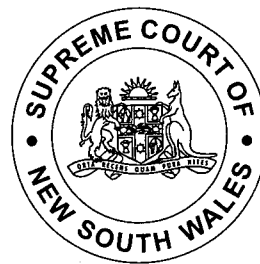


I, Shing Hei Lam, solicitor on the record for the Appellant, hereby certify this and the following 21 pages are a true and correct copy of the Appellant's Written Submissions for publication on the Supreme Court of New South Wales website pursuant to paragraph 27 of the Practice Note No. SC CA 1


Shing Hei Lam
17 October 2025



Filed: 8 October 2025 2:46 PM



D00028M714

Written Submissions

COURT DETAILS

Court	Supreme Court of New South Wales, Court of Appeal
List	Court of Appeal
Registry	Supreme Court Sydney
Case number	2025/00161420

TITLE OF PROCEEDINGS

First Appellant	Kin Lam
First Respondent	Tuo Liu

FILING DETAILS

Filed for	Kin Lam, Appellant 1
Legal representative	Shing Hei Lam
Legal representative reference	
Telephone	9223 1513
Your reference	Kin.SL

ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Written Submissions (Appellant's Annotated Submissions.pdf)

[attach.]

APPELLANT'S ANNOTATED SUBMISSIONS**COURT DETAILS**

Court	Supreme Court of New South Wales, Court of Appeal
Registry	Sydney
Case number	2025/161420

TITLE OF PROCEEDINGS

Appellant	Kin Lam
Respondent	Tuo Liu

PROCEEDINGS IN THE COURT BELOW

Title below	Tuo Liu v Kin Lam
Court below	Supreme Court of New South Wales
Case number below	2020/00117870
Dates of hearing	14, 15, 16, 19, 20, 23, 27 February, 13 March 2024
Material date	4 April 2025
Decision of	Walton J

FILING DETAILS

Filed for	Kin Lam (Appellant)
Filed in relation to	Whole decision below
Legal representative	Mr Shing Hei Lam MLH Lawyers
Legal representative reference	Kin.SL
Contact name and telephone	Mr Shing Hei Lam, 02 9223 1513
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LIU v. LAM

NSW COURT OF APPEAL PROCEEDINGS 2025/251819

APPELLANT'S WRITTEN SUBMISSIONS**A. OVERVIEW**

1. This proceeding is an appeal from a decision of a single judge of the NSW Supreme Court pursuant to s 101(1) of the *Supreme Court Act* 1970 (NSW) (**J**),¹ in which the Appellant was found liable pursuant to an indemnity given to the Respondent pursuant to a written agreement dated 14 May 2018 in respect of the Respondent's liability under orders made in Chinese proceedings (**Agreement**).² The Agreement is set out in full at **Appendix A**.
2. This appeal raises a single issue, viz the sufficiency of the consideration given by the Respondent under the Agreement for the Appellant's promise of indemnity. The Respondent submitted to the primary judge that the consideration was a promise to forbear from suing the Appellant, which was said to be found in clauses I-III of the Agreement.³ The primary judge referred to the Respondent's submission as to the consideration,⁴ found that there was offer and acceptance,⁵ found an intention to create legal relations,⁶ and upheld the claim for breach of contract against the Respondent, but did not expressly make a finding that there was consideration, thereby either making no finding of consideration or implicitly accepting the Respondent's submission.
3. The Appellant contends that, as a matter of contractual construction and legal principle, the Respondent's submission put to the Court below was erroneous. There was no forbearance to sue capable of supplying the necessary consideration. In the absence of consideration, it was not open as a matter of law for the primary judge to uphold a claim for breach of contract, being an essential ingredient of the cause of action. The primary judge ought to have found that there was no binding contract and dismissed the claim.

B. KEY FACTS

4. A summary of the factual findings insofar as they inform the Court of the surrounding

¹ *Liu v Lam* [2024] NSWSC 1306 (Red [28-278](#)).

² Blue [274-9, 295-8](#).

³ [Respondent's opening submissions, \[6\] \(Black 203E-H, U\)](#); Respondent's closing submissions, [\[7\] \(Black 273K-P, U\)](#).

⁴ J[[253](#)] (Red [37W](#)).

⁵ J[[655](#)] (Red [225J](#)).

⁶ J[[744](#)]-[[745](#)] (Red [257O-U](#)).

commercial context of the Agreement or are otherwise relevant to the issue raised on the appeal are set out below.

5. The parties met in 2011 and subsequently sought to cross-refer and collaborate in a variety of business opportunities, under which they could each earn commission.⁷
6. From March 2014, the Appellant became involved in obtaining possible funding for a Hong Kong company that developed piping technology, CAN (HK) Co Ltd (**CAN**).⁸ The Appellant was advised that CAN required EUR 10 million to buy land for a factory and a further EUR 40 million to build a production factory.⁹
7. The ~~Defendant-Appellant~~ established that a Singaporean company (BS Tech) and a Malaysian company (Jiaso) would be able to source funds to invest in CAN.¹⁰ BS Tech would introduce lenders for a fee of 4% of the face value of the instrument and Jiaso required a further 1.9% for a necessary security instrument.¹¹
8. On 3 June 2014, the Appellant, the Respondent and Hong Kong Jiayi International Trade Co Ltd (**Jiayi**), a company incorporated in Hong Kong, entered into a written agreement (**Jiayi Agreement**).¹² Relevantly, under the Jiayi Agreement:
 - (a) The Appellant borrowed RMB 5 million (EUR 600,000) from Jiayi;¹³ and
 - (b) The Respondent gave a guarantee to Jiayi in respect of the monies lent to the Appellant.¹⁴
9. The funds borrowed under the Jiayi Agreement were for the purpose of paying the fees of BS Tech and Jiaso (see [7] above).¹⁵ The funds were advanced by Jiayi on or about 5 June 2014 to a Hong Kong company of which the Appellant was the sole director and shareholder, Millenium Commodity Trading Limited (**Millennium**).¹⁶
10. On 13 June 2014, Millennium entered into an agreement with BS Tech for the provision by BS Tech of an EUR 10 million loan instrument, for a fee of 4% of the face value of the instrument.¹⁷ Then on 20 June 2014, the Appellant caused Millennium to transfer the funds that he had borrowed from Jiayi to BS Tech.¹⁸

⁷ J[11] (Red 35P), [113]-[117] (Red 60K, M-W).

