**IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE**

**[2019] SGHC 277**

Suit No 765 of 2016

Between

Ma Hongjin

… *Plaintiff*

And

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

… *Defendants*

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# GROUNDS OF DECISION

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[Contract] — [Consideration] — [Failure]
[Contract] — [Variation]

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# Ma Hongjin
# v
# SCP Holdings Pte Ltd and another

**[2019] SGHC 277**

High Court — Suit No 765 of 2016
Vinodh Coomaraswamy J
29–30 January; 8 February 2019

13 December 2019

**Vinodh Coomaraswamy J:**

## Introduction

1 The plaintiff lent the first defendant $5m under a loan agreement. The parties then entered into a supplemental agreement. The supplemental agreement sought to vary the loan agreement by imposing additional obligations on the first defendant. The first defendant failed to perform one of those additional obligations when it fell due. The plaintiff brings this action against the first defendant to enforce that additional obligation.[1]

2 I have dismissed the plaintiff's claim. I have held that the supplemental agreement was unsupported by consideration. The first defendant received no

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1 Statement of Claim ("SOC") Amendment No. 2, para 9 and p 8.

benefit and the plaintiff suffered no detriment in exchange for the additional obligation.

3 The plaintiff has appealed against my decision. I now set out my grounds.

**Facts**

4 The plaintiff is an investor. Her husband, Mr Han Jianpeng, is a businessman. He was the driving force behind the couple's dealings with the first defendant and its group of companies. I shall refer to that group as the "Biomax group".

5 The first defendant is an investment holding company. It is the ultimate holding company of the Biomax group. The first defendant owns and controls Biomax Holdings Pte Ltd ("Biomax Holdings")[2] which, in turn, owns and controls the second defendant.

6 The second defendant is the only operating company in the Biomax group. It manufactures fertilisers and nitrogen compounds and sells agricultural machinery and equipment.[3]

7 Mr Sim Eng Tong is the driving force behind the Biomax group. He is the controlling shareholder of the first defendant. He is also a director of all

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2 Affidavit of evidence-in-chief ("AEIC") of Han Jianpeng, para 6.

3 Statement of Claim ("SOC") Amendment No. 2, para 3.

three companies: the first defendant, Biomax Holdings and the second defendant.[4]

8 Mr Sim and Mr Han were introduced to each other in late 2014. They became friends.[5] They met frequently to discuss, amongst other things, potential investments in the Biomax group.[6] Mr Han and Mr Sim personally conducted all of the critical negotiations leading to a number of investments which Mr Han made in the Biomax group.[7] The plaintiff participated only to a limited extent.[8] These investments include the loans which form the subject-matter of this action.

9 Mr Han and the plaintiff agreed that the first such investment would be in the plaintiff's name.[9] That investment was a convertible loan of $5m from the plaintiff to the first defendant.

10 The plaintiff and the first defendant duly entered into a formal agreement dated 6 January 2015 known as the Convertible Loan Agreement ("the CLA").[10] Under the CLA, the plaintiff agreed to lend $5m to the first defendant for two years. The first defendant, in return, agreed to pay interest to the plaintiff on the $5m at 10% per annum and granted the plaintiff an option to convert the loan into shares at the end of the second year.

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4 SOC Amendment No. 2, para 4; AEIC of Han Jianpeng, Tab 1, ACRA search results, pp 52, 60 and 61.

5 AEIC of Chua Siok Lui, paras 6(b) and 14.

6 AEIC of Han Jianpeng, paras 4, 5 and 8.

7 AEIC of Ma Hongjin, paras 5 and 6.

8 AEIC of Ma Hongjin, para 5.

9 AEIC of Han Jianpeng, para 10.

10 AEIC of the Ma Hongjin, para 7.

11 Clause 3 of the CLA sets out the first defendant's specific obligations. At the end of the first year, in January 2016, the first defendant was obliged to pay the plaintiff $500,000. At the end of the second year, in January 2017, the second defendant was obliged to repay to the plaintiff the $5m principal with a payment of a further $500,000 in interest. But the plaintiff had the option to require the first defendant to procure a transfer to her of 15% of the shares in Biomax Holdings in discharge of the first defendant's obligation to pay the total sum of $5.5m falling due in January 2017. Clause 3 provides as follows:[11]

> **3. INTEREST AND REPAYMENT OF THE LOAN**
>
> 3.1 The interest rate on the Loan is ten (10) per cent per annum.
>
> 3.2 Subject to Clauses 4 and 7, the Lender shall be entitled to require the Borrower to repay the Loan in the following manner:
>
> (a) *On 5th January 2016: To repay the interest accruing up to 5th January 2016 (S$500,000).*
>
> (b) On the Maturity Date (5th January 2017):
>
> i. **Option 1**: Borrower to repay the principal amount of the Loan in full and the amount of unpaid interest accruing up to 5th January 2017 (S$500,000, assuming that the Borrower has repaid the interest accruing up to 5th January 2016 at point (a) above); **OR**
>
> ii. **Option 2**: *Borrower to procure the transfer of 15% of the total number of shares in [Biomax Holdings]* (the "**Full Repayment Shares**") from the Borrower to the Lender. For avoidance of doubt, the transfer of the Full Repayment Shares from the Borrower to the Lender shall represent the full and final repayment of the principal amount of the Loan and interest on the Loan.

[11] See AEIC of Han Jianpeng, Tab 2, Convertible Loan Agreement dated 6 January 2015, p 68.

[emphasis added in italics]

12 The plaintiff duly disbursed the loan to the first defendant. She did so in three tranches: (a) $2.5m on 6 January 2015;[12] (b) $1m on 14 January 2015;[13] and (c) $1.5m on 30 March 2015.[14]

13 Within two months of entering into the CLA, Mr Han and the plaintiff became unhappy with the first defendant's financial results.[15] In March 2015, Mr Han and Mr Sim, in their own words, "re-negotiated some of the terms of the CLA".[16] The renegotiation resulted in the plaintiff and the first defendant entering into a supplemental agreement dated 16 April 2015. It bears the title "Supplemental Agreement relating to a S$5,000,000 Convertible Loan Agreement Dated 6 January 2015". I shall call it "the SA".

14 The SA recorded the parties' agreement to vary the terms of the CLA in two ways. First, it increased from 15% to 20% the Biomax Holdings shares which the plaintiff had the option to call for in January 2017. Second, it increased from $500,000 to $750,000 the first defendant's payment obligation in January 2016.[17] These variations are recorded in cl 2 of the SA:

> **2. AMENDMENTS**
>
> In accordance with Clause 9.3 of the [CLA] and pursuant to this Supplemental Agreement, the parties agree that the [CLA] be hereby amended as follows:

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12 Agreed Bundle of Documents ("AB"), p 102.

13 AB, p 103.

14 AB, p 104.

15 AEIC of Ma Hongjin, para 8.

16 AEIC of Ma Hongjin, para 8.

17 AEIC of Han Jianpeng, Tab 4, Supplemental Agreement dated 16 April 2015, cl 2, p 82.

> (a) Clause 3.2(b)(ii) of the [CLA] shall be amended by deleting the words "15%" appearing at line 1 and inserting the words "20%" in place thereof.
>
> (b) A new Clause 3.3 shall be inserted as follows:
>
> "3.3 The Borrower agrees to pay an additional lump sum facility fee of S$250,000 on 5th January 2016."

15 The SA was an attempt to effect a one-sided variation. By that, I mean a variation which imposes additional obligations on only one party to an existing contract without conferring any additional benefit on that party or imposing any additional obligation on the counterparty. To that extent, the characterisation of the additional $250,000 due in January 2016 as a "facility fee" was a complete misnomer. The plaintiff extended the first defendant no facility whatsoever under the SA in exchange for the fee. This additional $250,000 therefore amounted to nothing more than the plaintiff attempting to impose a one-sided increase of 50% in the rate of interest payable in the first year of the loan, *ie*, from 10% per annum to 15% per annum.

16 I therefore do not accept that the recitals to the SA are accurate when they record that it was the first defendant which asked the plaintiff to vary the CLA in the terms set out in the SA. The first defendant had no reason to agree to a one-sided variation, entirely against its own interest. Recital (B) reads as follows:[18]

> (B) The Borrower has requested the Lender and the Lender has agreed to amend the [CLA] to the extent set out in this Supplemental Agreement.

17 In January 2016, the first defendant duly paid the plaintiff the first tranche of interest which fell due on the loan under cl 3.2(a) of the CLA (see

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[18] AEIC of Han Jianpeng, Tab 4, Supplemental Agreement dated 16 April 2015, p 82.

[11] above).[19] The first defendant has, however, failed to pay the plaintiff the $250,000 facility fee, then or at all.[20]

## Procedural history

### *Claim against the first defendant*

18 The plaintiff commenced this action in July 2016. At that time, the first defendant's only arguable breach of contract was its failure to pay the facility fee in January 2016. The plaintiff's claim in this action as against the first defendant is therefore limited to a claim to recover the facility fee of $250,000.[21]

19 While this action was pending, the first defendant also failed to pay the plaintiff the $5.5m which fell due in January 2017 under cl 3 of the CLA. The plaintiff accordingly initiated a separate action[22] against the first defendant for that separate breach of the CLA.[23] In October 2017, the plaintiff secured summary judgment against the first defendant in that separate action for $5m plus contractual interest at 10% per annum from January 2016 to the date of payment.[24] I need say nothing further about that claim or that action.

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19 AEIC of Ma Hongjin, para 10; AB, p 419, Letter of demand from the plaintiff to the first defendant dated 12 April 2016.

20 Defence and Counterclaim ("Defence") Amendment No. 2, para 7.

21 SOC Amendment No. 2, p 9.

22 HC/S 13/2017.

23 AEIC of Ma Hongjin, para 13.

24 *Ma Hongjin v SCP Holdings Pte Ltd* [2018] 4 SLR 1276 at [63]; HC/ORC 6652/2017 in HC/S 13/2017.

