Gay Choon Ing v Loh Sze Ti Terence Peter and Another Appeal
[2009] SGCA 3

Case Number : CA 33/2008, 34/2008

Decision Date : 08 January 2009

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : Tan Teng Muan, Loh Li Qin (Mallal & Namazie) and Sarbjit Singh Chopra (Lim & Lim) for the appellant in Civil Appeal No 33 of 2008 and the respondent in Civil Appeal No 34 of 2008; Manjit Singh s/o Kirpal Singh and Sree Govind Menon (Manjit Govind & Partners) for the respondent in Civil Appeal No 33 of 2008 and the appellant in Civil Appeal No 34 of 2008

Parties : Gay Choon Ing — Loh Sze Ti Terence Peter

Contract – Compromise agreement – Requirements for valid compromise – Consideration – Definition – Adequacy benefit – Detriment or loss suffered – Intention to create legal relations – Contextual approach to contractual interpretation – Course of correspondence demonstrated parties' intention to reach amicable solution – Whether there was valid compromise agreement between parties by virtue of contemporaneous execution of Points of Agreement and Waiver Letter

8 January 2009 Judgment reserved.

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

Introduction

1 These are two related appeals against the decision made by the High Court in Suit No 341 of 2005, taken out by Loh Sze Ti Terence Peter, the plaintiff, against Gay Choon Ing, the defendant, respectively. For ease of reference, we shall continue to refer to the parties here as "the plaintiff" and "the defendant". The appeals arise out of the same facts, and it is convenient to deal with them together in this judgment.

2 In Civil Appeal No 33 of 2008 ("CA 33/2008"), the defendant appealed against the orders made by the trial judge ("the Judge") which included, *inter alia*, an order declaring that the defendant held 1.55 million ordinary shares of $1 each ("the Shares") in the defendant's family company, Gay Lip Seng & Sons (Pte) Ltd ("the Company"), on trust for the plaintiff. Being dissatisfied with various aspects of the decision made by the Judge (see *Loh Sze Ti Terence Peter v Gay Choon Ing* [2008] SGHC 31 ("the GD")), the plaintiff appealed to this court via Civil Appeal No 34 of 2008 ("CA 34/2008"). Three documents signed and concluded between the plaintiff and the defendant are particularly integral to the proceedings themselves: first, a trust deed concluded between both parties as at 3 January 1994 ("the Trust Deed"); second, points of agreement ("the POA") signed between both parties on 27 October 2004; and, third, a waiver letter concluded contemporaneously with the POA.

3 Having heard and carefully considered the submissions of the respective parties, we have decided to allow the defendant's appeal in CA 33/2008 and dismiss the plaintiff's appeal in CA 34/2008. We now set out the reasons for our decision.

The decision in the court below

4 The Judge carefully considered the arguments of both parties in the court below and arrived at the conclusion, *inter alia*, that the defendant held the Shares on trust for the plaintiff and that the POA should be rescinded. Central to her decision was the emphasis placed on the construction of the Trust Deed. First, she held, *inter alia*, that the approach to adopt towards the acrimonious dispute was to "construe the Trust Deed in its entirety to determine whether or not the declaration of trust was to create a trust of the Shares with [the plaintiff] as the beneficial owner" (see the GD at [19]). She reasoned that the *substance and form* of the Trust Deed suggested that the document bore the "hallmarks of an express trust" (at [20]). Further, cl 3 of the Trust Deed specifically indicated that the beneficiary would indemnify the defendant for obligations arising by reason of the Shares being registered in his name.

5 Secondly, the Judge had to consider if the sum of $1.55m, which the plaintiff had allegedly paid for the Shares, was a loan to the defendant or an investment in the Company. The Judge embarked on an extensive analysis of the testimony of both parties during cross-examination as well as the various arguments canvassed by both parties. She held that there was no contemporaneous documentary evidence of the purported loan extended by the plaintiff, and accepted that the only formal documentation of the parties' relationship was embodied in the Trust Deed. Further, and notwithstanding the defendant's assertions, she acknowledged that while both the plaintiff and defendant shared a close relationship, the circumstances were not such "that the common sense of the situation bore out a loan even out of kindness" (at [31]). Contrary to the defendant's suggestion of a loan, the plaintiff's investment represented a substantial block of shares in the Company and allowed the defendant to take control of the Company. On this basis, she found that the defendant held the Shares on trust for the benefit of the plaintiff.

6 Having decided these two issues in favour of the plaintiff, the Judge proceeded to consider the plaintiff's complaints in relation to, *first,* breaches during the period of trusteeship before the signing of the POA and *second*, whether the signing of the POA had been induced by misrepresentation or breach of trust.

7 The plaintiff alleged, *inter alia*, that the defendant had misappropriated his share of profits and dividends, dealt with the Shares without informing him or obtaining his prior consent, held himself out as the beneficial owner of the Shares and withheld material information of the Company from him. The plaintiff further averred that the defendant had fraudulently or negligently misrepresented to him that the dividends due to him amounted to $100,000 and that the fair value of the Shares was $1.4 m. The plaintiff therefore sought to have the POA rescinded on the ground of misrepresentation. He also sought to have the POA rescinded for alleged breach of trust by the defendant.

8 The Judge discussed extensively the scope of the defendant's duties as trustee under the Trust Deed. Addressing the plaintiff's four main allegations, the Judge concluded, *first*, that there were neither pre-emption provisions in the Company's articles of association restricting the transfer of shares by a member to an existing member or stranger nor any legal obligation on the part of a member "desiring to sell his shares to first offer them for sale to all the existing members of the Company", and not just to the defendant (see the GD at [52]). *Second*, the Judge found that the plaintiff was, on a balance of probabilities, aware that the issue of the Company's bonus shares were "for the original ten shares as the bonus issue was a result of a capitalisation of the revaluation of the Company's property *prior* to the issuance of the new shares" [emphasis in original] (at [63]). *Third*, she held that the plaintiff was only entitled to dividends declared on the 1.55 million shares. The plaintiff was entitled to receive dividends in respect of the Shares from the time they were first declared in 1999 up to recent times and credit was to be given for all sums received by the plaintiff already. *Fourth*, she found that there had been no breach of trust in relation to the purchase of an apartment by the defendant using the Company's funds, on the basis that the plaintiff could not

conflate the defendant's "role as trustee director and as trustee of the Shares" (at [74]).

9 Turning to the POA, the Judge considered whether the signing of the POA was induced by misrepresentation or in breach of trust. *First*, on the allegation of misrepresentation, she held that the plaintiff was unable to point to any representations made by the defendant and, further, that the elements of inducement and reliance had not been made out. *Second*, she considered if the POA could be rescinded on the basis of the "fair dealing" rule. She held that a conflict of interest had arisen when the defendant failed to disclose the value of the Shares by the date of execution of the POA. Further, she reasoned that, considering that there had been a lack of material disclosure (at [92] of the GD):

> I find that [the defendant] intentionally refrained from acquiring and providing material information as to the value of the Shares, and his conduct was such as to attract the application of the fair dealing rule. The application of the rule, as I have stated earlier, does not depend on any finding of dishonesty. [The defendant's] non-disclosure involved a conscious act of disloyalty to make his conduct a breach of fiduciary duty in the sense explained by Millet[t] LJ in *Bristol & West Building Society v Mothew* [[1998] Ch 1] at 19:
>
> > Conduct which is in breach of this duty need not be dishonest but it must be intentional.
>
> Clearly, [the defendant] took over [the plaintiff's] beneficial interest in circumstances in which there was, in my judgment, no informed consent.

This then led the Judge to consider the defendant's argument that the POA was a compromise settlement between the parties, having regard to the contemporaneous waiver letter that both parties had signed. Her reasons for rejecting this argument can be broadly classified into two main categories: *first*, she held that the defendant had not furnished *sufficient* consideration in law as the waiver letter "was *vis-à-vis* [the plaintiff] in his capacity as representative of ASP [a Kenyan company of which the plaintiff was the managing director and shareholder] and not in his personal capacity" (at [95]); *secondly*, she was of the view that the defendant's denial of the contents of the waiver letter and his subsequent "fresh assertion through his Kenyan lawyers for severance pay [pursuant to his resignation from ASP] even after the POA was signed" did not support his contention that the POA and the waiver letter were to be construed as a valid compromise or settlement between the parties (*ibid*).

10 Having rejected the defendant's argument, she concluded that the defendant had breached the fair dealing rule and ordered that the POA be set aside. As a condition of rescission, she further ordered the plaintiff to hand over a sum of $1.5m (which the defendant had paid to the plaintiff pursuant to the POA) to the defendant and that he (the plaintiff) would be allowed to set off, from this sum, dividends payable to him.

11 It must be noted that the Judge addressed each issue in great detail and spared no effort in considering the arguments put forth by the parties. Based on the arguments presented before her, she arrived at a conclusion as to the legal status of the Trust Deed. With respect, however, there is an issue which (for reasons which we will elaborate upon below) is of signal importance to the resolution of the appeal in CA 33/2008, but which was dealt with as a subsidiary issue by the Judge (see the GD at [95]). This centres on whether or not there had, by virtue of the contemporaneous execution of the POA and the waiver letter, been a valid compromise agreement between the parties. If there had been such an agreement, then the defendant would have been released from all his legal obligations under the Trust Deed provided that he had complied with the relevant terms of the POA, and the plaintiff would be released from any possible liability to the defendant with respect to the

latter's claims in relation to severance pay (see [9] above). However, this question (as to whether or not there had indeed been a valid compromise agreement between the parties) appears to have been dealt with only tangentially by the parties themselves. This (unfortunate) lack of assistance by the parties relegated this important issue to the margins and was (justifiably) dealt with as such by the Judge. The Judge came to the conclusion that there had been no valid compromise agreement (at [94]–[95]; see also above at [9]). Running slightly ahead of the story, so to speak, we regretfully differ from this conclusion for reasons which we set out in detail below. Before proceeding to do so, however, it would be apposite to set out the relevant factual background to the present appeal.

Factual background

Development of friendship between both parties

12 Aristotle once observed in *Nicomachean Ethics*, Book VIII (Cambridge University Press, 2000) (Roger Crisp trans & ed) ch 3, at p 147:

> As the saying goes, [people] cannot know each other until they have eaten the proverbial salt together, nor can they accept each other or be friends until each has shown himself to be worthy of love and gained the other's confidence. Those who are quick to show the signs of friendship to one another wish to be friends, but are not, unless they are worthy of friendship and know it. For though the wish for friendship arises quickly, friendship does not.

This was, in a sense, true of the relationship between the plaintiff and the defendant, whose chapters of friendship unfolded over the last 30 years. Both parties were by no means strangers to each other and the history of their acquaintance can be traced back to its roots, nearly three decades ago in the early 1970s, when both men served alongside each other in the Singapore Armed Forces ("SAF"). As fellow comrades-in-arms, a steady friendship blossomed between both men that surpassed the vagaries of time and continued even after they left the SAF and embarked on their separate paths in life.

13 This friendship was further cemented when both men worked alongside each other in managing the plaintiff's business. The plaintiff was the managing director and a shareholder of a company called ASP Company Limited ("ASP"), located in Nairobi, Kenya. In the early 1980s, the plaintiff, who had business interests in Thailand, sounded out the defendant as to whether he would be interested in taking up employment in Thailand. The defendant was agreeable to this and commenced his employment in 1980 with Sathask Driam Company in Thailand. In 1981, the plaintiff asked the defendant to move to Kenya and the defendant was (again) willing to do so, joining ASP as its general manager in 1981. Thereafter, from 1981 to 2004, he continued to work for the plaintiff who was both his friend as well as his immediate boss. After 1995, the plaintiff and his family moved back to Singapore from Kenya and the defendant was left to run ASP by himself, reporting to the plaintiff often by email. The defendant rose through the ranks and was eventually named a director of ASP although he did not hold any shares in ASP. During his tenure of employment with ASP, the defendant's job entailed travelling to states where ASP had its business interests, to places such as China, even as he continued to be based in Kenya.

14 With the development of such a close-knit and inextricably intertwined bond between both men, it was hardly surprising that there was a level of implicit trust and mutual respect that developed between both parties. Indeed, this almost symbiotic friendship continued to thrive through the years, extending beyond purely business relations into their personal lives. Both families were close and went on family outings together, with the plaintiff serving, in some respects, as a mentor and role model to the defendant's two children, Rosemary and Larry. As an illustration of the close

bond shared between both men, the plaintiff further arranged for Rosemary to gain admission to a good school and also financed the defendant's children's education in Australia entirely out of his own pocket. It was telling that despite the spate of proceedings in the present case, we note, in passing, that in the defendant's affidavit of 3 November 2006, he acknowledged this close bond and remarked affirmatively of the plaintiff that "[h]e was my friend, my boss and the most trusted person outside my immediate family".[note: 1]

Events leading up to the signing of the Trust Deed in 1994

15 The defendant was a shareholder of the Company, a family business started by the defendant's father. The Company owned and operated a hotel known as Tai Hoe Hotel ("the Hotel"), a two-storey pre-war building located in Little India. Prior to 1993, the defendant held one of ten ordinary shares of $1 each in the equity of the Company. The other shareholders in the Company were the defendant's brothers and his father. After his father's demise in 1989, his father's shareholding was transferred to the defendant's mother in 1995.