⁸ J[12] (Red), J[119] (Red 35T).

⁹ J[13] (Red 35W).

¹⁰ ~~J[12]-[14] (Red 36B-E), [17]-[18] (Red).~~

¹¹ J[14] (Red 36B-E).

¹² J[6] (Red 34J-N). Court Book Volume 6 pp 168-171 (Blue 119-122).

¹³ Clause 2 (Blue 119M).

¹⁴ Clause 4.2 (Blue 120Q-V).

¹⁵ J[17] (Red 36M-P).

¹⁶ J[15] (Red 36F-I), [17] (Red 36M-P), [147] (Red 69S).

¹⁷ J[15] (Red 36F-I).

¹⁸ J[18] (Red 36Q).

11. On 30 September 2014, Millennium entered into an agreement with the parent company of CAN (Much Rise Investment Limited), whereby Millennium would obtain an effective 10% equity stake in the relevant CAN subsidiary.¹⁹
12. BS Tech failed to provide the agreed finance.²⁰ This led to Millennium commencing proceedings against BS Tech in Singapore to recover the paid sum,²¹ in respect of which it was successful in that it obtained a judgment debt,²² but the cheques provided by BS Tech in respect of the judgment debt were not entirely honoured.²³
13. The Appellant defaulted under the Jiayi Agreement, which led to Jiayi making demands for repayment from around May 2015.²⁴
14. On 13 July 2016, Jiayi commenced a proceeding in the People's Court of Tianjin Binhai New Area against the Respondent pursuant to the guarantee he had given under the terms of the Jiayi Agreement (**Chinese Lower Court Proceeding**).²⁵
15. On 26 November 2016, the parties met with the Respondents' Chinese lawyers, where the Appellant was asked to prepare a statement, which he agreed to do.²⁶
16. On 29 November 2016, the Appellant sent the Respondent an email in which he described the circumstances of the Jiayu Agreement.²⁷
17. On 30 November 2016, the Respondent sent a WeChat message to the Appellant containing a modified version of the 29 November 2016 email, which amendments the Respondent stated were made by his lawyer "*so that the issues were clear and so that the statement was in a proper form to be evidence in Court...*".²⁸
18. On 6 December 2016, the Appellant signed an email, being a final form of his evidence as per the communications of 29-30 November 2016, which he understood would be used as the foundation of his evidence in the Chinese Lower Court Proceeding.²⁹
19. On 7 April 2017, the Appellant met with the Respondent and his lawyer in Beijing, where he was provided with a hard copy of an affidavit for him to sign in the Chinese Court proceedings, due to his signed email being inadmissible, which he signed as

¹⁹ J[16] (Red 36K), J[158] (Red 76Q).

²⁰ J[18] (Red 36Q), J[157] (Red 76K-M).

²¹ J[188] (Red 83B-D).

²² J[212] (Red 88Q).

²³ J[3] (Red 33R-W).

²⁴ J[193] (Red 83N).

²⁵ J[7] (Red 34O), [206] (Red 87C).

²⁶ J[213] (Red 88T-W).

²⁷ J[215]-[216] (Red 89K-W). Blue 126.

²⁸ J[221]-[223] (Red 90W-92C). Blue 131-133.

²⁹ J[225]-[226] (Red 92K-93L). Blue 137.

requested.³⁰

20. On 27 September 2017, a judgment was delivered in favour of Jiayi against the Respondent in the Chinese Lower Court Proceeding, with RMB 6,635,516.54 in total found to be owed (**Chinese Lower Court Judgment**).³¹
21. The Respondent appealed the Chinese Lower Court Judgment to the Secondary Intermediate People's Court of Tianjin (**Chinese Appeal Proceeding**).³²
22. On 6 March 2018, the Respondent sent the Appellant a WeChat message stating that they needed to appear in Court, with the key issue being how to calculate interest and deal with a RMB 1 million payment.³³
23. On 8 March 2018, a meeting occurred between the parties, the Respondent's lawyers, and a mutual friend and business partner, Ms Meng,³⁴ in which they discussed the Chinese Appeal Proceeding.
24. On 9 March 2018, the Chinese Appeal Proceeding was heard, at which the Appellant appeared as a witness for the Respondent.³⁵
25. On the day after the hearing, 10 March 2018, the Respondent forwarded to the Appellant a message from his lawyers summarising what had occurred in Court.³⁶
26. In around this period, according to the Respondent, a conversation occurred between his lawyer and the Appellant, in which his lawyer said, *"If Mr Liu loses the case then he will be liable to make repayments. To be fair, there should be an agreement between you and Mr Liu"*.³⁷ The primary judge considered the Respondent's account of the conversation quite plausible in terms of the lawyer proposing *"the need for an agreement to be fair"* and noted the *"immediate context"* as being *"that the plaintiff was seeking to avoid the severe consequences of enforcement, and in particular, being placed on the bad credit list"*.³⁸
27. On 19 March 2018, judgment was delivered in the Chinese Appeal Proceeding. The appeal was unsuccessful and the amount found to be owed by the Respondent, including interest accrued during the proceeding, was found to be RMB 9,469,485.52

³⁰ J[232]-[236] ([Red 94X-95S](#)), [240]-[242] ([Red 96G-V](#)). [Blue 141-142](#).

³¹ J[7] ([Red 34O-V](#)), [254]-[261] ([Red 99H-102E](#)). [Blue 158-168](#).

³² J[8] ([Red 34W](#)).

³³ J[263] ([Red 102J-O](#)). [Blue 174](#).

³⁴ J[277] ([Red 106G](#)).

³⁵ J[262] ([Red 102G](#)), [287]-[299] ([Red 110K-115Y](#)). [Transcript \(Blue 199-218\)](#).

³⁶ J[313] ([Red 121R](#)). [Blue 221-222](#).

³⁷ J[319] ([Red 123B-I](#)).

³⁸ J[326]-[327] ([Red 124N-S](#)).

