax Holdings to her in lieu of paying the sum of S$5.5m due on 5 January 2017.

10 Although the CLA provided that the whole of the loan amount (*ie*, S$5m) was to be disbursed on the date of the CLA (see cl 2.2), the sum of S$5m was in fact disbursed to the respondent in three tranches on the following dates:

(a) S$2.5m on 6 January 2015;

(b) S$1m on 14 January 2015; and

(c) S$1.5m on 30 March 2015.

11 Within two months of entering into the CLA, the appellant and Mr Han became unhappy with the respondent's financial results. This caused Mr Han to re-negotiate some of the terms of the CLA with Mr Sim sometime in March 2015. This resulted in the appellant and the respondent entering into the "Supplemental Agreement relating to a S$5,000,000 Convertible Loan Agreement Dated 6 January 2015" ("the SA") on 16 April 2015. The two recitals to the SA provided that it was "supplemental to" the CLA, and that the appellant had agreed to amend the CLA to the extent set out in the SA at the respondent's request.

12 The SA essentially imposed additional obligations on the respondent by stipulating several amendments to the CLA. First, the proportion of Biomax Holdings shares in respect of which the appellant could exercise a call option on 5 January 2017 increased from 15% to 20%. Second, the SA imposed an additional "lump sum facility fee" of S$250,000 to be paid on the same day as

the first interest payment (*ie*, 5 January 2016). These amendments were to take effect on 16 April 2015. Notably, the appellant did not assume any additional obligations to the respondent under the terms of the SA.

13 There were a number of other transactions which the appellant was involved in which were of relevance to the appeal. Shortly after entering into the SA on 16 April 2015, the appellant entered into a Share Investment Agreement with Biomax Technologies ("the SIA") under which she agreed to extend a loan of not more than S$5m to Biomax Technologies for the purpose of setting up a recycling plant, though the loan facility under the SIA was eventually not disbursed. The appellant also separately extended a number of loans totalling S$6m to Biomax Technologies between June and October 2015 ("the June to October 2015 loan agreements"). Of these, only S$1m was eventually repaid by Biomax Technologies to the appellant.

14 In January 2016, the respondent made payment of S$500,000 but neglected to pay the S$250,000 facility fee which was provided for under the SA. The appellant thus commenced proceedings in Suit No 765 of 2016 (from which the present appeal arose) to obtain payment of the facility fee from the respondent and repayment of the outstanding loans and interest from Biomax Technologies.

15 Two further points bear mentioning before we turn to the Judge's decision. First, there was no appeal against the Judge's decision in respect of the appellant's claims against Biomax Technologies. Second, the appellant had commenced a separate suit against the respondent following its failure to repay the sum of S$5.5m due on 5 January 2017. These points were irrelevant to the present appeal and thus do not feature any further in these grounds.

The decision below

16 Although the respondent had initially pleaded a number of defences against the appellant's claim for the unpaid facility fee, it chose to abandon all defences prior to the trial save one – that the SA was unsupported by consideration and was therefore unenforceable. The respondent also advanced the technical argument that the appellant had failed to state in her pleadings that the SA was supported by consideration. As against this, the appellant made three arguments: (a) first, the SA and CLA were part of "one and the same contract", and cl 9.3 of the CLA dispensed with the need for consideration for contractual variation; (b) second, the CLA and the SA should be treated as part of the same transaction with the disbursement of the loans under the CLA (both before and around the time that the SA was entered into) being consideration for the respondent's agreement to pay the facility fee; and (c) third, that consideration was furnished by way of a factual or practical benefit in the form of goodwill from the appellant for future loans to the respondent or any of its related entities. Following the close of the appellant's case in the proceedings below, the respondent made a submission of no case to answer coupled with the usual election not to call evidence if the submission failed.

17 The Judge found that the SA was unenforceable as it was not supported by consideration. The Judge first considered the appropriate test to apply in civil cases following a defendant's submission of no case to answer. The Judge rejected the appellant's submission that she only had to prove a *prima facie* case in order to succeed on her claim, finding instead that she had to prove her case on a balance of probabilities. The Judge reasoned that, following the decision of this court in *Ho Yew Kong v Sakae Holdings Ltd and other appeals and other matters* [2018] 2 SLR 333 ("*Ho Yew Kong*"), a defendant who elects to make a submission of no case to answer *must* make an accompanying election not to

call evidence in the event that submission fails. As a result, there was no justification for a different standard of proof to apply in a situation where a defendant makes a submission of no case to answer as compared to one where that same defendant does not make such a submission but simply elects to call no evidence. In arriving at this decision, the Judge considered that the decision of the Singapore High Court in *Central Bank of India v Bansal Hemant Govinprasad and others and other actions* [2002] 1 SLR(R) 22 ("*Central Bank of India*") did not stand for the proposition that a submission of no case to answer would fail if the plaintiff was able to prove a *prima facie* case. The Judge also took the view that this court's decisions in *Tan Juay Pah v Kimly Construction Pte Ltd and others* [2012] 2 SLR 549 ("*Tan Juay Pah*") and *Lena Leowardi v Yeap Cheen Soo* [2015] 1 SLR 581 ("*Lena Leowardi*") did not stand for the proposition that a plaintiff need only prove a *prima facie* case upon a submission of no case to answer, and that any statements to that effect were *obiter dicta.*

18 Turning to the consideration issue, the Judge found that he was bound by the decision of this court in *Gay Choon Ing* ([2] *supra*) and that consideration was necessary for contractual variation. While the Judge found that the appellant had failed to adequately plead in her reply that the SA was supported by consideration in response to the respondent's defence that the SA was "void for lack of consideration", he considered that this did not cause any real prejudice to the respondent, preferring instead to decide the point based on whether consideration had been furnished for the SA. In this respect, the Judge rejected the arguments raised by the appellant and found that the SA was a free-standing agreement for which no consideration had been provided. First, cl 9.3 of the CLA did not allow for the contract to be varied without consideration. The decision of the Singapore High Court in *Benlen Pte Ltd v*

Authentic Builder Pte Ltd [2018] SGHC 61 ("*Benlen*") cited by the appellant was distinguished on the basis that the clause considered therein was materially different. Second, the CLA and SA could not be construed as being part of a single transaction. Even on the appellant's case, she and Mr Han did not contemplate the SA when she first entered into the CLA with the respondent. Rather, the SA was an attempt to reopen a concluded bargain and improve the appellant's position. This distinguished the facts of the case from the decision of this court in *Rainforest Trading Ltd and another v State Bank of India Singapore* [2012] 2 SLR 713 ("*Rainforest Trading*"). Third, the SA was not supported by consideration in the form of a factual or practical benefit to the respondent. There was no evidence that the parties had engaged in negotiations and reached an in-principle agreement on the terms of the SA prior to the disbursement of the third tranche of the loan on 30 March 2015. In any event, there was no evidence that the respondent gained some benefit from the appellant's disbursement of the third tranche of the loan under the CLA which was extrinsic to the disbursement and would bring the case within the principle in *Williams* ([4] *supra*). There was also no consideration in the form of goodwill to Mr Sim and his companies for future loans as there was no evidence that any goodwill shown by the appellant was causally connected to the respondent's entering into the SA.

The parties' arguments on appeal

19 The appellant did not dispute the Judge's findings on the appropriate legal test to be applied upon a defendant's submission of no case to answer. The appellant relied on many of the same arguments that were raised before the Judge. First, the appellant argued that cl 9.3 of the CLA dispensed with the need for fresh consideration for a variation of the CLA. Second, the appellant submitted that consideration had been furnished for the SA by way of a factual

and/or practical benefit. The appellant also sought leave to argue that *Gay Choon Ing* should be overruled at least in part – to the extent that consideration would not be required in the case of contractual *variation*.

20 The respondent's main contention was that the Judge ought to have rejected the appellant's case at the outset due to her failure to plead that the SA was supported by consideration. The respondent also argued that the Judge was correct in rejecting the appellant's arguments that the SA was supported by consideration. Regarding the appellant's application for leave to argue that *Gay Choon Ing* should be overruled in so far as contractual variation was concerned, the respondent took the position that the appellant should be precluded from doing so, and that in any event, the doctrine of consideration should be retained for contractual variations.

Issues

21 The following issues are addressed in these grounds:

(a) first, what is the test to be applied upon a submission of no case to answer by a defendant ("Issue 1");

(b) second, whether the appellant had adequately pleaded that the SA was supported by consideration ("Issue 2");

(c) third, whether cl 9.3 of the CLA dispensed with the need for fresh consideration for a variation of the CLA ("Issue 3");

(d) fourth, whether the appellant had furnished consideration for the SA by way of a factual and/or practical benefit ("Issue 4"); and

(e) fifth, whether the requirement for consideration should be dispensed with for contractual variations ("Issue 5").

Our decision

Issue 1: the applicable test upon a submission of no case to answer

22 As alluded to above, this particular issue (relating to the applicable test to be applied upon a submission of no case to answer by a defendant) did not really arise in the present appeal. However, as it raises an important point of general importance, and sets the context for the rest of the present discussion, we will make some general observations for guidance in future cases.

23 In the court below, after the appellant had closed her case (as the plaintiff), counsel for the respondent (the defendant) made a submission of no case to answer, *coupled with* the usual election not to call evidence if the submission failed (such election being *obligatory* pursuant to the rule laid down by this court in *Ho Yew Kong* ([17] *supra*) at [70]). As we shall see, this *obligatory* election is a matter (or factor, rather) of the first importance.