16 In 1993, the Company decided to redevelop the Hotel. Pursuant to this suggestion, a meeting of the shareholders of the Company was called sometime in 1993 when it was agreed that $3m represented the value of the Hotel's property and it was further agreed that for each one share currently held, additional shares of 299,999 shares would be issued ("the bonus shares"). The Company increased its authorised capital to $5.5m. The bonus shares were to be distributed "amongst the persons who were registered as holders of the issued share capital of the Company at the closing of the Register on 13 December 1993".[note: 2] Therefore, a total of 2,999,990 shares would be issued, giving a total of $3m in issued share capital, and $2,999,990 was credited to the capital reserve account of the Company.

17 The construction cost of the redevelopment of the Hotel was estimated to be about $5.5m. The bank agreed to finance the construction but required a contribution of 20% to be put up by the shareholders of the Company. The defendant agreed to invest $2.5m in return for 2.5 million shares. The other shareholders were agreeable to this.

18 Having undertaken to raise $2.5m for this redevelopment project, the defendant turned to the plaintiff in view of the friendship they shared. The plaintiff alleged that the defendant approached him to entice him into investing in the Company to enable the rebuilding and redeveloping of the Hotel. However, the defendant's recollection of this event differed – he alleged that the plaintiff "readily agreed to extend a *loan*"[note: 3] [emphasis added] to him and that he (the plaintiff) would do anything to have him remain in Kenya as he required him to continue to run the operations of ASP's business. The defendant further alleged that he confided in the plaintiff that he would prefer to secure the loan and would pledge an equivalent number of shares to him. This was to ensure that, in the event of his demise, the plaintiff would be able to recover his loan.

19 Whether the sum of money extended by the plaintiff was an *investment* or a *loan,* what is clear is that, pursuant to this arrangement between the parties, the defendant issued shares to the plaintiff. According to the plaintiff, both he and the defendant appointed Peter Chua, a solicitor with M/s Peter Chua & Partners, to document the arrangement. Both of them were agreeable to the terms and signed the Trust Deed on 3 January 1994. The Trust Deed provided as follows:

> THIS TRUST DEED is made the 3rd day of January, 1994 Between GAY CHOON ING (holder of NRIC No. S0942037/A) of 30 Verdun Road, Singapore 0820 (hereinafter referred to as "the Trustee") of the one part And LOH SZE TI TERENCE PETER (holder of NRIC No. S0015700/G) care of ASP Company Ltd, P.O. Box No. 56038, Nairobi, Kenya (hereinafter referred to as "the Beneficiary"

which expression shall where the context so admits include his successors-in-title) of the other part.

WHEREAS:-

1) GAY LIP SENG & SONS (PTE.) LTD. (hereinafter referred to as "the Company") is a company incorporated in the Republic of Singapore, having its registered office at 30 Verdun Road, Singapore 0820 and an authorised share capital of Singapore Dollars Five Million and Five Hundred Thousand (S$5,500,000.00) only.

2) 10 ordinary shares of the Company at S$1.00 each have been issued and fully paid up. 2,500,00 ordinary shares of the Company at $1.00 each have been issued and paid up for $0.24 each.

3) The Beneficiary has caused to be transferred to name of the Trustee the following shares in the Company (hereinafter referred to as "the said shares"), particulars of which are as follows:-

Certificate No.	**Paid up capital**	**No. of Shares**
11	$0.24	775,000
12	$0.24	775,000

NOW THIS DEED is made in consideration of the premises WITNESSETH as follows:-

1. The Trustee declares that he shall hold the said shares in the Company and the dividends thereon upon Trust for the Beneficiary absolutely and will sell transfer or otherwise deal with such shares and such dividends and interests payable in respect of the same in such manner as the Beneficiary shall from time to time direct.

2. The Trustee shall at the request of the Beneficiary or his successors-in-title attend all meetings of the shareholders of the Company, which the Beneficiary is entitled to attend by virtue of being the registered proprietor of the said shares, and shall vote at every such meeting in such manner as the Beneficiary or his successors-in-title shall have previously directed in writing and in default thereof and subject to any such direction at the discretion of the Trustee and further shall if so required by the Beneficiary or his successors-in-title execute all proxies or other documents which shall be necessary and proper to enable the Beneficiary his personal representatives or assigns or his or their nominees to vote at any such meeting in the place of the Trustee.

3. The Beneficiary shall at all times hereafter indemnify and keep indemnified the Trustee his personal representatives or assigns against all liabilities which the Trustee his personal representatives or assigns or his or their nominees may incur by reason of the said shares being registered in the name of the Trustee as aforesaid.

4. The power to appoint a new Trustee hereof is vested in the Beneficiary during his life.

20 By this document, the defendant understood it to mean that $1.55m would be *lent* by the plaintiff to him. However, the plaintiff understood it, on the contrary, to be an *investment* and that the defendant held the Shares on trust for him. Quite apart from this particular dispute, the quantum of money the defendant received for the Shares was the subject of some dispute between both parties; the defendant vigorously contended before the Judge that he had only received $1.4m but the plaintiff argued that the amount in question was higher, *viz*, $1.55m. The defendant contended that when a total of $1.4m was eventually received from the plaintiff after the signing of the Trust Deed, he did not endeavour to correct the Trust Deed as he trusted the plaintiff.

Events after signing of the Trust Deed –- 1995 to 2003

21 After the signing of the Trust Deed, the plaintiff continued to render assistance in the form of guidance to the defendant in relation to the development of the Hotel and the structure of the Company. Sometime in January 2001, the defendant acknowledged the plaintiff's contributions and wrote to the plaintiff thanking him for his help. In February 2003, the plaintiff contacted Rosemary to ask for details of dividends paid by the Company. Rosemary responded to the plaintiff's query and he was informed of the dividends paid in relation to 1.4 million shares. On 2 June 2003, the plaintiff followed up with further enquiries relating to the dividends payable for 2002. He was informed that these had not been paid.

A turn for the worse – 2003 to 2004

22 However, relations between the plaintiff and the defendant began to sour in 2003. In August 2003, the defendant indicated to the plaintiff that he wished to retire from ASP and mentioned that ASP paid retirement sums to its employees on their retirement from ASP. The plaintiff sought to persuade him to stay on for another year. The defendant agreed to do so but this did not dissuade him from wanting to retire eventually. On 30 July 2004, the defendant wrote to the plaintiff reiterating his intention to retire from ASP with effect from 31 October 2004 and asked that ASP "work out [his] terminal dues before [his] departure date".[note: 4]

23 Subsequently, in August 2004, the defendant again informed the plaintiff of his intention to retire but the plaintiff asked him to stay on for another three months to assist in a project and for time to work out the termination money payment. On 11 August 2004, the defendant wrote an email to the plaintiff as follows:[note: 5]

> I am required urgently in Singapore. I leave tonight and return on 18th. I will truly appreciate your releasing me on 31st Aug for my project requires that I be there personally. This is my one and only project after leaving you.
>
> You asked me about what is the fair value of your shares. I think the answer does not lie entirely in that it lies in how much blessing and good will you would give me when I leave you today and start on my own alone. I am not really concerned about how much you paid-in when you decided to help me out in 1993 and the value the shares were transacted just a few months ago. What I cannot afford is the value derives from the valuation of the property such as when my brother Gary did it to me.
>
> Since we both are so awkward about my severance package perhaps I just leave it to my friend in Nairobi to handle on my behalf after I have left if you find it less personal.

24 On 12 August 2004, the plaintiff responded tersely to the defendant's email, confessing openly that he felt betrayed by the defendant's decision to leave the employment of ASP:[note: 6]

1. [The Hotel]

Your own words to me is that you will make sure it is a good investment for me, that you will never cheat me etc. Your own words is how decent I have been in the TH investment never interfering etc- should this decency be rewarded or ignored?

Consider the facts

a. The investment was made over 10 years ago. Shortly after the fight with your brother was over, [I] stop getting any accounts or information etc.

b. I have not received any benefit from this investment while for years your family have.

c. When dividends are declared, I am not even informed and basically you have taken the dividends without telling me or asking me. Only when [I] needed funds and asked did I find out and even then [I] did not know you took it until LH had to tell Rosemary that as far as she is concerned she paid it all through you.

…

Tell me can you challenge [these] facts? Tell me in your heart is it right or fair?

Tell me, if you were in my position would you have accepted it?

Tell me what conclusion am I to draw from your actions?

If I did not have a trust document lodged with the lawyers, tell me what would my position be?

Inspite of everything, [I] had faith in you-was this misplaced? I never thought this of you. …

…

It would also be nice if you tell me exactly what [I] can expect from my investment and your promise of making it a good investment for me and when you will repay the dividends and when [I] will see some benefits so that [I] can decide what to do.

2. [ASP]

…

c. You said you told me last [A]ugust you wanted to leave. Remember that you have said before that you are leaving as early as from 1983. If [I] recall it was even last Aug you were to leave so let us be clear you are leaving at your convenience. In view of the many times you were leaving, [I] do not react until you want it to happen. …

[ASP] you know is in crisis and who by the way pays your salary all these years? [ASP] or [the Hotel]? I would expect some loyalty and care for [ASP] and especially to see that Nyeri is settled and a production planned set up. You return on 18/8 and want to hand over in 12 days? Do you really think this is fair or responsible or even possible?

I am not exactly sitting here and twiddling my thumbs.

You know the pressure I am under so it is clear you are only focussed on your interest and nothing else matters

I never thought I would ever have to say to a person such as you that you are derelict in your duty.

All you are concerned with is your package …

…

… You have let me down at this crucial juncture.

What was I asking for?- 3 months notice to give me time to try and sort things out. I hardly think this was unreasonable or unfair.

You have lost your bearings and sense of responsibility to the company that employs you and that has faithfully paid you however bad the times.

[emphasis added]

25 The relationship between the parties began to spiral out of control, taking a turn for the worse with the plaintiff, on one hand, accusing the defendant of withholding information from him and treating the Trust Deed as an investment and the defendant, on the other hand, becoming increasingly exasperated by the deepening rift that was widening between them. On 5 October 2004, the defendant wrote to the plaintiff seeking to work out the severance pay with regard to the local contract (what he had referred to in his earlier letter of 30 July 2004 as his "terminal dues" (see above at [22])). The letter encapsulates how embittered and tenuous relations between both parties had become:[note: 7]

I guess feeling is mutual. [B]ut [I] am glad the agony among all of us finally comes to an end. [I] do not think anyone is to be blamed for the situation we are in today. [R]ather it is a natural phenomenon among the family run businesses around the world. [I] have said so to you many times in the past and [I] am realistic about it even if there may be a shown [*sic*] down between us this month it is merely between the company and me as its employee. [I]t will not be emotional and [I] will not be bitter with you. [B]etween us personally let's put everything behind us. [I] can appreciate that you do what you got to do.

[I] cannot imagine how [I] survived and went through the last six months in this company.

[D]o you all appreciated [*sic*] *the state of mind I was in since beginning this year. [E]veryday living under suspense and uncertainty. [T]he most trying moment in [ASP]. … [I] had no one to turn to everyone seems to be avoiding the problem and the impression given was: we are broke and we are helpless. …*

…

[I] will be leaving the company on 31st [O]ct 2004. [F]or the record [I] started working for this company back in [B]angkok on 21st [F]eb 80 and a total of 24 years and 9 months. [W]hat is the company's stand on my service. [I] like to know it for my own piece of mind. …

…

Then [for] my sake, can the company work out my terminal dues for both local and foreign. [I] enclose my own working base on our two managers who left the company recently for your agreement. [T]hey both received 3 months for every year they worked so my computation is based on 4 months for every completed year of my service. [I] hope this is acceptable.

[emphasis added]

26 On 6 October 2004, the defendant again wrote to the plaintiff, copying the email to a few other employees of ASP, as follows:[note: 8]

[I]n your last email [A]ug the 12th you have again mentioned all that you have done for me and my family and make it appear as if if [I] ask for my final dues [I] am an ungrateful man, employee and friend. [I] am now compelled to revisit some of the things that [I] can recall [I] have done in the name of this company's family and hopefully you will be convinced that we are even and in your own words: it is childish to draw balance sheet among friends. [W]e have done what is required for the survival of this company and the time has come for me to leave the company with due recognition.

In this letter, the defendant proceeded to cite several instances of how he had succeeded in resolving business problems encountered in his employment at ASP. The contrast between the intensity of the bond once shared between the parties and how it had been broken is apparent in the letter. A note of resignation with a view to moving on is noticeably present in the undertones of the email:

[T]oday our difference in opinion is so far apart that there seems little chance that we would be ever able to work together again. [W]e have lost the bond like we had before. [Y]ou must not ignore those days we spent together driving to remote part of [K]enya and got stuck in the mud. [C]an you remember the last time we spent together as families. [I]t must be more than fifteen years ago. …

…

[T]hose who receive a copy of this email bcc and those who question my loyalty [I] want them to know that what [I] have done for this company (you) is not quantifiable and [I] do not intend to do so. *[I] only wanted to suggest that we all put everything behind us and [I] will leave with what [I] have earlier on expressed in my email to you. … [I] am just tired and [I] want to hang up my boot but if in future you should need me to soldier on again with you due to some reasons which [I] believe that day will come and again my skill may be required [I] promise you when that day comes [I] will gladly put back my boot.*

[emphasis added]

2 7 In an email sent by the plaintiff to the defendant on 15 October 2004, he (the plaintiff) appeared to recognise this practice of paying retirement sums to employees:[note: 9]

I cannot produce cash from thin air and your settlement must somehow come from [the Hotel] which is the only one without debt and is profitable.