***Claim against the second defendant***

20 I have thus far described the background to the plaintiff's claim in this action against only the *first* defendant. The plaintiff also brings a claim in this action against the *second* defendant. She brings that claim under three loan agreements which the plaintiff entered into with the second defendant in the second half of 2015. Those loan agreements are not connected to the CLA, save that they are all part of Mr Han's overall investment in the Biomax group. The plaintiff's claims against the two defendants in this action are therefore distinct and severable, both factually and legally, from each other.[25] For the reasons which follow, the plaintiff's claims were tried separately as against the individual defendants.

21 The plaintiff's claims as against both defendants were fixed to be tried before me in January and February 2019. However, the day before trial, the second defendant put itself into creditor's voluntary liquidation.[26] The result was that, under s 299(2) of the Companies Act (Cap 50, 2006 Rev Ed), the plaintiff's claim against the second defendant was automatically stayed. She could not have that claim tried without the leave of court.[27] The trial of the plaintiff's claim against the second defendant was vacated to allow that application for leave to be made and argued.[28] I eventually granted the plaintiff leave to proceed. Her claim against the second defendant was eventually tried before me in November 2019. That trial is not the subject of these grounds.

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25 SOC Amendment No. 2, p 10.

26 Notes of Evidence ("NE"), 29 January 2019, p 2, lines 10 to 11.

27 NE, 29 January 2019, p 2, lines 16 to 28.

28 NE, 30 January 2019, p 5, lines 14 to 25.

22 There was no impediment, however, to using the trial dates in January and February 2019 to try the plaintiff's claim against the first defendant. As I have pointed out, the claims against the two defendants were factually and legally distinct from each other. All of the plaintiff's and the first defendant's witnesses and both parties' counsel were available and ready to try the claim. The trial of that claim therefore went ahead as scheduled.[29] In that sense, the trial which gives rise to these grounds of decision proceeded as a straightforward trial between a single plaintiff and a single defendant.

## Submission of no case to answer

### *The defendant submits no case to answer*

23 At the trial of the plaintiff's claim against the first defendant, the plaintiff gave evidence on her own behalf and called two witnesses. One was Mr Han. The other was Ms Chua Siok Lui, a director of Biomax Holdings and of the second defendant.[30] Ms Chua gave evidence because she was present at some of the discussions between Mr Han and Mr Sim.[31]

24 Counsel for the first defendant chose not to cross-examine any of the plaintiff's witnesses. When the plaintiff closed her case, counsel for the first defendant made a submission of no case to answer[32] coupled with the usual election not to call evidence if the submission failed.[33] That election was obligatory. A court in Singapore will not entertain a submission of no case to

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29 NE, 29 January 2019, p 5, lines 18 to 21.

30 AEIC of Chua Siok Lui, para 1.

31 AEIC of Han Jianpeng, para 5; AEIC of Chua Siok Lui, paras 5(c), 13 and 15(c)

32 NE, 30 January 2019, p 8, lines 19 to 21.

33 NE, 8 February 2019, p 2, lines 9 to 11.

answer in a civil action unless the submission is accompanied by that election: *Ho Yew Kong v Sakae Holdings Ltd and other appeals and other matters* [2018] 2 SLR 333 ("*Ho Yew Kong*") at [70]. I note at the outset that the rule in *Ho Yew Kong* is an invariable rule. It is not a mere general rule, capable of being disapplied on the facts of a particular case.

***The test to be applied***

25 The threshold question which arises is the test which I should apply to determine whether the first defendant's submission of no case to answer ought to succeed.

26 On this threshold question, the plaintiff submits that she need only satisfy me that there is a *prima facie* case on each of the essential elements of her claim in order to defeat the defendant's submission of no case to answer and secure judgment in her favour.[34] As the plaintiff puts it:

> As was established in the case of *Viet Hai Petroleum Corporation v Ng Jun Quan & Or* [2016] SGHC 81…, there are three implications which flow from the 1st Defendant's submission of no case to answer:
>
> a. First, the Plaintiff only has to establish a *prima facie* case as opposed to proving her case on a balance of probabilities;
>
> b. Second, in assessing whether the Plaintiff has established a *prima facie* case, the Court will assume that any evidence led by the Plaintiff is true, unless it is inherently incredible or out of common sense; and
>
> c. Third, if circumstantial evidence is relied on, it does not have to give rise to an irresistible inference, as long as the desired inference is one of the possible inferences.

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[34] Plaintiff's closing submissions ("PCS"), para 7.

The first defendant does not address this threshold question in its written submissions.

27 The plaintiff's submission, if correct, amounts to relaxing the standard of proof on a plaintiff simply because the defendant chooses to make a submission of no case to answer. That cannot be correct in Singapore, where the rule in *Ho Yew Kong* applies as an invariable rule. Where a defendant elects to call no evidence as the price of making a submission of no case to answer, the submission of no case is conceptually indistinguishable from closing submissions at trial. The standard of proof resting on the plaintiff at closing submissions at trial is axiomatically proof on the balance of probabilities. It cannot be different where a party makes a submission of no case to answer coupled with the election to call no evidence.

28 Assume a straightforward civil action between one plaintiff and one defendant with no third parties and no counterclaim. That is the type of action which has been tried before me. For the reasons which follow, the correct position must be that the plaintiff can defeat the defendant's submission of no case to answer only if the plaintiff is able to satisfy the trial judge:

> (a) on the balance of probabilities that the evidence which the plaintiff has adduced at trial has proven the facts on which she relies for the essential elements of her case to be true; *and*
>
> (b) that applying the law to those facts yields an outcome in the plaintiff's favour.

If the plaintiff is able to satisfy the judge on both of these limbs, not only does the submission of no case to answer fail, but the plaintiff is entitled to judgment against the defendant. Equally, if the plaintiff cannot satisfy the judge on both

of these limbs, the submission of no case to answer succeeds and judgment must be entered for the defendant.

29 I now explain why I consider this to be the correct position.

*Four procedural alternatives at the close of the plaintiff's case*

30 After the plaintiff closes its case in a straightforward civil action, the defendant has four procedural alternatives which it can adopt:

(a) the defendant may elect to call evidence in support of its case;

(b) the defendant may elect to call *no* evidence in support of its case *without* making a submission of no case to answer;

(c) the defendant may make a submission of no case to answer *with* an election to call no evidence if the submission fails; and

(d) the defendant may make a submission of no case to answer *without* an election to call no evidence if the submission fails.

31 The important point to note is that the procedural result in the first three alternatives is conceptually identical. The parties and the trial judge move on to closing submissions, in substance if not also in theory.

32 Alternative (d) is conceptually distinct from the first three and must be treated distinctly from them. Because the rule in *Ho Yew Kong* is an invariable rule, alternative (d) can never arise in Singapore. Nevertheless, the courts in a number of other jurisdictions retain a discretion to permit a defendant to adopt alternative (d). Typically these are jurisdictions – unlike Singapore – which either retain or have a tradition of jury trials in civil actions. Cases from those

jurisdictions which consider the effect of a submission of no case to answer must therefore be treated with caution when cited as authority in Singapore.

33 Of the four alternatives in [30] above, alternative (a) is the paradigm. After the defendant closes its case, the parties present their closing speeches or, as is more common today in all but the simplest of trials, their closing written submissions. This procedure is expressly envisaged and accommodated in O 35 r 4(4) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed). Having considered the evidence and the law in the light of the parties' closing submissions, the trial judge delivers judgment. The test which the trial judge must apply in order to determine who is entitled to judgment is the test I have set out at [28] above.

34 Alternative (b) arises rarely. This is because there are a number of pre-trial procedural options which are designed to enable a defendant in a civil action to eliminate a hopeless case before trial, *ie*, without giving the plaintiff an opportunity even to open its case at trial, *eg,* O 14 r 12, O 18 r 19(1) and O 27 r 3 of the Rules of Court. The availability of these provisions and our adversarial system ensure that virtually every plaintiff who makes it all the way to trial has a claim which is at the very least arguable on both the facts and the law. In virtually every case, therefore, it is a very high-risk strategy for a defendant to allow the plaintiff to adduce evidence at trial and then elect to call no evidence for the defence. Nevertheless, alternative (b) is expressly envisaged and accommodated in O 35 r 4(3) of the Rules of Court.

35 Alternative (b) is no different procedurally from alternative (a) in both form and in substance. In both situations, the defendant opens its case. In alternative (a), the defendant then adduces positive evidence as part of its case. In alternative (b), by contrast, the defendant calls no evidence. Then in both alternatives, the defendant closes its case. The parties then proceed to closing

submissions in the usual way. The only difference between the two alternatives is that the defendant *actually* opens and closes its case in alternative (a), whereas it does so only *notionally* in alternative (b) because of the absence of evidence. The test which the trial judge must apply to determine who is entitled to judgment remains unchanged from that which is applicable in alternative (a).

36 Alternative (c) is also unusual, and for the same reason that alternative (b) is unusual. The rule in *Ho Yew Kong* is a strong disincentive, intended to discourage defendants from making submissions of no case to answer. Interestingly, alternative (c) is *not* envisaged or accommodated by the Rules of Court. In fact, there is no provision at all in the Rules of Court which permits a defendant to make a submission of no case to answer, with or without an election. There is only oblique recognition of the practice by a reference to it in O 40A r 6(2). Be that as it may, the practice is accepted by our case law (see the authorities cited in *Ho Yew Kong* at [70]). And, so long as the principles in the following paragraphs are kept in mind, there is perhaps no harm in continuing to call what happens in alternative (c) a "submission of no case to answer".