24 It is important, in the first instance, however, to note that, under general law, the plaintiff bears the legal burden of proving its case against the defendant in a civil case on ***a balance of probabilities***.

25 However, in the situation where the defendant has made a submission of no case to answer, local case law suggests that the plaintiff need only satisfy the court that there is *a* ***prima facie*** *case* on each of the essential elements of the claim in order to defeat the defendant's submission of no case to answer and secure judgment in its favour (see, for example, *Central Bank of India* ([17]

supra) at [21] as well as the decisions of this court in *Tan Juay Pah* ([17] *supra*) at [37] and *Lena Leowardi* ([17] *supra*) at [24]).

26 It might, at first blush, therefore, appear that in a situation where the defendant has made *a submission of no case to answer*, the standard of proof is different and this was indeed the view that the Judge took in the court below. He was therefore of the view that he had to choose one standard over the other (and chose the former, *viz*, proof on a balance of probabilities). *However*, on closer analysis, this is ***not*** the case and the Judge was, with respect, mistaken in thinking he had to make a choice when, in fact, ***none*** was required. Let us elaborate.

27 The starting point in our analysis is the concept of the *legal* burden. A plaintiff in a civil claim bears the legal burden of proving the existence of any relevant fact necessary to make out its claim on a balance of probabilities (assuming, of course, that the defendant cannot prove any applicable defences). This flows from the Evidence Act (Cap 97, 1997 Rev Ed) ("the EA"), and in particular s 103, which requires that a person desiring a court to give judgment as to any legal right or liability dependent on the existence of facts prove that those facts exist. Though the EA does not, on its face, distinguish between the *civil* and *criminal* burdens of proof, it has long been established that the legislation retains the traditional common law distinction between the two (see the decision of the Judicial Committee of the Privy Council (on appeal from the Federal Court of Malaysia) in *Public Prosecutor v P Yuvaraj* [1970] AC 913 at 920H–921B). Although there has been, on occasion, controversy over the possible existence of a third standard of proof, this court's decision in *Tang Yoke Kheng (trading as Niklex Supply Co) v Lek Benedict and others* [2005] 3 SLR(R) 263 at [14] clarified that there are only two such standards of proof –

proof on the balance of probabilities for civil cases and proof beyond a reasonable doubt for criminal cases.

28 A closely related (though distinct) concept is that of the *evidential* burden (or tactical burden). This is borne by the person on whom the responsibility lies to "contradict, weaken or explain away the evidence that has been led" (see the decision of this court in *Britestone Pte Ltd v Smith & Associates Far East, Ltd* [2007] 4 SLR(R) 855 ("*Britestone*") at [59]). While the legal burden is determined by considering the pleadings of the parties and determining the material facts relied on by the parties to establish the legal elements of a claim or defence, the evidential burden can shift between the parties based on the state of the evidence (see the decision of this court in *Cooperatieve Centrale Raiffeisen-Boerenleenbank BA (trading as Rabobank International), Singapore Branch v Motorola Electronics Pte Ltd* [2011] 2 SLR 63 at [30]–[31]).

29 The following passage from *Britestone* illustrates the operation of these concepts (at [60]):

> … [A]t the start of the plaintiff's case, the legal burden of proving the existence of any relevant fact that the plaintiff must prove and the evidential burden of adducing some (not inherently incredible) evidence of the existence of such fact coincide. Upon adduction of that evidence, the evidential burden shifts to the defendant, as the case may be, to adduce some evidence in rebuttal. If no evidence in rebuttal is adduced, the court may conclude from the evidence of the plaintiff that the legal burden is also discharged and making a finding on the fact against the defendant. If, on the other hand, evidence in rebuttal is adduced, the evidential burden shifts back to the plaintiff. If, ultimately, the evidential burden comes to rest on the defendant, the legal burden of proof of that relevant fact would have been discharged by the plaintiff …

30 Crucially, a party's establishment of a *prima facie* case on a particular fact on which it bears the legal burden denotes the point at which the evidential burden will shift to the defendant. In the decision of this court in *Anti-Corrosion Pte Ltd v Berger Paints Singapore Pte Ltd and another appeal* [2012] 1 SLR 427, the issue was whether defects in paint supplied by a paint manufacturer caused discolouration on a building. The appellant's evidence in that case was found to have demonstrated *prima facie* that the defective paint was likely the cause of the discolouration, which caused the evidential burden to shift to the respondent. As the respondent adduced no evidence on this point, it was found that the appellant had proven that the discolouration was more likely than not caused by defects in the paint (at [37]–[38]).

31 This, in our view, explains why the applicable test following a submission of no case to answer has been expressed as requiring the plaintiff to prove a *prima facie* case. Where a submission of no case to answer is coupled with an election not to call evidence (which is *obligatory* following *Ho Yew Kong* ([17] *supra*)), the establishment of a *prima facie* case on each of the relevant facts in issue essentially results in a finding that the plaintiff has proved those facts on a balance of probabilities. This is because, following the shifting of the evidential burden to the defendant, there is simply no evidence forthcoming from the defendant to disprove the plaintiff's position or weaken it such that the court can return a finding that the fact in issue is either "disproved" or "not proved" within the meaning of s 3 of the EA (see the decision of this court in *Loo Chay Sit v Loo Chay Loo, deceased* [2010] 1 SLR 286 at [20]). Seen in this light, the distinction between a *prima facie* case on the one hand and proof on a balance of probabilities on the other does not mean, as the parties argued below, that the court applies a laxer standard of proof in the former.

32 In ***summary***, the plaintiff *does* indeed bear the legal burden of proving its case against the defendant in a civil case on *a balance of probabilities*. *Where the defendant has made a submission of no case to answer*, *this* particular standard of proof is ***met or discharged*** by the plaintiff satisfying the court that there is a *prima facie* case on each of the essential elements of its claim. This is because in a situation where the defendant has made a submission of no case to answer, such a submission *must* (as we have already noted at [23] above) be *coupled with* an election *not to call evidence* (pursuant to the principle laid down in *Ho Yew Kong*), with the result being that if the plaintiff has established a *prima facie* case on the facts in issue (that are essential to its claim), this would *essentially* result in the court finding that the plaintiff has discharged its burden of proving the aforementioned facts ***on a balance of probabilities***. This is due to the fact that, upon the plaintiff establishing a ***prima facie*** *case* with respect to the relevant facts in issue, the ***evidential*** *burden* will ***shift*** to ***the defendant***. ***However***, because the defendant *has* ***had*** *(in the situation of* ***a submission of no case to answer****) to* ***elect*** *to* ***call no evidence***, it *would be* ***unable*** *to adduce* ***(any) evidence*** *to* ***either disprove*** *the plaintiff's position* ***or*** *weaken it such that the facts that the plaintiff relies upon are "****not proved****"*. Put another way, where a defendant elects not to call any evidence upon making a submission of no case to answer, there is simply no contrary evidence from the defendant for the court to consider. The court is only left with the evidence of the plaintiff and if, on a *prima facie* basis, the evidence satisfies all the ingredients or essential elements of the cause of action, judgment will be entered against the defendant. Because there is simply *no* balancing exercise of evidence to speak of, it might appear somewhat anomalous to describe the plaintiff as having proven its case on a balance of probabilities. However, such an anomaly is more apparent than real – in such a situation (concerning a submission of no case to answer), provided that it can establish a *prima facie* case on the facts in issue (that are essential to

its claim), the plaintiff has (***simultaneously***) proved its overall case on a *balance of probabilities*.

33 We therefore affirm that, in the situation where the defendant has submitted that it has no case to answer and has (as it legally must) also elected to call no evidence if it fails in this submission, *the plaintiff* would ***succeed*** if it can establish that it has *a* ***prima facie*** *case* on each of the essential elements of its claim. For the avoidance of doubt (and also for the reasons stated above), the plaintiff would (***simultaneously***) have ***necessarily proved*** its (***overall***) case against the defendant ***on a balance of probabilities***.

Issue 2: whether the appellant had adequately pleaded that the SA was supported by consideration

34 Although this particular issue relates to the doctrine of consideration, it concerns, in fact, a preliminary procedural point in relation to *pleadings* (or, in the respondent's view, an *absence* thereof). The position taken by the respondent was that the appellant's case should have failed *ab initio* owing to her failure to plead that the SA was supported by consideration. As against this, the appellant contended that the respondent had not suffered any prejudice from any failure on her part to plead that the SA was supported by consideration. According to the appellant, her reply and defence to counterclaim contained a blanket denial of para 6 of the defence and counterclaim, which contained the respondent's averments as to the lack of consideration for the SA, and the respondent had notice of the appellant's arguments from the time of her opening statement. Yet, the respondent still failed to challenge the appellant's reliance on unpleaded particulars at trial.

