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GROUNDS OF ECONOMIC DURESS – FURTHER CLARIFICATION OR FURTHER CONFUSION?

Sharon Global Solutions Pte Ltd v *LG International (Singapore) Pte Ltd*[1]

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ECONOMIC duress is a potent weapon used to set aside otherwise unimpeachable contracts. The challenge facing the courts is to devise a coherent doctrine of economic duress to distinguish between contracts concluded under "illegitimate" pressure and those which result from normal commercial pressure; between those which the law permits to be set aside and those which the law does not so permit. In a recent case,[2] economic duress was held to exist where there was pressure:

i. The practical effect of which was that there was compulsion on, or a lack of practical choice for, the victim;
ii. which was illegitimate, and;
iii. which was a significant cause inducing the claimant to enter into the contract.

In the light of the finding in that case, this note seeks to examine the Singapore High Court decision of *Sharon Global*.[3] It is indisputable that, at its core, the boundaries of the doctrine of economic duress are determined

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1 [2001] 3 SLR 368 ("*Sharon Global*").

2 *DSDN Subsea Ltd* v *PGS Offshore Technology AS* [2000] BLR 530, applied in *Carillion Construction Ltd* v *Felix (UK) Ltd* [2001] BLR 1, citing in support of this proposition the House of Lords decision in *Universe Tankships Inc of Monrovia* v *International Transport Workers Federation* [1983] 1 AC 366 ("*The Universe Sentinel*") and *Dimskal Shipping Co SA* v *International Transport Workers Federation* [1992] 2 AC 152. Dyson J stated that this summary of the law was not "controversial". See also, Lord Diplock in *The Universe Sentinel*, *ibid* at 384, where his Lordship explained: "The rationale is that his apparent consent was induced by pressure exercised upon him by that party which the law does not regard as legitimate, with the consequence that the consent is treated in law as revocable unless approbated either expressly or by implication after the illegitimate pressure has ceased to operate on his mind. " See Lord Scarman, *ibid* at 400, where he explained that the elements are that there is "(1) pressure amounting to compulsion of the will of the victim; and (2) the illegitimacy of the pressure exerted."

3 *Supra*, note 1.

as a matter of policy; the court should, however, for the benefit of future cases, endeavour to set out clear and principled guidelines. In particular, careful attention must be paid to the question of whether certain factors should be at all relevant to the inquiry. The aim must be to develop a coherent doctrine of economic duress based not on intuitive justice, but on clear articulated principles.

At the outset, it must be borne in mind that where economic duress is pleaded in the context of contractual renegotiation, the effect of rejecting the plea of economic duress is to allow the subsequent contract to override the initial one. If contractual rights are to be taken seriously as rights, the law must seek to protect the initial contract from being overridden[4] unless there is consensual variation.

I. SHARON GLOBAL

In the case of *Sharon Global*, the plaintiff, Sharon Global Solutions ("SG"), entered into a contract to sell steel products to the defendant, LG International ("LG"). LG then entered into a back-to-back agreement to sell the same to an important customer. SG subsequently ran into difficulties securing a vessel to ship the steel at a contractual rate and said that it would charter an alternative vessel only if LG agreed to share the increased costs. In the midst of negotiations, SG told LG that, failing agreement on the issue of sharing of costs, it would rather face the consequences of breach and forfeit the performance bond it had issued in favour of the LG. LG, having a deadline to meet, felt that it had no choice but to agree to the new terms proposed by SG. Failure to ship the steel on time would have resulted in "serious commercial consequences" and would also have affected LG's reputation and standing. After LG paid 25% of the charter hire, it instituted proceedings for the recovery of the payments made.[5]

Kan J held that the LG's plea of economic duress failed. He thought that the question to be answered was "whether the other party had used illegitimate pressure, the practical effect of which is that the victim had no choice".[6] He reasoned that although the doctrine of economic duress had not been defined with any certainty, where such was alleged, it was necessary to take into account all the circumstances of the case.[7] He opined that the state of mind of the parties was a relevant consideration.[8] He explained that on the facts of the present case, the spirit of the venture must be taken into account – both parties had intended to co-operate to gain entry into the steel

4 Contracts are usually only overriden where some "established" vitiating factor like frustration or misrepresentation is made out on the facts.

5 I take these facts from the headnote although it is not clear from a reading of the judgment itself whether Kan J agreed with all the facts as stated.

6 *Supra*, note 1, at para 31.

7 *Ibid*, at para 30 and 33.