37 The key point to note is that alternative (c) is identical to alternative (b) in substance, though perhaps not in theory. In theory, a submission of no case to answer has the following procedural consequence. The trial judge hears the submission of no case to answer. If the submission succeeds, the plaintiff's claim is dismissed. If the submission fails, the defendant has the opportunity to open its case. But the rule in *Ho Yew Kong* means that a defendant in Singapore has already been required to elect expressly to call no evidence as the price of the court entertaining the submission of no case to answer. The defendant whose submission fails is therefore bound by the election to call no evidence. As a result, as soon as the court rejects the defendant's submission of no case to answer, the defendant's case opens and closes instantly and notionally, as in

alternative (b). The parties then proceed to closing submissions in accordance with O 35 r 4(3). But hearing closing submissions afresh is wholly pointless. Nothing has changed on the facts or the law since the court considered and rejected the submission of no case to answer. Even if the case goes on appeal, and even if the appellate court holds that the judge at first instance was wrong to have accepted the submission of no case to answer, there is no question of remitting the matter to the judge at first instance or ordering a new trial. As Mance LJ said in *Boyce v Wyatt Engineering* [2001] EWCA Civ 692 ("*Boyce*") at [4]:

> First, where a defendant is put to his election, that is the end of the matter as regards evidence. The judge will not hear any further evidence which might give cause to reconsider findings made on the basis of the claimant's case alone. The case either fails or succeeds, even on appeal.

38 Mance LJ returned to this point in *Miller (t/a Waterloo Plant) v Margaret Cawley* [2002] EWCA Civ 1100 ("*Miller*"). At [18] of *Miller*, after citing [4] from *Boyce*, Mance LJ said:

> The issue after an election [to call no evidence] is, in other words, *not whether there was any real or reasonable prospect that the claimant's case might be made out* or any case fit to go before a jury or judge of fact. It is the straightforward issue, arising in any trial after all the evidence has been called, *whether or not the claimant has established his or her case by the evidence called on the balance of probabilities.*
>
> [emphasis added]

39 In alternative (c), if the submission of no case to answer succeeds, the plaintiff's claim obviously fails and judgment is entered for the defendant. But if the submission of no case to answer *fails*, the plaintiff's claim must equally obviously succeed and judgment must be entered for the plaintiff. The test to determine who is entitled to judgment in alternative (c) is therefore the very

same test which determines who is entitled to judgment in alternative (a) and also in alternative (b).

40 The other way of looking at alternative (c) is to recognise that the court hearing a submission of no case to answer in that alternative is not in substance determining the *procedural* issue of whether the defence is obliged to present its case. That issue is moot because of the defendant's mandatory election to call no evidence if the submission fails. The court is in truth determining the *substantive* issue of who is entitled to judgment. Thus, in alternative (c), the defendant's submission of no case to answer performs precisely the same function as the parties' closing submissions in alternatives (a) and (b).

41 The analysis is completely different in alternative (d): where a defendant is allowed to make a submission of no case to answer *without* electing to call no evidence if the submission fails. As I have pointed out, this alternative cannot arise in Singapore because the rule in *Ho Yew Kong* is an invariable rule. In England, however, putting the defendant to an election is a general rule rather than an invariable one (*Lloyd v John Lewis Partnership* [2001] EWCA Civ 1529 at [9] *per* Sir Murray Stuart-Smith; *Miller* at [13] *per* Mance LJ).

42 An English court therefore retains the discretion to allow a particular defendant, on the facts of a particular case, to make a submission of no case to answer while reserving the right to call evidence if the submission fails (*Miller* at [12]). Having said that, even in England, allowing a defendant to make a submission of no case to answer without being put to the election is a course which "calls, on any view, for considerable caution" (*Boyce* at [4]–[6] *per* Mance LJ; *Miller* at [13] *per* Mance LJ).

43 The result is that in England, the phrase "submission of no case to answer" has been held to describe in the strict sense *only* alternative (d) and *never* alternative (c). Alternative (c) is simply an election to call no evidence. As Simon Brown LJ said in *Benham Ltd v Kythira Investments Ltd* [2003] EWCA Civ 1794 ("*Benham*") at [23]:

> [I]f on a submission of no case to answer the judge *does* put the defendant to his election, then one of two consequences necessarily follows. Either the defendant withdraws his submission – in which case, of course, the problem resolves – or he elects to call no evidence – in which case the position is as set out by Mance LJ in paragraphs 17, 18 and 20 of *Miller* …[cited at [37] above]… In other words, it is only when the judge does *not* put the defendant to his election that it becomes necessary to consider the difficulties arising from a submission of no case to answer. Although one talks about entertaining such a submission without putting the defendant to his election, it is in fact meaningless to refer to a submission of no case *except* on the basis that the defendant has not been put to his election. Strictly, therefore, it is tautologous to refer both to entertaining a submission and also to not putting the defendant to his election. When hereafter I refer to entertaining a submission of no case, I am to be taken as referring to the hearing of such a submission without putting the defendant to his election.
>
> [emphasis in original]

44 The English cases have held that the test to be applied to determine whether a submission of no case to answer in the strict sense (*ie,* in alternative (d)), should succeed is a test which is *more* favourable to the plaintiff than the test which applies at the close of trial. This relaxed test reflects the fact that – if the submission fails and the trial continues in the usual way to receive evidence in the defence case – the plaintiff may be able to supplement the evidence she has presented in her case with evidence from the defendant's witnesses, either in chief or through cross-examination, to discharge her burden of proof on the balance of probabilities. In other words, in alternative (d), the issue which the court is determining on a submission of no case to answer *is indeed* the single

procedural issue of whether the defendant should be obliged to present its case. The court is not, as in alternative (c), considering the substantive issue of who is entitled to judgment.

45 Thus, the test which the English courts apply in alternative (d) is whether the plaintiff "has a real or reasonable prospect" of making out her case. That formulation is taken from the italicised words in the passage from *Miller* (at [18]) which I have cited at [38] above. If the plaintiff's case has a real or reasonable prospect of success, the trial judge must call on the defendant to present its evidence, hear the evidence and thereafter decide the case in the usual way, *ie,* on the balance of probabilities (*Miller* at [14] *per* Mance LJ):

> Where a judge does, however, embark at the close of the claimant's case on a determination whether the claimant's case has no real prospect of success *without requiring any election*, the judge will, if he determines that the claimant's case has no such prospect, dismiss the claim, and this will, subject to any appeal, be the end of the matter. *If, on the other hand, the judge determines that the claimant's case has a real prospect of success, he must go on to hear the defendant's evidence* and thereafter to find the factual position on the whole of the evidence and on the balance of probabilities.
>
> [emphasis added]

46 The fundamental conceptual distinction between alternative (c) and alternative (d) also explains why the test to be applied on a submission of no case to answer in a civil trial is different from that which applies in a criminal trial. The accused in a criminal trial is permitted to make a submission of no case to answer without electing to call no evidence if the submission fails. In other words, alternative (d) is the invariable rule in a criminal trial. Where alternative (d) is the invariable rule it is right that the test should be framed tentatively (evidence which *if* accepted as true *would* establish each essential element) and negatively (some evidence which is *not* inherently incredible): *Haw Tua Tau and others v Public Prosecutor* [1981–1982] SLR(R) 133 at [17].

*The Singapore case law*

47 The test to apply in alternative (d) is not, of course, something which I need to consider, given that it cannot arise in Singapore and is not the application I am considering. Nevertheless, some trace of the test to be applied in alternative (d), whether drawn from English law or from our law of criminal procedure, has crept into our case law on how to deal with the very different alternative (c).

48 I start with *Central Bank of India v Bansal Hemant Govinprasad and others and other actions* [2002] 1 SLR(R) 22 ("*CBI*"). That is the origin of the language of the "*prima facie* case" on which the plaintiff relies in its submission (see [26] above). In *CBI*, a bank sued a customer. The action went to trial. The bank called only one witness. That witness could not give direct evidence of the truth of the contents of documents which were critical to the bank's case. The trial judge, S Rajendran J, therefore held those documents to be inadmissible.

49 At the close of the plaintiff's case in *CBI*, the defendant elected to call no evidence and made a submission of no case to answer. It is clear from the judgment that *CBI* is not a case in which the defendant adopted alternative (d). But it is not possible to tell from the judgment whether the defendant adopted alternative (b) or alternative (c). The defendant's counsel may have simply elected to call no evidence with all parties thereafter characterising that election as a submission of no case to answer. That would make it alternative (b). It could well be, however, that the defendant's counsel made a formal submission of no case to answer, upon which Rajendran J put the defendant to an election and the defendant duly made the election. That would make it alternative (c). The artificiality of these distinctions is yet another reason alternative (b) and alternative (c) must be treated the same.

50 In a passage from *CBI* which has often been quoted since, Rajendran J said (at [21]):

> A decision by a defendant not to adduce evidence in his defence is a decision that ought not to be lightly taken. Where a defendant makes such an election, the result will be that the court is left with only the plaintiff's version of the story. So long as there is some *prima facie* evidence that supports the essential limbs of the plaintiff's claim(s), then the failure by the defendant to adduce evidence on his own behalf would be fatal to the defendant.

51 This passage is at the root of the plaintiff's submission as to the test I should apply (see [26] above). But I do not read this passage as authority for the proposition that a submission of no case to answer *in alternative (c)* must fail if the plaintiff has adduced no more than *prima facie* evidence on each essential limb of the plaintiff's case. That would amount to saying that the plaintiff is entitled to judgment upon proof of no more than a *prima facie* case simply because the defendant has elected to make a submission of no case to answer. That may well be the test which applies in alternative (d), where the court is simply trying to decide whether the defendant is obliged to present its case. But in alternative (c), there is no conceptual reason why the plaintiff should get judgment on a reduced standard of proof simply because the defendant has chosen to make a submission of no case to answer with an election to call no evidence if it fails.

52 To my mind, what is critical to understanding this passage from *CBI* is Rajendran J's use of the conditional "would" rather than the imperative "will" in the last sentence of this paragraph. That makes it clear that Rajendran J was not laying down a legal test to be applied to determine whether a submission of no case to answer succeeds. Indeed, what he said in this passage cannot be the legal test because a plaintiff may adduce even indisputable evidence on each essential element of its claim yet lose a submission of no case to answer on the

law. What Rajendran J was doing in this passage was simply observing as a fact that a plaintiff who adduces *prima facie* evidence on each of the essential limbs of his case would ordinarily be expected to secure judgment if the defendant adduces no evidence whatsoever (*ie,* alternatives (b) and (c)). That must undoubtedly be correct, so long as the plaintiff's claim turns on questions of fact alone.

