Supplementary Agreement without Fresh Consideration – Valid or Void? Kuala Dimensi Sdn Bhd v Port Kelang Authority [2025] CLJU 142 (Federal Court)

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It is common for parties to enter into supplemental agreements (**SA**) to revise the terms of a main agreement. However, where an SA varies the terms of the main agreement, particularly in relation to consideration *without* fresh consideration, is the SA valid? In this article, we analyse the Federal Court's decision on this issue.

Facts of the Case

The Plaintiff/Respondent, Port Kelang Authority (**PKA**) had appointed the Defendant/Appellant, Kuala Dimensi Sdn Bhd (**KDSB**) as a turnkey contractor to construct and develop the Port Klang Free Zone. Following KDSB's appointment, apart from the main development agreement, a total of five SAs were executed between the parties. Out of these, the last three SAs for additional works are relevant namely, "**ADW1**", "**ADW2**", and "**NADW**".

Pursuant to ADW1 dated 30.11.2005, KDSB was *inter alia*, required to finance and advance the additional development costs for the sum of RM510.38 million, excluding the variation order (if any). PKA would then pay KDSB the sum of RM510.38 million with interest at the rate of 5% p.a. according to Schedule 1 of ADW1.

Less than 6 months later (i.e., 26.04.2006), KDSB requested PKA to increase the chargeable interest under ADW1 to 7.5% p.a. due to a purported increase in base lending rate, and the long period of financing for ADW1 from 2001 to 2011. KDSB contended that the base lending rate which came into effect on 08.12.2005 was 6.25% p.a. but the lending rate for loans at the material time was between 7.25% p.a. to 7.75% p.a. Parties agreed to KDSB's request. This resulted in an additional payment obligation of RM49.367 million by PKA. There were no other changes made to the repayment terms. Notably, nothing was stated in ADW2 of any consideration to be received by PKA for its agreement to pay out the additional RM49.367 million and neither was the purported benefit to alleviate KDSB's financial strain for ADW1 stated.

On the same day, parties executed the NADW for new additional development works where PKA would pay RM335.8 million with interest at the rate of 7.5% p.a. to KDSB. The NADW made no reference to ADW2.

In 2009, PKA filed an action for a declaration that ADW2 was null and void for want of consideration.

High Court's (HC) Judgment

After a full trial, the HC dismissed PKA's action and held that ADW2 constitutes a valid contract. The HC found that ADW1 and ADW2 should be read together and therefore, the consideration for ADW2 is the completion of the additional works under ADW1 (*these were not pleaded*). The HC also found that the intention in executing ADW2 was to alleviate KDSB's financial difficulties to carry out the works under ADW1 and NADW. Moreover, since PKA agreed to enter into ADW2, PKA cannot later challenge its validity.

Court of Appeal's (CA) Judgment

The CA reversed the HC's decision and found that ADW2 was void for want of consideration as ADW2 merely conferred the benefit of extra interest of 2.5% p.a. to KDSB without any reciprocal benefit to PKA. In this regard, the CA found

inter alia that:

- the HC's finding was misconstrued as KDSB had never pleaded that the completion of additional works under ADW1 as the consideration for ADW2. The CA highlighted the age-old legal principle that parties are bound to and must abide by their pleadings.

- in reference to Section 26 of the Contracts Act 1950 (**CA 1950**), an agreement made without consideration was void unless it falls under any of the three exceptions as stated in the aforesaid section. The CA noted that none of the three exceptions are applicable to the factual matrix of the present case.