35 We agreed with the decision of the Judge that the appellant should be permitted to raise her arguments on consideration notwithstanding the fact that

they might have been unpleaded. The purpose of pleadings is to ensure that each party was aware of the respective arguments against it and that neither was therefore taken by surprise (see the decision of this court in *Liberty Sky Investments Ltd v Aesthetic Medical Partners Pte Ltd and other appeals and another matter* [2020] 1 SLR 606 at [15]–[16]). We noted that there appeared to be some reference in the appellant's pleadings to the fact that the SA had dispensed with the need for consideration. In the appellant's reply and defence to counterclaim dated 29 August 2016, it was stated that "the [SA] was executed as a valid and binding amendment to the CLA pursuant to Clause 9.3 of the CLA", which would cohere with the appellant's argument that cl 9.3 of the CLA dispensed with the need for consideration for contractual variation. While the remaining arguments relied on by the appellant were not particularised in her pleadings (apart from the blanket denial mentioned above at [34]), we found that the respondent had not been caught by surprise by these arguments and crucially, we did not think that they caused any prejudice to the respondent. The respondent was unable to particularise any prejudice which it had suffered in its case, other than to claim there ought to be stricter adherence to the requirements of pleadings where a defendant has made a submission of no case to answer, and that it had been caught off-guard by the appellant's reliance on an unpleaded point. Given the circumstances, we were of the view that this was a scenario where the appellant should be permitted to raise her arguments on consideration notwithstanding the fact that they might have been unpleaded as the respondent could be adequately compensated with costs (see the decisions of this court in *OMG Holdings Pte Ltd v Pos Ad Sdn Bhd* [2012] 4 SLR 231 at [18] and *Sun Jin Engineering Pte Ltd v Hwang Jae Woo* [2011] 2 SLR 196 at [20]).

Issue 3: whether cl 9.3 of the CLA dispensed with the need for fresh consideration for a variation of the CLA

36 There is no reason, in principle, why contracting parties cannot, by *agreement*, dispense with the doctrine of consideration with regard to the *variation* of *that* particular contract. Any contractual term to that effect would not only be *part of the bargain between the parties* but would also be one that is part of a contract, which, in its *formation*, was in fact *supported by valid consideration* in the eyes of the law to begin with. *If*, indeed, that particular contract had been formed *without* such valid consideration, then *that* contract (and, of course, all the terms contained therein) would *not* have been able to pass legal muster in the first place.

37 The former point (*viz*, that the court would be *giving effect* to *the bargain* between the parties) may appear to be *consistent with* the argument (considered below) that one should dispense with the requirement of consideration where a contract is *varied* because the parties are already in a cooperative venture where some give and take is required; as we shall see below, however, this assumption of a cooperative venture is *not necessarily always* the case, *but* where the parties have in fact *agreed* to *dispense with* the doctrine of consideration in relation to the *variation* of their contract, it is *implicit* in such an agreement that they had *crystallised* that spirit of cooperation *and* (more importantly) given it ***concrete legal form*** (at least in so far as the issue of *variation* is concerned). This is, of course, *quite different* from a more general argument (or, rather, *assumption*) that the parties are *necessarily* (*and therefore always*) in a situation of cooperation as well as give and take simply by entering into a contract with each other; as we shall elaborate upon below, this need not necessarily be the case, especially where parties subsequently *vary* their contract as such variation can

occur for *a variety* of reasons (not all of which are premised on a cooperative venture or an atmosphere of give and take).

38 Returning to the present case, the key question in the context of the present appeal in general and in relation to cl 9.3 in particular would therefore be whether the appellant and the respondent had intended that that clause *dispense with* the need or requirement for *consideration* if the CLA was *varied* – as was indeed in fact the case. At this juncture, the issue becomes one of *contractual construction* (here, of cl 9.3 of the CLA) – and it is to this issue that our attention now turns.

39 Clause 9.3 of the CLA reads as follows:

> 9.3 No amendment or variation of this Agreement shall be effective unless so amended or varied in writing and signed by each of the Parties.

40 In our judgment, on an objective reading of the plain language of cl 9.3, it cannot be the case that the parties had dispensed with the need or requirement for consideration if the CLA was varied. As the Judge rightly stated, cl 9.3 merely prescribes signed writing as a minimum threshold for legally valid variation to occur. In other words, it provides for a necessary, but not necessarily sufficient, condition for validity of a subsequent variation of the contract.

41 The appellant attempted to liken her case to that of *Benlen* ([18] *supra*), where Chan Seng Onn J had held (albeit *obiter*) that the meaning of a particular clause of the relevant contract was that the parties had in fact agreed to dispense with the doctrine of consideration in relation to the variation of their contract. The clause in question read as follows:

> 14.2 This Sub-Contract shall be varied or modified only with prior written consent from both parties.

42 In our view, the difference between the clause in *Benlen* and cl 9.3 of the CLA is at once clear. Clause 9.3 of the CLA cannot be construed to mean that the parties agreed that no fresh consideration would be required for subsequent variation, because of the reasons set out at [40] above. The clause in *Benlen*, however, can, as it provided that the contract "shall [*ie*, must] be varied or modified only with [*ie*, as long as there is] prior written consent from both parties". We therefore rejected the appellant's argument in this respect.

43 The appellant further argued that even if cl 9.3 of the CLA did not exhaustively provide for the requirements of a valid variation of contract, the parties nonetheless intended for the CLA to be varied or amended without the need for consideration. According to the appellant, any interpretation of cl 9.3 otherwise would result in "potentially absurd consequences", as it would amount to an interpretation that parties had only intended that certain variations to the CLA would be binding even though the "only stated requirements" of cl 9.3 were complied with by the parties.

44 Despite claiming to be otherwise, this argument in reality hinged on the requirements in cl 9.3 being exhaustive – if complying with the "only stated requirements" of cl 9.3 did not result in a valid variation agreement being concluded, this would only be "absurd" if cl 9.3 provided for necessary and sufficient requirements in the first place. This was not the case, and we therefore dismissed this argument as well.

Issue 4: whether the appellant had furnished consideration for the SA

45 This particular issue relates to the question whether the appellant had, in any event, furnished fresh (and valid) consideration for the respondent's promise which it now seeks to enforce. The appellant's primary argument in

this regard centred on the alleged "*goodwill*" which was said to constitute sufficient consideration within the meaning and scope set out in *Williams* ([4] *supra*). Specifically, the appellant alleged that the respondent gained her "goodwill" to provide future loans to the respondent or its related entities in return for her entry into the SA.

46 Before proceeding to consider this particular issue, however, a couple of preliminary observations are apposite.

47 First, the alleged consideration that has been sought to be furnished might be insufficient in the eyes of the law for at least three reasons. It might be the case that the alleged consideration, although contemporaneous with or otherwise causally connected with the promise that is sought to be enforced, is *itself* insufficient in the eyes of the law to begin with. It might also be the case that the alleged consideration, although otherwise sufficient in the eyes of the law, is not contemporaneous with or otherwise causally connected with the promise that is sought to be enforced – in which case it will be considered what has been termed *past* consideration that will also *not* pass legal muster. Finally, it might be the case that the alleged consideration is not only itself insufficient in the eyes of the law but is *also* past consideration in the manner just described. Much will, of course, depend on the precise facts and circumstances of the case.

48 Secondly, having referred to the concept of "causal connection" in the preceding paragraph, it should be noted that there may be *different senses* in which that concept might be used. ***One*** sense is, as we put it in *Gay Choon Ing* ([2] *supra* at [82]), that:

> [T]he element of request is necessary in order to establish a link between the parties concerned. So, for example, if the promisee chooses, of his or her own volition (and without more), to confer a benefit on the promisor, this will not constitute sufficient

> consideration in the eyes of the law. Likewise, if the promisee chooses, of his or her own volition, to incur a detriment, then (as the leading English Court of Appeal decision of *Combe v Combe* [1951] 2 KB 214 … clearly illustrates) that would *not* constitute sufficient consideration in the eyes of the law. [emphasis in original]

Another sense in which the concept of "causal connection" might be used occurs in relation to the so-called exception to the well-established principle that "past consideration is no consideration". As this court observed (again, in *Gay Choon Ing* at [83]):

> It should also be noted that an absence of ***linkage*** between the parties can also occur if the consideration is *past* – hence, the oft-cited principle that "past consideration is no consideration". However, the courts look to the substance rather than the form. Hence, what looks at first blush like past consideration will still pass legal muster if there is, in effect, a *single* (contemporaneous) transaction (the common understanding of the parties being that consideration would indeed be furnished at the time the promisor made his or her promise to the promisee). [emphasis in italics in original; emphasis added in bold italics]

49 In the present case, the appellant argued that the Judge had erred in requiring a "common understanding" between the parties that the future loans would result from the respondent's entry into the SA, because the phrase "common understanding" was taken from the judgment of *Rainforest Trading* ([18] *supra*) at [38], where the term was used in the context of past acts which validly constitute consideration for a later promise. According to the appellant, all that should be required is that the "practical benefit" had moved from the promisee to the promisor, and there is no requirement that there be a "common understanding" or "specific promise" that the benefit would accrue to the respondent at the time the promise was made. In the alternative, the appellant argued that it "could be inferred" that there was an "expectation of goodwill" to be granted to the respondent at the time the SA was entered into, and this sufficed as valid consideration.

50 To be clear, we noted that it was not the appellant's case that consideration, by way of practical benefit or otherwise, was provided by the performance of the appellant's existing contractual obligations under the CLA, and rightly so. Before the SA was entered into, all of the appellant's obligations under the CLA had been performed, and the entire loan under the CLA had been disbursed. There was no evidence that the negotiations leading up to the conclusion of the SA took place before the third and final disbursement of the loan. The appellant's pleaded action against the respondent was also founded on the SA, and not on any oral agreement that preceded the signing of the SA. These facts stand in stark contrast to those of *Williams* ([4] *supra*), which is a case where one party's promise to perform an obligation which it was already contractually obligated to perform, *but where performance had not yet been completed* at the time of the contractual variation, was found to confer a practical benefit on the other party who promised an additional benefit under the variation agreement. Such was not the case here.