(Chinese Judgment Debt).³⁹

28. The Chinese Court engaged in enforcement procedures to enforce the Chinese Judgment Debt, including seizing the Respondent's home and deducting funds from his bank account. The Respondent was anxious to avoid being placed on a 'bad credit' list, which had severe consequences in China, and sought to delay the Court's enforcement measures.⁴⁰ A list of the measures available to the People's Court of Tianjin Binhai New Area in 2018-2019 to enforce its judgments appears at J[312].⁴¹
29. On 13 April 2018, the Respondent's Chinese lawyer sent a WeChat message with a draft of the Agreement to the Respondent, stated to have been prepared on his instructions.⁴² There were subsequent communications amending the draft, including amendments to make New South Wales the relevant forum.⁴³
30. On 27 April 2018, the Respondent sent a WeChat message to the Appellant. The message conveyed advice received by the Respondent from his Chinese lawyer to the effect, *inter alia*, that:⁴⁴
 - (a) The Respondent should have the draft agreement reviewed by an Australian lawyer;
 - (b) He had communicated with the 'enforcement judge' and recommended providing documents "*for reliability... in order to avoid being listed on the list of people with bad credits*"; and
 - (c) He should look at the draft agreement and see if it had a problem, as it "*needs to be submitted to the judge*".
31. On 1 May 2018, the Respondent sent the Appellant a draft of the Agreement via WeChat.⁴⁵
32. On 7 May 2018, execution of the Chinese Appeal Judgment was commenced against the Respondent's assets.⁴⁶
33. On 8 May 2018, the Respondent sent a WeChat message to the Appellant stating that the Appellant needed to sign each page of the Agreement, so it could then be forwarded to the enforcement division of the Chinese Court.⁴⁷

³⁹ J[9] (Red 35D-H), [300]-[302] (Red 116B-117F). Blue 231-6.

⁴⁰ J[10] (Red 35I-M).

⁴¹ J[312] (Red 121G-O).

⁴² J[330] (Red 125K-O). Blue 245.

⁴³ J[331]-[332] (Red 125P-126E). Blue 245-6.

⁴⁴ J[333]-[336] (Red 126G-V). Blue 248.

⁴⁵ J[347] (Red 129K-N). ~~Blue~~.

⁴⁶ J[349] (Red 129Q). Blue 252-6.

⁴⁷ J[350] (Red 129T-W). Blue 270.

34. On 9 May 2018, the Appellant signed the Agreement with his English signature and sent it to the Respondent.⁴⁸
35. On or about 14 May 2018, the parties met at a hotel in Shenzhen. While the subject of significant controversy at trial, the primary judge was satisfied that the parties signed the Agreement around this time (with the Appellant this time signing with his Chinese signature).⁴⁹
36. On 22 June 2018, the Respondent submitted a repayment schedule to the Chinese Court in relation to the Chinese Judgment Debt.⁵⁰
37. Although the Respondent was in ‘constant communication’ with the Appellant from May 2018, the first occasion on which the Respondent ever referred to suing the Appellant was in a WeChat message and telephone call on **20 December 2018**.⁵¹
38. By 23 January 2019, the Respondent had paid a total of RMB 9,469,485.52 in respect of the Chinese Judgment Debt, thereby paying the judgment debt in full.⁵² The Appellant separately paid RMB 1 million to Jiayi pursuant to the Jiayi Agreement.⁵³
39. On 20 April 2020, the Respondent commenced the proceedings below.⁵⁴

C. THE AGREEMENT

40. The relevant terms of the Agreement are summarised below. It is set out in full in the Appendix to these submissions (copied from the translation at Blue 295-8).
41. **The Recitals** refer to the Jiayi Agreement, the Chinese Lower Court Proceeding and its result, the Chinese Appeal Proceeding and its result, and states that the Appellant “*voluntarily becomes liable for the repayment of all and final liabilities assumed by the Respondent in the above-mentioned cases*”.
42. The chapeau of the operative terms states that the terms were a result of “*friendly negotiations*”.
43. **Clause I** provides that the Appellant promised to bear all of the debts assumed by the Respondent due to “*the above-mentioned cases*” and various associated losses. These debts are defined as ‘all debts’.
44. **Clause II** states that the Appellant promised that he would, before 31 December 2018, “*pay all debts and interests agreed in Clause I*”.

⁴⁸ J[367], [371] (Red 138S-V). Blue 453-458.

⁴⁹ J[1] (Red), [28]-[32] (Red 38L-40U), J[377] (Red 139Q). Blue 295-298.

⁵⁰ J[379] (Red 140B).

⁵¹ J[382]-[386] (Red 140H-Q). Blue 373.

⁵² J[10] (Red 35L), [380] (Red 140D), [392] (Red 141U).

⁵³ J[10] (Red 35L).

⁵⁴ J[1] (Red), J[393] (Red 141W). Statement of Claim (Red 1-14).

45. **Clause III** provides that, if the Appellant failed to “*perform the obligation to pay* [the Respondent] *within the period agreed in Clause II*”, then the Respondent had the right to commence legal proceedings to request payment of “*all debts mentioned above*” together with interest and costs.
46. **Clause IV** stated that the Appellant “*voluntarily*” provided a mortgage over particular property in Australia by way of security.
47. **Clause V** provided that, if the Appellant failed to “*perform the obligation to pay* [the Respondent] *within the period agreed in Clause II*”, then the Respondent could choose to exercise rights as a mortgagee granted pursuant to security given in Clause IV.
48. **Clauses VI-VIII** impose on the Appellant various obligations and grant to the Respondent various rights in respect of the security.
49. **Clauses IX** provides that the contract takes effect after being signed by the parties and that the English version shall prevail over the Chinese version in respect of inconsistency.
50. **Clause X** relevantly provides that, if any dispute could not be negotiated, “*the matter shall be administered exclusively by the courts of the State where [the Appellant’s] land locates*”.