- the argument that ADW1 should be read together with ADW2 is rejected as they were not executed contemporaneously. Meanwhile, although ADW2 and NADW were executed on the same day, the terms of ADW1 and NADW involved separate and distinct scopes of work for separate and distinct considerations. There was no common objective and hence, cannot be read together.[1]

Federal Court's (FC) Judgment
In the appeal, four questions were to be determined by the FC:

1. ***Where it is alleged that there was no consideration for the agreement between the parties, is consideration to be proved only within the four corners of the said agreement or can the same be proved by extrinsic evidence?***

   The FC declined to answer this question as it was not premised from the CA's decision. The FC noted that the CA did not rely on any extrinsic evidence in arriving at its decision and in fact, there was no such extrinsic evidence present to support the assertion that ADW2 is supported by consideration. Further, the FC fell back on the trite principle that where terms of a contract have been reduced to writing, the contract could only be proved by the document itself, and it is not open to KDSB to seek to introduce and for the court to admit evidence that would *inter alia* add new terms to it. The FC drew support from Sections 91 and 92 of the Evidence Act 1950.

2. ***Whether the practical benefit test, as laid down in Williams v Roffey Bros and Nichollas (Contractors) Ltd 1991 1 QB 1, is good law?***

   The FC declined to answer this question as it was never raised, discussed, or adjudicated in the courts below. The FC found that this question was an attempt by KDSB to extend the application of the legal principle laid down in *Williams v Roffey* i.e., that a practical benefit can serve as a valid consideration which based on the facts, showed no practical benefit to PKA but only KDSB. In any event, the FC distinguished the present case from the facts in *Williams v Roffey* and further found that no evidence was led to show that KDSB would have been unable to perform its obligations under ADW1 and/or enter into NADW if ADW2 was not executed.

3. ***Whether parties who had made their intention clear by entering into legal relations, are bound by an agreement to vary their previous agreement when they have acted upon the former, namely the variation agreement?***
4. ***Whether the doctrine of estoppel should be invoked against PKA when it had agreed to the proposal to increase the interest rate and made payment of the same without reservation?***

   The FC took to answering these two questions together as they overlapped. Before addressing these questions, the FC reiterated its earlier finding that ADW2 was without consideration given that when addressing these two questions, KDSB insisted that since consideration was present in ADW2 and PKA had acted on it, the parties are bound by the variation.

   Evidently, at the forefront of these questions is the effect of Section 26 CA 1950.

[1] Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v Arab-Malaysian Prima Realty Sdn Bhd & Ors [2001] 1 MLJ 324 (CA)

- In observing Question 3, the FC noted that the question suggested that parties who entered into legal relations are bound by it (agreement) even if one receives no consideration. This flies in the face of Section 26 CA 1950. Accordingly, the FC answered Question 3 in the negative.

- Flowing from the above, Question 4 is answered in the negative. The FC highlighted the trite and fundamental principle of law that the doctrine of estoppel cannot prevail against a statute or protect against illegality.[2] In this connection, the FC emphasised that where a contract is automatically void for want of consideration, the same cannot be legitimised due to the conduct of parties and/or by the doctrine of estoppel.

Conclusion

While the Federal Court's decision reaffirms a number of trite legal principles, at the heart of it lies the fundamental requirement under Section 26 CA 1950 that a contract must be supported by valid consideration. In the absence of such consideration, an agreement is rendered void, regardless of whether the parties had acted upon it and the doctrine of estoppel would be of no assistance in validating an otherwise void contract.

This case serves as an important reminder that parties seeking to vary contractual terms of a main agreement through a supplemental or variation agreement must ensure that the latter is not lacking in consideration. The apex court has made it clear that such a deficiency is fatal.

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This article is for general information only and should not be relied upon as legal advice.
The position stated herein is as at the date of publication on 7 March 2025.

[2] Silver Corridor Sdn Bhd v Gallant Acres Sdn Bhd & Anor [2016] 5 MLJ 1 (FC); Datuk Bandar Kuala Lumpur v Perbadanan Pengurusan Trellises & Ors and other appeals [2023] 3 MLJ 829 (FC); see also Ketua Pengarah Hasil Dalam Negeri v TCY Jaya Sdn Bhd [2024] 2 MLJ 362 (CA)