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Compromising on consideration in Singapore: *Gay Choon Ing v Loh Sze Ti Terence Peter*

Goh Yihan

Introduction

It is not often that a judgment contains a reference to Aristotle's work or a coda at its conclusion. The recent Singapore Court of Appeal¹ judgment of *Gay Choon Ing v Loh Sze Ti Terence Peter*² (delivered by Andrew Phang JA) contained both, the latter of which an extensive judicial exposition on the difficulties (and tentative solutions) relating to the contractual doctrine of consideration. This re-evaluation of consideration at the slightest opportunity is unsurprising, given the conceptual problems that have afflicted the doctrine. There have been various judicial solutions, generally capable of classification into two distinct types: first, through an internal re-definition of concepts within consideration (for example, the equation of factual and legal benefit or detriment in *Williams v Roffey Bros & Nicholls (Constructors) Ltd*³); second, through the application of an external doctrine in conjunction with or in replacement of consideration (for example, the arguable substitution of promissory estoppel for consideration in *Collier v P & MJ Wright (Holdings) Ltd*⁴). For convenience, the former type will be termed the 'internal solution', and the latter termed the 'external solution'. The application of either type of solution has different implications about the continued utility of consideration. Whilst leaving its final conclusion deliberately undecided, the Court in *Gay Choon Ing* seemingly preferred an external solution, providing yet another string to the bow for the abolition of consideration in contract law, at least in the Singapore context. However, questions remain as to the consequences of such abolition, particularly when, as this comment will suggest, there is insufficient recognition of the distinction between (and consequences of) internal and external solutions to the considerable problems of consideration.

Facts and the Court's re-evaluation of consideration

Despite the Court's extensive discussion of consideration, the actual application of the doctrine raised no 'fundamen-

tal difficulties'.⁵ The facts that allowed the opportunity to re-evaluate consideration reflected the ebb and flow of friendship, captured by Aristotle in his *Nicomachean Ethics* (Book VIII),⁶ and interestingly cited by the Court in a rare judicial nod to classical literature.⁷ The appellant in *Gay Choon Ing* was a close friend of the respondent and was employed by the latter's company in Kenya, ASP, until his resignation in 2004. In 1993, the appellant's family business in Singapore had plans to redevelop a hotel and the appellant sought the respondent's financial assistance. The respondent acceded to this request and entered into a trust deed wherein the appellant was to hold some shares in his family business on trust for the respondent in exchange for funds. This investment remained uneventful until 2002, when the respondent suspected that he was not informed whenever dividends were declared. The respondent's suspicion was confirmed in 2003 when the appellant indicated his desire to leave ASP with an appropriate severance package, thereby straining the parties' friendship. Following a consensus to resolve matters amicably, the parties concluded a 'Points of Agreement' in 2004 wherein the appellant agreed to purchase the shares held on trust for a sum of money. At the same time, a waiver letter from ASP was sent to the appellant, stating that ASP had no claim against the appellant and that the appellant could leave ASP but without any severance pay. The appellant signed this letter in acceptance of its terms. However, following another altercation in 2005, the respondent initiated a claim for breach of trust and an account of all sums due to him. At first instance, the Singapore High Court found for the respondent and ordered that the 'Points of Agreement' be rescinded and that the appellant account for dividends payable to the respondent. However, the appellant was not found to be in breach of trust. Both parties later cross-appealed.

The Court allowed the appellant's appeal. It thought that the central issue was in contract law (as opposed to

trust law), viz, whether the contemporaneous execution of the 'Points of Agreement' and the waiver letter constituted a valid compromise agreement between the parties, thereby releasing both parties from their obligations to each other.⁸ The actual resolution of this issue on the requirement of consideration was not difficult: relying on the classical definition of consideration in *Misa v Currie*,⁹ the Court found that it was sufficient for the respondent to have suffered a detriment through his promise to relinquish all claims against ASP, such that it did not matter that ASP or the respondent may not have been conferred a benefit. In any event, the Court was prepared to find the conferment of a benefit on the respondent in view of his personal interest in not having his company sued. It was also irrelevant that ASP (and not the respondent in his personal capacity) signed the waiver letter because the appellant had done likewise at the respondent's request.¹⁰ Having found the other essential elements of a compromise present, the Court had no difficulty ruling in favour of the respondent.