D. THE PROCEEDING BELOW

The pleadings and submissions of the parties

51. In his Statement of Claim (**SOC**),⁵⁵ the Respondent pleaded a breach of contract claim based upon the Agreement. The Respondent relevantly alleged that under the terms of the Agreement, the Appellant had agreed to repay the Respondent what the Respondent was required to pay pursuant to the orders made in the Chinese Lower Court Proceeding and Chinese Appeal Proceeding, together with interest, before 31 December 2018 (particularised with reference to Clauses I-II).⁵⁶ The Appellant, in breach of the Agreement, failed to pay the amount owed under the Agreement.⁵⁷ The Respondent paid the amount owed by him pursuant to the orders made in the Chinese proceedings (RMB 9,469,485.52), which led to the conclusion of the enforcement of the Chinese Judgment Debt, which amount the Respondent contended constituted its loss and damage flowing from the Appellant’s alleged breach of the Agreement.⁵⁸
52. It is pertinent to observe that the Respondent:

⁵⁵ Red [1-14](#).

⁵⁶ SOC [\[3\] \(Red 4G\)](#), [16]-[19] (Red [5W-6M](#)).

⁵⁷ SOC [\[24\] \(Red 7K\)](#).

⁵⁸ SOC [\[25\]-\[30\] \(Red 7N-8H\)](#).

- (a) Made no allegation as to the existence of consideration (either expressly, or implicitly by pleading a promise made by the Respondent), despite being obliged to plead it;⁵⁹
 - (b) Did not plead the existence of a debt owed by the Appellant to the Respondent, other than that contended to have been created by the Agreement itself; and
 - (c) Did not allege that he, in entering the Agreement or otherwise, offered to, or actually did, forbear from suing the Appellant, nor that the Appellant made a request (express or implied) that he do so.
53. The Appellant, in his Further Amended Defence (**Defence**),⁶⁰ denied entering into the Agreement,⁶¹ and denied an intention to enter into legal relations.⁶²
54. Additionally, the Appellant raised a number of other defences. They are, however, not relevant to the sole issue that the Appellant seeks to raise on the appeal.
55. In both written opening and closing submissions, the Respondent (no doubt fully cognisant of the elements of a cause of action for breach of contract, which he bore the onus of proving⁶³) asserted the existence of consideration. His contention was put as follows:⁶⁴
- ~~56.~~ “As the debt owed under the Jiayi Loan Agreement was, in substance and form, Mr Lam’s debt (and not Mr Liu’s debt), Messrs Liu and Lam entered into the Agreement under which Mr Lam agreed to, in substance, indemnify Mr Liu for his loss occasioned by the Lower Court Proceedings, Appeal Proceedings, and the Judgment Debt, in consideration for Mr Liu proffering a period of forbearance [citing clauses I-III of the Agreement]. The amount of the indemnity was to be paid by 31 December 2018, and no payment has been made.”
57. The Appellant did not object to the Respondent alleging the existence of consideration, although the Respondent had not complied with his obligation to plead it (see [52(a)] above).

The primary judge

58. The primary judge was cognisant of how the Respondent put his case as to formation of contract, including his contention concerning the nature of the alleged consideration under the Agreement. This is evident from J[25],⁶⁵ where his Honour summarised the

⁵⁹ JD Heydon, *Heydon on Contract* (2019) at [5.70] (“It has been said that generally an allegation of consideration should be pleaded”), citing *McKellar v Container Terminal Management Services Ltd* (1999) 165 ALR 409 at [125].

⁶⁰ Red 15-25.

⁶¹ Defence [2(a)] (Red 16T) and [16] (Red 20L).

⁶² Defence [2(f)] (Red 17H).

⁶³ JD Heydon, *Heydon on Contract* (2019) at [5.60] (“The onus of establishing consideration rests on the party alleging that there is a contract – usually the promisee”), citing *McKay v National Australia Bank Ltd* [1998] 1 VR 173 at 177.

⁶⁴ Respondent’s written opening submissions, [6] (Black 203E-H, U) Respondent’s written closing submissions [7] (Black 273K-P, U).

⁶⁵ J[25] (Red 37W-X).

Respondent's claim as follows:

"In substance, the plaintiff claimed that, under the Agreement, the defendant agreed to indemnify the [Respondent] for his loss occasioned by the Judgment Debt in consideration for the [Respondent] proffering a period of forbearance."

59. The primary judge did not expressly address, one way or the other, the Respondent's submission as to the existence of consideration. There are two possibilities as to how this should be construed. Either:

- (a) The primary judge overlooked the submission and failed to deal with it at all (thereby upholding a claim for breach of contract in the absence of a finding of consideration); or
- (b) The primary judge's reasons should be construed as implicitly accepting the Respondent's submission on this issue.

60. In terms of findings that might bear upon the surrounding context of the Agreement, the following findings in particular are noted:

- (a) At J[65],⁶⁶ the primary judge referred to evidence given by the Appellant in the Chinese Appeal Proceeding to the effect that he signed the Agreement knowing that it would be provided by the Respondent and his lawyers to the Chinese Court, or a Chinese Official associated with the Court to show the **plaintiff Respondent** would imminently receive funds sufficient to discharge the Judgment Debt **with a view to delaying the enforcement of the judgment out of the Chinese Appeal Proceeding pending receipt of those funds**. At J[73]-[75],⁶⁷ the primary judge concluded that the Appellant's evidence given in the Chinese proceedings represented the true position, concluding that the Agreement was signed by the Appellant:

"... knowing that it would be provided by the [Respondent] and his lawyers to a Chinese Court or Official to demonstrate that the [Respondent] would imminently receive funds sufficient to discharge the Judgment Debt and to obviate the need for enforcement of the judgment pending the receipt of those funds".

- (b) The primary judge referred to a number of communications by email, WeChat and conversation leading up to the entry into the Agreement. These communications, as found by the primary judge, are summarised in paragraphs [15]-[19], [22]-[23], [25]-[26], [29]-[31], [33]-[37] above. They comprise:
 - (i) Communications between the parties and the Respondent's Chinese lawyers in which the Respondent enlisted the Appellant's assistance in the Chinese Lower Court Proceeding and they communicated cooperatively

⁶⁶ Red **48U-X**.