53 Rajendran J then went on (at [28]) to explain why, on the facts of *CBI*, he rejected the defendant's submission of no case to answer and entered judgment for the plaintiff:

> At the close of the case for [the bank], there was evidence on which the court could come to the conclusion that the [defendants] knew, when they… dealt with the goods…, that the documents were the property of [the bank]. In proceeding to deal with the goods despite that knowledge, the [defendants] could well be liable in conversion and/or as constructive trustees. But, by electing not to testify, the [defendants] have elected not to put before the court their explanation of the events that happened. In these circumstances, I can only conclude that they had no defence to these claims. I therefore give judgment in favour of [the bank] in the sum of US$1,190,893.28 in Suit 1045/99 and US$274,319.04 in Suit 1046/99. I also order that the [defendants] pay the costs of the two suits and pay interest on the judgment sum at 6% pa from date of writ.

54 Once again, I do not read this passage as yielding a legal proposition applicable to determining a submission of no case to answer. I do not even read it as giving an indication of the approach to be taken on any such application. It appears to me that what Rajendran J was analysing here was whether an adverse inference under s 116(g) of the Evidence Act (Cap 97, 1997 Rev Ed) could legitimately be drawn against the defendants from their failure to adduce evidence within their control, *ie*, their own testimony.

55 It is well-established that a court cannot use an adverse inference to find a fact proven on the balance of probabilities unless the party on whom the burden lies to prove that fact has first adduced *prima facie* evidence of the fact (*Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 2 SLR(R) 407 at [50]; *Koh Bee Choo v Choo Chai Huah* [2007] SGCA 21 at [28]; *Sudha Natrajan v The Bank of East Asia Ltd* [2017] 1 SLR 141 ("*Sudha*") at [20(c)]). In this passage, Rajendran J was simply concluding, on the facts of the case before him, that the *prima facie* evidence adduced by the bank on the essential elements of its claim permitted him legitimately to draw an adverse inference against the defendants from their failure to adduce available evidence.

56 Rajendran J concluded this paragraph by entering judgment for the plaintiff. Implicit in that sequencing is a finding that the combined effect of the *prima facie* evidence adduced by the plaintiff in its case and the adverse inference to be drawn against the defendants from their complete failure to adduce available evidence was sufficient to discharge the plaintiff's burden of proof at trial *on the balance of probabilities* and thereby to entitle the plaintiff to final judgment.

57 As *CBI* makes clear, a defendant in alternative (c) – and indeed also in alternative (b) – runs the usual tactical risk that a defendant runs in alternative (a) when it fails to call available evidence. That risk is the court drawing an adverse inference from that failure under s 116(g) of the Evidence Act. The circumstances in which an adverse inference can be drawn, the strength of the adverse inference and the legitimate use of the adverse inference will be determined on the usual principles which apply in every trial. These principles have most recently been comprehensively restated in *Sudha* at [20]. As for alternative (d), the principles which apply in dealing with the adverse inference in that alternative were analysed by Simon Brown LJ in *Benham* at [24]–[32].

58 I do not need to consider further the circumstances in which it is legitimate to draw an adverse inference when determining a submission of no case to answer. The plaintiff did not invite me to draw any adverse inferences against the first defendant from its failure to adduce evidence which was available to it.

*Court of Appeal authority*

59 I am conscious that in *Tan Juay Pah v Kimly Construction Pte Ltd and others* [2012] 2 SLR 549 ("*Tan Juay Pah*") at [37], the Court of Appeal cited *CBI* as authority for the proposition that a plaintiff – in order to defeat a submission of no case to answer and secure judgment against the defendant in alternative (c) – need establish *only* a *prima facie* case against the defendant and need not prove her case on the balance of probabilities. *Tan Juay Pah* was in turn cited in the more recent Court of Appeal decision in *Lena Leowardi v Yeap Cheen Soo* [2015] 1 SLR 581 ("*Lena Leowardi*") as authority for the same proposition (at [24]) in terms strikingly similar to the plaintiff's submission (see [26] above). However, I do not consider the view I have expressed above to be contrary to the authority of those cases. In both those cases, in my respectful view, the proposition was *obiter*.

60 In *Tan Juay Pah*, the Court of Appeal held that an engineer's submission of no case to answer in a claim by a subcontractor should have succeeded because the subcontractor's case against the engineer was "fatally flawed" (at [94]). That conclusion turned on issues of law rather than on issues of fact which had to be proven to a particular standard. Further, even if the Court of Appeal's conclusion did turn on facts, it amounts to a conclusion that the subcontractor had failed to establish even a *prima facie* case on those facts. For both reasons, therefore, *Tan Juay Pah* did not turn on the standard of proof which the

subcontractor had to meet in establishing the facts of its case. The Court of Appeal in *Tan Juay Pah* did not have to consider what the result of the engineer's submission of no case to answer should have been if the subcontractor's evidence on essential issues of fact fell within the gap between a case proven only to a *prima facie* standard and a case proven on the balance of probabilities.

61 In *Lena Leowardi* too, what was said about the standard of proof being that of a *prima facie* case was *obiter*. The sole issue in that case was whether a borrower could rely on the presumption in s 3 of the Moneylenders Act (Cap 188, 2010 Rev Ed) to establish that his lender was a "moneylender" within the meaning of the Act. The Court of Appeal determined that issue on the basis that the borrower had failed adequately to plead his case as required by O 18 r 8(1) of the Rules of Court (at [37]). That finding alone was sufficient to dispose of the appeal. The Court of Appeal nevertheless went on to consider the lender's case on the merits. The Court of Appeal first set out the test as follows (at [23]):

> At the trial below, the Respondent made a submission of no case to answer. The test of whether there is no case to answer is whether the plaintiff's evidence at face value establishes no case in law or whether the evidence led by the plaintiff is so unsatisfactory or unreliable that its burden of proof has not been discharged (see *Lim Eng Hock Peter v Lin Jian Wei* [2009] 2 SLR(R) 1004 ("*Lim Eng Hock*") at [209]). The Respondent relied on the former limb of the test.

This, in my respectful view, correctly states the test. The first limb deals with the defendant having no case to answer on the law. The second limb deals with the defendant having no case to answer on the facts. And the concluding words of the second limb correctly, again with respect, directs the ultimate focus to whether the plaintiff has discharged her burden of proof, *ie,* a plaintiff's burden to prove the facts essential to her claim on the *balance of probabilities*. The reference to evidence being "unsatisfactory or unreliable" does not attenuate the

balance of probabilities standard. The Court of Appeal cited *Lim Eng Hock Peter v Lin Jian Wei and another [2009] 2 SLR(R) 1004* ("*Lim Eng Hock*") as authority for this proposition. *Lim Eng Hock* was a defamation case in which the plaintiff had to establish malice in order to defeat a defence of qualified privilege. As Chan Seng Onn J said in at [210] of *Lim Eng Hock*:

> However, the plaintiff was not able to show malice on the part of the defendants to defeat their defence of "qualified privilege", despite the defendants adopting a position of "no case to answer". *A position of "no case to answer" does not diminish the usual burden remaining on the plaintiff to establish there was malice on a balance of probability on the totality of the evidence.*
>
> [emphasis added]

62 I make one final point. There are very good reasons given by the Court of Appeal in *Ho Yew Kong* (at [70]) for making alternative (d) impermissible in Singapore. But the proposition for which *CBI* was cited in both *Tan Juay Pah* and *Lena Leowardi* – and on which the plaintiff relies in the present action – would operate as an additional and perverse penalty imposed upon a defendant simply for framing its submission as a submission of no case to answer (bringing it within alternative (c)) rather than a simple election to call no evidence (alternative (b)). The reduced standard of proof would be an additional penalty because the defendant would already have suffered a penalty by being compelled to elect not to call evidence. And it would be a perverse penalty because alternative (c) is indistinguishable conceptually from alternative (b). The proposition would mean that – on precisely the same cause of action and upon precisely the same evidence – a defendant would be found wholly liable if it adopted alternative (b) simply upon the plaintiff proving a *prima facie* case but would succeed entirely if it adopted alternative (c) unless the plaintiff could establish her case on the balance of probabilities.

*Conclusion on the applicable test*

63 The result of this analysis is that I must decide the rights and liabilities of the plaintiff and the first defendant in the present action in precisely the same way as those rights and liabilities would have been determined if the defendant had adduced evidence and proceeded to closing submissions in the usual way (alternative (a)) or if the defendant had opened its case and elected to call no evidence before closing it (alternative (b)).

64 As in the usual civil trial, the test which I as the trial judge must apply to determine who is entitled to judgment is that set out at [28] above. If both tests are met, judgment must be entered for the plaintiff. If either test is not met, judgment must be entered for the first defendant.

65 All of this suggests that in Singapore, using the terminology of a "submission of no case to answer" is apt only to mislead by introducing or inducing a category error. That terminology therefore ought to be dropped. As Simon Brown LJ said in *Benham*, a submission of no case to answer coupled with an election not to call evidence if the submission fails is not a submission of no case to answer in substance and amounts simply to an election to call no evidence. In Singapore, a submission of no case to answer is *always* indistinguishable from alternative (b). Perhaps that is why the Rules of Court make no provision whatsoever for a submission of no case to answer of any type, whether with or without an election. No such provision is necessary if the submission can be made only upon an election to call no evidence if it fails. All that is necessary is for the procedural rules to cater for a defendant who opts to call no evidence. That the Rules of Court do.

66 Having outlined the law on a submission of no case to answer, I now turn to the law on consideration.

**Consideration**

67 As mentioned, the plaintiff's only claim against the first defendant in this action is to recover the unpaid facility fee of $250,000. The first defendant initially pleaded a number of defences to that claim. At trial, however, the first defendant abandoned all of the defences save one: that the SA is unsupported by consideration and is therefore unenforceable.[35] The plaintiff's claim against the first defendant thus turns neatly on that single issue.