He voiced how he wished to work out an amicable solution because they were "friend[s] and strong all[ies]":[note: 10]

(I) The past

…

3. All of this resentment you feel that you are not treated well is tied in a major way to your remuneration. I have asked [you] in the past to go and investigate with your friends etc and enquire about people's packages. …

…

Take your net of USD7500 per month x the 15 years since 1989 and you get USD1,350,000. There were other sums not in this figure like bonuses etc So what [I] am trying to say there are many ways of looking at things and I really feel I have more than done my part. Each time along the way, at the end of SDT [I] gave you a sum, when Bob came, I gave [you] a sum. When we did well , [you] got 4 to 5 mths bonus, always net- yet when we are on our knees due to the many bad years how are [you] reacting? Even though these years [you] ran the company.

…

(II) [ASP]

1. You have been in full charge of the company for many years so you know the exact position the Company is in. All the export jobs we hoped for did not materialise. I state this as a fact and not to apportion blame. Over the last 4 to 5 years I have had to borrow money to send to prop the company up and on top of that we have loans of USD3M and no facility left to even have working capital. This loan is not backed by amounts owed to us by contractors so over the next 3 to 5 years we have to earn real profits of this US 3M to repay the Bank. In reality, [ASP] is [at] the lowest it has been and has to be rebuilt and it will take quite some time. …

…

III. Summary

(a) Why am I writing this e mail? To try and show [you] there is a different side to things and a different view which I hope you will think about.

(b) Currently you know the state that [ASP] is in and its cashflow position. Dar has not even begun commercial production and [is] in no position to help and indeed it should have been [ASP] helping as the more [established] company. We are all trying to take the co. thru this patch ...

I cannot produce cash from thin air and your settlement must somehow come from [the Hotel] which is the only one without debt and is profitable.

…

(i) *We are both tired and tense and emotional. … As I said, there is disappointment on both sides. I hope time will let us take a kinder view of each other.*

For now, all we can do is to talk and try to find a solution for each other. After all this time it would be nice if we do as much as we can so that the friendship remains. I appreciate what

[you] said about at some future time if your skills are required again, then [you] will gladly put back on your boots. This makes me hope we can sort things out amicably as I have always considered [you] a friend and strong ally.

[emphasis added]

28 On 16 October 2004, the defendant replied to the plaintiff's email and assented to resolving to the matter amicably instead of seeking to litigate:[note: 11]

[I] agree with you that legal way is double edge and it can be long drawn battle. [B]ut [I] am not fighting the battle. …

…

[I] wait to see if the company will settle with me amicably through one of the mediators above and [I] look forward to being called upon by him on behalf of the company for a final agreement.

29 As can be seen from the above exchange of correspondence, both parties were highly strung and emotional over the acrimonious relations and disagreements that had resulted from the ongoing dispute. However, in the midst of the negotiations, both men acknowledged and recognised their past bond as both friends as well as business allies and, on the basis of this friendship and bond once enjoyed, they sought to settle matters amicably rather than legally.

Signing of the POA

30 On 25 October 2004, the defendant's Kenyan lawyers, M/s G N Gichuhui Ngari & Co Advocates, wrote to the plaintiff seeking payment of the defendant's "terminal dues" within seven days. This culminated in the signing of the POA by both parties two days later, on 27 October 2004. With respect to this document, the defendant alleged before this court, first, that he had no input into the POA; second, that the document was prepared by the *plaintiff*; and third, that the waiver of the retirement dues was only for the *foreign* contract and the plaintiff would pay him under the *local* contract as the amount involved was small. The POA in fact stated (in full) as follows:

Points of Agreement

Mr Gay Choon Ing is holding in trust 27.5% (equivalent to SGD1,400,00/-) of the share capital in Gay Lip Seng & Sons (Pte) Ltd, in trust for Mr Terence Loh Sze Ti, representing the actual payment made by Mr Terence Loh for this investment. The Trust Document is held by Mr Peter Chua of Peter Chua & Partners.

Mr Gay Choon Ing and Mr Terence Loh Sze Ti have agreed that Mr Terence Loh will sell to Mr Gay Choon Ing the entire 27.5% held in trust for SGD1,500,000/-, made up of SGD1,400,000/- original investment plus SGD100,000/- dividends not received. This amount is payable, SGD500,000/- on 15 November 2004, SGD500,000/- on 15 November 2005 and SGD500,000/- on 15 November 2006.

On completion of payment of the purchase price, the Trust Document will be surrendered to Mr Gay Choon Ing by Mr Peter Chua as stakeholder.

While payment is being made, Mr Peter Chua will hold the Trust Document on behalf of both parties as stakeholder and Mr Gay Choon Ing will be entitled to vote the entire 27.5% share as he

wishes at any AGM or EGM or shareholders' meeting as long as it is not adverse to Mr Terence Loh's interest.

If payment is not received within fourteen days of due date, interest will accrue at 3% above the Citibank base rate until such time as payment is received and Mr Terence Loh will be entitled to vote the 27.5% share interest at any AGM, EGM or shareholders' meeting.

31 What was particularly significant was that on *the exact same day*, a waiver letter was sent by the plaintiff in his capacity as managing director of ASP to the defendant ("the Waiver Letter"), stating the following:

Dear Mr Gay

Further to our meeting today, we thank you for accepting that it was your decision to leave and bearing in mind the financial position of the company, you have accepted to leave on 31 October 2004 after your notice period *without claims on the company whatsoever.*

In turn, the company acknowledges that it has no claims against you whatsoever.

We thank you for the many years of dedicated and loyal service to the company and wish you every success in your future endeavours.

Please sign a copy of this letter as your acknowledgment and acceptance.

[emphasis added]

This letter was signed by the defendant as well as by the plaintiff on behalf of ASP. Bearing in mind the chain of correspondence between both parties set out above and the fact that both parties signed both documents contemporaneously on the same day, three significant conclusions can be drawn from this: *first*, far from suggesting that the parties were seeking to initiate legal proceedings to resolve the outstanding disputes, both parties were keen on *resolving* matters *amicably*; *second*, this intention to resolve matters amicably had effectively *materialised* with the *execution* of these two documents, where each party in effect promised to have "no claims against [the other] whatsoever"; and, third, the Waiver Letter was signed by the defendant at the *request* of the *plaintiff*, thus sealing this commitment between both parties towards resolving matters amicably.

32 *After* the POA was executed, the defendant returned to Singapore and, by 10 January 2005, full payment in the sum of $1.5m was made to the plaintiff. Receipt of this sum was acknowledged in an email sent by the plaintiff to the defendant on 10 January 2005:[note: 12]

Dear Gay,

1. Thank you for payment thru Peter Chua.

2. Good luck and *best wishes for your future endeavours*.

God Bless

TL

[emphasis added]

33 However, tempers (unfortunately) flared up again when on 10 February 2005, the plaintiff wrote to the defendant, alleging that the defendant may have committed criminal breach of trust and that the defendant had made threats to him at a dinner in Shanghai, even as he reiterated his intention that he had hoped to resolve matters amicably:[note: 13]

Dear Gay,

1. *I had hoped we both can move on with our lives without bitterness. I have [ASP] to rebuild and [you] have [the Hotel] to expand and it seems senseless to be in conflict.*

2. You may or may not be aware that with a criminal breach of trust, the mere repayment does not remove the [criminal breach of trust] and it stays a criminal offence. I certainly would not like to pursue this and it will also involve your family regarding the dividend payment etc and [whether] they perjure themselves or what and me explaining to them why [I] have to take such action and why the dividend was hijacked and given to who[m].

Also with [criminal breach of trust], once it is brought to the authorities it is out of my hands and unlike a civil case where at any time the lawyer can be instructed to stop the case.

3. Also, if there were things done without me or indeed other shareholders knowing at [the Hotel] or with the shares, I will get a court recovery and get the shares back and perhaps there can be justice to all minority shareholders past and present who can then actually takeover.

4. On top of all this, it is now on record your threats made at the dinner in [S]hanghai. Is this criminal intimidation/criminal intent? You have even said assume anything bad that happens it is you- it makes it easy to make a police report.

I hope all of this is not necessary and we can forgive each other and move on to the next stage of our lives.

[emphasis added]

34 Under the present cloud of simmering tensions, this unfortunate turn of events unsettled both parties and culminated in an eventual impasse. The plaintiff's letter was followed by the defendant's reply in his defence on 21 February 2005,rebutting the plaintiff's allegations of criminal breach of trust as "unjustified and unwarranted", as follows:[note: 14]

My dear [T]erence,

[Y]our email of 10th [F]eb 2005 instant refers.

[Y]ou have in your email made reference to alleged criminal breach of trust and you have also made reference to my family.

[I] consider your email as threat which is unjustified and unwarranted and [I] take strong objection to your email and put on record my rejection of the allegation you have made.

[Y]ou have also in your email made an unjustifiable threat of civil process to "get the shares back" this is an intimidation.

[I]n your email, you made reference to the "threats" [I] allegedly made at a dinner in [S]hanghai. [I] categorically denied having made any threats against anyone. [C]an you provide me with the

following details:

1. what "threats" were allegedly made. eg. details of the words/phrases used.

2. when and where these alleged "threats" were made.

3. to whom were these alleged threats made.

4. who were the individuals present when these threats were allegedly made.

[I]n the mean time [I] reserve my rights in this matter.

35 On 21 March 2005, the plaintiff, through his lawyers, M/s Manjit Govind & Partners, wrote to the defendant requesting for true copies of the Company's accounts in view of his investment, alleging that the defendant was a "trustee of his interest in … the Company" and that "as his trustee [the defendant had] withheld information that would affect the value of his shares".[note: 15]

36 On 30 March 2005, the defendant, through his lawyers, M/s Lim & Lim, refuted the plaintiff's allegation that the plaintiff had invested in the Company and *first*, alleged that the money was an interest-free loan for which "as security, 1.55 million shares would be 'pledged' to [the plaintiff]"; *second*, indicated that he (the defendant) was willing to have the plaintiff's auditors look at the Company's audited accounts to confirm the status of the dividends; and *third* (most critically in our opinion), sought to frame the signing of the POA as an initiative engineered by the plaintiff although he confirmed on record that the *plaintiff* had *requested* him to sign the Waiver Letter to promise that he would have no claims against ASP whatsoever:

> In October 2004, your client drew up the points of agreement in relation to the shares and at the same time drew up a letter effectively attempting to avoid paying our client his termination dues.
>
> The Points of Agreement made specific reference to the dividends and it was taken into account in the redemption price. *Your client was most concerned that our client had legitimate claims against your client's Company for the 23 years and 8 months service our client had given to your client and his Company.*
>
> Our client believes that he is entitled according to Kenyan law to a very substantial payment for the years of service he had put in. *It was this that most concerned your client and your client insisted that our client signed your client's letter stating that our client had no claims. Your client required this to be signed together with the Point of Agreement. Our client says he did sign the letter under intense pressure.*
>
> *As mentioned, the documents were drawn up by your client and were signed at his premises.*
>
> …
>
> *It was your client who arranged for the preparation of the Points of Agreement which fixed the price for the redemption of the shares. Our client did not make any representation to your client.*
>
> [emphasis added]

It should be noted that the contents of this particular letter belied the parties' intention and effort, at

the point of execution of the POA, to extinguish their claims against one another and the plaintiff's intention, by extending the Waiver Letter on the same day and requesting the defendant to countersign on the letter, to cement this effort at reaching a final (and legally binding) reconciliation. This was by no means a half-hearted attempt at putting a stop to the escalating tensions mounting between them.

The issues on appeal

37 The defendant appealed, *inter alia*, against the following aspects of the Judge's decision:

(a) that he held the Shares on trust for the benefit of the plaintiff;

(b) that the POA between the parties be rescinded; and

(c) that he account for dividends payable to the plaintiff in respect of the Shares, which dividends were first declared by the Company in 1999 right up to recent times.

38 The plaintiff appealed against those aspects of his case which the Judge did not agree with, including, *inter alia*:

(a) that as a condition to the rescission of the POA, he was to hand over the sum of $1.5m to the defendant;

(b) that he was not entitled to 61.9% of the shares of the Company; and

(c) that the defendant was not in breach of his duties as trustee and at law in failing to offer him the proportion of the Shares held on trust.

39 In our view, these issues, with respect, miss the real focal point of the dispute between the parties. The key inquiry, having regard to the events that transpired and led to the present proceedings as mentioned above, was whether or not the POA and the Waiver Letter constituted a valid compromise agreement between the parties. Running slightly ahead of the story, so to speak, it was in fact clear to us, from a close analysis of these documents as well as the context furnished by the course of correspondence between the parties from October 2004 to February 2005, that both the plaintiff and the defendant, for all intents and purposes, *acted and proceeded* on the basis that there was a concluded compromise. The plaintiff promised to release the defendant from *all* his obligations under the Trust Deed in accordance with the terms of the POA while the defendant in turn, agreed to relinquish *all* claims against ASP. It is also pertinent to note, first, that the settlement sum extended was ultimately paid and received *without* any qualification; and, second, that the plaintiff wished the defendant well in his *future* endeavours. Both parties clearly were keen to move on and put aside their differences. What appeared to derail these hitherto settled relations were the purported threats made over the dinner in Shanghai. However, this would *not* affect the *already concluded* compromise agreement between the parties which, in our view, effected a "clean break" between them, leaving no outstanding legal issues between them under the Trust Deed as well as between the defendant and ASP with regard to the former's claims for severance pay.