⁶⁷ Red **50L-51F**.

regarding a statement for the Appellant to provide to help the Respondent;

- (ii) Communications between the parties and the Respondent's Chinese lawyers in relation to the Chinese Appeal Proceeding. The Respondent sought the Appellant's assistance as a witness in that proceeding;
- (iii) Communications while the appeal judgment was reserved, where the Respondent's lawyer made a **suggestion** that it would be **fair** if there was an agreement between the parties to address the amounts that **the Respondent** had to pay pursuant to the orders of the Chinese Court, to help the Respondent avoid the consequences of enforcement by the Court;
- (iv) Following the unsuccessful appeal, the parties communicated about entry into the Agreement, again in the context of the Respondent's concern about the enforcement of the Chinese Judgment Debt by the Chinese Court.

61. The primary judge made no finding of any dispute between the parties or assertion of liability on the part of the Appellant owed to the Respondent prior to entry into the Agreement. To the contrary, the primary judge positively found that the first occasion on which the Respondent made a threat to sue the Appellant was on 20 December 2018, over half a year after they signed the Agreement.⁶⁸
62. The primary judge concluded that an Agreement was reached on 14 May 2018.⁶⁹ In doing so, the primary judge rejected the Appellant's contentions concerning the non-formation of contract. Those arguments focused on issues of offer and acceptance,⁷⁰ an assertion of a partnership,⁷¹ and a lack of intention to create legal relations.⁷²
63. The primary judge also dismissed other defences raised by the Appellant, including as to allegations relating to set off of amounts that the Appellant contended was owed by the Respondent to the Appellant from other transactions, although the Appellant was successful in establishing that the interest claimed was penal⁷³. These are not relevant to the issue sought to be raised on the appeal.

E. ANALYSIS

64. The appeal raises a confined question of law and contractual interpretation, viz whether the Agreement was supported by consideration. This issue was raised by the Respondent below, who made submissions on the question, contending that clauses I-

⁶⁸ J[382]-[386] (Red 140H-X). Blue 373.

⁶⁹ J[640] (Red 220X).

⁷⁰ J[631]-[6556] (Red 215N-225P).

⁷¹ J[671]-[697703] (Red 230I-243G).

⁷² J[704]-[745] (Red 243J-257T).

⁷³ J[792]-[806] (Red 270M-276O).

III established a forbearance to sue that supplied sufficient consideration. The Appellant in this appeal contends that the Respondent's submission to the primary judge was erroneous.

E1. Whether the issue was raised below

65. As explained in paragraphs [51]-[57] above, the Respondent asserted at SOC [3] and [16] that the parties entered into the Agreement, which was denied without qualification in the Defence at [2(a)] and again at [16(a)]. There was thus joinder of issue as to whether the parties had entered into a contract at law. As explained above, the Respondent should have, but failed to, plead the existence of consideration (see [52(a)] above), but the Appellant did not object to the issue being raised by the Respondent. The Respondent specifically addressed the Court in relation to consideration in both opening and closing written submissions, asserting that the consideration comprised an alleged period of forbearance in Clauses I-III, no doubt because he knew that it was an element of his claim that he bore the onus to prove. The primary judge was cognisant of the submission: J[25].⁷⁴ Furthermore, the primary judge could not have lawfully determined a claim based on an action for breach of contract in favour of the Respondent without finding that the contract was supported by consideration, being a critical element of the cause of action. As stated in *Heydon on Contract* at [5.10]:⁷⁵

The parties to negotiations may have capacity to contract. They may have reached agreement in the sense that offer and acceptance coincide. That agreement may be certain in the sense that it does not lack completeness or finality or clarity. A reasonable person in the position of each party may think that the other intends to create legal relations. There may be no vitiating factor like non est factum, duress, misrepresentation, mistake, undue influence, unconscionable dealing, sham or illegality. But a promise in an agreement will still lack contractual force unless either the agreement is a deed or the promise is supported by consideration.

The parties also emphasised to the primary judge that the issues in the joint statement of issues should **not** be taken to narrow what was in dispute as per the pleadings; the parties, especially the Respondent, sought for the pleadings to be the 'repository' of the issues and emphasised that the joint statement of issues was without prejudice to contentions available on the pleadings (Blue 433K, Black 86J, 87G-J, 88G-J, 440M-441J). As noted above, there was a joinder of issue on the pleadings as to the existence of a contract by virtue of the denials at Defence [2(a)] and [16(a)]. The Appellant also described his case in oral closing submissions as that, "*The big picture position is whether there's an agreement properly formed to sue on, and whether it's got an intention to be binding*" (Black 85L-M).

⁷⁴ Red 37W-X.

⁷⁵ JD Heydon, *Heydon on Contract* (2019) at [5.10]. Footnotes omitted. Emphasis added.

E2. If the answer to E1 is no, whether the Appellant ought to be permitted to raise it on appeal

66. If, despite the above, the question of consideration is properly construed as a new point on appeal and leave is required (as contended for by the Respondent in his Notice of Contention), the Appellant should be permitted to raise the issue on appeal.

67. As stated by Mason J in *O'Brien v Komesaroff* (1982) 150 CLR 310 at 319:

In some cases when a question of law is raised for the first time in an ultimate court of appeal, as for example upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is expedient in the interests of justice that the question should be argued and decided (Connecticut Fire Insurance Co v Kavanagh [1892] AC 473 at 480; Suttor v Gundowda Pty Ltd (1950) 81 CLR 418 at 438; Green v Sommerville (1979) 27 ALR 351 at 362; 141 CLR 594 at 607-8).

68. The Respondent submits that this is such a case. The ground of appeal concerns the contractual interpretation of a written instrument and a question of law; viz, whether clauses I-III of the Agreement contains a forbearance to sue that the law would recognise as sufficient consideration. The Court is in as good a position as the primary judge to deal with this question, and it is expedient and in the interests of justice that the question should be argued and decided.

69. It is further noted that there is no question of a further trial if the Appellant succeeds.⁷⁶

70. The Respondent cannot reasonably submit that he might have conducted the proceeding differently below had the Appellant specifically contended there was no consideration.⁷⁷ The Respondent must have anticipated the possibility of needing to address the Court on the existence of consideration having regard to the joinder of issue in the pleadings (given the Respondent's unqualified denial of the existence of a contract) and the Respondent's onus of proof to establish the elements of a contract, including consideration (see [55] above). In fact, he did anticipate it, as shown by his written closing submissions specifically raising and addressing it, and the Respondent plainly was satisfied with the evidence that he had led before the primary judge, and how he had run his case, to make good his submission on the issue. It is also plain that no further evidence needed to be led by the Respondent to make good his proposition that clauses I-III contained the requisite consideration at law, it being a matter of contractual construction and law.