51 We also noted that it was not the appellant's case that she had made a *promise* to enter into the SIA and the June to October 2015 loan agreements as consideration for the SA. This is for two reasons:

(a) Although the negotiations relating to the SIA occurred at about the same time as the negotiations for the SA, and the SIA was entered into on the same day as the SA (and the appellant's case refers to these facts), the negotiations surrounding the SIA between Mr Han and Mr Sim were described by Mr Han as "entirely separate from the CLA and the re-negotiation of its terms leading up to the [SA]". On appeal, the appellant admitted that the SIA and the CLA were "entirely separate contracts".

(b) The appellant's counsel confirmed, during oral submissions before us as well as in closing submissions before the court below, that the appellant was not making the argument that she had made a specific promise to extend the loans under the SIA to Biomax Technologies in exchange for the respondent assuming further obligations under the SA. Indeed, there was no evidence to such effect.

Instead, the appellant's case was that "goodwill" had moved from herself to the respondent, and this alone constituted a sufficient nexus.

52 In our judgment, the appellant's criticism of the Judge's ruling failed to appreciate the different senses in which the concept of "causal connection" might be used. While the concept of a causal connection might have been used in *Rainforest Trading* in the second sense as described at [48] above, in the present case, it is the *first* sense which is relevant. On the facts of the present case, assuming that the alleged consideration is itself sufficient in the eyes of the law, the element of request necessary in order to establish a link between the parties was *absent*, as there was no request for any "goodwill" by the respondent leading to the conclusion of the SA. It is insufficient that the benefit the respondent conferred upon the appellant pursuant to the SA stirred up "goodwill" on the appellant's part and of her own volition. In addition, we note that motive for making a promise does not in itself amount to consideration (see *Chitty on Contracts* (H G Beale gen ed) (Sweet & Maxwell, 33rd Ed, 2018) ("*Chitty*") at para 4-011 and the oft-cited English decision of *Thomas v Thomas* (1842) 2 QB 851 ("*Thomas*") at 859). The assertion that the respondent might have been motivated, in making its promise under the SA, by the prospect of obtaining "goodwill" from the appellant was therefore also insufficient to establish the appellant's case in this regard.

53 In any event, the alleged consideration is insufficient in the eyes of the law to begin with. To the extent that "goodwill" referred to the improved relationship between the appellant and Sim and/or the respondent, we note the decision in *Thomas* (at 859) that there is no consideration for a promise made "in consideration of natural love and affection", as such purported consideration bore no value in the eyes of the law. To the extent that "goodwill" referred to some increased likelihood that the appellant would extend future loans to the respondent or its related entities, we note the following extract from *Chitty* at para 4-025:

> **Discretionary promise** Consideration would again be illusory where it was alleged to consist of a promise the terms of which left performance entirely to the discretion of the promisor. A person does not provide consideration by promising to do something "if I feel like it", or "unless I change my mind". …

We agree. The present case might even be said to be one step removed from a discretionary promise, as there was never any promise regarding any future loans to begin with. In sum, the SA was not supported by valid consideration.

Issue 5: whether the requirement for consideration should be dispensed with for contractual variations

54 This particular issue relates to the new (and *potentially far reaching*) argument proffered by the appellant on appeal that the doctrine of consideration should, in any event, be *dispensed with* in cases concerning contractual *variation or modification*. However, as a preliminary point, we address the respondent's objection to the effect that the appellant should not have been granted leave to make this new argument on appeal in the first place.

55 In *Grace Electrical Engineering Pte Ltd v Te Deum Engineering Pte Ltd* [2018] 1 SLR 76, this court held that applications by a party to raise new points

on appeal (and in particular, points representing a substantial departure from the position taken by that party below) would be subject to careful consideration, with due regard being had to factors including the following (at [38]): (a) the nature of the parties' arguments below; (b) whether the court had considered and provided any findings and reasoning in relation to the new point; (c) whether further submissions, evidence, or findings would have been necessitated had the new points been raised below; and (d) any prejudice that might result to the counterparty in the appeal if leave were granted.

56 The respondent contended that allowing the appellant to pursue this point on appeal would cause it to suffer prejudice. According to the respondent, it had chosen to abandon all its defences save the defence of no consideration because parties had accepted that the doctrine of consideration applied to contractual variations. However, the respondent failed to show that the parties' agreement as to the applicable legal principles preceded its decision to rely only on the defence of no consideration. Indeed, it had decided to abandon all defences save the defence that the SA was unsupported by consideration on 19 January 2019, *prior to the filing of opening statements for trial* on 21 January 2019. It therefore appeared to us that the respondent had made the decision to abandon its other defences before the point at which it could have gained notice of any legal arguments that the appellant intended to rely on. More importantly, this argument was purely a legal one which did not require any new evidence to be adduced, which meant that this court would have been in just as advantageous a position as the court below to adjudicate upon the issue (see the decisions of this court in *Ang Sin Hock v Khoo Eng Lim* [2010] 3 SLR 179 at [63] and *JWR Pte Ltd v Edmond Pereira Law Corp and another* [2020] SGCA 68 at [29]). Accordingly, we were of the view that leave should be granted to the appellant to make the argument as to whether the doctrine of

consideration should be dispensed with in cases concerning contractual variation.

57 Having dealt with the respondent's preliminary objection, let us turn now to consider the appellant's substantive argument that the doctrine of consideration should be dispensed with or abolished in so far as the *variation* of contracts is concerned.

58 In *Gay Choon Ing* ([2] *supra*), this court undertook (at [111]−[116]) a review of the possible alternatives were the doctrine of consideration to be abolished, and concluded as follows (at [117]−[118]):

> 117 Because so much academic ink has been spilt on the doctrine of consideration over so very many decades (with no concrete action being taken) and because there is (as we have noted at [92] above) such a dearth of cases on the doctrine itself, it would appear that any proposed reform of the doctrine is much ado about nothing. Indeed, the doctrine of consideration is (notwithstanding the numerous critiques of it) nevertheless still (as also noted) an established part of not only the Singapore landscape in particular but also the common law landscape in general. Not surprisingly, it is a standard topic in all the contract textbooks. In short, it cannot be ignored. However, because the doctrine of consideration *does* contain certain basic weaknesses which have been pointed out, *in extenso*, in the relevant legal literature, it almost certainly needs to be reformed. The basic difficulties and alternatives have been set out briefly above but will need to be considered in much greater detail when the issue next comes squarely before this court. One major difficulty lies in the fact that a legal mechanism must be maintained that will enable the courts to effectively and practically ascertain which promises ought to be enforceable. Hence, even if the doctrine of consideration is abolished, an alternative (or alternatives) must take its place. There then arises the question as to whether or not the alternatives themselves are sufficiently well established in order that they might furnish the requisite legal guidance to the courts. In this regard, it is significant to note that the various alternatives briefly mentioned above *are (apart from the requirement of writing) already a part of Singapore law*.

> 118 In the circumstances, maintenance of the status quo (*viz*, the availability of both (a somewhat dilute) doctrine of consideration *as well as* the alternative doctrines canvassed above) may well be the *most practical* solution inasmuch as it will afford the courts *a range of legal options* to achieve a just and fair result in the case concerned. However, problems of *theoretical* coherence may remain and are certainly intellectually challenging (as the many perceptive pieces and even books and monographs clearly demonstrate). Nevertheless, given the long pedigree of the doctrine, the fact that no single doctrine is wholly devoid of difficulties, and (more importantly) the need for a legal mechanism to ascertain which promises the courts will enforce, the 'theoretical untidiness' may well be acceptable in the light of the existing practical advantages (though *cf* [J W Carter, Andrew Phang & Jill Poole, "Reactions to Williams v Roffey" (1995) 8 JCL 248 at 265]). However, this is obviously a provisional view only as the issue of reform was not before the court in the present appeal.
>
> [emphasis in original]

59 As alluded to at the outset of the present judgment, after *Gay Choon Ing* academic ink *continued* to be spilt on the doctrine of consideration (see, for example (and by one of the staunchest supporters of the doctrine itself), Mindy Chen-Wishart, "Consideration and Serious Intention" [2009] Sing JLS 434 and, by the same author, "In Defence of Consideration" (2013) 13 OUCLJ 209 as well as "Reforming Consideration: No Greener Pastures" in *Contract in Commercial Law* at Ch 5 (and the legal literature cited therein); a useful and updated overview of the various issues may also be found in Jonathan Morgan, *Great Debates in Contract Law* (Red Globe Press, 3rd Ed, 2020) at Ch 2). With respect (and despite the interesting academic analyses), we are no nearer a solution that is at once both theoretically *as well as* practically viable and therefore see no reason to change the views we had expressed in *Gay Choon Ing*. However, could it be argued that that decision was concerned with the operation of the doctrine of consideration in the context of the ***formation*** of contracts whereas the present case relates to the operation of the doctrine in the context of the ***variation or modification*** of contracts (though *cf* the view of the

Judge in the court below at [99] as well as in the decision of the Singapore High Court in *S Pacific Resources Ltd v Tomolugen Holdings Ltd* [2016] 3 SLR 1049, especially at [14]). As also alluded to at the outset of this judgment, it is argued in some case law as well as some academic commentary that, in so far as the ***variation or modification*** of contracts is concerned, the requirement of consideration may be *dispensed with*. And it is to those materials that our attention now turns – bearing in mind that the *substance* of the arguments concerned is what matters as well as the fact that accepting them would simultaneously entail a departure from decisions such as *Williams* ([4] *supra*) and *Foakes* ([4] *supra*).