While this uncontroversial application of the present law is unproblematic, it may be questioned whether the two documents were ever intended to constitute a compromise between the parties. There is of course nothing to prevent the essence of a compromise to be found within two or more documents, but the Court evidently took a pragmatic view of the facts in finding that the parties intended to form a compromise by these two documents. Indeed, it was prepared to look over the fact that both the 'Points of Agreement' and the waiver letter technically involved different parties, preferring instead to view both parties in their 'relevant context'.¹¹ Although, as the Court correctly stated, this would have no legal effect vis-à-vis the consideration issue, one may have cause to wonder if the parties themselves saw the two documents as a valid compromise, particularly when, as the Court pointed out on numerous occasions, the parties' counsel never made compromise a major issue either in proceedings below.¹²

However, it is probably the case that the conclusion, on an objective construction of the documents concerned, was the correct one. What might be legally interesting, however, is that notwithstanding the rudimentary application of consideration, the Court proceeded to discuss the principal difficulties of the doctrine, as well as the main alternatives available for future determination. Pursuant to this endeavour, the Court stated the *Williams* innovation generated 'very practical difficulties' in as much as it rendered consideration largely redundant since it would be all too easy to locate some element of consideration between contracting parties.¹³ Furthermore, the *Williams* innovation only had a narrow sphere of operation involving a promise to pay more for the performance of an existing

duty owed to the same party; it had no application where the promise is to pay less in discharge of an entire debt (for example, in *Foakes v Beer*¹⁴). Neither did the innovation have any relevance in a promise to perform an existing duty imposed by law (for example, in *Glasbrook Brothers, Limited v Glamorgan County Council*¹⁵) nor in a promise to perform an existing duty owed to a third party (for example, in *New Zealand Shipping Co Ltd v A M Satterthwaite & Co Ltd*¹⁶). Indeed, both of these situations are conventionally explained by the orthodox requirement of a legal benefit or detriment. Having implicitly considered that the internal reformation of consideration by the *Williams* innovation to be unsatisfactory, the Court indicated a tentative (if rather obvious) preference for the external application of economic duress as a replacement for consideration, noting that the situations in *Glasbrook* and *The Eurymedon* may be adequately dealt with by economic duress.¹⁷ It stopped short of crystallising this preference into law because, quite apart from the fact that this issue was not argued, economic duress (and its related doctrines of unconscionability and undue influence) is not free from difficulties.¹⁸ Nonetheless, the Court staunchly noted that consideration would need to be reformed; in the Court's own words (at [117]):

'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.'

Indeed, it seems that the time that the Court has earmarked to do so is when a viable alternative relatively free of problems is found.

Two innovations in the potential future reform of consideration

The supposed need to reform consideration is not new, and has in fact been advocated by many.¹⁹ In this respect, the Court's unusual coda contains two innovations, one general and the other specific, which may be of interest in any discussion relating to the potential reform of consideration.

General innovation: methodology of reform

The general innovation is in the Court's methodology of dealing with any future reform to consideration. In seemingly rejecting an internal solution (ie, the *Williams* inno-

vation) and preferring an external solution (ie, arguably economic duress), the Court has avoided (or will avoid on a future occasion) the present difficulties associated with internal and external solutions operating in tandem. In this respect, while the *Williams* innovation has been widely praised,²⁰ it has not escaped criticism.²¹ In particular, it has been said that the *Williams* innovation is difficult to reconcile with prior case law and that its application renders consideration moot, at least in existing duty cases.²² The problem might be that, even though the *Williams* innovation is an internal solution, it has the potential to fundamentally alter the orthodox basis of consideration, such that legally gratuitous promises may be enforceable.²³ In this sense, it assumes the character of an external solution, but without providing for an alternative doctrine in replacement of consideration. What remains is in name consideration, and sought to be conceptually understood as such, but that conceptual understanding cannot be complete, for 'consideration' as a label does not accurately describe consideration anymore. It may be said that the *Williams* innovation does not apply in every aspect of consideration (as indeed the Court does²⁴), but that is to expose the doctrinal incoherence that exists and the inadequacy of the internal solution.²⁵ Indeed, the Court's apparent disavowal of the innovation in *Williams* as reducing the legal requirement of consideration to almost vanishing point shows a preference for doctrinal coherence than individual pragmatism.