E3. Consideration of the appeal ground

71. The guarantee given by the Respondent under the Jiayi Agreement predated the Agreement. Being past consideration, it was not capable of supporting the

⁷⁶ cf *Whisprun Pty Ltd v Dixon* (2003) 200 ALR 447 at [51] per Gleeson CJ, McHugh and Gummow JJ at [51].

⁷⁷ As above.

Respondent's promises under the Agreement. As stated by Bell CJ in *Yi v Park* [2024] NSWCA 187 (Mitchelmore and Adamson JJA agreeing) at [43], "*It is hornbook law that past consideration is not good consideration*", citing *Eastwood v Kenyon* (1840) 11 Ad & E 438; *SAS Realty Developments Pty Ltd v Kerr* [2013] NSWCA 56 at [69]. It is for this reason that the Respondent sought to extract a forbearance from the terms of the Agreement.

Principles of contractual construction

72. The principles of contractual interpretation are set out in authorities such as *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at [35]; *Mainteck Services Pty Ltd v Stein Heurtey SA* (2014) 89 NSWLR 633 at [71]-[86]; *Mount Bruce Mining v Wright Prospecting* (2015) 256 CLR 104 at [46]-[52] and [108]-[109]; *Victoria v Tatts Group Ltd* (2016) 90 ALJR 392 at [51]-[75]; *Simic v New South Wales Land and Housing Corporation* (2016) 91 ALJR 108 at [18] and [78]; *Cherry v Steele-Park* (2017) 96 NSWLR 548 at [46] and [57]-[90].

Textual analysis

73. Contrary to the Respondent's written closing submission below, the text of the written agreement does not contain a promise by the Respondent to forbear from suing the Appellant.
74. **(The Recitals)**. The Recitals set out relevant surrounding context, particularly the Jiayi Agreement (Recital 1), the Chinese First Instance Proceeding and its outcome (Recital 2-3), and the Chinese Appeal Proceeding and its outcome (Recital 4). Significantly:
 - (a) There is no reference to the Appellant being liable to the Respondent under the Jiayi Agreement or otherwise;
 - (b) There is no reference to the Respondent asserting that the Appellant is liable to him or of any dispute between them or of any demand made by the Respondent;
 - (c) There is no reference to the Appellant asking the Respondent to defer the taking action against him or the Respondent stating he would do so.
75. To the contrary, Recitals 1-4 build into Recital 5, which simply states that the Appellant "**voluntarily becomes liable**" (emphasis added) for the **Respondent's** liabilities as a result of those matters. Implicit in these words is that it is by his own choice that the Appellant assumed a liability, that in entering the Agreement he is assuming the liability (i.e. it did not pre-exist), and the relevant liability in contemplation is that of the Respondent to Jiayu (i.e. not that of the Appellant to the Respondent).
76. **(The chapeau to the operative provisions)**. The chapeau to the operative provisions reinforces the voluntary and unpressured nature of the Appellant's promises under the

Agreement, stating that it was formed through “*friendly negotiations*”. Again, not the type of language that one would expect to find if the surrounding context involved the Appellant making promises to the Respondent to obtain a reprieve from the Respondent enforcing his extant rights against the Appellant. Certainly that is not surrounding context that the Agreement itself recorded and identified.

77. **(Clauses I-III)**. There is nothing in clause I-III comprising a promise by the Respondent to defer the enforcement of an asserted liability owed by the Appellant to the Respondent that is independent of the liabilities created by the Agreement itself:
- (a) **Clause I** is a promise by the Appellant to bear all the debts assumed by the Respondent due to “*the above mentioned cases*” (i.e. those referred to in the Recital, none of which comprise a debt owed or asserted to be owed by the Appellant to the Respondent but, rather, the Respondent’s debts to Jiayi), together with various other associated expenses, which are defined as “**all debts**”;
 - (b) **Clause II** defines the time for performance of the obligation in clause I. It states that the Appellant “*promises that before 31 December 2018, it will pay all debts and interests agreed in Clause I...*”. Properly construed, clause II merely prescribes the date by which the debt created by Clause I is payable. As noted above, the lower case expression ‘all debts’ is a defined expression referable to the liability created in Clause I rather than all debts generally. To the extent there is any doubt, the words that follow, “*... agreed in Clause I*”, render the meaning pellucidly clear. Properly construed, this contains **no** agreement by the Respondent to forbear from suing on a liability owed by the Appellant that existed prior to the Agreement, but merely prescribes the time for performance of the promise made in clause I; and
 - (c) **Clause III** provides that, if the Appellant does not perform the obligation to pay the Respondent within the period agreed in Clause II, the Respondent has the right to commence legal proceedings to request the Appellant to pay ‘all debts mentioned above’ and interest for overdue payments. On proper construction, this clause merely confers a right on the Respondent that provides that he may sue to recover the liability created in clause I if the time for performance in clause II passes. It is a facilitatory clause; it creates a right that entitles the Respondent to sue if the Appellant does not discharge his obligations under the Agreement by a date, rather than purport to constrain the Respondent from enforcing rights that he may have. Furthermore, its subject matter is ‘all debts mentioned above’, i.e. the debt created by Clause I. It does not preclude the Respondent from suing in respect of any debt he contends exists independent of clause I of the Agreement.

78. **Clause X** provides that, in the event of a dispute that could not be resolved by negotiation, *“the matter shall be administered exclusively by the courts of the State where [the Appellant’s] land locates”*. This is significant context in terms of ascertaining whether the parties contemplated a promise by the Respondent to defer enforcement of a preexisting asserted liability owed by the Appellant to the Respondent arising from the Jiayu Agreement or Chinese proceedings. The Jiayu Agreement was enforceable in China. If the Agreement truly was intended to include a promise by the Respondent to forebear from suing the Appellant based on perceived rights arising in China, it is distinctly unlikely that the Agreement:
- (a) Would provide that it would be the courts of New South Wales that would exclusively administer the Agreement; and
 - (b) Would contain no clauses that would enable the Appellant to rely upon it in a Chinese Court that would operate as a bar or stay to any enforcement action in China brought by the Respondent.
79. In these circumstances, a textual analysis of the Agreement does not support the proposition that there was good consideration given by the Respondent in the form of a forbearance from suing the Appellant.