60 With respect, ***none*** of the arguments in favour of the abolition of the doctrine of consideration in the context of the *variation or modification* of contracts is persuasive. Let us elaborate.

61 ***First***, in *Gay Choon Ing*, we explained why it was most practically wise to maintain the status quo (*viz*, the availability of both the (somewhat dilute) doctrine of consideration *as well as* the alternative doctrines such as economic duress, undue influence, unconscionability as well as promissory estoppel and proprietary estoppel) inasmuch as such an approach would afford the courts ***a range of legal options*** to achieve a just and fair result in the case concerned (see also Lee Pey Woan, "Consideration" in *The Law of Contract in Singapore* (Academy Publishing, 2012) ("*Consideration*") Ch 4 at para 04.109). Although *Gay Choon Ing* related to a situation regarding the *formation* of a contract, this is a ***general*** argument that would apply ***equally*** to situations relating to ***variation or modification*** of contracts (which is the situation in the present case).

62 ***Secondly*** (and on a related note), the difficulties with regard to the possible alternatives to the doctrine of consideration (which were referred to briefly in *Gay Choon Ing* ([2] *supra*)) do not appear to have been resolved despite the period of more than a decade since that particular decision was handed down. Indeed, in some instances, the difficulties appear to have either worsened or opportunities to resolve them have not been availed of by the court concerned. An example of the latter occurred in the decision of the Supreme Court of the United Kingdom in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2019] AC 119, where the court managed (by holding that the variation agreement in question was invalid) to avoid having to deal directly with the issue of consideration in respect of that agreement – in particular, the status of the decision in *Foakes* in light of the development in *Williams* (which, at the English Court of Appeal level, was at odds with *Re Selectmove Ltd* [1995] 1 WLR 474 (this particular issue was in fact referred to in *Gay Choon Ing* at [102]–[103])). As one commentator interestingly observed, "[s]ince [*Foakes*] is a House of Lords decision, [its] re-examination can be performed only by the Supreme Court; but, with its having taken 134 years for this issue to finally reach our highest court, it is unclear when it will have another opportunity to do so" (see Robert Harris, "Modifications, Wrangles, and Bypassing" [2018] LMCLQ 441 at p 449).

63 ***Thirdly***, and turning specifically to the issue of the *variation or modification* of a contract, it has been argued that the requirement of consideration may be unnecessary because, unlike the situation where parties enter into a contract (*ie*, a situation relating to the *formation* of a contract), the parties in the situation where a *variation or modification* occurs are *already* in a contractual relationship with each other (see, for example, Tan Cheng Han, "Contract Modifications, Consideration and Moral Hazard" (2005) 17 SAcLJ

566, especially at pp 578–580 and John Cartwright, *Formation and Variation of Contracts* (Sweet & Maxwell, 2nd Ed, 2018) ("*Cartwright*") at para 9–24). Looked at in this light, the argument is that the parties who are already in a contractual relationship with each other are more likely to be flexible with each other in order to advance their common enterprise and that to therefore insist that any contractual variations or modifications require consideration may run counter to or militate against such an enterprise (and/or situations where one party might be willing to afford the other party a concession to cultivate a long-term relationship).

64 Whilst this is one possible perspective, it is *not* the *only* one. Parties enter into contracts for a myriad of reasons and may desire to vary or modify their contract for a myriad of reasons (not all of which might be as positive or sanguine as depicted in the scenario just considered). It is important to note at this juncture that a *legal* rule or principle is, *ex hypothesi*, *normative* in nature and is intended to be applicable *universally*, *regardless of* the precise factual scenario concerned. Hence, it ought to cover as many potential factual situations as possible. Given the myriad of factual permutations (including those that occur *after* the contract has been entered into), a change in the law (here, the dispensing with the requirement of consideration where the variation of contracts is concerned) would be consistent with only one basic scenario (where the parties in an existing contractual relationship are seeking to cooperate with each other). What, then, about the argument that there exist *alternative legal doctrines* which would nevertheless accommodate and deal with other scenarios where the parties are not so sanguine, thus addressing any injustice or unfairness that might result from the variation of the contract concerned? *However*, that merely brings us back *full circle* to a point that was already considered in *Gay Choon Ing* – that the alternative doctrines themselves contain specific

difficulties that need to be ironed out *and* that including the doctrine of consideration as part of *a range of legal options* (*in addition to* these alternative legal doctrines) may well be the best (as well as most practical) way forward.

65 It should also be noted that, pursuant to *Williams* ([4] *supra*) (which is now part of the law relating to the doctrine of consideration in Singapore), it is no longer onerous to demonstrate that the requirement of consideration has been satisfied because any *factual* benefit or detriment would suffice in the eyes of the law. Looked at in this light, perhaps the suggested inconvenience to the parties might be somewhat exaggerated in a situation where all is well between them. Further, as just noted, the situation between parties may *not* always be so sanguine – in which case the requirement of consideration *does* indeed serve an important function.

66 We have also seen that if the parties are truly optimistic, they could ***exclude*** the requirement for consideration for the *variation* of the contract by *unambiguously* stating so at the point the contract is ***formed*** (see [36] above). And, of course, there would be no difficulty if the parties vary the term(s) of their contract by way of a ***deed***.

67 ***Fourthly***, the ***case law*** is – at best – *inconclusive*. We turn, first, to the ***New Zealand*** position. The leading decision in this regard is that of the Court of Appeal of New Zealand in *Antons Trawling Co Ltd v Smith* [2003] 2 NZLR 23 ("*Antons Trawling*"). However, a close reading of the judgment of the court in that case (which was delivered by Baragwanath J) will reveal that the court did, in fact, find (after a meticulous examination of the relevant facts) that the promisee had furnished *sufficient* consideration pursuant to the legal principles laid down in *Williams*. As the court observed (at [93]):

> We are satisfied that [*Stilk v Myrick* (1809) 2 Camp 317] ***can no longer to be taken to control*** such cases as [*Williams*], [*Attorney-General for England and Wales v R* [2002] 2 NZLR 91] and the present case where there is no element of duress or other policy factor suggesting that an agreement, duly performed, should not attract the legal consequences that each party must reasonably be taken to have expected. On the contrary, a result that deprived Mr Smith [the promisee] of the benefit of what Antons [the promisor] had promised he should receive would be inconsistent with the essential principle underlying the law of contract, that the law will seek to give effect to freely accepted reciprocal undertakings. The importance of consideration is as a valuable signal that the parties intend to be bound by their agreement, rather than an end in itself. ***Where the parties who have already made such intention clear by entering legal relations have acted upon an agreement to a variation, in the absence of policy reasons to the contrary they should be bound by their agreement. Whichever option is adopted, whether*** that of [*Williams*] ***or*** that suggested by Professor Coote and other authorities, the ***result*** is in this case ***the same***. [emphasis added in bold italics and underlined bold italics]

68 It is clear that whilst the court in *Antons Trawling* did entertain the possibility of dispensing with the requirement of consideration in the context of a variation of a contract (see the sentence italicised in bold italics in the quotation in the preceding paragraph), it did *not* reject the approach in *Williams* either; on the contrary, the last sentence of the aforementioned quotation makes it clear that the approach in *Williams* was *also* a ground upon which the court was prepared to premise its decision upon (reference may also be made to the recent decision of the New Zealand High Court in *Gloria Jean's Coffees International Pty Ltd and another v Daboko Ltd* [2020] NZHC 29 ("*Gloria Jean's Coffees*") at [30]–[31] and [40]; *cf* another decision of the New Zealand High Court in *Blair v Horne and others* [2006] NZHC 195, especially at [38]–[39]). Indeed, as one commentator aptly observed, "[t]he status of *Williams* and the practical benefit test in New Zealand is now ambiguous" (see Karen N Scott, "From Sailors to Fisherman: Contractual Variation and the Abolition of the Pre-Existing Duty Rule in New Zealand" (2005) 11 Canterbury L Rev 201

("*Scott*") at p 214 (see also at p 215); reference may also be made to Brian Coote, "Variations Sans Consideration" (2011) 27 JCL 185 ("*Coote*") at p 197 as well as Jeremy Finn, Stephen Todd & Matthew Barber, *Burrows, Finn and Todd on the Law of Contract in New Zealand* (LexisNexis NZ Limited, 6th Ed, 2018) ("*Burrows, Finn and Todd*") at p 129). Indeed, Prof Scott also refers to a point that has already been raised above (at [64]) – which is that the *alternative* doctrine of economic duress may itself embody problems of its own (see *Scott* at pp 211−212; see also Craig Ulyatt, "The Demise of Consideration for Contract Variations" (2003) 9 Auckland U L Rev 1386 ("*Ulyatt*") at p 1397) as might the other doctrines (such as undue influence and the doctrine of unconscionability (see *Scott* at pp 212−214)). It is also apposite to note that it has also been argued that the rationale for awarding damages for expectation loss can only be justified by requiring consideration to be demonstrated (see *Ulyatt* at p 1393).