40 We should, however, emphasise, at the outset, that we find the findings and reasoning by the Judge with regard to all the remaining issues to be both meticulous as well as correct. Hence, we need focus only on whether or not the parties concluded a valid compromise agreement. Our decision on this particular issue is relevant to the appeal in CA 33/2008. This is because, although we have affirmed the findings and reasoning of the Judge with respect to the remaining issues, the defendant

would nevertheless succeed in his appeal if there is a valid compromise agreement. However, it necessarily follows then that the plaintiff's appeal in CA 34/2008 must fail. We turn now to the reasons why we find that the parties had concluded a valid compromise agreement.

Our decision

The law on compromise

41 In the leading Commonwealth textbook on compromise and settlements, Foskett QC sets out the following definition of a "compromise" (see David Foskett, *The Law and Practice of Compromise* (Sweet & Maxwell, 6th Ed, 2005) at para 1.01):

> Compromise can be defined as *the settlement of dispute by mutual concession, its essential foundation being the ordinary law of contract* … A more practical and, perhaps, more apt definition would be *the complete or partial resolution by agreement of differences before final adjudication by a court or tribunal of competent jurisdiction.* [emphasis added]

This definition finds, in fact, judicial expression in several old English cases such as the English Court of Appeal decision of *Plumley v Horrell* (1869) 20 LT 473, where Lord Romilly MR observed, as follows (at 474):

> *Primâ facie* everybody would suppose that a compromise means that the question is not to be tried over again. That is the first meaning of a compromise. When I compromise a law suit with my adversary, I mean that the question is not to be tried over again.

In the (also) English Court of Appeal decision of *Knowles v Roberts* (1888) 38 Ch D 263, Bowen LJ reiterated (at 272) that a compromise essentially puts a dispute to an end:

> As soon as you have ended a dispute by a compromise you have disposed of it.

42 Bearing in mind the mechanics of an adversarial system of litigation, it is not surprising that parties may seek to give effect to the terms of their agreement to compromise and settle their disputes, whether *prior* to or *at* the trial itself. The courts would permit this, if certain requirements are satisfied. The rationale for this has been alluded to briefly by K S Rajah JC in the Singapore High Court decision of *Lee Hong Choon v Ng Cheo Hwee* [1995] 2 SLR 663, as follows (at 666, [11]):

> This is known as the principle of 'party control' or 'party autonomy', and it is of exceptional importance since its effect is to promote the resolution and disposal of pending proceedings and thus to reduce to a fairly acceptable minimum the number of actions or proceedings which are actually tried by a judge at a plenary trial or are finally adjudicated upon by the court. The law encourages the compromise or settlement of civil disputes and employs a number of devices or techniques for this purpose. These include:
>
> (1) the right of the parties to negotiate under the protection of the privilege of 'without prejudice';
>
> (2) the device of a payment into court in satisfaction of a claim for debt or damages;
>
> (3) the making of an 'open offer' in claims other than for debt or damages;
>
> (4) the making of a written offer expressed to be 'without prejudice save as to costs';

(5) the offer of a contribution in third party proceedings;

(6) the offer to accept liability up to a specified proportion.

Put simply, where parties have demonstrated that they intend to dispose of their dispute by reaching an amicable resolution agreeable to both parties, this compromise or settlement will be recognised and given effect to by the courts.

43 As Foskett observes (at para 3.01), a compromise is essentially founded on contract. Before a compromise can be reached between two parties, there must, of necessity, be an *actual or potential dispute* between parties that can be disposed of, as established in cases such as *Chapman v Chapman* [1954] AC 429, *Mercantile Investment and General Trust Company v International Company of Mexico* [1893] 1 Ch 484 ("*Mercantile*") and *Sneath v Valley Gold, Limited* [1893] 1 Ch 477. In the English Court of Appeal decision of *Mercantile*, an action was brought by the holders of 125 debentures (issued by the defendant American company) with the aim of recovering interest due on them. The defendant company alleged that, at a prior company resolution, a majority of the debenture holders had resolved that the debentures of the company be exchanged for paid-up preference shares in an English company which had taken over the assets and liabilities of the defendant company. Hence, the defendant company argued that the plaintiffs' rights as debenture holders had determined, given that the resolution was binding on the plaintiffs. In considering the validity of the resolution and whether it modified or compromised the rights of the debenture holders against the defendant company, Fry LJ observed (at 491) that:

> [I]n my opinion, this transaction is not a compromise of these rights. In our older legal language the word "compromise" appears to have been used, in accordance with its etymology, to express the mutual promises of "persons at controversy" to submit to the arbitrament of a third person the matters in dispute between the two (see "A compromise defined," 2 West Symboleography, 163). *In our present language it undoubtedly embraces an agreement between two or more persons for the ascertainment of their rights when there is* ***some question in controversy*** *between them or some difficulty in the enforcement to the uttermost farthing of the rights of the claimant. But, in my opinion, the word is applicable only where there is some such controversy or some such difficulty.* Nothing of the sort existed in the present case. [emphasis added in italics and bold italics]

44 In the Singapore High Court decision of *Info-communications Development Authority of Singapore v Singapore Telecommunications Ltd (No 2)* [2002] 3 SLR 488 ("*Info-communications*"), Lai Kew Chai J, citing Foskett, observed at [120] that:

> A compromise is little more than a species of contract. What distinguishes it from other contracts is *the requirement of a dispute or differences between parties which are eventually settled*. In Foskett *The Law and Practice of Compromise* it is written (at p 5):
>
> > Bearing in mind its essential nature, it is submitted that a compromise in the true sense of the term cannot arise until some dispute or difference of view exists between the parties which, by agreement, they resolve. It is not necessary for there to be pending litigation, but there must be some 'actual' or 'potential' dispute.

The learned judge further noted, in a similar vein, as follows (at [124]):

> In essence a compromise is to contract to settle disputes. If the elements of contractual formation are satisfied on the facts, then a compromise was entered into by the parties.

45 What can be gleaned from the aforementioned extracts is that without an *actual or potential dispute*, it is obvious that nothing can be settled or compromised. A compromise or settlement is the *result* of the resolution of an actual or potential dispute.

Essential requirements of a compromise

46 As already alluded to above, the general principles of contract law apply with equal force to the law of compromise as in other contractual contexts. As Foskett has observed (at para 3.01, and adopted in *Info-communications* (at [115])), a compromise will not arise unless certain requirements are fulfilled; these include (differing somewhat, though, from the precise sequence Foskett has adopted) what is, in fact, traditionally required under the general common law of contract, *viz*, an identifiable agreement that is complete and certain, consideration, as well as an intention to create legal relations. As these requirements are elaborated upon in detail in all the leading textbooks on contract law, just a basic outline will suffice for the purposes of the present appeal.

An identifiable agreement that is complete and certain

47 *First*, there must be an identifiable agreement, which is complete and certain. Essentially, this means that negotiations between the parties must have crystallised into a contractually-binding agreement in which there is no uncertainty as to the terms of the contract concerned. The traditional tools of analysis centre around the concepts of offer and acceptance. An "offer" has been described as follows (see M P Furmston, *Cheshire, Fifoot and Furmston's Law of Contract* (Oxford University Press, 15th Ed, 2007) ("*Cheshire, Fifoot and Furmston*") at p 40):

> An offer, capable of being converted into an agreement by acceptance, must consist of a definite promise to be bound, provided that certain specified terms are accepted.

An "acceptance" has been described as follows (see Edwin Peel, *Treitel: The Law of Contract* (Sweet & Maxwell, 12th Ed, 2007) ("*Treitel*") at para 2.015):

> An acceptance is a final and unqualified expression of assent to the terms of an offer.

48 An "offer" must be distinguished from an "invitation to treat". The former has already been defined above (at [47]). The latter, on the other hand, is simply an attempt to initiate negotiations, to induce offers; hence, a response to an "invitation to treat" can never result in a concluded contract. Although there are decisions illustrating specific instances of "invitations to treat", the distinction between an "offer" on the one hand and an "invitation to treat" on the other is, at bottom, a question of the *intention* of the party concerned (*viz*, whether his or her intention was to make "a definite promise to be bound provided that certain specified terms are accepted" (an offer; and see above at [47]) *or* merely attempting to induce offers instead (an invitation to treat)).

49 It should be noted, however, that the concepts of offer and acceptance are not always helpful – not, at least, where they are applied in a mechanistic fashion. But, of that, more later (see below at [61]–[63]).

50 It should be further noted that before a contract can be said to have been concluded, the terms of the contemplated contract must be both certain and complete (see the oft-cited House of Lords decision of *G Scammell and Nephew, Limited v HC and JG Ouston* [1941] AC 251). Possible gaps may be filled by a previous course of dealing between the parties or by trade practice or where a definite formula exists (see, in this last-mentioned regard, for example, the English decision of *Brown v Gould* [1972] Ch 53; the Malaysian Privy Council decision of *Kepong Prospecting Ltd v Schmidt*

[1968] 1 MLJ 170; and the decision of this court in *British Malayan Trustees Ltd v Sindo Realty Pte Ltd* [1999] 1 SLR 623).

51 Turning to a specific illustration where a valid compromise agreement was found by the court, in the Malaysian Federal Court decision of *The Ka Wah Bank Ltd v Nadinusa Sdn Bhd* [1998] 2 MLJ 350, the respondents were directors of a company that had been granted banking facilities by the appellant bank. The respondents defaulted in payment and the bank commenced three suits against them. The respondents contended that the first suit had been *compromised* as a result of an exchange of correspondence passing between their solicitors and an authorised agent of the bank. They averred that the totality of the letters read as a whole constituted a binding agreement in full and final settlement. Not surprisingly, the bank denied that this was a valid compromise.

52 The Federal Court focused on the construction and the effect of the correspondence exchanged between the parties to see if "there [was] to be found in them an offer substantially accepted in terms which constitute a contract" (at 366). Citing the House of Lords decision of *Gibson v Manchester City Council* [1979] 1 WLR 294 ("*Gibson*"), the court referred to Lord Diplock's observation in that case (at p 297) that:

> [T]here may be certain types of contract, though … exceptional, which do not fit easily into the normal analysis of a contract as being constituted by offer and acceptance; but a contract alleged to have been made by an *exchange of correspondence between the parties* in which the successive communications other than the first are in reply to one another, is not one of these. [emphasis added]

Adopting this approach, the Federal Court considered the chain of correspondence between the bank's authorised agent and the respondents' solicitors and came to the conclusion that there was a *valid* compromise in the circumstances, on the basis of *two* letters suggesting that the bank would accept shares owned by the respondents (and the transfer forms duly executed) as *full and final settlement* of the sum owed.

53 The aforementioned paragraphs suggest (correctly, in our view) that the courts look at the *whole* course of the negotiations between both parties in order to ascertain if an agreement is reached *at any given point in time*. It should further be noted that where such a point is identified, the mere fact that negotiations are continued *thereafter* does not of itself affect the existence of the agreement *already concluded*. Of course, if the continued negotiations disclose *an agreed rescission* of an agreement already concluded, then the position is quite different.

54 Once an agreement has been established by the court, that concludes the matter. In the Singapore High Court decision of *Tan Kee v The Titular Roman Catholic Archbishop of Singapore* [1997] SGHC 281, for example, G P Selvam J observed, as follows (at [31]):

> A compromise is a settlement agreement arrived at, either in court or out of court, either before or after action, for resolving a dispute or settling a claim upon what appears to the parties, and in particular the conceder, to be fair and equitable terms, having regard to the uncertainty they are in regarding the facts or the law and facts together. *Once concluded neither party may resile from the compromise or settlement as that would [be] tantamount to a breach of contract and courts find such conduct unacceptable.* [emphasis added]

55 More recently, in *Man Financial (S) Pte Ltd v Wong Bark Chuan David* [2008] 1 SLR 663, this court considered whether a termination agreement entered into between the appellant and the

respondent constituted a *fresh contract* or a *settlement agreement*, and observed (at [40]) that:

> On a more general level, we should emphasise that *if a particular agreement between existing contracting parties is intended to encompass or embody a settlement or compromise, it would be prudent for the parties concerned to state this clearly in the contract itself. If that is not done*, the court will, as in the *present* case, construe the contract concerned objectively, having regard to the relevant terms in the *context* in which they were arrived at and the substance of the contract. In the final analysis, substance is more important than form. In the present appeal, what is important is the fact that the correspondence set out above points clearly to one thing (and one thing alone): *The very pith and marrow of the Termination Agreement centred on the closure of the existing employment relationship between the appellant and the respondent*. This agreement was *not*, in other words, a contract that sought to compromise or settle *existing disputes* between the parties in respect of *existing covenants or clauses in restraint of trade.* [emphasis in original]

56 Indeed, the *objective* nature of the entire inquiry has been underscored in many cases. For example, in the decision of this court in *Aircharter World Pte Ltd v Kontena Nasional Bhd* [1999] 3 SLR 1, M Karthigesu JA noted (at [30]) that:

> Under this test [for determining whether the parties have reached an agreement], once the parties have to all outward appearances agreed in the same terms on the same subject-matter, then neither can, generally, rely on some unexpressed qualification or reservation to show that he had not in fact agreed to the terms to which he had appeared to agree. Such subjective reservations of one party, therefore, do not prevent the formation of a contract.