Surrounding context

80. Surrounding context as recorded in the Recitals is discussed at [74]-[76] above.
81. As for surrounding context as contained within the communications of the parties and the findings of the primary judge, it supports the textual analysis above and does not support the proposition that the commercial context included a forbearance to sue.
82. An analysis of the communications between the parties prior to entry into the Agreement shows no assertion by the Respondent of any debt owed by the Appellant to him, no threat to sue, or indeed conflict or dispute between them, prior to entry into the Agreement. As the primary judge found, the first instance of a threat to sue was in an email and a conversation on **20 December 2018**, over 6 months after entry into the Agreement (see [37] above). There is nothing in the voluminous communications between the parties, all admitted into evidence before the primary judge, that constitutes an assertion by the Respondent that the Appellant was liable to repay him for the liabilities incurred by the Respondent under the Jiayu Agreement or the Chinese proceedings, or any discussion of a forbearance from enforcing those rights in connection with the Agreement.
83. To the contrary, the correspondence shows that:
- (a) The parties engaged in highly cooperative and collaborative communications,

reflective of their longstanding relationship as business partners, ongoing business activities, and the Respondent's desire to enlist the Appellant's cooperation and aid as a witness in the Chinese Lower Court Proceeding and Chinese Appeal Proceeding. Of particular significance is the Respondent's own evidence of the conversation in March 2018, in which his lawyer suggested that the parties should enter into an agreement in respect of **the Respondent's** liabilities, "*To be fair*".⁷⁸ That is not remotely close to a demand that the Appellant enter into the Agreement or otherwise expect to be sued. Whether it was their ongoing business association, the Respondent's not wanting to dissuade the Appellant from assisting him in the Chinese proceedings, or some other reason, the Respondent did not assert any liability owed by the Appellant to him; and

- (b) The Respondent's overriding concern at the time was of the consequences of the Chinese Court enforcing the Chinese Judgment Debt against him. As found by the primary judge, the consequences of an outstanding judgment debt in China were substantial, and the Respondent held a perception that the Agreement would assist in delaying **action taken by the Chinese Court against him**. That is an entirely different concept from the Agreement being entered into for the purpose of the **Respondent forbearing from taking action against the Appellant**. The Respondent's submission as to consideration conflates these two distinct concepts. If the Agreement was entered into to assist the Respondent delay action taken by the Chinese Court against him, that is still consideration moving from the Appellant to the Respondent, not vice versa.

Principles concerning forbearance from suing

84. An examination of the authorities concerning the circumstances in which a forbearance from suing constitutes good consideration is also instructive.
85. As stated by Isaacs J in *Butler v Fairclough* (1917) 23 CLR 78 at 96 (emphasis added), "A promise not to sue for a limited period, definite or indefinite, is a valuable consideration **where the substantive claim is one for which the other party is liable**."
86. In *Player v Isenberg* [2002] NSWCA 186 at [45], Beazley JA stated, "... forbearance to sue only constitutes good consideration **if it comes about at the request of the other party to the contract**" (emphasis added).
87. To similar effect, in *Kearney v Grow Choice Pty Ltd* [2023] NSWCA 325 at [34]-[35], Basten JA (with whom Meagher and Mitchelmore JJA agreed) stated (emphasis

⁷⁸ J[319] (Red [1231](#)).

added):

*[34] Fifthly, the Mr Fagan's evidence did not include any statement that he had said to Mr Kearney that Grow Choice would not take proceedings against North West until the sale of Longacres, or the water rights. **In other words, not only did Mr Kearney not seek forbearance, but Mr Fagan did not offer it.** While it may be possible to imply a contract of guarantee where there was no discussion of the possible consideration for such a contract, the implication is, at best, strained. **The mere fact of not bringing proceedings does not relevantly constitute forbearance.***

*[35] Sixthly, Mr Fagan did assert in his affidavit that he continued to permit Grow Choice to trade with North West in the belief that Mr Kearney would honour his promise of payment when Longacres was sold. **However, the evidence relied on in this Court did not convey that belief to Mr Kearney, nor suggest that the trading relationship would come to an end if the promise were not fulfilled.***

88. In *Yi*, Bell CJ (Mitchelmore and Adamson JJA agreeing) found that the primary judge erred in finding that a forbearance to sue constituted valuable consideration in the absence of a finding that any money was repayable at the time the agreement had been entered into. There being no extant obligation to pay, there was “*no act of forbearance which was capable of supplying the consideration*”.⁷⁹
89. From these cases, it is apparent that there are (at least) three cumulative elements that must exist for a forbearance from suing to exist:
 - (a) Forbearance must be sought or requested by the relevant party;
 - (b) The forbearing party must offer or promise forbearance. A corollary of this is that the forbearing party must have asserted the existence of liability, in order for him or her to then offer to forbear from enforcing it; and
 - (c) There must be an existing obligation to pay at the time of entry into the relevant agreement, in order for there to be an act of forbearance capable of supplying consideration.
90. Here, every element is missing:
 - (a) There is no finding, or evidence, of the Appellant seeking forbearance. The Agreement itself refers to no such request nor do the voluminous pre-contractual communications, all of which were in evidence below, reveal any such request. There is no evidence of the concept or necessity of forbearance crossing the Appellant's mind, let alone a communication to the Respondent constituting a request;
 - (b) There is no finding, or evidence, of an offer or promise made by the Respondent of forbearance. None is found in the Agreement itself (see [74]-[78] above), or in the precontractual communications (see [82]-[83] above). The Respondent does not even assert the existence of a liability or demand for repayment; and
 - (c) There is no finding, or evidence, of an extant obligation to pay owed by the

⁷⁹

Yi v Park [2024] NSWCA 187 at [39]-[43].

Appellant to the Respondent. It is observed that the Notice of Contention asserts the existence of a debt arising from the Jiayu Agreement and Chinese Proceedings. This will be addressed in reply.