69 It is also interesting to note that Baragwanath J, in arriving at the more radical proposition that consideration was not required in the context of contractual variation or modification in *Antons Trawling*, appeared to be heavily influenced by Prof Brian Coote's critique of *Williams* ([4] *supra*) in "Consideration and Benefit in Fact and in Law" (1990) 3 JCL 23. In essence, in rejecting the approach centring on practical benefit or detriment as being an unprincipled way of achieving justice, Prof Coote concluded his critique by stating (at p 28, and presumably as a principled alternative) that "[t]heoretically, it may still be open to a court of final resort in a common law country to decide that consideration should not be necessary for the variation of a contract" (indeed, in a subsequent article already referred to above, Prof Coote opined that the court in *Williams* dispensed, "at least for all practical purposes", with the requirement of consideration "by the use of *a fiction*" [emphasis added] (see

Coote at p 197)). If, however, *Williams* is considered a principled approach, then there is no need to adopt the more radical alternative suggested by Prof Coote. At this juncture, it is perhaps apposite to pause to observe, parenthetically, that part of Prof Coote's dissatisfaction with the approach in *Williams* might be attributed to the fact that – in contrast to the traditional approach in *Stilk v Myrick* (1809) 2 Camp 317 ("*Stilk*") – recourse to a concept of *factual* benefit or detriment may be argued to lack *normative* force. Whilst this last-mentioned argument might be attractive at first blush, it neglects, with respect, the proposition that *the court* can indeed *confer normative force* on *a test*, the *content* of which might turn on a *factual* determination. Viewed in this light, the approach in *Williams* is no less a *legal* test (although, as just mentioned, its *content* might turn on a *factual* determination). Indeed, in the ordinary course of legal discourse as well as analysis, the *legal* principles are not enunciated for their own sake – they are intended to be *applied* to the relevant *facts* of a particular case. The approach in *Williams* embodies this although, by its very nature, the legal principles and the relevant facts are perhaps more inextricably connected and may – to that extent – be viewed as two (albeit different) sides of the same coin. This does not, of course, detract from the obvious point (which we also acknowledged in *Gay Choon Ing* ([2] *supra*) at [118]) that the approach in *Williams* results in "a somewhat dilute" doctrine of consideration – although, depending on the precise facts and circumstances of a particular case, the value of the practical benefit or detriment concerned may indeed be significant (see Pey-Woan Lee, "Contract Modifications – Reflections on Two Commonwealth Cases" (2012) 12 OUCLJ 189 ("*Lee*") at p 196). As has also been pointed out on a related note, "a more straightforward explanation of [*Williams*] [may] lie in the recognition that a re-promise does confer additional value on the counter-party if the re-promise

represents *an increased chance of performance*" [emphasis in original] (see *Lee* at p 197).

70 One might also usefully note the following observations by Baragwanath J in an extrajudicial paper delivered after he had retired from the bench (see David Baragwanath, "Judging: A Butterfly View" (2010) 16 Canterbury L Rev 243 at p 251):

> The Judge's responsibility for judicious updating and development of the judge-made common law is no longer disputed by those familiar with the process. In *Antons Trawling Co Ltd v Smith*, for example, an 1809 English decision [*ie*, *Stilk*], that variation of contract is ineffective unless there is fresh consideration, would have resulted in injustice. Mr Smith was the Master of a fishing vessel and he contracted with Antons to search for orange roughy. He was told that if he discovered a new bed he would be entitled to 10 per cent of the resulting quota. Having done so, he was denied the quota and sued. We held that the common law rule was a misapplication of an earlier principle aimed at avoiding extortion by a person in Mr Smith's position. There being no question of that, *and* ***the consideration required*** *by the ordinary law of contract* ***being provided*** *by the exchange of mutual obligations* we held the oral agreement to be enforceable. [emphasis added in italics and bold italics]

With respect, the observations just quoted are ambiguous. Whilst on one reading, they suggest a more radical approach that dispenses with the requirement of consideration in the context of contractual variation or modification, the language emphasised suggests that the court in *Antons Trawling* had merely proceeded on the more traditional approach and had found that consideration had indeed been provided on the facts of that particular case. The reader will recall that a plain reading of the actual language of the judgment in *Antons Trawling* itself demonstrates a similar ambiguity (see [68] above).

71 In the subsequent New Zealand Court of Appeal decision of *Teat v Willcocks* [2014] 3 NZLR 129 ("*Teat*"), Arnold J, delivering the judgment of

the court, observed as follows (at [54] (reference may also be made to *Gloria Jean's Coffees*, especially at [32]; the decision of the High Court of New Zealand in *New Zealand Local Authority Protection Disaster Fund v Auckland Council* [2013] NZHC 1858 at [35]; and *Burrows, Finn and Todd* at pp 129–130)):

> … ***Although*** the position is ***not yet settled***, we consider ***that consideration in the form of a benefit "in practice"*** [citing *Williams*] is ***sufficient to support a binding variation***. ***Further***, we are ***attracted to*** the ***alternative view*** expressed by this Court in *Antons Trawling Co Ltd v Smith* ***that no consideration at all may be required provided the variation is agreed voluntarily and without illegitimate pressure***. …
>
> [emphasis added in bold italics and underlined bold italics]

72 For completeness, we note that *Antons Trawling* ([67] *supra*) has been cited in a fair number of subsequent decisions of the New Zealand High Court (including those already referred to above). Woolford J, for example, cited and applied *Antons Trawling* in *Goldsmith and others v Carter and others* [2012] NZHC 1693, observing (at [34]) that "*[i]n any event*, I am of the view that consideration is not necessarily essential for the variation [of the contract] to be effective" [emphasis added]. Notably, there was no real discussion of the detailed reasons for endorsing such an approach, although this is perhaps understandable as *Antons Trawling* was a decision of the Court of Appeal. It should also be noted that sufficient consideration in law was found on the facts of the case (*cf* the phrase "in any event" in the observation just quoted) (reference may also be made to *Hunan Holdings Ltd v Virionyx Corporation Ltd* (2005) 2 NZCCLR 1079 at [45]–[51]). And in *Mulholland v Hansen* [2015] NZHC 895, whilst *Teat* was cited (at [25]), Muir J found, in fact, that there was no variation to begin with (reference may also be made to *Shell (Petroleum Mining) Co Ltd and another v Vector Gas Contracts Ltd and another* [2014]

NZHC 31 at [128]–[132], *Baxter v Coleman* [2016] NZHC 2693 at [207]–[211] and *Green v Carr* [2018] NZHC 3408, especially at [38]; significantly, in all these decisions, no decisive or conclusive view on what the legal position ought to be is expressed (though *cf Flight Park Tandems Ltd v Club Flying Kiwi Ltd* (2005) 2 NZCCLR 508 at [75]–[76])). There are also decisions which prefer nevertheless to expressly adopt the more cautious (and traditional) view that consideration is required in the context of contractual variation or modification (see, for example, *Northwest Developments Ltd v Xue* [2019] NZHC 1042 at [30]). These are just a sampling of various decisions of the High Court of New Zealand that demonstrate that there has been no decisive or conclusive pronouncement that dispenses with the requirement of consideration in the context of contractual variation or modification and that, generally speaking, consideration continues to be a requirement in this particular regard. This is perhaps not surprising because, as we have seen (see especially [68] above), the decisions of the Court of Appeal of New Zealand in *Antons Trawling* and *Teat* did not themselves render a decisive or conclusive view that consideration was clearly no longer required in the context of contractual variation or modification.

73 To ***summarise***, whilst the New Zealand courts have expressed support for the legal proposition that no consideration should be required in the context of contractual variation, the more liberal approach in *Williams* ([4] *supra*) that holds that sufficient consideration can be provided by way of a *factual* benefit or detriment has ***not*** been rejected; on the ***contrary***, it still appears to be sound law ***as well*** (reference may also be made to *Coote* at p 193 as well as *Burrows, Finn and Todd* at pp 129–130).

74 Turning to the ***Canadian*** context, the leading decision appears to be that of the New Brunswick Court of Appeal in *Greater Fredericton Airport*

Authority Inc v NAV Canada (2008) 290 DLR (4th) 405; [2008] NBJ No 108 ("*NAV*"), as cited by the appellant. The court in that case held, *inter alia*, that no enforceable contract had been entered into between the parties and that the respondent was therefore not liable to pay the appellant for the new equipment which the latter alleged that the former had promised to do. Interestingly, the court found that the promisee had *furnished no consideration* for the promisor's promise ***and*** that the promisee had also established that it had been the victim of *economic duress*. These holdings ought to be borne in mind as we examine the detailed reasoning of the court (the judgment of the court was delivered by J T Robertson JA, and concurred with by W S Turnbull and M E L Larlee JJA). The judgment by Robertson JA is a comprehensive and scholarly one. His assessment of *Williams* in the context of the enforceability of post-contractual modifications or variations is not a positive one (at [28]). He is also critical of artificial attempts to locate consideration (at [29], where he states, *inter alia*, that he agrees with "Professor Waddams' exhortation that courts should avoid 'fictional' attempts to find consideration"). Robertson JA also points to the fact that the doctrine of consideration was formulated "before the recognition of the modern and evolving doctrine of economic duress" (at [30]). He then concludes thus (at [31]):

> For the above reasons, I am prepared to accept that a post-contractual modification, unsupported by consideration, may be enforceable so long as it is established that the variation was not procured under economic duress. In reaching this conclusion, I am mindful that the Supreme Court has cautioned that it is not the role of the courts to undertake "major" reforms in the common law or those that may have "complex ramifications". …

75 Rather curiously, however (and with respect), the learned judge then proceeded to state as follows (at [32]):

> … Again having regard to the Supreme Court's admonition, ***I wish to emphasize that I am <u>not</u> advocating the***