***The plaintiff's case on consideration***

68 The chronology of events, in so far as it relates to the first defendant's sole defence of an absence of consideration, is as follows. The parties entered into the CLA on 6 January 2015. The plaintiff disbursed the third and final tranche of the loan to the first defendant on 30 March 2015. In March and April 2015, the parties (in the plaintiff's own words) "re-negotiated" the CLA.[36] They entered into the SA on 16 April 2015.

69 Counsel for the plaintiff argues that the SA is supported by consideration on three grounds.

70 The plaintiff's first argument is that the SA and the CLA are "one and the same contract". The SA explicitly states that it is "supplemental to" the CLA. Both parties were aware that, by entering into the SA, they were doing no more than simply varying the CLA. Other clauses in the two agreements support this construction. First, cl 9.3 of the CLA provides that the CLA can be varied only "in writing and signed by" both parties. The requirement for signed writing

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35 The plaintiff's opening statement, para 3.

36 AEIC of Ma Hongjin, para 8.

was satisfied when the parties executed the SA. Second, cl 5.1 of the SA provides that the CLA and SA "shall be read and construed as one instrument". The SA is part of the same contract as the CLA.

71 The plaintiff's second argument is that the CLA and the SA should be treated as being part of one and the same *transaction*, even if they are not one and the same *contract*. The renegotiation of the CLA took place in March 2015, *before* the plaintiff disbursed the last tranche of the loan to the first defendant on 30 March 2015. Therefore, the plaintiff did not need to provide any new consideration for the SA because it was understood between the parties that the additional obligations which the SA sought to insert into the CLA was to be her compensation for disbursing the final tranche of the loan.

72 The plaintiff's final argument is that, even if the SA is treated as a free-standing contract and entirely separate from the CLA, there was consideration to support the SA. The consideration was in the form of continuing "factual and/or practical benefits" which the first defendant obtained when the plaintiff disbursed the loan in the three tranches. This benefit is twofold: (a) the first defendant had use of the money before the parties renegotiated the CLA and entered into the SA; and (b) goodwill from the plaintiff for future loans to the first defendant or its related entities.

***The first defendant's case***

73 The first defendant's case is as follows. As a preliminary point, it takes the procedural point that the plaintiff has nowhere specifically pleaded any of these three arguments, in breach of O 18 r 8(1) of the Rules of Court.

74 On the merits of the plaintiff's arguments, the first defendant begins by pointing out that the additional obligations which the SA sought to insert into

the CLA were one-sided: they were solely to the plaintiff's benefit and not in any way to the first defendant's benefit.

75 The first defendant goes on to reject each of the plaintiff's three grounds:

(a) First, the CLA and SA are not part of one and the same contract. Clause 9.3 of the CLA does not render unnecessary the usual requirement of consideration to support the variation of a contract.

(b) Second, the CLA and SA are not part of one and the same transaction. There was never any understanding between the parties that the consideration for the loan under the CLA would include the additional obligations which the SA sought to insert into the CLA. In fact, the SA was a new idea which arose after the parties had already entered into the CLA and which the parties never contemplated when they did so.

(c) Finally, the plaintiff conferred no factual or practical benefit on the first defendant by actually disbursing the loan under the CLA. Even the plaintiff's own evidence is not that the renegotiations took place before the plaintiff disbursed the third tranche of the loan. Accordingly, there is nothing in the plaintiff's own case to link the renegotiations in March 2015 which led to the SA dated 16 April 2015 to the plaintiff's disbursement of any of the tranches of the loan, including the third tranche on 30 March 2015.

76 In the analysis of the doctrine of consideration which follows, I assume a paradigm contract between two parties. Although a contract usually comprises mutual promises – and in that sense each party is both a promisor and a promisee – it is a convenient expositional tool to speak of one party as the promisor and

the counterparty as the promisee. In the analysis which follows, I shall use "promisee" to refer to the party seeking to enforce a promise and "promisor" to refer to the party resisting enforcement. On the facts of this case, in relation to the SA, the plaintiff is therefore the promisee and the first defendant is the promisor.

### *The doctrine of consideration*

77 The function of the doctrine of consideration in the law of contract, broadly speaking, is to divide the promises which the law will enforce from the promises which the law will not enforce. The need for that dividing line is fundamental. As a result, the doctrine of consideration is as old as the law of contract itself. But any bright dividing line is capable of having harsh consequences. Consideration is no exception. The doctrine is capable of rendering promises unenforceable in circumstances which appear to be unjust, particularly where the promisee has relied on the promisor's promise. The doctrine has therefore been much criticised and often circumvented. The position today is that the common law has whittled consideration down to little more than a token. But the token is essential even today: consideration retains its place as one of the three fundamental elements for the formation of a contract. An offer and acceptance unaccompanied by consideration is incapable of giving rise to any legal obligation.

#### *Consideration must be sufficient but need not be adequate*

78 The classic statement of what amounts to consideration comes from the case of *Currie v Misa* (1875) LR 10 Exch 153 at 162:

> A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or *benefit* accruing to the one party, or some forbearance, *detriment*, loss or responsibility, given, suffered, or undertaken by the other.
>
> [emphasis added]

In other words, consideration "signifies a return *recognised in law* which is given *in exchange* for the promise sought to be enforced" [emphasis added] (*Gay Choon Ing v Loh Sze Ti Terence Peter and another appeal* [2009] 2 SLR(R) 332 ("*Gay Choon Ing*") at [66]).

79 The court does not inquire as to the adequacy of the consideration "so long as there is sufficient consideration furnished by the promisee in the eyes of *the law*" [emphasis in original] (*Gay Choon Ing* at [86]). The law requires only that the promisee's act, forbearance or promise has *some* economic value, even if that value cannot be quantified: *Treitel on the Law of Contract* (Edwin Peel ed) (Sweet & Maxwell, 14th ed, 2015) at para 3-027. So long as this requirement is satisfied, it does not matter if, in an objective sense, that economic value is not in any way commensurate with what the promisee receives in return.

80 The question which the plaintiff's claim raises is whether a promisee's performance of an *existing* contractual obligation can be consideration for an additional promise by the promisor. The traditional view is that it cannot, because the promisor obtains no benefit in law. The promisor obtains nothing to which it was not already legally entitled. But the modern view accepts that consideration need not be a legal benefit to the counterparty but can be a factual or practical benefit: *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 ("*Williams*").

81 In *Williams*, a main contractor in a building project engaged a subcontractor. After the subcontractor had completed part of its works, it found

itself in financial difficulty. There was doubt about whether it could complete the subcontract works on time. The subcontractor approached the main contractor to ask for additional money to complete the subcontract works on time, something which the subcontractor was already under a legal obligation to do. The main contractor was liable to the owner for liquidated damages for any delay in completion. The main contractor therefore agreed to pay the subcontractor the additional money. The subcontractor completed some discrete aspects of the subcontract works, but did not in fact complete all of the works. The main contractor failed to pay all of the additional money promised. It alleged that its promise to do so was unsupported by consideration and therefore unenforceable.

82 The English Court of Appeal held that the main contractor's promise to pay the additional money *was* supported by consideration and *was* therefore enforceable. The consideration was the practical benefit which the main contractor obtained or the disbenefit which it avoided by promising to pay the subcontractor the additional money. This included being able to avoid liquidated damages for delay and not having to incur the trouble and expense of engaging another subcontractor to complete the subcontract works (see *Williams* at 10–11).

83 *Williams* has been cited and affirmed in a number of Singapore cases. I will outline only the two which best illustrate the scope of the concept of practical benefit.

84 In *Sea-Land Service Inc v Cheong Fook Chee Vincent* [1994] 3 SLR(R) 250 ("*Sea-Land*"), an employer gave a redundant employee one month's notice of termination under his employment contract and agreed to pay him enhanced severance pay. The employee served out his notice period. The employer

refused to pay the enhanced severance pay. The employer argued that the agreement to do so was unsupported by consideration. The employee argued that the work he did during his notice period was the consideration.

85 The Court of Appeal rejected the employee's argument. It held that the work which a redundant employee does during his notice period is, virtually by definition, of minimal value to his employer. In any event, the employer did not give the employee one month's notice, and secure his labour during that one month, *in exchange for* the enhanced severance pay. The employer gave the employee one month's notice simply because it was contractually obliged to do so in order to bring an end to the employment.

86 The Court of Appeal in *Sea-Land* cited and analysed *Williams* (at [9]–[13]). Although the Court of Appeal did not express its conclusion using the language of factual or practical benefit from *Williams*, its decision amounts to a holding that the employee's last month of work in that case was not a factual or practical benefit to the employer. Thus, the Court of Appeal held that the case came within the general rule that performance of an existing legal duty is not consideration. In any event, the Court of Appeal also held that the employee failed because he did not render his services during his notice period *because of* the employer's promise to pay the enhanced severance pay. As the Court of Appeal said (at [14]):

> … The value of the last month's work by an employee about to be made redundant could hardly be other than minimal, since the management would only retrench workers that were not essential for their operations. Secondly, we agreed with the appellants' counsel that the appellants had not requested the respondent to complete his last month of employment in exchange for their payment of the enhanced benefits. The appellants were merely complying with their contractual obligations and had chosen to provide the respondent with one month's notice before his employment was terminated, instead of terminating his employment there and then and

> compensating him with a month's wages in lieu of notice. We were therefore of the view that the respondent's last month's work for the appellants would not amount to valid consideration and that it fell within the general rule that prohibits the performance of existing duties from constituting such consideration.

87 By contrast, in *Teo Seng Kee Bob v Arianecorp Ltd* [2008] 3 SLR(R) 1114, Lai Siu Chiu J found a practical benefit to be consideration. In that case, a buyer of shares in a private company sued his seller for breach of contract. After the parties had agreed on the terms of the contract, the seller promised separately to release the company's inventory to the buyer. As a result, the buyer paid the first instalment of the purchase price to the seller under the contract. The seller refused to release the company's inventory as promised. Lai Siu Chiu J found that the seller's separate promise to release the inventory was supported by consideration: the buyer had paid the first instalment of the purchase price under the contract to the seller, which the seller had then used as part of its cash flow (at [91]).