More broadly, the problem with an internal solution supplemented by an external one is that both sets of solutions might pull in different directions: whilst internal solutions seek to preserve consideration, external ones arguably do the exact opposite. Consequently, consideration now consists of a patchwork of internal solutions supplemented by partial external ones, leading to the perception that the doctrine is being preserved in name only but devoid of any substantive utility. As mentioned above, the lack of uniformity in the application of the internal solutions also leads to the concern that consideration is internally incoherent. What is needed is a definitive preference for one category of solution over the other. The courts could recognise that whilst consideration fulfils some important function, its internal rules have become overly technical in apparent separation from this function, such that it should be wholly replaced by an external doctrine that is itself not as clouded internally as consideration is perceived to be. This was what the Court tentatively settled upon in *Gay Choon Ing*.

Specific innovation: economic duress as replacement for consideration?

However, the difficulty of replacing consideration with another doctrine externally is locating such an alterna-

tive. Any such replacement is necessarily premised on two bases: first, that the rationale for consideration is fully understood, and second, that the alternative doctrine is capable of giving effect to this rationale.²⁶ If this is correct, the Court's specific innovation of an apparent preference for economic duress in replacement of consideration may not be altogether desirable. In the first place, while the modern view is that consideration is to put some legal limits on the enforceability of agreements,²⁷ it is less clear exactly why (and, consequently, how) consideration is to do this.²⁸ On the one hand, one could take a broad policy-oriented view and say that certain agreements should not be enforceable because of certain extenuating reasons, including duress. On the other hand, one could also take a narrower view, including that which states that the law should only enforce reciprocal bargains or that consideration may be evidence of a serious intention to contract.²⁹ All of these have been cited as possible justifications for consideration.³⁰ However, whichever view one takes from the palette of various justifications for consideration, it is perhaps clear that no one has been determinatively accepted as being correct. That makes the search for a replacement, premised on an understanding of the purpose of the original doctrine being replaced, difficult to begin. It is of course acknowledged that most of the abovementioned possible functions of consideration can be served by other legal doctrines,³¹ but the mere replication of its functions in other doctrines is not reason enough for its abolition; there are numerous examples of such overlap across contract law.³²

In any event, it is certainly the case that the rationale of consideration is not perfectly symmetrical with (and hence replaceable by) economic duress specifically. An examination of the *Glasbrook* and *Eurymedon* situations, which the Court suggested might show the viability of replacing consideration with economic duress,³³ illustrates the point. Although *Glasbrook* was concerned with the public policy of avoiding extortion by public authorities, the factual scenario therein is not wholly representative of cases falling within the category of the performance of an existing duty imposed by law. In particular, where there is no extortion, there yet may be a wider public policy not to find consideration so as to prevent conduct that is generally criminal, as illustrated in *Brown v Brine*.³⁴ The fluidity of consideration in enforcing a wider public policy apart from extortion also finds expression in a separate set of cases involving promises to pay rewards for information that might lead to the arrest of a felon. These promises were enforced even though in England there was a public duty until

1968 to do so.³⁵ Here, the public policy is satisfied in the enforcement of the promise (as opposed to denial), suggesting that the prevention of extortion through economic duress is not the full extent of public interests protected. Likewise, while the situation in *The Eurymedon* is susceptible to extortion,³⁶ this does not necessarily mean that consideration does not perform a residual function towards deciding whether promises in that situation should be enforced. Indeed, outside of modification of contracts, consideration may serve a wider purpose of sieving out unenforceable promises for want of economic duress but which were not seriously intended.³⁷ Without symmetry both in purpose and conceptual basis,³⁸ economic duress may not be a complete external replacement for consideration. At the very least, it cannot be the sole replacement of a doctrine that arguably is ‘a proxy for a number of different reasons why a promise is not enforceable’.³⁹