57 In a similar vein, Yong Pung How CJ, also in a decision of this court in *Tribune Investment Trust Inc v Soosan Trading Co Ltd* [2000] 3 SLR 405, observed as follows (at [40]):

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

58 And, in the Singapore High Court decision of *Chia Ee Lin Evelyn v Teh Guek Ngor Engelin née Tan* [2004] 4 SLR 330, Lai Kew Chai J held, *inter alia*, that there had been no valid compromise arrived at by the parties concerned on the facts. The learned judge emphasised the importance of the objective test which has just been referred to, as follows (at [43]):

> As this action concerns the formation of five oral contracts of the purport to be explained later, *the primary test of the court when analysing the totality of the evidence, which is entirely oral, is to find if there was in each alleged oral contract an intention to enter into a binding contract*. It is important to note that the test of a person's intention is not a subjective one, but an *objective* one. In other words, the intention which courts will attribute to a person is always that which that person's conduct and words amount to when reasonably construed by a person in the position of the offeree, and not necessarily that which was present in the offeror's mind. [emphasis added]

59 On appeal, his decision was affirmed (see the decision of this court in *Teh Guek Ngor Engelin née Tan v Chia Ee Lin Evelyn* [2005] 3 SLR 22). Choo Han Teck J, delivering the judgment, noted that it was doubtful that a valid compromise had arisen given the lack of convincing evidence (at [12]):

> In the contract of compromise that had been alleged in this case, not only was there insufficient evidence that the terms had been fully negotiated and properly communicated between, and to, the parties, *the communication through Dorothy Chia [a friend of the two parties] also did not appear to have been made with the intention to create a binding contract*, as Dorothy Chia herself regarded her conversation with Evelyn Chia as a "social call". Where three experienced lawyers, including a Senior Counsel, were unable to *adduce clear evidence of a simple "drop hands" agreement, the trial judge would be entitled to dismiss the allegation of such a contract on the basis that the party relying on it had not discharged the burden of proof on a balance of probabilities.* That appeared to be the case here. The trial judge only go so far as to find … that Dorothy Chia "was advising both parties not to pursue their claims against the other in court". This fits the evidence that the role played by Dorothy Chia was closer to that of an agony aunt than a contract agent. … In the circumstances, this court will not interfere with the trial judge's finding that there was no compromise agreement. [emphasis added]

60 It should, however, be mentioned (in passing) that although the objective test is adopted (and is, indeed, necessary in order to enable the courts to administer legal criteria that are not inherently arbitrary), the *practical reality* is that much will depend on the precise facts before the court concerned. In particular, the court will, wherever possible, rely on relevant documents. Where, however, there is a dearth of objective criteria (such as documents), the court will nevertheless attempt its level best by examining closely (and in particular) the precise factual matrix.

61 As alluded to above, however, the rules relating to offer and acceptance can, on occasion, be rather technical. One result is that rather fine distinctions have sometimes been drawn (see, for example, the English Court of Appeal decisions of *Chapelton v Barry Urban District Council* [1940] 1 KB 532 and *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163). On other occasions (thankfully not often), entire contracts might even be "invented", resulting in no small measure of artificiality (see, for example, the oft-cited House of Lords decision of *Clarke v The Earl of Dunraven and Mount-Earl* [1897] AC 59 and the English High Court decision of *Shanklin Pier Ld v Detel Products Ld* [1951] 2 KB 854). Indeed, in the Privy Council decision of *New Zealand Shipping Co Ltd v A M Satterthwaite & Co Ltd* [1975] AC 154 ("*The Eurymedon*"), Lord Wilberforce, delivering the judgment of the majority of the Board, observed thus (at 167):

> … English law, having committed itself to a rather technical and schematic doctrine of contract, in application takes a practical approach, often at the cost of forcing the facts to fit uneasily into the marked slots of offer, acceptance and consideration.

62 It was perhaps the somewhat technical nature of the rules relating to offer and acceptance that prompted Lord Denning MR in the English Court of Appeal decision of *Butler Machine Tool Co Ltd v Ex-Cell-O Corporation (England) Ltd* [1979] 1 WLR 401 ("*Butler Machine Tool Co*") to adopt a somewhat more fluid (and, in our view, rather radical) approach, as follows (at 404):

> The better way is to look at all the documents passing between the parties – and glean from them, or from the conduct of the parties, whether they have reached agreement on all material points – even though there may be differences between the forms and conditions printed on the back of them.

63 It should, however, be noted that Lord Denning was alone in advocating the above approach.

The majority of the court in *Butler Machine Tool Co* adopted the traditional method of analysis, examining each "shot" which was "fired" by each of the respective parties, finding a concluded agreement only when a final and unqualified acceptance had been identified in accordance with the principles set out briefly above. It is also noteworthy that Lord Denning himself, despite advocating the broad approach referred to in the preceding paragraph, nevertheless *also* endorsed the traditional approach. More importantly, perhaps, Lord Denning's broader approach has not really found favour with the courts and, indeed, appears to have been all but rejected in *Gibson* ([52] *supra*). Whilst it is true that the court concerned must examine the whole course of negotiations between the parties (see above at [53]), this should be effected in accordance with the concepts of offer and acceptance. What *is* required, however, is a less mechanistic or dogmatic application of these concepts and this can be achieved by having regard to the *context* in which the agreement was concluded. Looked at in this light, the traditional approach is not, in substance at least, that different from the broad approach advocated by Lord Denning. Indeed, the traditional approach is probably the approach that has hitherto been adopted in the Singapore context (see, for example, the Singapore Privy Council decision of *The Master Stelios* [1982-1983] SLR 39 as well as the Singapore High Court decision of *Pac-Asian Service Pte Ltd v Westburne International Drilling Ltd* [1986] SLR 390) and, as just mentioned, we see no reason why it should not continue to be adopted (albeit with the context of the contract always being borne in mind).

Consideration

64 Another pre-requisite is that of consideration. As we shall see (in the coda to this judgment), the doctrine of consideration has been heavily criticised. There have even been calls for its abolition. However, the doctrine itself has weathered such criticism and is still a standard requirement before a valid contract can be said to have been formed.

65 The doctrine is, however, dispensed with for contracts under *seal* (*ie*, which are concluded by way of a *deed*). This is due to historical circumstances which we need not go into in the present appeal. That this is the position in Singapore is clear (see, for example, the Singapore High Court decisions of *Development Bank of Singapore Ltd v Yeap Teik Leong* [1988] SLR 796 at 802, [28] and *Hong Leong Finance Ltd v Tay Keow Neo* [1992] 1 SLR 205 at 223, [59]; but *cf* with regard to covenants in restraint of trade, as to which see the (also) Singapore High Court decision of *Asia Polyurethane Mfg Pte Ltd v Woon Sow Liong* [1990] SLR 407 at 411, [15]).

66 Very generally put, consideration signifies a return recognised in law which is given in exchange for the promise sought to be enforced. That is why it is stated as a matter of course that consideration must always move from the promisee to the promisor.

67 On a more specific and precise level, the traditional definition adopted is the "benefit-detriment analysis". It also functions as a practical approach. Although various criticisms have been levelled against it, it continues to remain the most workable of all the definitions. The most oft-cited formulation is by Lush J in the English decision of *Currie v Misa* (1875) LR 10 Exch 153 (affirmed in *Misa v Currie* (1876) 1 App Cas 554), as follows (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]

68 An alternative definition was suggested by that great jurist, Sir Frederick Pollock, and was adopted in the House of Lords decision of *Dunlop Pneumatic Tyre Company, Limited v Selfridge and Company, Limited* [1915] AC 847 at 855. It utilises the language of "purchase and sale". In other

words, the promisee "purchases" the promisor's promise by either doing some act or by offering a counter-promise in return. Whilst this particular definition is *theoretically* attractive (and has been accepted in many quarters as the "bargain theory of consideration"), the "benefit-detriment analysis" is probably more helpful in terms of *practical application.* Indeed, there is, in our view, no *necessary* inconsistency between both definitions (as suggested in some quarters (see, for example, *Cheshire, Fifoot and Furmston* ([47] *supra*) at pp 96–97; but *cf Treitel* ([47] *supra*) at para 3–007), with (as just mentioned) the former focusing on the theoretical aspect and the latter focusing on the practical aspect (and leaving aside nice theoretical arguments as to whether or not the "benefit-detriment analysis" is consistent with the concept of executory consideration, which is discussed in the following paragraph).

69 Consideration can, of course, be either executory *or* executed. Consideration is executory when it consists in a *counter-promise*, and is executed when it consists of *an act*. The former occurs, therefore, in the context of a *bilateral* contract (where there is a counter-promise by the promisee, which constitutes (as just mentioned) the consideration for the promisor's promise; see also the recent decision of this court in *Ong Chay Tong & Sons (Pte) Ltd v Ong Hoo Eng* [2008] SGCA 42 at [30] ("*Ong Chay Tong*")). The latter occurs in the context of a *unilateral* contract (where (as also just mentioned) the act by the promisee constitutes the consideration for the promisor's promise), a classic example of which can be found in the fact situation in the leading English Court of Appeal decision of *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256. We note that there remains some controversy as to whether or not executory consideration may contain an element of self-reference. This has, in fact, been dealt with convincingly by Prof Treitel (see *Treitel*, especially at para 3–008). However, the concept of executory consideration in the context of a bilateral contract is now too well established to admit of any doubt.

70 There are several other legal principles, many of which will be dealt with in their application to the facts of the present appeal as well as in the coda to this judgment. At this juncture, it might be appropriate, however, to mention briefly the English Court of Appeal decision of *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 ("*Williams*"). The importance of this particular decision lies in its endorsement of the much wider concept of consideration to the effect that a *practical* benefit or detriment (as opposed to a (narrower) *legal* benefit or detriment) could constitute sufficient consideration in law. Indeed, this principle in *Williams* has been ostensibly applied (or at least recognised) in the Singapore context (see, for example, the decision of this court in *Sea-Land Service Inc v Cheong Fook Chee Vincent* [1994] 3 SLR 631 (commented upon in J W Carter, Andrew Phang & Jill Poole, "Reactions to Williams v Roffey" (1995) 8 JCL 248 ("the Reactions article") at 262–264); the Singapore High Court decision of *Teo Seng Kee Bob v arianecorp Ltd*[2008] 3 SLR 1114 at [88]–[92]; as well as the (also) Singapore High Court decisions cited below at [96] and [97]).

Intention to create legal relations

71 There is also the requirement that there be an intention to create legal relations on the part of the parties concerned. Put simply, it must be demonstrated that there was an intention on the part of both parties that the transaction entered into was to *have legal effect* before a valid contract can be said to have been formed. Put another way, the parties must have intended that, if a disagreement arose or the contract was not honoured subsequently, the aggrieved party could invoke the assistance of the court. Much will of course depend upon the interpretation the court takes of the particular factual matrix concerned. Indeed, it has been argued that, in the light of the doctrine of consideration itself, there is no real need for a separate requirement that there be an intention to create legal relations (*cf Treitel* at para 4–027). However, the requirement that there be an intention to create legal relations on the part of the parties concerned is a well-established one. More importantly, perhaps, the suggestion that the doctrine of consideration is an appropriate substitute

for the requirement that there be an intention to create legal relations presupposes a relatively problem-free doctrine of consideration. As we shall see in the coda to this judgment, however, that is far from being the case.

72 It is unnecessary, for the purposes of the present appeal, to enter into a detailed discussion of this particular doctrine which (as already noted in the preceding paragraph) is, in any event, heavily dependent on the specific factual matrix concerned. It may nevertheless be observed that there are established presumptions. In particular, in *social and domestic* arrangements, there is a presumption that the parties do *not* intend to create legal relations (see, for example, the leading English Court of Appeal decision of *Balfour v Balfour* [1919] 2 KB 571). However, in *business and commercial* arrangements, there is a *converse* presumption to the effect that it is presumed that the parties *do* intend to create legal relations (see, for example, the leading English Court of Appeal decision of *Rose and Frank Company v J R Crompton and Brothers, Limited* [1923] 2 KB 261, which was affirmed by the House of Lords in *Rose and Frank Company v J R Crompton and Brothers, Limited* [1925] AC 445).

Whether there was a valid compromise or settlement in the present proceedings

73 Let us now apply the general principles to the facts of the present proceedings in order to ascertain whether there was a valid compromise or settlement in the present case, bearing in mind that the test is an objective one. Counsel for the defendant, Mr Tan Teng Muan ("Mr Tan"), in his written submissions, briefly alluded to the issue of the legal status of the POA and the Waiver Letter.[note: 16] He argued that, *first*, it was the plaintiff who had decided to link the defendant's claim for severance pay together with the cancellation of the Trust Deed. He further averred that it was the plaintiff who required the Waiver Letter to be signed *before* the POA was executed. *Second*, he drew a distinction between a foreign contract component and a local contract component, submitting that the waiver was supposed to be limited to the defendant's foreign contract component and that he should still be paid his local contract component. *Third*, he argued that the defendant did furnish consideration even though it did not flow to the plaintiff. He emphasised that:[note: 17]

> It is the Defendant's case that the POA constituted a valid and binding settlement agreement between the parties and was what the Plaintiff had drawn up to settled [*sic*] both the outstanding issues of his alleged investment in the Company and the Defendant's demands for his severance package.

74 Counsel for the plaintiff, Mr Manjit Singh ("Mr Singh"), on the other hand, in his written submissions[note: 18] endorsed the Judge's findings that *first*, there could not have been a valid compromise as the defendant had undermined this by making a fresh assertion for severance pay via his Kenyan lawyers *after* the signing of the POA. *Second*, Mr Singh argued that the Waiver Letter involved different parties and the plaintiff acted only as a representative of ASP.

75 As already mentioned earlier in this judgment, we found that both parties neglected to direct their minds in the court below to what, in our view, constituted the crux of the issue in the present proceedings, neglecting (in particular) to see the importance of the POA and the Waiver Letter being executed contemporaneously on the same day (see, further, the reference by the Judge in the GD at [94] (quoted in the next paragraph) to the fact that this was merely a "fallback argument" by counsel on behalf of the defendant).

