Clarifying the Doctrine of Consideration for Contractual Variations: *Ma Hong Jin v SCP Holdings Pte Ltd* [2020] SGCA 106

I. Executive Summary

Among all the doctrines of contract law, perhaps the most academic ink has been spilt on the doctrine of consideration. Broadly, consideration is a benefit (or detriment) provided or suffered by one party, in exchange for the other party entering into the contract. As held by the Singapore Court of Appeal ("**CA**") in the seminal case of *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] 2 SLR(R) 332 ("***Gay Choon Ing***"), consideration is necessary for a contract to be legally enforceable. However, to date it was unclear whether consideration was also necessary for amendments to a contract (i.e. contractual variations) to be enforceable.

The CA addressed this point in *Ma Hong Jin v SCP Holdings Pte Ltd* [2020] SGCA 106, where the parties had entered into a variation of their original contract. Following a dispute based on the contract variation, respondent SCP Holdings Pte Ltd ("**SCP**") argued that the variation was unsupported by consideration and was therefore unenforceable. The CA held that in general, parties can agree to dispense with the doctrine of consideration for variations on their contract. However, it agreed with SCP that the parties in this case had not actually done so. As such, the contract variation was unenforceable.

In reaching its conclusion, the CA also addressed a procedural issue on the applicable standard of proof required of the plaintiff when a defendant submits that it has "no case to answer" and elects to call no evidence even if the submission fails.

II. Material Facts

In 2015, the appellant Mdm Ma Hongjin ("**Mdm Ma**") was an investor who entered into a convertible loan agreement (the "**CLA**") with the respondent SCP, which owns and controls Biomax Holdings Pte Ltd ("**Biomax Holdings**"). Under the CLA, Mdm Ma was to extend a $5m loan to SCP over two years, while SCP was to pay interest at 10% per annum. Within two months, Mdm Ma and her husband Mr Han Jianpeng ("**Mr Han**") became unhappy with SCP's financial results. Thus, Mr Han, who had been the actual negotiator for the CLA, re-negotiated some terms of the CLA with SCP's controlling shareholder Mr Sim Eng Tong, after which Mdm Ma and SCP entered into a supplemental agreement (the "**SA**"). In particular, the SA provided that SCP had to pay an additional "lump sum facility fee" ("**facility fee**") of S$250,000. Mdm Ma did not assume any additional obligations to SCP under the SA.[1] Subsequently, SCP failed to pay the facility fee. Mdm Ma then commenced proceedings to obtain payment of the facility fee, as well as other sums which were not the subject of the appeal.[2]

The High Court ("**HC**") agreed with SCP that the SA was unenforceable as it was not supported by consideration. It also considered that following a defendant's submission of no case to answer, a plaintiff would still have to prove its case on a balance of probabilities.

III. Issues on Appeal

On appeal, the CA discussed the following issues:

A) What is the test to be applied upon a submission of no case to answer by a defendant?

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[1] Shortly after entering into the SA, Mdm Ma entered into other transactions with Biomax Technologies Pte Ltd ("**Biomax Tech**"), which was owned and controlled by Biomax Holdings, which was in turn owned by SCP.

[2] Mdm Ma also sued to obtain repayment of the outstanding loans and interest from Biomax Tech, as well as other sums outstanding from SCP. Those claims, however, are irrelevant to this appeal.

B) Did Mdm Ma adequately plead that the SA was supported by consideration?
C) Did the CLA dispense with the need for consideration for contractual variations?
D) Did Mdm Ma furnish consideration for the SA?
E) Should the requirement of consideration be dispensed with for contractual variations?

A. What is the test to be applied upon a submission of no case to answer by a defendant?

In the HC, after Mdm Ma had closed her case as the plaintiff (i.e., the party bringing the case), SCP as the defendant (i.e. the party defending against the plaintiff's case) made a submission of "no case to answer", coupled with the usual election not to call evidence if the submission failed. Under Singapore law, it is in fact *obligatory* to elect not to call evidence in such a case.

The HC rejected Mdm Ma's argument that in such a situation, she only had to prove a *prima facie* case[3] in order to succeed on her claim, finding instead that she had to prove her case on a balance of probabilities.[4] However, the CA disagreed with the HC's analysis, holding that the establishment of a *prima facie* case on each of the relevant facts essentially results in a finding that the plaintiff has *also* proven those facts on a balance of probabilities.