Conclusion: compromise is best for now

Ultimately, the problem is that any external solution requires the rationale of consideration to be authoritatively determined to allow for the effective evaluation of any alternative. The Court’s tentative preference for economic duress as an alternative (if correctly understood to be such), together with its rejection of economic duress because it is internally problematic, perhaps does not recognise this more fundamental problem. To be fair, the Court has indicated that its views in *Gay Choon Ing* were merely tentative, and so its apparent preference for economic duress as a replacement for consideration cannot be taken as having conclusively addressed these problems. However, perhaps the suggestions herein could be useful on the next occasion when the reform of consideration comes squarely within the Court’s purview. Until then, possibly the best solution is as the Court in *Gay Choon Ing* (and most other jurisdictions in the Commonwealth) settled upon: a compromise on an imperfect quilt of consideration, comprising of both internal and external solutions. Perhaps this is best put by the Court itself, as follows:⁴⁰

‘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 ...’

This has the attraction of a known imperfection, which in turn results in certainty: the problems associated with consideration are well known, and the piecemeal solutions both internal and external are applied with little real problems.⁴¹ However, whilst certainty is an important (some may say overriding) consideration in commercial dealings, the price for it may be one that the Court is unwilling to pay, judging by its reference to ‘problems of theoretical coherence’⁴² within consideration. If that is so, then the unusual coda by the Court will provide interesting judicial fodder for those (in Singapore at least) who might be looking to the external extinguishment of consideration, as opposed to the internal resolution of the doctrine. Perhaps when the Court does have the direct opportunity to decide more fully whether to do so, a coda may not be necessary. However, another quote from Aristotle may not be entirely out of place, viz. ‘Even when laws have been written down, they ought not always to remain unaltered’.⁴³ The same, with some alteration to take into its proper context, could be said about consideration, which, for the moment at least, remains mired in compromise in Singapore (and elsewhere).



* Faculty of Law, National University of Singapore. I am grateful to Professor J W Carter, Professor Tan Cheng Han SC and Gary Low for very helpful comments on an earlier draft of this note. All errors, however, remain my own.

1 Hereafter referred to as ‘the Court’ unless otherwise specified.

2 [2009] SGCA 3. As mentioned in the main text, the judgment was delivered by Andrew Phang JA, with the other members of the Court being Chao Hick Tin and V K Rajah JJA.

3 [1991] 1 QB 1 (*Williams*). This equation of factual and legal benefit or detriment shall be termed the ‘*Williams* innovation’ in the remainder of this comment.

4 [2008] 1 WLR 643, noted by Alexander Trukhtanov, ‘*Foakes v Beer*: Reform of Common Law at the Expense of Equity’ (2008) 124 LQR 364 and also by Richard Austen-Baker, ‘A Strange Sort of Survival for Pinnel’s Case: *Collier v P & MJ Wright (Holdings) Limited*’ (2008) 71 MLR 611.

5 [2009] SGCA 3 at [94].