> ***abrogation of the rule in*** [*Stilk*]. Simply, the rule should not be regarded as determinative as to whether a gratuitous promise is enforceable. ***Nor am I suggesting that the doctrine of consideration is irrelevant when it comes to deciding whether a contractual variation was procured under economic duress. There will be cases where the post-contractual modification is in fact and law supported by valid or fresh consideration.*** In my view, that type of evidence is important when it comes to deciding whether the contractual variation was procured with the 'consent' of the promisor. After all, why would anyone agree to pay or do more than is required under an existing contract in return for nothing? ***But if*** the contractual variation was ***supported by fresh consideration***, ***the argument*** that the variation was ***procured under economic duress*** appears, on the face of it, ***less convincing*** and the circumstances more in line with what one expects to see in every commercial contract: a 'consensual bargain'. On the ***other hand***, for example, a person who agrees to pay more than the original contract price either in writing under seal or in return for a 'peppercorn' is entitled to argue that the agreement was procured under economic duress. [emphasis added in bold italics and underlined bold italics]

76 A plain reading of the quotation in the preceding paragraph suggests that there might be an inconsistency (see also, in this regard, a similar view in Rick Bigwood, "Doctrinal Reform and Post-Contractual Modifications in New Brunswick: *NAV Canada v. Greater Fredericton Airport Authority Inc.*" (2010) 49 Can Bus LJ 256 ("*Bigwood*") at p 266). In particular, it suggests that the ***doctrine*** of *consideration* is still *alive and well*, so to speak – and, in fact, may even retain its original legal form as set out in the seminal English decision of *Stilk* ([69] *supra*) (and, possibly at least, as modified later in *Williams*). *However*, a closer reading of the same quotation suggests that whether or not sufficient consideration has been furnished might merely be a ***factor*** in the decision of the court as to whether or not there was ***economic duress***. At this particular juncture, however, one may ask whether, in a situation where there is indeed *sufficient* ***consideration*** in the eyes of the law, that would – *in and of itself* – suffice to render the contract concerned enforceable. It is, of course, true that the doctrine of ***economic duress*** could ***nevertheless*** be invoked by the

promisor to argue that the contract is *otherwise unenforceable*. At this particular juncture, however, it should be noted that both consideration and economic duress are being invoked as ***separate and independent doctrines***. In fairness, it should be noted that it is entirely possible to rely upon the ***doctrine*** of ***economic duress*** whilst having regard to *consideration* as a ***factor*** and this may well be what Robertson JA had in mind. *However*, there is no reason in principle why ***both doctrines*** (of *consideration* ***and*** *economic duress*) cannot potentially operate together as they are not mutually exclusive. Indeed, it could be argued that there could – in many situations at least – be a fine line between consideration as a *doctrine* on the one hand and consideration as a *factor* in determining whether there is economic duress on the other. This appears, in fact, to be implicit in the quotation in the preceding paragraph. There is also the further difficulty that *consideration* was apparently also endorsed in its ***doctrinal*** *form* (*cf* the reference to *Stilk*).

77 It is also noteworthy that, on the *actual facts* of *NAV* itself, the court found that there had been *no fresh consideration* furnished in law. It then proceeded to find that there had nevertheless been economic duress on the (same) facts (not least because the promisor made the promise concerned "under protest" and that this was what had happened in substance in any event) (at [64]–[66]). In doing so, the court applied the following approach which it had outlined earlier in its judgment (at [53]):

> Subject to the above observations, a finding of economic duress is dependent initially on two conditions precedent. First, the promise (the contractual variation) must be extracted as a result of the exercise of 'pressure', whether characterized as a 'demand' or a 'threat'. Second, the exercise of that pressure must have been such that the coerced party had no practical alternative but to agree to the coercer's demand to vary the terms of the underlying contract. However, even if those two conditions precedent are satisfied, a finding of economic duress does not automatically follow. Once these two threshold

> requirements are met, the legal analysis must focus on the ultimate question: whether the coerced party 'consented' to the variation. *To make that determination three factors should be examined: (1) whether the promise was supported by consideration*; (2) whether the coerced party made the promise 'under protest' or 'without prejudice'; and (3) if not, whether the coerced party took reasonable steps to disaffirm the promise as soon as practicable. Admittedly, the last two factors are more likely to have a bearing on the ultimate outcome of a case than the first. As well, note that under this general framework, no reference is made to the supposed victim having 'independent legal advice' or to the 'good faith conduct' on the part of the supposed coercer. I shall also deal with these matters separately. For the moment, I am going to focus on the framework outlined above. [emphasis in underlining in original; emphasis added in italics]

78 What is interesting is that, if the court in *NAV* ([74] *supra*) had adopted the traditional approach of requiring consideration in the context of a contractual variation, then it would have been able to arrive at the ***same*** *result* on the *facts* since it had found (as just noted) that *no fresh consideration* had been provided by the promisee to the promisor. Instead, in applying the approach that was quoted in the preceding paragraph, the court held (at [66]) that "[t]he fact that the promise was not supported by fresh consideration suggests that consent was lacking" (this was one of the *factors* that is in bold italics in the quotation at [75] above and also italicised in the quotation at [77] above).

79 Assuming, however, that Robertson JA's view that consideration can be dispensed with in the context of contractual variation provided that there is no economic duress (a view that, not surprisingly, was endorsed in *Coote* (at pp 195–197)), there nevertheless remain, with respect, difficulties with such an approach which have already been set out above as well as below (and that also includes problems with economic duress as an alternative (see [68] above); and, on alternatives generally, see [61]–[62] above). These difficulties are significant ones which *NAV* does not, with respect, really address. We also note that a large part of the judgment in *NAV* itself was devoted to clarifying the applicable legal

principles with respect to *economic duress*. That this exercise was itself not uncontroversial is demonstrated by the fact that the court in *NAV* ***rejected*** (at [47]–[50]) the criterion of *illegitimate pressure* and focused (at [51] and [53]) on the factor of whether there was a practical alternative instead. Given the fact that the criterion of illegitimate pressure has been traditionally accepted as a factor in both the case law as well as the textbooks demonstrates that the doctrine of economic duress is itself by no means free from difficulties (as already alluded to above). Indeed, a learned commentator delivered a powerful critique of the analytical framework for economic duress proposed in *NAV* (see *Bigwood* at pp 269–277; reference may also be made to *Lee* at pp 201–205). The court in *NAV* also explored (at [62]) the role of good faith on the part of the alleged coercer – an issue which, respectfully in our view, is one which has potential difficulties (particularly given the nature of good faith even as a doctrine, at least in the Singapore context (*cf* the decisions of this court in *Ng Giap Hon v Westcomb Securities Pte Ltd and others* [2009] 3 SLR(R) 518, especially at [47] and [51]–[60] and *The One Suites Pte Ltd v Pacific Motor Credit (Pte) Ltd* [2015] 3 SLR 695 at [44])). Finally (and on a more general level), the approach adopted by the court (see [77] above) was also somewhat different from that adopted in other jurisdictions (this is, of course, consistent with its rejection of the criterion of illegitimate pressure which has just been referred to).

80 In ***summary***, there are difficulties with the proposition advanced in *NAV* that the courts can dispense with the requirement of consideration in the context of contractual variation provided that there is no economic duress. We have *also* seen that not a smidgen of ambiguity was introduced, as the court in *NAV* did not (unambiguously at least) reject the doctrine of consideration in relation to *Stilk* ([69] *supra*) *as well as* in relation to *Williams* ([4] *supra*). If such ambiguity

is resolved by construing consideration as a *factor* (as opposed to a doctrine) in the context of the court's determination as to whether there is economic duress, this still does not explain the abovementioned endorsement of consideration in its *doctrinal* form.

81 A subsequent decision was also cited by the appellant – that of the British Columbia Supreme Court in *River Wind Ventures Ltd v British Columbia* [2009] BCJ No 880; [2009] BCSC 589 (reversed, *River Wind Ventures Ltd v British Columbia* [2011] BCJ No 257; [2011] BCCA 79 (albeit without any apparent doubt being cast on the analysis of the law relating to consideration as such; remitted for assessment of damages in *River Wind Ventures Ltd v British Columbia* [2011] BCJ No 1678; [2011] BCSC 1195); see also *British Columbia v River Wind Ventures Ltd* [2011] SCCA No 179 (application for leave to appeal to the Supreme Court of Canada dismissed)). Whilst I C Meiklem J agreed (at [32]) with the reasoning of the court in *NAV*, the learned judge did note that the first sentence in [31] of *NAV* (as quoted at [74] above) might not have "fully capture[d] the modernized principle intended to be enunciated by the court". It should also be noted that this particular decision did in fact also find that the plaintiff promisee had failed to establish that there had been fresh consideration furnished for the promise (at [36]).