88 What emerges from the cases is that the promisee's performance of an existing contractual obligation cannot in itself be a sufficient factual or practical benefit to the promisor to constitute consideration for an additional promise from the promisor. Rather, the factual or practical benefit must accrue to the promisor separately from the promisee's performance of his existing obligation. In that sense, the factual or practical benefit must be extrinsic to that performance. And, as in the orthodox doctrine of consideration, the consideration must also be causally connected to the promisor's additional promise. *Williams* does not relax the need for an exchange, *ie*, the causal connection between the promise and the factual or practical benefit.

89 In *Williams*, the main contractor secured the benefit – extrinsic to the works which the subcontractor was already obliged to do – of avoiding

liquidated damages and avoiding having to engage another subcontractor to complete the works. And securing those extrinsic benefits caused the main contractor to promise to pay the additional money to the subcontractor. In contrast, in *Sea-Land Service*, the redundant employee simply performed his last month's duties as he normally would have. Performing those duties conferred no benefit to the employer extrinsic to the employee's existing contractual obligations. And in any event, the contractual performance which the employee rendered during his last month of service and the employer's promise of the additional severance payment were not causally connected to each other.

90 Further, for a factual or practical benefit in the *Williams* sense to constitute consideration, it must "not merely [be] the promisor's subjective hope or motive but a fact objectively identified in the same way that the likelihood of any other factual occurrence is assessed": Lee Pey Woan, "Contract Modifications: Reflections on Two Commonwealth Cases" (2012) 12(2) Oxford University Commonwealth Law Journal 189 at p 198. This means that while the subjective views of the parties are relevant, whether something constitutes a factual or practical benefit is ultimately an objective question to be determined by the court.

*Past consideration*

91 It is also well accepted that past consideration is not consideration. An act done before a promise and unconnected to the promise cannot be consideration for the promise because it is not done in *exchange* for the promise: *The Law of Contract in Singapore* (Andrew Phang Boon Leong, gen ed) (Academy Publishing, 2012) ("*The Law of Contract in Singapore*") at para 04.011.

92 To be clear, the past consideration rule does not simply look at chronology: *Sim Tony v Lim Ah Ghee (trading as Phil Real Estate & Building Services)* [1995] 1 SLR(R) 886 at [16]. Rather, what is crucial is the nexus between the act said to be consideration and the promise. Specifically, the later act must be causally linked to the earlier promise. Therefore, the court's inquiry is whether, at the time of the earlier act, a later promise was contemplated or required. If so, that connects the earlier act to the subsequent promise and establishes that they are part of the same transaction: *The Law of Contract in Singapore* at para 04.017.

93 The following comments in *Gay Choon Ing* at [83] explain this further:

> 83 … [T]he 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). This was established as far back as the 1615 English decision of *Lampleigh v Braithwait* (1615) Hob 105; 80 ER 255 and, whilst often referred to as an exception to the principle, is not really an exception for (as just stated) its application results in what is, in substance, a single transaction to begin with… a modern statement of this particular legal principle can be found in the Hong Kong Privy Council decision of *Pao On v Lau Yiu Long* [1980] AC 614 ("*Pao On*"), where Lord Scarman, delivering the judgment of the Board, observed thus (at 629):
>
> > An act done before the giving of a promise to make a payment or to confer some other benefit can sometimes be consideration for the promise. *The act must have been done at the promisors' request: the parties must have understood that the act was to be remunerated either by a payment or the conferment of some other benefit: and payment, or the conferment of a benefit, must have been legally enforceable had it been promised in advance.* [emphasis added]
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> [emphasis in original in italics; emphasis added in bold italics]

*Variation of contracts requires consideration*

94 The doctrine of consideration applies not only to contract *formation* but also to contract *variation*. A promisee who wants to enforce a variation of a contractual obligation must show that he has given something in return for the variation at the promisor's request which constitutes a benefit to the promisor or a detriment to the promisee: John Cartwright, *Formation and Variation of Contracts* (Sweet & Maxwell, 2014) ("*Cartwright*") at para 9-08.

95 Where a variation is bilateral, in the sense that *both* parties' rights and obligations are varied to their mutual benefit, consideration is found in "each party [agreeing] to give up the right to enforce the other's obligations in return for the discharge of his own obligations": *Cartwright* at paras 9-09 to 9-10. But where the variation is one-sided, in the sense that only *one* party takes on additional obligations under the variation, that counter-promise is absent. Consideration for the promisor's promise in a one-sided variation must be found outside the agreement to vary itself.

96 Whether a contractual variation should require consideration at all has been doubted. The reluctance to apply the doctrine of consideration as strictly in cases of contract variation is explained, in Professor Tan Cheng Han's view, by the fact that parties in an existing contractual relationship are no longer dealing at arm's length but are in fact engaged in a cooperative venture which may require "some give and take" to advance the overall objectives of their contract. That sort of "give and take" may not comport precisely with the requirements of contract law (see Tan Cheng Han, "Contract Modifications, Consideration and Moral Hazard" (2005) 17 SAcLJ 566 ("*Tan*") at paras 19–21):

> 19 … While it is true that one party to the contract may make a promise to the other without obtaining any additional rights or benefits, *it may not be correct to classify such a transaction as gratuitous*. Where the parties are in a contractual relationship, there is a degree of interdependence and the parties to such a relationship frequently do not hold the other party strictly to the terms of the contract. *There is often some give and take which takes place not because one party wishes to confer a gift on the other, but because this may better facilitate the fulfilment of the objective for which the parties entered into the relationship*. There may also be the expectation that any accommodation given will be similarly reciprocated by the other party should the need arise. As such, a one-sided promise made in this context is often made with a view to benefiting the promisor in a material way beyond joy and satisfaction and not merely to confer a benefit on the promisee.
>
> 20 It can therefore be said that *where there is already a contractual relationship, it may be more appropriate to recognise that the arm's length stage is over and the parties are thereafter working out a type of team play*. They are parties in a distinct semi-joint-venture known as "Contract". This aspect of contract is more pronounced where the parties enter into what is intended to be a long-term or complex business relationship … As such, the law should more easily facilitate contract modifications without insisting on the strict requirements of consideration.
>
> [emphasis added]

97 It has also been argued that dispensing with the requirement of consideration for a contractual variation will bring the law in line with commercial expectations and will promote certainty: *The Law of Contract in Singapore* at paras 4.059–4.060. The New Zealand Court of Appeal has gone so far as to open the door to abandoning consideration altogether as a requirement for a contractual variation to be binding, with reliance sufficing in itself: *Anton Trawlings Co Ltd v Smith* [2003] 2 NZLR 23 at [93] and *Teat v Willcocks* [2014] 3 NZLR 129 at [54].

98 We have not gone that far in Singapore. In *S Pacific Resources Ltd v Tomolugen Holdings Ltd* [2016] 3 SLR 1049 at [13], Chua Lee Ming JC (as he then was) expressed some regret that even though parties may have agreed to a variation "with the expectation and intention that each party will abide by it *whether or not the [variation] was supported by consideration*" [emphasis added], it remains the case that absence of consideration will render the variation unenforceable.

99 Authority binding on me therefore establishes consideration as part of our law of contract: *Gay Choon Ing* at [117]. That obliges me to accept consideration as necessary not only for contractual formation but also for contractual variation. The only concession to the promisee recognised by Singapore law is from *Williams*: a practical or factual benefit can be consideration for the promisor's promise.

100 The parties before me rightly accept that this is the case. Against the backdrop of these principles, therefore, I go on to analyse the facts of the present case.

***Whether the plaintiff failed to plead consideration***

101 Having considered the plaintiff's evidence and the parties' submissions, I have accepted the first defendant's submissions and dismissed the plaintiff's claim for the facility fee of $250,000. The plaintiff has failed to establish that the SA is supported by consideration.

102 I begin with the first defendant's preliminary objection to the plaintiff's pleadings.

103 Order 18 r 7 of the Rules of Court makes it clear that every pleading must contain "material facts on which the party pleading relies for his claim". Order 18 r 8 of the Rules of Court also provides:

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

Order 18 r 8 is simply one aspect of the function of pleadings, which is to ensure that the opposing party has reasonable notice of what his opponent is coming to the court to prove: *Re Robinson's Settlement, Gant v Hobbs* [1912] 1 Ch 717 at 728.

104 The first defendant submits that O 18 r 8(1)(*b*) requires the plaintiff to raise an explicit plea in response to the first defendant's averment in the defence

that the SA "is void for lack of consideration".[37] This she has failed to do. The only plausible consideration discernible from the plaintiff's pleadings appears in her reply to the defence and counterclaim and is a reference to Mr Sim's gratitude to the plaintiff and Mr Han for a large investment.[38] But this is not consideration in law.

105 I accept the first defendant's submission that the plaintiff has failed to comply with O 18 r 8(1). A promisor who asserts in his defence that the contract on which he is sued is not supported by consideration will be taken by surprise if the promisee does not plead specifically in her reply what the consideration is. This is a contravention of O 18 r 8(1)(*b*).

106 Nowhere in either the plaintiff's statement of claim[39] or reply to the defence[40] does she plead her case on the consideration supporting the SA. Her case on consideration appeared for the first time, albeit in abbreviated form, in her opening statement[41] filed as late as 21 January 2019, one week before trial began. She set out her argument on consideration in full only in her closing submissions.[42]

107 Nevertheless, I prefer not to decide the plaintiff's claim on this point of pleading.[43] I do not consider that the plaintiff's failure to comply with O 18

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37 Defence Amendment No. 2, para 6.