76 Not surprisingly, therefore, the Judge dealt with this particular issue in accordance with the importance (or, more to the point, lack thereof) with which both counsel accorded to it. As already mentioned above (at [9]), the Judge came to the conclusion that there had been no valid compromise

agreement and her reasons are to be found in the GD at [94]–[95], as follows:

> Mr Tan's fallback argument is that [the defendant] said that the POA was a compromise settlement between [the parties] having regard to the contemporaneous waiver letter that [the defendant] signed to give up all claims against ASP for any severance payments. [The defendant] explained that both the POA and the waiver letter were prepared by [the plaintiff] and [the defendant] was required to sign the waiver letter before the POA was executed. [The plaintiff] disputes this.
>
> Unfortunately for [the defendant], the waiver letter is irrelevant to whether he had complied with the fair-dealing rule. First, the waiver letter was *vis-à-vis* [the plaintiff] in his capacity as representative of ASP and not in his personal capacity. Thus, it could not properly be linked to the sale of [the plaintiff]'s beneficial interest. [The defendant] also failed to establish that [the plaintiff] was the alter ego of ASP. There is no evidence that [the plaintiff] was the majority shareholder in ASP much less the controlling figure in ASP. [The plaintiff] had explained that he is one of six shareholders of ASP. His shareholding, he said was less than 1% of ASP's share capital. [The defendant] himself in an email dated 16 October 2004 recognised that ASP was not owned by [the plaintiff] alone. He mentioned there were others like "the Wongs" and "Edesa". Second, notwithstanding the parties to the waiver letter and the POA being different, [the defendant] failed to show how signing the waiver letter satisfied the fair dealing rule. It is not enough for [the defendant] to argue that the contemporaneous waiver letter showed that the POA was a compromise on the part of [the plaintiff]. [the defendant] had to show that [the plaintiff] was fully aware that this was the case. Finally, and in any event, [the defendant]'s own denial of the contents of the waiver letter coupled with his fresh assertion through his Kenyan lawyers for severance pay even after the POA was signed completely undermines his position that the POA and waiver letter were a compromise.

77 In our view, the POA and the Waiver Letter were executed contemporaneously on the same day and this marked the crystallisation of the ongoing negotiations between both parties into a legally binding agreement in which all existing disputes between them were compromised or settled. As alluded to above (at [23]–[29]), the series of correspondence leading up to the signing of the POA and the Waiver Letter between the plaintiff and the defendant demonstrated that both parties had originally been locked in a dispute. However, as the correspondence between them progressed, both parties expressed a desire to resolve the ongoing disputes amicably and to move on with their respective lives. Viewed in this light, the POA and the Waiver Letter were concluded at a crucial point in time. Both parties voiced how they wished to work out an amicable solution because they were "friend[s] and strong all[ies]".[note: 19] In the midst of the spate of correspondence between them, both men were weary of fighting the ongoing dispute and acknowledged, as well as recognised, their past bond as friends and business allies. On the basis of this friendship once enjoyed (and perhaps, their initial reluctance to institute legal proceedings), they sought to reconcile matters amicably rather than litigate them. The result of this intention was the POA and the Waiver Letter. We also note that, on 16 October 2004, barely ten days *before* the POA and the Waiver Letter were executed, the defendant replied to the plaintiff's email and agreed with the plaintiff that resorting to litigation "can be [a] long drawn battle" but admitted that he was "not fighting the battle". Instead, the defendant looked forward to being called by one of the "mediators" on behalf of ASP for a final agreement.[note: 20] The fact that both parties had sought to resolve their disputes by mediation also served to support this particular construction of the POA and the Waiver Letter.

78 By way of a preliminary observation, what the parties intended – and, in our view, effected – through the POA and the Waiver Letter was a "clean break". Perhaps such terminology (used in the context of matrimonial proceedings) is not wholly inappropriate, given the hitherto close relationship

between the plaintiff and the defendant which had (unfortunately) then (to adopt the terminology of matrimonial proceedings once again) broken down irretrievably. Turning to specifics, the plaintiff promised to release the defendant from all his obligations under the Trust Deed in accordance with the terms of the POA ("the plaintiff's promise") in return for which the defendant would relinquish all his claims against ASP ("the defendant's promise"). There was no doubt, in our view, that the parties clearly intended to create a legal relationship through the signing of these documents. However, did it matter (as the Judge appeared to suggest) that the *defendant's* claims were against ASP instead of the plaintiff? One approach would be to pierce the corporate veil and state that these claims were therefore (and in effect) against the plaintiff as well. However, there was insufficient evidence to arrive at such a conclusion. In our view, this was not legally relevant in any event. Let us elaborate.

79 It was clear – and this was borne out by the entire factual context leading to the signing of both the POA and the Waiver Letter on the same day – that the plaintiff had a more than passing interest in ensuring that the defendant's claims against ASP were settled amicably. Indeed, as we have noted, the defendant signed the Waiver Letter at the request of the plaintiff. It was also clear, in our view, that he had done so in the light of what he (the defendant) stood to gain as a result of the plaintiff's promise. Indeed, as we observed in the preceding paragraph, both parties would, as a result of the combined legal effect of the POA and the Waiver Letter, effect a "clean break". However, at this juncture, it might be queried whether the defendant's promise to relinquish his claims against ASP for severance pay constituted sufficient consideration in the eyes of the law in return for the plaintiff's promise.

80 In our view, the fact that the Waiver Letter was entered into between the defendant and ASP (and not the plaintiff) is legally irrelevant with regard to the issue as to whether or not the defendant had, by signing the Waiver Letter, furnished sufficient consideration to the plaintiff in return for the plaintiff's promise. It is true that *ASP* stood to benefit as a result of the defendant's signing of the Waiver Letter. *However*, this was done *at the request of the plaintiff*. Indeed, the Waiver Letter itself was *signed by the plaintiff* on behalf of ASP. The status of the plaintiff's shareholding in ASP as well as other related matters mentioned in the GD at [95] (reproduced above at [76]) are immaterial inasmuch as the defendant had, by signing the Waiver Letter, *suffered a detriment at the plaintiff's request and had thereby furnished sufficient consideration in law* for the plaintiff's promise since (as already noted at [67] above), either a detriment or a benefit can constitute sufficient consideration in the eyes of the law (a point to which we will also return in some detail in the next paragraph). The fact that *the plaintiff* had not personally benefited (in an *obvious* manner) from the defendant's signing of the Waiver Letter was not relevant in the present context; neither was the (related) fact that the request was *literally* made by the plaintiff on behalf of ASP. To elaborate, it is clear, from the correspondence between the parties set out above, that although the plaintiff was *literally* acting on behalf of ASP, he *also* had a *personal interest* in the defendant signing the Waiver Letter (and there was therefore a benefit to him, albeit in a less obvious manner). Further, one cannot, in the nature of things, look at the Waiver Letter in isolation, shorn of its context. As already mentioned, it is crucial, for the purposes of the present appeal, to view *both* the Waiver Letter *and* the POA *as set in their relevant context*. Looked at in this light, it is clear (having regard, in particular, to the fact that both documents were signed contemporaneously as well as, in general, to the correspondence referred to above) that the plaintiff clearly had a *personal* interest in requesting (and ensuring) that the defendant sign the Waiver Letter.

81 In many contractual situations, it is true that there will be, *simultaneously*, a detriment incurred by the promisee (here, the defendant) and a benefit conferred on the promisor (here, the plaintiff). However, as already mentioned in the preceding paragraph, this need not necessarily be the case; there is sufficient consideration if there is *either* detriment incurred by the promisee (at the request of the promisor) *or* a benefit conferred by the promisee on the promisor (again, at the

request of the promisor) (and see generally above at [67] as well as *Treitel* ([47] *supra*) at para 3-005). That having been said, having regard to the analysis in the preceding paragraph, it is *equally* clear, in our view, that the defendant had, by signing the Waiver Letter, *also* conferred a *benefit* on the plaintiff (having regard to the latter's *personal* interest in the matter). This benefit was not merely factual but was also legal in nature inasmuch as the plaintiff had hitherto no legal entitlement as such *vis-à-vis* the signing of the Waiver Letter by the defendant.

82 It should be noted, parenthetically but not unimportantly, that the element of request is necessary in order to establish a link between the parties concerned. So, for example, if the promisee chooses, of his or her own volition (and without more), to confer a benefit on the promisor, this will not constitute sufficient consideration in the eyes of the law. Likewise, if the promisee chooses, of his or her own volition, to incur a detriment, then (as the leading English Court of Appeal decision of *Combe v Combe* [1951] 2 KB 214 ("*Combe*") clearly illustrates) that would *not* constitute sufficient consideration in the eyes of the law. In *Combe*, the plaintiff wife failed in an action against her ex-husband for a promise made by him to pay her maintenance as the court held that the fact that she had voluntarily refrained from claiming maintenance against him in a court of law did not constitute sufficient consideration because it was done entirely at her behest, with no request whatsoever coming from her ex-husband. She also failed in her claim based on promissory estoppel as the court held that the doctrine of promissory estoppel could only be used as a "shield" and not as a "sword" (see also below at [115]).

83 It should also be noted that an absence of linkage between the parties can also occur if the consideration is *past* – hence, the oft-cited principle that "past consideration is no consideration". However, the courts look to the substance rather than the form. Hence, what looks at first blush like past consideration will still pass legal muster if there is, in effect, a *single* (contemporaneous) transaction (the common understanding of the parties being that consideration would indeed be furnished at the time the promisor made his or her promise to the promisee). 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 somewhat more recent decision is that of the English Court of Appeal in *In re Casey's Patents* [1892] 1 Ch 104, and 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]

84 The element of request (see above at [82]) may also be usefully noted. It bears mention that the statement of principle in *Pao On* quoted in the preceding paragraph has, in fact, been affirmed in the local context. Indeed, in the Singapore High Court decision of *Sim Tony v Lim Ah Ghee* [1994] 3 SLR 224, Lai Siu Chiu J also referred to this particular statement of principle (at 237, [51]) as being "one *apparent* exception" [emphasis added] to the general rule that past consideration cannot constitute sufficient consideration in law. This court affirmed Lai J's decision and endorsed her view to the effect that a court should not take a *strict view from literal chronology* in ascertaining whether the consideration concerned was past: see *Sim Tony v Lim Ah Ghee* [1995] 2 SLR 466, especially at 471–472, [16].

85 In the present appeal, no issue of past consideration in fact arises. Both the POA as well as the Waiver Letter were in fact entered into contemporaneously and were clearly intended to constitute a contemporaneous compromise agreement.

86 We should add that there were no other legal impediments from the perspective of the doctrine of consideration. Indeed, it has been long established that *legal* sufficiency must be *distinguished* from the *layperson's* perception of adequacy in so far as the doctrine of consideration is concerned. In the circumstances, the court will *not* inquire into the actual adequacy of the consideration concerned so long as there is sufficient consideration furnished by the promisee in the eyes of *the law*. Indeed, as we allude to below, this somewhat artificial approach (mandated, in our view, by the perceived need of the courts to give effect to the rationale of freedom of contract) in fact contributes toward the emaciation of the doctrine of consideration itself.

87 Other possible legal impediments relate to various situations where the promisee merely promises to perform (or performs): (a) an existing duty imposed on the promisee *by law*; or (b) an *existing contractual duty* owed to *a third party*; or (c) an *existing contractual duty* owed to the *same party* (*viz*, *the promisor*). The facts of the present appeal do *not* relate to any of these situations and we therefore say no more about them at the moment save that these situations, whilst standard "fare" for every contract textbook, are not unproblematic. In particular, situation (c) must now, apparently, be viewed quite differently in the light of recent decisions (especially that of the English Court of Appeal in *Williams* ([70] *supra*), which has been referred to briefly above (at [70]). None of these situations arises on the facts of the present appeal. However, given the difficulties engendered by each of these situations as well as the need to consider them from the perspective of possible reform when they are raised squarely for consideration by this court (or even the Legislature), we will deal with them in the briefest of fashions in a coda to the present judgment.

88 Although the defendant appeared to deny the contents of the Waiver Letter, subsequent to the signing of the POA, by making a fresh assertion through his Kenyan lawyers with regard to his claim for severance pay, it is important to note that the POA and the Waiver Letter had already been concluded and that this fresh assertion was, in any event, wholly at variance with the terms and tenor of the concluded contract between the parties and ought not, therefore, to have been taken into account. In addition, we have already noted that, after the parties had concluded their agreement, further acrimony arose and the defendant's later actions ought to be construed in the light of these further (and unfortunate) developments. Whilst this court observed, in *Zurich Insurance (Singapore) Pte Ltd v B*#*Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR 1029 at [132(d)], that "there should be no absolute or rigid prohibition against evidence of previous negotiations or subsequent conduct", it also observed that "such evidence is likely to be inadmissible for non-compliance" with the requirement that the parties' intentions be objectively ascertained and the threshold requirement (in order for the court to adopt a different interpretation from that suggested by the plain language of the contract) that the context of the contract be clear and obvious. The court did also add that "the relevance of subsequent conduct remains a controversial and evolving topic that will require more extensive scrutiny by this court at a more appropriate juncture" (*ibid*). That having been said, it is clear that the subsequent conduct in the present proceedings, being in direct contradiction of the terms of the concluded contract between the parties, cannot be admitted.

89 In the circumstances, therefore, we are of the view that the POA and the Waiver Letter constituted a valid compromise or settlement agreement between the plaintiff and the defendant.