82 Another decision in the Canadian context is that of the New Brunswick Court of Appeal in *Harrity v Kennedy* [2009] NBJ No 305; [2009] NBCA 60 ("*Harrity*"). As in *NAV* ([74] *supra*), Robertson JA once again delivered the judgment of the court (which was concurred with by J C M Richard and B R Bell JJA). Not surprisingly, perhaps, the learned judge cited *NAV* (at [27]). More interestingly, in the very next paragraph, Robertson JA observed as follows (at [28]):

> I recognize that the doctrine of consideration provides a technical reason for refusing to enforce a contractual provision. Indeed, according to the 'hunt and peck' theory of consideration, judges will rummage through trial and appeal records to find the necessary consideration if that is what is needed to achieve a just result. If they believe that enforcement would lead to an unjust result, the same judges will declare there is an absence of meaningful consideration and, therefore, the promise is gratuitous and unenforceable. ***But even if I were entitled to jettison the doctrine of consideration, which I am at liberty to do***, I am at a loss to think of a good reason why the disclaimer clause should be deemed effective to insulate Mr. Harrity from liability. [emphasis added in bold italics]

83 Whilst the learned judge's observations as quoted in the preceding paragraph are reminiscent of his views in *NAV* (at [29], see [74] above), what is interesting in the context of the present judgment is his apparent acceptance that the ***doctrine*** of *consideration* still ***exists***. Indeed, in relation to *Harrity*, Robertson JA expressly stated (at [31]) that he preferred to rest his decision with regard to the enforceability of the disclaimer clause "on a *lack of consideration*" [emphasis added].

84 More recently, however, the British Columbia Court of Appeal, in *Rosas v Toca* [2018] BCJ No 938; [2018] BCCA 191 ("*Rosas*"), had occasion to consider the issue as to whether it was appropriate to reform the doctrine of consideration as it applied to the variation of an existing contract (this case was also cited in *Cartwright* at para 9–24, note 198). It was necessary in *Rosas* to determine whether there had been consideration furnished for the multiple forbearance agreements made annually that had been relied upon by the plaintiff in order to preserve her limitation period. The court below had held that the relevant limitation period had expired and the plaintiff appealed to the British Columbia Court of Appeal, which held that the forbearance agreements were enforceable and therefore delayed the running of the limitation period. In the

circumstances, the plaintiff's action was thus commenced within the limitation period and was not time-barred. Her appeal was therefore allowed.

85 R J Bauman CJBC delivered the judgment of the court (with which L Fenlon and B Fisher JJA agreed). The learned judge undertook an extremely comprehensive survey of the relevant case law as well as legal scholarship in relation to the doctrine of consideration. Interestingly, Bauman CJBC was of the view (at [104]) that *NAV* "expressly approve[d] of, and indeed buil[t] on, the reasoning from [*Williams*]". The learned judge then proceeded, later in his judgment, to elaborate that *NAV* had in fact "expanded the doctrine of consideration even more radically than in [*Williams*]", and he observed as follows (at [109]):

> … Robertson J.A. held that any 'post-contractual modification' may be enforceable though unsupported by consideration so long as economic duress was not made out. ***While*** the Court cited *Williams v. Roffey Bros.* ***and appeared to adopt its reasoning***, there is ***no mention of the need for practical benefit and no discussion of what practical benefit the Airport Authority received from Nav Canada's performance of its pre-existing obligation***. … [emphasis added in bold italics]

86 The observations just quoted in the preceding paragraph hark back to the ambiguity we have already indicated above (at [75]–[76]). It is perhaps even more interesting that Bauman CJBC proceeds to immediately observe in the next paragraph (at [110]) as follows (a point which we have also already noted above at [83]):

> ***Interestingly, only a year after*** deciding *NAV Canada*, the New Brunswick Court of Appeal in [*Harrity*], with Robertson J.A. again writing the reasons for the Court, distinguished *NAV Canada* and held that a disclaimer of liability for misrepresentations in the sale of a yacht was ***unenforceable for lack of consideration***. … [emphasis added in bold italics and bold underlined italics]

87 Most interestingly, perhaps, Bauman CJBC observes (at [112]) that:

> With respect, it is ***difficult to reconcile*** the result in [*Harrity*] with the clear statement from *NAV Canada* that '[a]s a matter of commercial efficacy, it becomes necessary at times to adjust the parties' respective contractual obligations and the law must then protect their legitimate expectations that the modifications or variations will be adhered to and regarded as enforceable' … [emphasis added]

Whilst the learned judge does attempt an explanation, this is, with respect, only at the level of the specific facts and does not really deal with the implications from the standpoint of *general legal principle* (which, *ex hypothesi*, would be applicable to all future cases where the same legal issue arises).

88 It should also be noted that *Rosas* ([84] *supra*) also referred to reforms *beyond the shores* of Canada (at [123]–[130]), and these included the New Zealand decisions in *Antons Trawling* ([67] *supra*) and *Teat* ([71] *supra*). It bears reiterating, however, that the New Zealand position is far from clear (see generally [67]–[73] above).

89 Bauman CJBC in *Rosas* also refers to the academic literature (at [131]–[154]) but, even here, it is clear that there is ***no consensus***; this is perhaps not surprising in so far as the very nature of academic discourse is concerned.

90 Having conducted such a comprehensive comparative survey, Bauman CJBC arrived at the conclusion (especially at [176], [180] and [183]) that the requirement of consideration can be dispensed with in the context of contractual variation or modification, taking into account the fact that it is unnecessary to justify the enforcement of such agreements by finding consideration through "imaginative bases" or "machinations" in any given fact situation (at [176] and [179]); he observes as follows (at [180]–[181]):

> 180 Enforcement of the ***modification*** in cases like this reflects the notion in a going transaction situation that ***the parties are already in a contractual relationship and are simply adapting it to changed circumstances***. This is not the case of the 'unwary signor or the casual promisor' being 'hooked' too easily into a contractual relationship as feared by Professor Chen-Wishart. ***Surely the fact of the existing contractual relationship in the going transaction scenario attenuates much of such concern.*** Further, as with any bargain, certainty of terms and proof of mutual intention to be bound will have to be proved by the party seeking to rely on the variation agreement. In any event, the bargain theory of contracts—the notion that contracts are enforced and expectation damages justified because the promisor has been paid the value of the thing promised—is inconsistent with the longstanding enforcement of contracts under seal, or based on nominal consideration of $1.00 or a peppercorn.
>
> 181 While the rationale for the enforcement of going transaction modifications is often based on the realities facing commercial actors in business transactions, friends and neighbours who make significant loans and agreements face similar realities: circumstances change and contractual modifications may be desirable and beneficial to both parties.
>
> [emphasis added in bold italics]

91 With respect, the fact that the parties are already in an existing contractual relationship cannot (as we have already explained above at [64]) – in and of itself – justify dispensing with the requirement of consideration in ***all*** cases of contractual variation or modification. There are also a number of ***other*** *difficulties* that have been set out both above and below. Finally, it is interesting that Bauman CJBC *also held* (at [177]) that "[i]f one were driven to find consideration here, even in a modified form", there *were*, indeed, *practical benefits* that had flowed to the promisor on the facts of this particular case (at [177]–[178]) – presumably, pursuant to the principles set out in *Williams* ([4] *supra*).

92 It remains to be seen whether the courts of the other Canadian provinces will follow the British Columbia Court of Appeal's clear departure from the

conventional approach. It will be seen, therefore, that the ***Canadian*** position as a whole is ***not as clear as it might appear at first blush***. ***Further***, ***even if*** the position was clear (in supporting the appellant's argument that consideration is not required in the context of contractual variation), it is ***equally clear (if not clearer) that there are numerous difficulties with the adoption of such a position***. In so far as the former point is concerned, it is also noteworthy that one of the leading textbooks in Canadian contract law merely cites both *Williams* and *NAV* ([74] *supra*) in the footnotes without any attempt to explain the inconsistencies (if any) between both decisions (see S M Waddams, *The Law of Contracts* (Thomson Reuters, 7th Ed, 2017) at para 138, notes 383, 384 and 385).

93 We have examined the relevant case law in some detail in order to demonstrate that it is – at best – inconclusive in so far as support for the proposition that consideration is not required in the context of contractual variation or modification is concerned. Put simply, the doctrine of consideration is still very much a requirement for the variation or modification of existing contracts in so far as the overall case law in the Commonwealth is concerned. *Further*, and in any event, there are many difficulties that such case law has not addressed. We are therefore not persuaded by the reasons given in those judgments for the departure from the requirement for consideration in the context of contractual variations or modifications.

94 ***Fifthly*** (and this is a point that has been raised by many commentators with regard to the decision in *Anton Trawlings* ([67] *supra*)), the *broader* issue that is raised is whether abolishing the requirement of consideration in the context of contractual variation is the thin end of the legal wedge. Put simply, why should the doctrine of consideration not be abolished with regard to the ***formation*** of contracts as well if the doctrine is indeed abolished in the context

of contractual variations (see, for example, *Ulyatt* at p 1395; *Scott* at pp 215−216; *Lee* at p 199 (and, by the same author, *Consideration* at para 04.060); as well as Marcus Roberts, "Variation contracts in Australia and New Zealand: whither consideration?" (2017) 17 OUCLJ 238 at pp 257–258)? That is a valid question to raise and brings us back – full circle once again – to the more general issue as to whether or not the doctrine of consideration as a ***whole*** should be abolished (which is a point which we have already dealt with above as well as in the *coda* to *Gay Choon Ing* ([2] *supra*) many years earlier).

95 For the reasons set out above, the appellant's argument on this particular issue must fail as well.

Conclusion

96 We accordingly dismissed the appeal. We awarded the respondent costs fixed at $38,000, inclusive of disbursements. The usual consequential orders applied.

Sundaresh Menon Chief Justice	Andrew Phang Boon Leong Judge of Appeal	Judith Prakash Judge of Appeal

Tay Yong Kwang Judge of Appeal	Steven Chong Judge of Appeal

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