- 6** Aristotle, *Nicomachean Ethics* (Book VIII), Roger Crisp trans & ed, Cambridge University Press, 2000. The particular passage cited by the Court read as follows: ‘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.’
- 7** [2009] SGCA 3 at [12].
- 8** [2009] SGCA 3 at [39].
- 9** (1876) 1 App Cas 554.
- 10** [2009] SGCA 3 at [80].
- 11** [2009] SGCA 3 at [80].
- 12** [2009] SGCA 3 at [76].
- 13** [2009] SGCA 3 at [101].
- 14** (1884) 9 App Cas 605.
- 15** [1925] AC 270 (*Glasbrook*).
- 16** [1975] AC 154 (*The Eurymedon*).
- 17** [2009] SGCA 3 at [107] and [109] (emphasis in original).
- 18** As considered in Andrew Phang, ‘Whither Economic Duress? Reflections on Two Recent Cases’ (1990) 53 MLR 107.
- 19** See, for example, Andrew Phang, ‘Consideration at the Crossroads’ (1991) 107 LQR 21.
- 20** See, for example, Roger Halson, ‘Sailors, Sub-Contractors and Consideration’ (1990) 106 LQR 183; Roger Adams and John Brownsword, ‘Contract, Consideration and the Critical Path’ (1990) 53 MLR 536; Richard Hooley, ‘Consideration and the Existing Duty’ [1991] JBL 19; and J W Carter, Andrew Phang & Jill Poole, ‘Reactions to *Williams v Roffey*’ (1995) 8 JCL 248.
- 21** Brian Coote, ‘Consideration and Benefit in Fact and in Law’ (1990) 3 JCL 23.
- 22** J W Carter, Elisabeth Peden and G J Tolhurst, *Contract Law in Australia*, 5th ed, LexisNexis Butterworths, 2007 at p 134, which in turn cites Coote, n16, above.
- 23** See also Carter, Phang and Poole, n15, above at 265 but cf Carter, Peden and Tolhurst, n17, above at p145.
- 24** [2009] SGCA 3 at [103]–[108].
- 25** Carter, Peden and Tolhurst, n17, above at p144.
- 26** See F M B Reynolds and G H Treitel, ‘Consideration for the Modification of Contracts’ (1965) 7 Malaya L Rev 1 at 9 and G H Treitel, ‘Consideration: A Critical Analysis of Professor Atiyah’s Fundamental Restatement’ (1976) 50 ALJ 439 at 441, where the learned author identifies two questions which arise in, inter alia, ‘existing duty’ cases: (a) has the promisee done anything in return for the promisor’s promise; and (b) is what the promisee has done contrary to the public interest.
- 27** [2009] SGCA 3 at [98]. See also Carter, Peden and Tolhurst, n17, above at p 103–4, as well as B J Reiter, ‘Courts, Consideration, and Common Sense’ (1977) 27 UTLJ 439 at 439–440 and Carter, Phang and Poole, n15, above at 250.
- 28** Carter, Peden and Tolhurst, n17, above at p 104.
- 29** See also Law Revision Committee, Sixth Interim Report (Statute of Frauds and the Doctrine of Consideration), Cmd 5449, 1937 and Mindy Chen-Wishart, *Contract Law*, 2nd ed, Oxford University Press, 2007 at p125.
- 30** See the very useful summary of the possible justifications for consideration in Tan Cheng Han, ‘Contract Modifications, Consideration and Moral Hazard’ (2005) 17 SAclJ 566 at 569–576.
- 31** P S Atiyah and Stephen A Smith, *Atiyah’s Introduction to the Law of Contract*, 6th ed, Clarendon Press, 2005 at p128.
- 32** For example, between mistake and misrepresentation.
- 33** [2009] SGCA 3 at [107] and [109].
- 34** (1875) LR 1 Ex D 5. See also Edwin Peel, *The Law of Contract*, 12th ed, Sweet & Maxwell, 2007 at p99–100.
- 35** See, for example, *England v Davidson* (1840) 11 A. & E. 856, cited and discussed in Peel, n32, above at p99–100.
- 36** Although the prevalent view is that this situation is not susceptible to duress, it has been noted that this might not necessarily be the case: see Reynolds and Treitel, n21, above, at 6, n25.
- 37** See Law Revision Committee, n24, above at para 17.
- 38** Carter, Phang and Poole, n15, above at 252, where the learned authors state that ‘whereas factors such as duress qualify the ability of a promisee to enforce a contract, by conferring on the promisor a right of rescission or an ability to have the contract set aside, consideration determines whether the promise is binding at all’. This illustrates the conceptual distinctiveness between consideration and duress (and its like doctrines). See also Hooley, n15, above at 33.
- 39** Tan, n25, above at 574. In this respect, it seems that the Court’s apparent preference for economic duress as a replacement for consideration might be based on its belief that consideration served a singular function. It said ([2009] SGCA 3 at [111]): ‘It is axiomatic ... that if the doctrine of consideration is indeed abolished ... the function it has hitherto performed must be fulfilled by alternative doctrines ...’, but cf [2009] SGCA 3 at [117].
- 40** [2009] SGCA 3 at [118] (emphasis in original).
- 41** Although cf Adams and Brownsword, n16, above at 541–2.
- 42** [2009] SGCA 3 at [117].
- 43** Aristotle, *Politics* (Book II), Benjamin Jowett trans, NuVision Publications, 2004 at p39.