Conclusion

90 For the reasons set out above, we allow the appeal in CA 33/2008 and dismiss the appeal in

CA 34/2008.

91 Given the manner in which the appeals were argued and the reasoning we have adopted (particularly in relation to CA 33/2008), we are of the view that a fair costs order would be that the defendant be entitled to half of his costs in CA 33/2008 and to full costs in both CA 34/2008 and Suit No 341 of 2005. The usual consequential orders are to follow.

A coda on the doctrine of consideration

Introduction

92 Fortunately, as can be seen from the analysis above, no fundamental difficulties with respect to the doctrine of consideration were raised on the facts of the present appeal. However, that the doctrine both continues to be an entrenched part of the Singapore contract law landscape *and* is simultaneously bedevilled by both theoretical as well as practical difficulties is well known (indeed, in the latter respect, the academic literature is prodigious and includes many pieces (and the occasional book or monograph) that focus on the theoretical foundations of the doctrine as well (see, for example, the recent comprehensive article by Roy Kreitner, "The Gift Beyond the Grave: Revisiting the Question of Consideration (2001) 101 Colum L Rev 1876)); indeed, the doctrine has also been the occasion for the clash of intellectual titans (see the now classic debate between Prof P S Atiyah, *Consideration in Contracts: A Fundamental Restatement* (Australian National University Press, 1971) (an inaugural lecture which has since been reprinted as "Consideration: A Restatement" in P S Atiyah, *Essays on Contract* (Clarendon Press, 1986), Essay 8, pp 179–243 (which also contains a *further* response to Prof Treitel's article, below)) and Prof G H Treitel, "Consideration: A Critical Analysis of Professor Atiyah's Fundamental Restatement" (1976) 50 ALJ 439). Despite the copious academic literature (only a small sampling of which will be referred to below), empirical evidence is – not surprisingly – lacking. Nevertheless, the dearth of cases on the doctrine thus far might be some indication, *ceteris paribus*, that the doctrine might now be outmoded or even redundant, and that its functions may well be met by more effective alternatives.

93 We do *not* propose to delve into the issue of possible *reform* as it does not arise before us. Suffice it to state that, as far back as 1937, the UK Law Revision Committee ("the UK Committee") was highly critical of the doctrine and came very close to recommending the *abolition* of the doctrine itself (see Law Revision Committee, *Sixth Interim Report (Statute of Frauds and the Doctrine of Consideration* (Cmd 5449, 1937) ("the Report"). However, the doctrine is still with us almost eight decades later. And it has had some of the staunchest of supporters (see, for example, K O Shatwell, "The Doctrine of Consideration in the Modern Law" (1954) 1 Syd LR 289), some of whom have roundly criticised the Report (see, for example, C J Hamson, "The Reform of Consideration" (1938) 54 LQR 233). Equally, though, the doctrine has also had some of its staunchest detractors (see, for example, Lord Wright, "Ought the Doctrine of Consideration to be Abolished from the Common Law?" (1936) 49 Harv L Rev 1225 (although it should be pointed out that the learned author was also the chairman of the UK Committee)). There are some who have adopted a "middle view", advocating abolition of the doctrine only in relation to the modification of existing contracts (see, for example, Tan Cheng Han, "Contract Modifications, Consideration and Moral Hazard" (2005) 17 SAcLJ 566).

94 We will, however, set out (in the briefest of fashions) the principal *difficulties* which exist as well as the main alternatives that are available to the court when the issue of reform does squarely arise before this court in the future (we would add, parenthetically, that these issues would also be of direct relevance should a *legislative* approach be adopted instead). Before proceeding to do so, however, an equally brief summary of the history and rationale of the doctrine will be attempted, for it is only by understanding the past that we may know where we are (here, in the midst of difficulties)

and (more importantly) where we might be going (here, the possible alternatives).

95 That having been said, the doctrine of consideration has, in fact, been commented on (albeit *obiter*) in two recent Singapore High Court judgments.

96 In the first, *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR 594 (affirmed on appeal in *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] 1 SLR 502 without considering this particular issue), V K Rajah JC observed thus (at [139]):

> Next, the defendant contends that no consideration passed from the plaintiffs to them. The credit card payments had not been processed. No cash had been collected. Consideration was less than executory and non-existent. This contention is wholly untenable. The modern approach in contract law requires very little to find the existence of consideration. Indeed, in difficult cases, the courts in several common law jurisdictions have gone to extraordinary lengths to conjure up consideration. (See for example the approach in *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1990] 1 All ER 512.) No modern authority was cited to me suggesting an intended *commercial transaction of this nature* could ever fail for want of consideration. Indeed, the time may have come for the common law to shed the pretence of searching for consideration to uphold commercial contracts. The marrow of contractual relationships should be the parties' intention to create a legal relationship. Having expressed my views on consideration, I should also add for good measure that, in any event, there is ample consideration. There was a promise to pay made by the plaintiffs in exchange for the delivery of the requisite laser printers. Mutual promises, by all accounts, on the basis of existing case law, more than amply constitute consideration. [emphasis in original]

97 In a similar vein, in the second decision, *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric* [2007] 1 SLR 853 ("*Sunny Metal*"), it was observed as follows (at [28]–[30]):

> 28 The doctrine of consideration was similarly not an issue because the Deed was precisely that – a contract under seal and which, under current Singapore law, does not require consideration (see, for example, the Singapore High Court decisions of *Development Bank of Singapore Ltd v Yeap Teik Leong* [1988] SLR 796 at [28] and *Hong Leong Finance Ltd v Tay Keow Neo* [1992] 1 SLR 205 at [59]). In any event, as the Deed itself points out, consideration *was* furnished. As a matter of general observation, it should be noted that the doctrine of consideration itself, although long established, has come under increasing fire – especially in recent years. For example, in the Singapore High Court decision of *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR 594 ("*Digilandmall*"), affirmed on appeal in *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2005] 1 SLR 502 without considering this particular issue, V K Rajah JC (as he then was) observed, as follows (at [139]):
>
> [the passage quoted in the preceding paragraph]
>
> 29 Indeed, the doctrine of consideration may be outmoded even outside the context of purely commercial transactions, even though commercial transactions constitute (admittedly) the paradigm example where the doctrine ought to be abolished. To elaborate, on a more general level, there exists, first, the somewhat inconsistent approaches adopted between situations where it is sought to enforce a promise to pay more (see, for example, the leading English decisions of *Stilk v Myrick* (1809) 2 Camp 317 and *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1) and where it is sought to enforce a promise to take less (see, for example, the leading English decisions of *Foakes v Beer* (1884) 9 App Cas 605 and *Re Selectmove* [1995] 1 WLR 474). The present situation in Singapore is also not unambiguously clear in this regard (see

the Court of Appeal decision of *Sea-Land Service Inc v Cheong Fook Chee Vincent* [1994] 3 SLR 631, where *Williams v Roffey Bros & Nicholls (Contractors) Ltd* was ostensibly applied).

30 More importantly, perhaps, the combined effect of *Williams v Roffey Bros & Nicholls (Contractors) Ltd* (to the effect that a *factual*, as opposed to a legal, benefit or detriment is sufficient consideration) and the well-established proposition that consideration must be sufficient but need not be adequate (see, for example, the Singapore Court of Appeal decision of *Wong Fook Heng v Amixco Asia Pte Ltd* [1992] 2 SLR 342 at 348, [23]) is that (as Rajah JC had pointed out in *Digilandmall* (see [28] above)) it will, absent exceptional circumstances, be all too easy to locate some element of consideration between contracting parties. This would render the requirement of consideration otiose or redundant, at least for the most part. On the other hand, there are other possible alternatives available that can perform the tasks that the doctrine of consideration is intended to effect. These include the requirement of writing, as well as the doctrines of promissory estoppel, economic duress and undue influence (for these two last-mentioned doctrines, in the context of the modification of existing legal obligations). However, the doctrine of consideration in general, and its possible abolition or reform in particular, does not, thankfully, arise for decision on the facts of the present proceedings.

[emphasis in original]

Reference may also be made to the recent decision of this court in *Ong Chay Tong* ([69] *supra* at [29]).

History and rationale

98 It is now generally accepted that the precise historical origins of the doctrine of consideration are not entirely clear (see, for example, the excellent summary by Prof A W B Simpson in *Cheshire, Fifoot and Furmston* ([47] *supra*) at p 10 and, by the same author, *A History of the Common Law of Contract – The Rise of the Action of Assumpsit* (Clarendon Press, 1987) at chs IV–VII as well as C H S Fifoot, *History and Sources of the Common Law – Tort and Contract* (Stevens & Sons Limited, 1949) at ch 16 and the perceptive essay by J L Barton, "The Early History of Consideration" (1969) 85 LQR 372). The "modern" view is, however, less contentious and is, in any event, consistent with the circumstances of Singapore (see s 3(2) of the Application of English Law Act (Cap 7A, 1994 Rev Ed); put simply, the "modern" purpose of the doctrine of consideration is to *put some legal limits on the enforceability of agreements, even where they would otherwise be legally binding*. As Prof Atiyah observed ([92] *supra* at p 181), "[s]ince it is unthinkable that any legal system could enforce *all* promises it has always been necessary for the courts to decide which promises they would enforce" [emphasis in original]. In a similar vein, Prof Reiter emphatically put it thus (see B J Reiter, "Courts, Consideration, and Common Sense" (1977) 27 UTLJ 439 at 439–440):

> Our legal system does not enforce all promises. This is hardly surprising: no legal system has ever enforced all promises and no legal system ever will. …
>
> There are good reasons for not attaching the sanctions of law to all promises. It would be impractical, if not impossible, to enforce every promise. …
>
> It is therefore essential that some rational process be developed to identify which interests of which promises will be protected by the law and which will not.

99 However, if this is the case, then a related issue (already alluded to) is whether or not there

exist possible *alternatives* that are more appropriate (and which are dealt with briefly below at [111]–[116]).

Difficulties

100 The very practical difficulties generated by *Williams* ([70] *supra*) have taken centre stage in recent times and have, in fact, been referred to in *Sunny Metal* ([97] *supra*), where it was observed (at [30]) that (see also above at [91]):

> [T]he combined effect of *Williams v Roffey Bros & Nicholls (Contractors) Ltd* (to the effect that a factual, as opposed to a legal, benefit or detriment is sufficient consideration) and the well-established proposition that consideration must be sufficient but need not be adequate (see, for example, the Singapore Court of Appeal decision of *Wong Fook Heng v Amixco Asia Pte Ltd* [1992] 2 SLR 342 at 348, [23]) is that (as Rajah JC had pointed out in *Digilandmall* …) it will, absent exceptional circumstances, be all too easy to locate some element of consideration between contracting parties. This would render the requirement of consideration otiose or redundant, at least for the most part.

101 It ought to be noted, at this juncture, that the concept of a factual (as opposed to a legal) benefit or detriment is not new. Although ostensibly appearing in judicial form for the first time in *Williams*, it was referred to by two authors as far back as 1965 (see F M B Reynolds & G H Treitel, "Consideration for the Modification of Contracts" (1965) 7 Mal L Rev 1). Be that as it may, *Williams* has, by introducing the concept of a factual benefit or detriment, led (in conjunction with the rule that consideration must be sufficient but need not be adequate) to a practical redundancy (in the main, at least), as noted in the passage quoted in the preceding paragraph. It comes, therefore, as no surprise that *Williams* has been the subject of a copious amount of academic commentary and critique (see, for example, Brian Coote, "Consideration and Benefit in Fact and in Law" (1990) 3 JCL 23; Roger Halson, "Sailors, Sub-Contractors and Consideration" (1990) 106 LQR 183; and John Adams & Roger Brownsword, "Contract, Consideration and the Critical Path" (1990) 53 MLR 536). It has also elicited a number of judicial responses from other Commonwealth jurisdictions (see generally the Reactions article ([70] *supra*); reference may also be made to the New South Wales Court of Appeal decisions of *Tinyow v Lee* [2006] NSWCA 80 at [61] and *Dome Resources NL v Silver* [2008] NSWCA 322 at [63]–[68] as well as John Burrows, Jeremy Finn & Stephen Todd, *Law of Contract in New Zealand* (LexisNexis NZ Limited, 3rd Ed, 2007) at pp 114–117).

102 It should also be noted that *Williams* related to the attempt by the promisee to enforce a promise by the promisor to *pay more*. There is another possible situation which relates, instead, to the attempt by the promisee to enforce a promise by the promisor to *take less* – in other words, the promisor accepts part payment in discharge of the entire debt owed by the promisee. The classic decision is, of course, that of the House of Lords in *Foakes v Beer* (1884) 9 App Cas 605 (which premised its decision, in turn, on the seminal decision in *Pinnel's Case* (1602) 5 Co Rep 117a; 77 ER 237). There was, in fact, a powerful judgment by Lord Blackburn in *Foakes v Beer* which (not unlike the approach in *Williams*) adopted a very practical approach. However, the learned law lord ultimately relented and agreed with the decision of the rest of the House. It should be observed that the decision in *Foakes v Beer* itself may not have been on sure substantive ground in following *Pinnel's Case*, as the latter may have been decided on a point of pleading and has, in any event, been subject to not inconsiderable criticism (see, for example, Michael Lobban, "*Foakes v Beer* (1884)" in *Landmark Cases in the Law of Contract* (Hart Publishing, 2008) (Charles Mitchell & Paul Mitchell eds) ch 8, especially at pp 227–230 and 241–243 (as well as the literature and case law cited therein), which chapter also contains a valuable historical perspective of this famous decision; *contra* Janet O'Sullivan, "In Defence of *Foakes* v. *Beer*" [1996] CLJ 219).