Summary

91. In the circumstances, the Respondent's submission to the primary judge that the Respondent gave consideration under the Agreement found in clauses I-III was erroneous as a matter of contractual interpretation and law.
92. It was erroneous for the primary judge to either uphold the Respondent's claim for breach of contract in the absence of a finding of consideration (being an error of law, given the essentiality of consideration to the cause of action), or to implicitly accept the Respondent's erroneous submission as to consideration.
93. On the correct construction of the contract and the application of correct legal principle, the Respondent failed to establish his claim and it ought to have been dismissed.

F. CONCLUSION

94. For the reasons set out above, the appeal should be granted and the orders sought in the Notice of Appeal ought to be made.



P.D. REYNOLDS

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Date: ~~15 August 2025~~ 8 October 2025

APPENDIX A: THE AGREEMENT (BLUE 295-8)

Party A: LAM Kin, born on 26 June 1970, nationality: Australia, passport number: E1019729; residential address: 1A/6 Gas Works Road, Wollstonecraft 2065.

Party B: LIU Tuo, born on 07 June 1963, nationality: China, identification number: 110105196306070854, residential address: 28E, Building F, Huating Jiayuan, 6 North 4th Ring Road Middle, Chaoyang District, Beijing.

Due to:

1. On 3 June 2014, Party A signed a Loan Agreement with Hong Kong Jiayi International Trade Co, Ltd. (hereinafter referred to as 'Hong Kong Jiayi'). Party A borrowed RMB 5 million yuan from Hong Kong Jiayi and Party B was the guarantor.
2. Because Party A failed to make repayments on time, on 13 July 2016, Hong Kong Jiayi sued Party B at The People's Court of Tianjin Binhai New Area ('Binhai Court') and requested Party B to assume the liabilities as a guarantor. It asked the court to order Party B to pay the principal of the loan, being RMB 5 million yuan, interests for overdue payment, being RMB 2.73 million yuan (as of 4 July 2016), interests payable at the actual date of paying off the debts, liquidated damages, and other fees. It also asked the court to order Party B to pay its legal service fee, being RMB 331,200 yuan, and all litigation costs. Binhai Court accepted this case and the case ID was (2016) JIN 0116 MIN CHU NO 2011.
3. After hearing, Binhai Court made the decision and ordered Party B to pay Hong Kong Jiayi the principal of the loan, being RMB 5 million yuan and the interests for overdue payment and liquidated damages incurred between 20 June 2014 and 4 July 2016, being RMB 1483333.31 yuan (the 1 million repayment made during that period has already been deducted from the amount). The court ordered Party B to pay Hong Kong Jiayi the interests for overdue payment, liquidated damages and other fees incurred between 5 July 2017 and the actual date of paying off the debts. This amount will be calculated on the basis of RMB 5 million yuan with an annual interest rate of 24%. Other claims raised by Hong Kong Jiayi were dismissed. Party B paid 62183.33 yuan for the filing fee of the case and the 9000 yuan authentication fee was borne by Party B ('first instance Judgment').
4. After the first instance judgment was made, Party B appealed within the term for appeal. The appellant court made the judgment on 19 March 2018. Party B's appeal was dismissed and the first instance judgment was upheld.
5. Party A voluntarily becomes liable for the repayment of all and final liabilities assumed by Party B in the above-mentioned cases.

As a result, through friendly negotiations, Party A and B formed the following agreements.

- I. Party A promises to Party B that it will borne all the debts assumed by Party B due to the above-mentioned cases, and all liabilities, fees and loss incurred by Party B, including but not limited to all and any liabilities, legal service fees, litigation costs, translation fees, authentication fees, potential costs for court enforcement, penalty interests, and all the legal service fees paid by Party B ('all debts'). Besides, Party A should pay Party B interest from 13 July 2016 until the day that all debts are paid off. The principal shall be the amount of all debts and the interest rate is 0.02% per day.
- II. Party A promises that before 31 December 2018, it will pay all debts and interests agreed in Clause I to the following account designated by Party B:

Account Name:

Bank:

Account Number:

- III. If Party A fails to perform the obligation to pay Party B within the period agreed in

Clause II, Party B has the right to commence legal proceedings to request Party A to pay all debts mentioned above and interests for overdue payments (0.05% per day). All resulting costs, including but not limited to litigation costs, legal service fee, translation fee and authentication fee, shall be borne by Party A.

- IV. Party A voluntarily offers a piece of land owned by him in Australia as the security for all debts mentioned above. Party A should assist Party B to process the mortgage of the land in Australia according to Australian law. Within () days after this contract takes effect, Party A and Party B should proceed with the procedures of registering the mortgage of the property. Party A should not delay this process without reason.

Below is the information of the land:

Location: 32°48'46.4"S, 150°41'30.6"E

Size:

Owner:

Term of Ownership:

Certificate ID:

- V. If Party A fails to perform the obligation to pay Party B within the period agreed in Clause II, Party B can choose to exercise the rights of mortgagee against the mortgaged land. However, all other rights of Party B will not be affected by the rights in relation to mortgage.
- VI. Without Party B's consent, Party A should not sell, transfer, gift, or mortgage the property. Party A should keep the property properly according to Party B's request. If the property is subject to government requisition, Party B has the rights to place the compensation in escrow or request Party A to perform the obligation to pay all debts at an earlier time.
- VII. If Party A breached the contract and disposed the property by himself, such disposal would be invalid. Party B can request Party A to return the property to its original state and pay a sum that equals to 10% of the amount of all debts as liquidated damage.
- VIII. If Party A concealed the facts that the mortgaged property is co-owned, or is subject to disputes, or had been seized or retained, or is subject to other mortgages, Party A shall compensate Party B for any economic loss caused by such concealment, and pay a sum that equals to 10% of the amount of all debts as liquidated damage.
- IX. This contract will take effect after being signed by both parties. This contract is in quadruplicates. Party A and Party B hold two copies respectively. The contract is made in English and Chinese. If there are inconsistencies between the two versions, the English version shall prevail.
- X. Any disputes in relation to this agreement shall be resolved through negotiation. If negotiation is unsuccessful, the matter shall be administered exclusively by the courts of the State where Party A's land locates.