38 NE, 8 February 2019, p 13; see also Reply and Defence and Counterclaim ("Reply") Amendment No. 1, para 7.

39 SOC Amendment No. 2, paras 5 to10.

40 Reply Amendment No. 1, para 7.

41 The plaintiff's opening statement, para 19; NE, 8 February 2019, p 14, 24.

42 PCS, paras 9 to 29; NE, 8 February 2019, p 11.

43 NE, 8 February 2019, p 26.

r 8(1)(*b*) has caused any real prejudice to the first defendant. The issue of consideration in this action is a question of mixed fact and law. As far as the facts are concerned, the first defendant elected not to call evidence knowing that the plaintiff was asserting that the SA was supported by consideration but had failed to plead that consideration in compliance with O 18 r 8(1)(*b*). Further, the first defendant did not attempt to strike out this aspect of the plaintiff's claim or to seek further particulars of it before trial or before its submission of no case to answer. In my view, the first defendant must be taken to have accepted the risk that the plaintiff would rely on facts which she had not pleaded to make good at trial her assertion that the SA is supported by consideration.

108 In any event, it is unnecessary to rely on the pleading point to dispose of this action. First of all, of course, the defendant does not allege that this failure has caused it any actual prejudice. So in that sense, it is a technical objection. Second, and more importantly, the plaintiff has failed to establish on the balance of probabilities that the SA is supported by consideration and is therefore enforceable. I prefer, therefore, to deal with the plaintiff's claim on the merits.

***Whether the SA was supported by consideration***

109 I find that the CLA and the SA are neither part of the same contract nor part of a single transaction.

110 I find, further, the SA is a free-standing agreement for which the plaintiff provided no consideration.

*Not a single contract*

111 In support of her argument that the CLA and SA should be construed as one contract (thereby eliminating any need for the SA to be supported by

consideration separate from that which supports the CLA), the plaintiff relies in particular on cl 9.3 of the CLA.[44]

112 Clause 9.3 of the CLA is a limb of cl 9 of the CLA. That clause begins with an entire agreement clause (cl 9.1) before providing expressly that no amendment or variation of the CLA shall be effective unless carried out in writing and signed by the parties (cl 9.3):[45]

> **9. ENTIRE AGREEMENT AND MODIFICATIONS**
>
> 9.1 This Agreement constitutes the entire agreement between the Parties with respect to the transactions contemplated in this Agreement and supersedes all prior oral and written agreements, memoranda, understandings, undertakings, representations and warranties between the Parties relating to the subject matter of this Agreement.
>
> …
>
> 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.*
>
> [emphasis added]

113 The plaintiff contends that cl 9.3 allows the parties to vary the CLA without consideration. The plaintiff argues that in *Benlen Pte Ltd v Authentic Builder Pte Ltd* [2018] SGHC 61 ("*Benlen*"), the court considered a substantially similar clause and held that the clause made it possible to vary the contract "even if no additional consideration [was] provided".[46]

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44 NE, 8 February 2019, p 24.

45 AEIC of Han Jianpeng, Tab 2, Convertible Loan Agreement dated 6 January 2015, p 70 to 71.

46 PCS, para 17.

114 In *Benlen*, a subcontract provided in cl 14.2 that "[t]his Sub-Contract *shall* be varied or modified only with prior written consent from both parties" [emphasis added] (at [5]). Interpreting this clause, Chan Seng Onn J made the following observations (at [44]):

> … The effect of this clause is that the Subcontract is in fact an agreement permitting variation. In this regard, I find the following extract from Sean Wilken QC and Karim Ghaly's seminal treatise, *Wilken and Ghaly: The Law of Waiver, Variation, and Estoppel* (Oxford University Press, 3rd Ed, 2012) ("*Wilken and Ghaly*") (at paras 2.42–2.43), to be instructive:
>
> > A rigid formal adherence to the requirements of variation creates difficulties in practice. Such difficulties have been mitigated by two *mechanisms for variation of a contract* ***without*** *the express consent of the parties to, or* ***consideration for, that variation***. The first mechanism is clearly established and involves construing certain agreements as if the parties had agreed to permit certain types of variation to those agreements. …
> >
> > The common law allows agreements permitting variation in two cases. First, *when the parties incorporate within the contract a set of rules themselves providing for their own variation or amendment.* … Second, *where the parties have either expressly or impliedly agreed that one or both of them should have the power to vary the agreement … that party will have that power.*
> >
> > [emphasis added in italics and bold italics]
>
> Applying these principles to the present arrangement under the Subcontract, cl 14.2 of the Subcontract makes it possible to vary the Subcontract even if no additional consideration is provided, where both parties provide prior written consent to the proposed variation.

115 The plaintiff relies on the extract from *Wilken and Ghaly* cited in *Benlen* and says that the present case falls within the first mechanism for varying a contract without consideration, *ie*, construing the contract as if the parties had agreed to permit certain types of variation to those agreements. Put another way, this amounts to a submission that the parties agreed in cl 9.3 of the CLA on a

set of rules governing how the CLA could be varied in a manner which would bind both parties.

116 I digress to note that the position taken by Chan J in *Benlen* accepts that it is permissible for parties to agree now to be bound by a future variation which is not supported by fresh consideration, *ie*, consideration given again at the time of the variation. I too accept that that outcome is conceptually permissible.

117 Allowing a contractual clause to have this effect is not an inroad on the doctrine of consideration and does not amount to enforcing a variation without consideration. This is because the consideration for the clause, given when the parties entered into the agreement in which the clause resides, suffices by the parties' agreement to supply consideration for all future variations. To use the language of the test in *The Law of Contract in Singapore* (quoted above at [96]), any future variation *under that clause* is sufficiently connected to the consideration that was given earlier in time for the clause itself. Put another way, clauses to this effect are a basis for saying that it was the parties' intention when they entered into their original contract that the consideration given for that contract would supply the consideration for all future variations. In my view, this is consistent with the law on consideration in Singapore (see especially [92]–[93] above).

118 But *Benlen* does not assist the plaintiff. The clause which Chan J construed in *Benlen* is quite different from cl 9.3 of the CLA in this case. Clause 14.2 in *Benlen* stipulated that the subcontract "*shall* be varied or modified only with prior written consent from both parties" [emphasis added]. One construction of cl 14.2 is that it sets out *exhaustively* the requirements for a variation to be valid and binding. Any such variation would be binding if it was made with prior written consent *with no other requirements* including a

requirement for consideration. Clause 14.2 could thus reasonably bear the construction that the parties had expressly contracted thereby that the consideration for the original contract would also supply the consideration necessary for any future variation to be binding.

119 Clause 9.3 of the CLA cannot reasonably bear that construction. Clause 9.3 states that "[n]o amendment or variation of this Agreement shall be effective unless so amended or varied in writing and signed by each of the Parties". As the first defendant submits, cl 9.3 merely prescribes signed writing as a threshold or minimum requirement for a variation.[47] On any construction, cl 9.3 does not provide that signed writing is the *only* requirement for a future amendment or variation to be binding. For cl 9.3 to be reasonably capable of bearing that meaning, it would have to read "an amendment or variation of this Agreement shall be effective if it is so amended or varied in writing and signed by each of the Parties". Converting a non-exhaustive provision like cl 9.3 into an exhaustive form of words in this way goes beyond a legitimate exercise in construction. It amounts to rewriting the parties' contract. Clause 9.3 does not suffice in itself to supply consideration such that a future variation of the CLA is binding on the parties so long as it is in writing and signed.

120 I note at this juncture that the plaintiff sought to rely on the *contra proferentum* rule by arguing that, because the first defendant drafted both the CLA and the SA, cl 9.3 ought to be construed against the first defendant.[48] I reject this argument. In my view, cl 9.3 does *not* exhaustively prescribe the requirements for a valid variation of the CLA. There is no ambiguity in the

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47 NE, 8 February 2019, p 17.

48 NE, 8 February 2019, p 23.

meaning of cl 9.3. In the absence of ambiguity, there is no scope for the operation of the *contra proferentum* rule.

121 I have found that cl 9.3 does not have the effect of allowing the parties to vary the CLA without consideration for the variation. The plaintiff's argument that other clauses of the SA clearly refer to the CLA does not therefore take it very far. Even if I accept that the variations sought to be inserted into the CLA by the SA were intended to take effect within the framework of the CLA, the plaintiff must still show consideration for the SA. The variations to the CLA benefit only the plaintiff. The plaintiff's first argument accordingly fails.

*Not a single transaction*

122 Next, the plaintiff argues that there was a common understanding between the parties that the compensation for the plaintiff's performance of her obligations under the CLA, *ie*, the disbursement of the loan, would be the first defendant's additional obligations under the SA.[49] The CLA and the SA thus form a single transaction. For this argument, the plaintiff refers to *Rainforest Trading Ltd and another v State Bank of India Singapore* [2012] 2 SLR 713 ("*Rainforest Trading*").[50]

123 In *Rainforest Trading*, the Court of Appeal said (at [38]):

> … The courts are understandably (and justifiably) reluctant to invalidate otherwise perfectly legitimate and valid commercial transactions on as technical a basis as consideration. *A strictly chronological approach in determining whether consideration is past or not is deeply unrealistic and unnecessarily restrictive*; it also undermines the freedom of contracting parties as well as the sanctity of commercial transactions … *If the earlier act*

49 PCS, paras 19 to 23.

50 PCS, para 21.

> *which is said to constitute the consideration for the later promise is part of substantially one and the same transaction and there was a common understanding between the parties that the former was to be compensated for by the latter*, the consideration is valid and hence the later promise is enforceable, notwithstanding the fact that, in strictly chronological terms, the consideration was provided before the promise was made. This would often be the case for many commercial arrangements, *particularly loan transactions* …
>
> [emphasis added]

I am of course bound by *Rainforest Trading*. But the case does not assist the plaintiff on the facts. In *Rainforest Trading*, the facts unequivocally established a "common understanding" that the compensation for the loan would be the subsequent pledge of shares.