In doing so, the CA first reiterated the distinction between the *legal* burden of proof and the *evidential* burden of proof. Generally, in a civil case the plaintiff bears the *legal* burden of proving its case against the defendant, on a balance of probabilities. At this point, the plaintiff also has the evidential burden of providing some evidence of its claim. However, once the plaintiff provides such evidence (thereby establishing a *prima facie* case), the evidential burden then shifts to the defendant to "contradict, weaken or explain away the evidence". If the defendant is unable to discharge this evidential burden, the court may conclude from the plaintiff's evidence that the *legal* burden is also discharged and make a finding on the fact against the defendant. Conversely, if the defendant discharges this evidential burden, then the evidential burden shifts back to the plaintiff to rebut the defendant's evidence. For instance, in a prior case which dealt with whether defects in paint supplied by a manufacturer caused discolouration on a building, the appellant's evidence demonstrated *prima facie* that the defective paint was likely the cause of discolouration. This caused the evidential burden to shift to the respondent to argue otherwise. However, as the respondent produced no evidence on this point, the court found that the appellant had proven that the discolouration was more likely than not caused by defects in the paint.

However, where the defendant makes a submission of no case to answer, coupled with an election not to call evidence, the establishment of a *prima facie* case by the plaintiff on each of the relevant facts essentially also results in a finding that the plaintiff has proven his case on a balance of probabilities. This is because, following the shifting of the evidential burden to the defendant, there will be no evidence coming from the defendant to disprove or weaken the plaintiff's position. There is simply no contrary evidence from the defendant for the court to consider. Thus, where the defendant has submitted that it has no case to answer and has (as it legally must) also elected to call no evidence if it fails in this submission, the plaintiff would succeed if it can establish that it has a *prima facie* case on each of the essential elements of its claim.

[3] Generally, this means that the relevant party has produced sufficient evidence to justify a verdict in his/her favour regarding his/her claims (absent evidence to the contrary from the other party).
[4] Generally, this means that the court would have to be satisfied that it was more likely than not that that the relevant party had proven his/her case.

B. Did Mdm Ma adequately plead that the SA was supported by consideration?

SCP argued that Mdm Ma's case should have failed, owing to her failure to plead, from the start, that the SA was supported by consideration. The CA disagreed. It noted that the purpose of pleadings was to ensure that each party was aware of the respective arguments against it and that neither was taken by surprise. Here, there was indeed some reference in Mdm Ma's pleadings that the SA had dispensed with the need for consideration; as such this argument had not caught SCP by surprise. Moreover, SCP could not specify any prejudice which it had suffered by Mdm Ma's arguments, other than to claim that there ought to be stricter adherence to the requirements of pleadings, and that it had been caught off-guard. Given the circumstances, the respondent could also be adequately compensated with costs. Thus, the CA held that Mdm Ma should be permitted to raise her arguments in this respect.

C. Did the CLA dispense with the need for consideration for contractual variations?

In deciding whether the parties had agreed to dispense with the need for fresh consideration in executing the SA (and thereby varying the terms of the CLA), the CA first observed that parties could, in general, agree to dispense with the need for consideration in varying or changing a contract. However, it is implicit in such an agreement that the parties would have crystallised the spirit of cooperation and given such variation a concrete legal form. This was quite different from an assumption that the parties are necessarily always in a situation of cooperation, simply by entering into a contract with each other.

The CA considered that the key clause in question was clause 9.3 of the CLA. It stated: "[n]o amendment or variation of this Agreement shall be effective unless so amended or varied in writing and signed by each of the Parties." Based on an objective reading of this clause, the CA rejected the view that the parties had dispensed with the need or requirement for consideration if the CLA was varied. Rather, clause 9.3 merely prescribed a signed writing as a necessary, but not necessarily sufficient, condition for the validity of a subsequent variation of the contract. Such wording was different from a clause (as in a prior case) which stated that "[t]his Sub-Contract shall be varied or modified only with prior written consent from both parties". Unlike clause 9.3, such a clause provided that the contract "shall [*ie*, must] be varied or modified only with [*ie*, as long as there is] prior written consent from both parties". Conversely, clause 9.3 cannot be construed to mean that the parties agreed that no fresh consideration would be required for subsequent variation of their contract. As such, the CA also rejected this argument.

D. Did Mdm Ma furnish consideration for the SA?

Mdm Ma argued that she had, in fact, furnished fresh and valid consideration for SCP's promise, in the form of "goodwill" to provide future loans to SCP (or its related entities) in return for her signing the SA.

The CA first noted that alleged consideration may be legally insufficient if: (i) it is itself insufficient in the eyes of the law to begin with; (ii) it is not contemporaneous or otherwise *causally connected* with the promise to be enforced (i.e., "past consideration"), or (iii) it is not only insufficient in the eyes of the law but is also past consideration.