103 However, the English Court of Appeal in *In re Selectmove Ltd* [1995] 1 WLR 474 refused to extend the holding in *Williams* to the situation where part-payment is taken as discharge of the entire debt owed (reference may also be made to the recent English Court of Appeal decision of *Collier v P & M J Wright (Holdings) Ltd* [2008] 1 WLR 643 ("*Collier*"), where, however, the court held that there was a triable issue on promissory estoppel which would operate as an exception to the rule in *Foakes v Beer* (this case is also noted in Richard Austen-Baker, "A Strange Sort of Survival for *Pinnel's Case: Collier* v *P & M J Wright (Holdings) Limited*" (2008) 71 MLR 611)). It would in fact have required no great leap of logic – let alone faith – to have extended the holding in *Williams* to a *Foakes v Beer* situation (see also Edwin Peel, "Part Payment of a Debt is No Consideration" (1994) 110 LQR 353 at 355; *contra* O'Sullivan, *supra*). The court in *In re Selectmove Ltd* was, it should be observed, bound by the House of Lords decision in *Foakes v Beer*. No such constraint exists, of course, in the Singapore context. This furnishes yet another string to the legal bow of those who would seek the abolition of the doctrine of consideration.

104 *Williams*, as already alluded to above, related to a situation where there was the promise to perform (or the performance of) an existing duty owed to the *same* party. There are also two other situations which have been alluded to above (at [87]).

105 The first relates to the promise to perform (or the performance of) an existing duty imposed by *law* (the oft-cited case in this regard is the House of Lords decision in *Glasbrook Brothers, Limited v Glamorgan County Council* [1925] AC 270 ("*Glasbrook*")). The general rule is that the mere performance of such a public duty imposed by law does not, without more, constitute sufficient consideration in law for the promisor's promise. If, however, something *extra* is furnished by the promisee, this would constitute sufficient consideration in law.

106 Two observations may be made with respect to this particular situation. The first is that if the *same approach* is adopted as in *Williams* (which related to a different situation concerning the promise to perform (or the performance of) an existing duty owed to the same party), then it would of course be easy to locate consideration in virtually every fact situation since (as we have already noted) factual benefit or detriment is not difficult to locate. We pause here to further observe that it could be argued – at a *threshold* level – that *Williams* ought *not* to apply to such a situation in the first instance on the basis that "it is in fact at variance with the very principle underlying [*Glasbrook*] itself which stands for the completely contrary point: there is no consideration because only if the duty is exceeded is there legal benefit or detriment" (see the Reactions article ([70] *supra*) at 267). It should also be noted, in this regard, that *Glasbrook*, being a decision of the House of Lords, would generate (in *England*) issues of precedent similar to those considered briefly above (at [102]) in relation to *Foakes v Beer*. However, as already noted, no such constraint exists in the Singapore context and there is hence no legal impediment from the perspective of precedent preventing the Singapore courts from extending the reach of *Williams* to such a situation as well, should it be minded to do so.

107 The second observation is this: A close look at this particular situation in general and *Glasbrook* in particular demonstrates that the *broader* concept of *public policy* is an important consideration (in particular, the danger (or even the actual effecting) of extortion by public authorities (as was the case in *Glasbrook*)). Looked at in this particular light, the *alternative* doctrine of *economic duress* might well prove to be an appropriate *replacement* for the doctrine of consideration itself (of this, more later: see generally below at [111]–[114]). Indeed, it should be noted that *even if* the doctrine of consideration is *retained*, the doctrine of economic duress could still override it inasmuch as even if consideration is located in a technical sense, economic duress may nevertheless operate to render the contract concerned voidable.

108 The second situation relates to the promise to perform (or the performance of) an existing duty owed to a *third party*. In this regard, the existing case law suggests that this is sufficient consideration in law (see generally the relatively recent Privy Council decisions of *The Eurymedon* ([61] *supra*) and *Pao On* ([83] *supra*) (the latter case of which was applied by Lai Siu Chiu JC in the Singapore High Court decision of *SSAB Oxelosund AB v Xendral Trading Pte Ltd* [1992] 1 SLR 600); see also the classic survey by A G Davis, "Promises to Perform an Existing Duty" (1938) 6 CLJ 202). And, as Prof A L Goodhart put it (in "Performance of an Existing Duty as Consideration" (1956) 72 LQR 490 at 493):

> On the other hand, the performance of a duty to a third person can be regarded as furnishing adequate consideration without running the risk that the promisee may bring improper pressure to bear in obtaining the promise. The promisor clearly obtains a benefit to which he was not previously entitled, so that there is every reason to hold that he should be bound to perform his own promise. On this point the English and the American cases are in accord.

Indeed, the observation just quoted suggests that the sufficiency of consideration in such a situation is premised on the concept of *legal* benefit or detriment (as opposed to a *factual* benefit or detriment), thus rendering reliance on *Williams* (in the context of the latter concept of benefit or detriment) redundant. On the other hand, however, there is nothing that prevents the Singapore courts from extending the reach of *Williams* to such a situation either (see generally the analysis in the Reactions article (at 267–269)).

109 When compared to the preceding situation (*viz*, that relating to a public duty imposed on the promisee by law), the question naturally arises as to why the courts are more liberal in locating sufficient consideration in *this* situation – whereas in the preceding situation, something *extra* must be done (see also above at [105]). It may well be the case that the courts are less strict in the present situation because the danger (or even the actual effecting) of extortion is *relatively less* compared to a situation where a public duty is imposed on the promisee by law. Again, however, if the same approach towards consideration is adopted as that in *Williams*, it would, in any event, be very easy to locate consideration as the inquiry is premised on a merely *factual* (and not legal) basis. Nevertheless, the danger of extortion *even in this situation* is possible and therefore cannot be ignored completely. In this regard, the doctrine of economic duress would *still* have a role to play in appropriate fact situations.

110 It remains to be observed that if the principle in *Williams* is extended to cover *all* the three situations discussed above, the issue, *inter alia*, of the abolition of the doctrine of consideration (briefly alluded to above) would become an even more pronounced one.

Possible alternatives

The alternatives stated

111 It is axiomatic, in our view, that if the doctrine of consideration is indeed abolished (whether judicially or legislatively), the function it has hitherto performed must be fulfilled by alternative doctrines (*cf* also Richard Hooley, "Consideration and the Existing Duty" [1991] JBL 19). There have been a number of suggestions (principally in the academic literature) which we cannot obviously canvass in any detail in the present judgment (see, for example, K C T Sutton, *Consideration Reconsidered: Studies on the Doctrine of Consideration of the Law of Contract* (University of Queensland Press, 1974) at Pt IV; and for an early American perspective, see Edwin W Patterson, "An Apology for Consideration" (1958) 58 Colum L Rev 929 at 956–963). These have been briefly alluded to in *Sunny Metal* ([97] *supra*) and include the doctrine of promissory estoppel (see, for example, Dan

Halyk, "Consideration, Practical Benefits and Promissory Estoppel: Enforcement of Contract Modification Promises in Light of *Williams* v. *Roffey Brothers*" (1991) 55 Sask L Rev 393 and Norma J Hird & Ann Blair, "Minding your own Business – *Williams v. Roffey* Re-visited: Consideration Re-considered" [1996] JBL 254; *cf* also *per* Glidewell LJ in *Williams* itself (at 13) as well as *Collier* ([103] *supra*)) and the doctrine of economic duress (see, for example, *per* Hobhouse J in *The Alev* [1989] 1 Lloyd's Rep 138 at 147 as well as Lee Pey Woan, "Consideration" in *Basic Principles of Singapore Business Law* (Thomson, 2004) (Andrew Phang gen ed) ch 3 at paras 3.42–3.43; and *cf per* Glidewell LJ in *Williams* itself (at 16), but where the doctrine of economic duress (as well as fraud) were mentioned *in addition to* the doctrine of consideration (see also below at [114])).

112 Indeed, given the at least possible linkages between economic duress on the one hand and undue influence and unconscionability on the other (see *Cheshire, Fifoot and Furmston's Law of Contract – Second Singapore and Malaysia Edition* (Butterworths Asia, 1998) ("*Cheshire, Fifoot and Furmston – Singapore and Malaysia Edition*"), especially at pp 558–559 and 566 (and the literature cited therein) as well as David Capper, "Undue Influence and Unconscionability: A Rationalisation" (1998) 114 LQR 479), there is no reason in principle why undue influence and unconscionability ought not also to be potential alternatives (although unconscionability is still a fledgling doctrine in the Commonwealth law of contract). This approach was in fact adopted by Santow J in the New South Wales decision of *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723 at 747.

113 On a more general level, the doctrines of economic duress, undue influence and unconscionability appear to be more clearly suited not only to modern commercial circumstances but also (more importantly) to situations where there has been possible "extortion". There is also the proposal of the UK Committee to the effect that consideration is merely evidence of a serious intention to contract, with the result that it should not be required where the promise itself is in writing.

The difficulties

114 We pause to observe, if only in the briefest of fashions, that the possible alternatives to the doctrine of consideration set out so very cursorily in the preceding paragraphs are *themselves* subject to *their own specific difficulties*. For example, the fledgling nature of the doctrine of unconscionability was mentioned in [112] above. The doctrine of undue influence, however, has been relatively well established in the landscape of the common law of contract, although the doctrine of economic duress (being of very recent origin by common law standards (and see, in this regard, the English High Court decision of *The Siboen and the Sibotre* [1976] 1 Lloyd's Rep 293)) stands somewhere in the "middle" (being not without difficulties of its own).

115 On the other hand, the doctrine of promissory estoppel still contains pockets of controversy. One issue that arises is whether it can be used as a "sword" (*ie*, as a cause of action in and of itself) or merely as a "shield" (*ie*, merely as a defence, which (it should be noted) applies (depending on the precise facts) equally to plaintiffs and defendants alike). Reference may be made, in the former regard, to the oft-cited Australian High Court decision of *Waltons Stores (Interstate) Limited v Maher* (1988) 164 CLR 387 (*cf* the present English position which now evinces the possibility, at least, of the more liberal Australian position (see the English Court of Appeal decision of *Baird Textiles Holdings Ltd v Marks & Spencer plc* [2002] 1 All ER (Comm) 737), the strict (English) position (that the doctrine could only be used as a shield and not as a sword) being set out (most famously perhaps) in the (also) English Court of Appeal decision of *Combe* ([82] *supra*)). To take another example, the role of the concept of detriment may still need further elaboration (see *Cheshire, Fifoot and Furmston – Singapore and Malaysia Edition* ([112] *supra*) at pp 202–205). Finally, the issue as to whether or not the doctrine of promissory estoppel is only suspensory in operation may also require further

consideration (see *id* at pp 199–201).

116 Indeed, even in the context of *proprietary* estoppel, the law has not been static (see, for example, the very recent House of Lords decision of *Cobbe v Yeoman's Row Management Ltd* [2008] 1 WLR 1752). Finally, the UK Committee's proposal to the effect that consideration should not be required where the promise concerned is in writing is also not free from difficulties (see Andrew Phang, "Consideration at the Crossroads" (1991) 107 LQR 21 at 23). All this having been said, it is almost inevitable that no doctrine is immune from its own specific difficulties although, from a *relative* perspective, the courts would be wise to utilise only those doctrines with relatively fewer difficulties.

A pragmatic approach?

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

118 In the circumstances, maintenance of the status quo (*viz*, the availability of both (a somewhat dilute) doctrine of consideration *as well as* the alternative doctrines canvassed above) may well be the *most practical* solution inasmuch as it will afford the courts *a range of legal options* to achieve a just and fair result in the case concerned. However, problems of *theoretical* coherence may remain and are certainly intellectually challenging (as the many perceptive pieces and even books and monographs clearly demonstrate). Nevertheless, given the long pedigree of the doctrine, the fact that no single doctrine is wholly devoid of difficulties, and (more importantly) the need for a legal mechanism to ascertain which promises the courts will enforce, the "theoretical untidiness" may well be acceptable in the light of the existing practical advantages (though *cf* the Reactions article ([70] *supra* at 265)). However, this is obviously a provisional view only as the issue of reform was not before the court in the present appeal.

[note: 1]See Joint Record of Appeal Vol 3, p 653.

[note: 2]See Joint Record of Appeal, Vol 4, p 2567.

[note: 3]See Joint Record of Appeal, Vol 3, p 651.

[note: 4]Appellant's Core Bundle ("ACB"), Vol 2, p 89.

[note: 5]ACB Vol 2, p 90.

[note: 6]ACB Vol 2, p 91.

[note: 7]ACB Vol 2, Part B, at p 93

[note: 8]ACB Vol 2, part B at p 98.

[note: 9]ACB Vol 2 p 102.

[note: 10]ACB Vol 2, at pp 100–104.

[note: 11]ACB Vol 2, at p 106.

[note: 12]See Joint Record of Appeal, Vol 3B, p 789.

[note: 13]ACB Vol 2, at p 112.

[note: 14]*Ibid*.

[note: 15]ACB, Vol II, at pp 114 to 115.

[note: 16]Defendant's Skeletal Arguments, at paras 22–26.

[note: 17]See the Defendant's Skeletal Arguments at para 26.

[note: 18]Respondent's Case in CA 33 of 2008, at pp 32–33.

[note: 19]ACB Vol 2, at p 104.

[note: 20]ACB Vol 2, at p 106.