124 In *Rainforest Trading*, a bank agreed to lend US$80m to a borrower to acquire certain shares. The next day, the borrower fully drew down the loan. More than five weeks later, a third party deposited the by-then acquired shares with the bank by way of an equitable mortgage as security for the borrower's loan. The borrower defaulted on the loan. The bank sued the third party to enforce its security. The third party argued that the equitable mortgage was unsupported by consideration, having been granted after the bank had disbursed the loan to the borrower.

125 The Court of Appeal rejected the third party's argument. It found that the consideration (the bank's loan of US$80m to the borrower) and the promise (the equitable mortgage which the third party granted to the bank over the shares) were part of a single transaction (at [31]).

126 It is not difficult to see why the equitable mortgage and the loan in *Rainforest Trading* comprised a single transaction. First, and most crucially, the loan agreement expressly provided that the equitable mortgage was to be

granted pursuant to and only *after* the parties entered into and executed the loan agreement. Second, there was evidence that the third party itself accepted this to be the case: in two letters to the bank, the third party acknowledged that it was pledging the shares "with regard to" or "as part of security for" the loan. Third, the *very nature* of the parties' transaction meant that the equitable mortgage could be granted only after the borrower had drawn down the loan in order to acquire the shares.

127 None of the factors in *Rainforest Trading* which connected the legs of the parties' single transaction can be found in the plaintiff's claim.

128 Critical is the evidence of the plaintiff that the SA was the result of a "re-negotiation" of the terms of the CLA:[51]

> Sometime in March 2015, Sim and [Mr Han] re-negotiated some of the terms of the CLA *as [Mr Han] and I did not feel that [the first and/or second defendants] had achieved the financial results which Sim had claimed they would during that 2-month period*. [emphasis added]

Mr Han's evidence in his affidavit of evidence in chief is identical to the plaintiff's.[52] The substance of this evidence is that the CLA was one transaction, the terms of which were agreed when the parties executed the CLA. The SA was another transaction, the result of a *renegotiation* of the terms of the CLA. The SA and the CLA are separate transactions.

129 On the plaintiff's own case, she and Mr Han did not contemplate the SA when the plaintiff entered into the CLA with the first defendant. The SA arose only because, two months *after* investing in the defendants via the CLA, the

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51 AEIC of Ma Hongjin, para 8.

52 See AEIC of Han Jianpeng, para 16.

plaintiff became dissatisfied with the first defendant's financial results. The facts of *Rainforest Trading* are quite different. The bank, the borrower and the third party contemplated from the outset a single transaction with three legs: the loan would be granted, the shares would be acquired and then the shares would be mortgaged to the bank as security for the loan.

130 The present case is one in which the plaintiff and Mr Han realised they had concluded a poor bargain. They sought to improve the plaintiff's position by reopening the concluded bargain in order to vary its terms in her favour. It is entirely accurate that the plaintiff and Mr Han should themselves describe the SA as the result of "re-negotiating" the CLA. That is precisely what the SA was: an attempt to reopen a concluded bargain. The CLA and the SA were never part of the same transaction. The plaintiff's second argument is therefore rejected.

*No practical benefit*

131 I also do not accept the plaintiff's final and alternative argument that the SA is a free-standing contract supported by consideration in the form of a factual or practical benefit accruing to the first defendant.

132 I deal first with an argument that the plaintiff's counsel advanced in the course of the oral closing submissions. He suggested that the parties engaged in the renegotiations and reached an in-principle agreement on the terms of the SA in late March 2015, *before* the plaintiff disbursed the third and final tranche of the loan on 30 March 2015 (see [12] above).[53] The argument appears to be that the first defendant obtained a factual benefit by entering into the SA in that the

[53] NE, 8 February 2019, pp 6 to 7.

first defendant thereby secured the plaintiff's release of the final tranche of the loan.

133 I have no hesitation in rejecting this argument. First, there is no evidence whatsoever that the renegotiations took place *before* the plaintiff disbursed the final tranche of the loan on 30 March 2015. Counsel invited me to draw this inference from the plaintiff's evidence in her affidavit of evidence in chief that the renegotiations took place "[s]ometime in March 2015".[54] Since the final tranche of the loan was disbursed on 30 March 2015, and since that was the last day of March 2015, the plaintiff's submission is that the renegotiations must inevitably have taken place before the disbursement.

134 There is no evidence whatsoever to support this submission. This sequence of events is nowhere deposed to in the plaintiff's affidavits, even though the plaintiff and Mr Han would have personal knowledge of it if it were true. It is extraordinary to me that they should remain silent on this crucial point if it were in fact true. All that is disclosed by the evidence is that the SA was executed on 16 April 2015, more than two weeks *after* the plaintiff disbursed the third tranche of the loan.

135 Second, even if I were to accept as a fact that the renegotiations did take place before 30 March 2015, it does not follow that the plaintiff's disbursement of the third tranche of the loan conferred a practical benefit on the defendant. On the authority of *Williams*, I accept that a promisee's performance of an existing contractual obligation can constitute consideration for a promisor's promise where the promisee's performance confers a practical or factual benefit

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54 NE, 8 February 2019, p 6.

on the promisor. But as I have noted (at [88] above), even *Williams* does not suggest that the additional practical benefit to the promisor can arise from the fact itself that the promisee performs the existing contractual obligation. There is no evidence that the first defendant gained some benefit from the plaintiff's disbursement of the third tranche of the loan to the first defendant which was extrinsic to the disbursement. The first defendant had nothing to gain, and on the evidence gained nothing, by promising improved terms in exchange for the third tranche of a loan which the plaintiff was obliged to disburse anyway.

136 There is, in any event, no evidence that the plaintiff's disbursement of the final tranche of the loan was causally connected in any way to the first defendant entering into the SA. If that were indeed true, it is even more remarkable and even more inexplicable that the plaintiff and Mr Han should not have given positive evidence to that effect in their affidavits of evidence in chief.

137 Finally, I note that it is not the plaintiff's case that the parties reached a binding *oral* agreement in March 2015 – before the plaintiff disbursed the final tranche of the loan – to vary the terms of the CLA. The plaintiff sues only on the written SA, which the parties executed *after* the plaintiff had disbursed the third tranche.

138 For all these reasons, I reject the suggestion that the disbursement of the third tranche of the loan on 30 March 2015 was the consideration for the SA.

139 The plaintiff's final argument is that by entering into the SA and undertaking additional obligations under the CLA, the first defendant obtained a practical benefit in the form of *goodwill* from the plaintiff for future loans for

Mr Sim and his related companies.[55] On the evidence, the plaintiff did indeed extend further loans to related companies. One example is the loans which the plaintiff extended to the second defendant between June 2015 and October 2015.[56]

140 I reject this submission. There is no evidence whatsoever that any goodwill shown by the plaintiff was causally connected to the first defendant entering into the SA. In fact, the plaintiff concedes that there was no "specific promise" at the time of the SA to extend future loans to the second defendant in exchange for the first defendant's agreement to improve the terms of the CLA.[57] The plaintiff argues, nonetheless, that goodwill *in fact* accrued to the first defendant as evidenced by the further loans granted to the second defendant. I do not accept this point. Returning to the basic principle that the consideration supplied by the promisee must be causally connected to the promisor's promise (see [92] above), I do not see how goodwill for future loans could have been the price of the first defendant's entry into the SA if there was no common understanding on this between the parties. In any event, on the facts, there is nothing to connect the SA to the future loans which the plaintiff extended to the Biomax group.

**Conclusion**

141 For all the foregoing reasons, I accept the first defendant's submission that it has no case to answer. The plaintiff has failed, on its own evidence, to establish that the SA is supported by consideration. Judgment must accordingly

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55 PCS, para 28.

56 PCS, para 28.

57 NE, 8 February 2019, p 9.

be entered for the first defendant in this action, dismissing the plaintiff's claim against it.

142 Having delivered my decision, I heard the parties on costs. I bore in mind the general rule that costs should follow the event, except when it appears that in the circumstances, some other order should be made, or there are special reasons for depriving the litigant of his costs in part or in full: *Tullio Planeta v Maoro Andrea G* [1994] 2 SLR(R) 501 ("*Tullio*") at [21]. Where a successful party has raised issues or made allegations improperly or unreasonably, the court may not only deprive him of his costs but may also order him to pay the whole or part of the unsuccessful party's costs: *Re Elgindata Ltd (No 2)* [1992] 1 WLR 1207 ("*Elgindata*"), followed and approved in *Tullio* at [24].

143 I consider that the rule in *Elgindata* applies in this case. On the eve of trial, the first defendant informed the plaintiff that it was abandoning all its defences save for the consideration defence.[58] The mere fact that the first defendant withdrew these other defences does not mean, in itself, that the first defendant raised those defences improperly or unreasonably. However, I accept the plaintiff's submission[59] that in this case, there are other factors which lead to the conclusion that the first defendant raised and abandoned these defences unreasonably. In particular, I note that the defence of misrepresentation formed the more substantial passages of the defence, and compelled the plaintiff's witnesses to give substantial evidence on this defence. Yet, the first defendant did not disclose any documents in discovery in support of this defence, or indeed of any of its abandoned defences.

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58 Plaintiff's Submissions on Costs, para 9.

59 NE, 28 February 2019, p 8.

144 Thus, I accept that I should depart from the general rule on costs in this case. Exceptionally, I also accept that on the facts of this case, I should not only deprive the first defendant of the costs of the abandoned defences but award those costs against the first defendant and to the plaintiff.

145 As to quantum, I have rejected both the parties' submissions. It appears to me from the pleadings that the work done on both the consideration defence and the abandoned defences was almost equal. Therefore, I ordered the plaintiff to pay the first defendant the costs of this action fixed at $20,000 and limited to the consideration defence. I also ordered the first defendant to pay the plaintiff the costs of this action also fixed at $20,000 being the costs incurred by the plaintiff in dealing with all of the abandoned defences. The effect is that the costs orders cancel each other out leaving each party to bear its own costs.

Vinodh Coomaraswamy
Judge

Derek Kang and Kathy Chu (Cairnhill Law LLC) for the plaintiff;
Alvin Tan (Wong Thomas & Leong) for the defendants.