With regard to the concept of "causal connection" in (ii), the CA further noted that there were two senses in which that concept might be used. The *first* sense requires an element of *request*, to establish a link between the parties concerned. Thus, if one party voluntarily chooses to confer a benefit on the other party or incur a detriment to himself, this would not constitute sufficient consideration. The *second* sense is related to the concept that "past consideration is

no consideration",[5] as this also denotes an absence of linkage between the parties. What looks, at first blush, as past consideration will only pass legal muster if there is a single (contemporaneous) transaction, with the parties having the common understanding that consideration would indeed be furnished at the time the promisor made his promise.

With regard to Mdm Ma's "goodwill" argument, the CA found the first sense (the element of request) to be relevant here. In this respect, it held that the element of request necessary to establish a link between the parties was absent. SCP had not requested for any "goodwill" from Mdm Ma, which then led to the conclusion of the SA. It was insufficient that the benefit SCP conferred upon Mdm Ma pursuant to the SA stirred up "goodwill" on her part and of her own voluntariness. In addition, motive for making a promise did not in itself amount to consideration.

In any event, the alleged consideration was legally insufficient to begin with. To the extent that "goodwill" referred to an improved relationship between the parties, the CA noted that consideration for a promise made "in consideration of natural love and affection" bore no legal value. And to the extent that "goodwill" referred to some increased likelihood that Mdm Ma would extend future loans to SCP or its related entities, such consideration would be illusory where it consisted of a promise whose performance was left entirely to the discretion of the promisor. Indeed, there was never any promise regarding any future loans to begin with. As such, the CA also rejected this argument.

E. Should the requirement for consideration be dispensed with for contractual variations?

Finally, Mdm Ma argued that consideration should be dispensed with in cases concerning contractual variation or modification. The CA disagreed, based on five main points.

First, the CA held that it was practically wise to maintain the status quo. Allowing for the availability of both the doctrine of consideration as well as alternative doctrines (such as economic duress) would afford the courts a range of legal options to achieve a just and fair result in the case concerned.

Second, the CA noted that the difficulties relating to possible alternatives to the doctrine of consideration were still not resolved by the courts even now; indeed, in some instance they appeared to have either worsened or were not addressed at all.

Third, the CA rejected the argument that consideration was unnecessary for contractual variations, as the parties were already in a contractual relationship. The idea underlying such an argument was that such parties were more likely to be flexible with each other, to advance their common enterprise. Thus to insist that any contractual variations or modifications required consideration would run counter to, or militate against, such an enterprise (and/or situations where one party might be willing to afford the other party a concession to cultivate a long-term relationship).

However, the CA noted that this was but one possible perspective. Parties entered into contracts for many reasons. They might also desire to vary or modify their contract for many reasons, not all of which might be as positive as depicted in the scenario just considered. But a legal

[5] Past consideration refers to consideration that was made or performed prior to the formation of the contract. For example, if A promises to pay B for something that B has already performed, B's performance of such an act is regarded as past consideration.

rule is intended to be applicable universally, regardless of the precise factual scenario concerned. A change in the law as argued for here (i.e. dispensing with the requirement of consideration for a contract variation) would be consistent with only one scenario, i.e. where the parties in an existing contractual relationship are seeking to cooperate with each other. Any argument that the courts should consider other legal doctrines to accommodate and deal with other factual scenarios would bring them back full circle to the point that the alternative doctrines themselves contain difficulties that need to be ironed out. Indeed, including the doctrine of consideration, in addition to these alternative legal doctrines, might be the best and most practical way forward. The CA further noted that if parties could always exclude the requirement for consideration for a contract variation by unambiguously stating so at the time the contract is formed, or through varying their contract by deed.

Fourth, the CA noted that it was inconclusive, at best, to say that the doctrine of consideration in relation to contractual variation had been abolished in other Commonwealth jurisdictions. Indeed, the doctrine of consideration was still very much a requirement for the variation or modification of existing contracts, insofar as the overall case law in the Commonwealth was concerned.

Fifth, if the doctrine of consideration were to be abolished for contractual variations, the CA questioned why the doctrine of consideration should not then be abolished for the *formation* of contracts as well. That would then bring the courts back full circle to the more general issue of whether or not the doctrine of consideration *as a whole* should be abolished, which it had already answered in the negative.

IV. Learning Points

This case confirms that the doctrine of consideration remains a part of Singapore's law, including in situations which involve the variations of contracts. Nonetheless, parties seeking to do away with consideration for contractual variations can do so by unambiguously providing for it when the contract is formed. To this end, the wording in this clause should clearly set out a clear list of conditions for the parties to vary the contract. For instance, the contract could include a statement which states that: "the contract can be varied or modified without consideration, as long as there is prior written consent from both parties".

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