8 *Ibid*, para 33.

business.[9] He also considered it relevant that the cause of SG's demand was due to its inexperience in misjudging the freight costs badly and that it was willing to bear half of the additional freight.[10] For these reasons, concluded Kan J, it could not be said that SG was seeking to exploit the situation to increase its profits.[11]

His Honour held that, as a matter of causation, it was incumbent on the LG, as the party relying on economic duress, to show that the duress placed it in a position such that it was compelled to accede to SG's demands.[12] This, in his opinion, it had failed to do, especially since it had contemplated making a contribution towards the increased costs before the renegotiated contract was made.[13] In fact, his Honour concluded that SG's declaration that it would not perform was to be regarded as a legitimate notice of its inability to perform rather than an illegitimate threat.[14] Further, he could not find on the facts that LG had "no alternative but to accept the plaintiff's terms because it had to fulfil its obligations to POSCO (customer) under any circumstances".

His Honour's reasoning merits close attention.

II. ILLEGITIMACY OF PRESSURE

Kan J explained that, in his view, the mere fact that a breach of contract was threatened did not automatically give rise to actionable economic duress. His Honour's exposition is not uncontroversial.[15] There is a considerable body of academic opinion to the effect that the only sensible way to determine legitimacy of pressure is by reference to the lawfulness of the threatened act –[16] that a threat of an unlawful act should always be deemed illegitimate.

Despite this, Kan J adopted the tentative suggestion by the learned authors of *Chitty on Contracts*[17] that the good faith of the party making the demand might be relevant in determining whether a threat to breach a contract might, nevertheless, be legitimate.

The passages from *Chitty* cited by Kan J for the proposition that in deciding the legitimacy of a threat of unlawful action it was necessary to take into account all the circumstances of the case and, in particular, the

9 *Ibid*, para 34.
10 *Ibid*, para 35.
11 *Ibid*, para 37.
12 *Ibid*, para 43.
13 *Ibid*, para 44
14 *Ibid*, para 45.
15 I leave aside, for the moment, issues relating to causation.
16 See Graham Virgo, *The Principles of The Law of Restitution* (Clarendon Press, Oxford 1999) at 208. See also Goff and Jones, *The Law of Restitution* (Sweet & Maxwell 1998) at 329, who appear to take a similar view to some extent. See also Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press, Oxford 1988), at 177.
17 *Chitty on Contracts*, 28th Edition, Vol I, (Sweet & Maxwell 1999)

state of mind of the parties, are suspect. In particular, the passage[18] which Kan J cited at length, and upon which he based his conclusion, is no more than academic speculation as to when a threat of unlawful action "will ever" be regarded as legitimate.[19] It does not support the proposition that it is proper to look at the circumstances of the case in determining whether a threat to breach a contract amounts to legitimate pressure. Indeed, a close reading of the relevant passages in *Chitty* indicates that the authors are more disposed to the view that "prima facie it is thought to be clear that a threat to commit an unlawful act will constitute an improper threat for the purposes of the law of duress".[20]

There is much to be said in favour of equating the illegitimacy of a threat to its lawfulness.[21] It provides much needed guidance on the vexing question of the "legitimacy" of a threat or demand. It is also consistent with the role of the law as a protective institution –[22] parties should not be allowed to procure contractual variations by threatening unlawful action; nor should parties be compelled to deal under such unlawful threats.[23] It is argued, therefore, that an elegant solution to the troublesome problem of defining what constitutes an "illegitimate" demand would simply be to say

[18] *Ibid*, at 425.

[19] Note that the passage begins with the sentence: "It is thus difficult to state with confidence whether a threat of a breach of contract will ever be regarded as legitimate and, if so, in what circumstances. " It is also interesting to note that the authors of *Chitty on Contracts* cite no authority whatsoever in support of their submissions.

[20] *Supra*, note 17, at 422. It is argued that such an unlawful threats should include threats to breach a contract. If contractual rights are to be taken seriously as rights, the law should confer the same degree of protection as it does rights against threats of tortious and criminal acts. See, in this regard, Rick Bigwood, *Economic duress by threatened breach of contract*, (2001) 117 LQR 376 at 379 - 380.

[21] The author is not proposing that a plea of economic duress should succeed whenever there is a threat to commit an unlawful threat. It will be argued later in this piece that reasons for disallowing a plea of economic duress should be dealt with at a "policy" stage of the inquiry instead of within the rubric of "illegitimacy". The main reason for this is that the policy reasons why economic duress should be disallowed often do not sit comfortably under the label "illegitimacy".

[22] As evidenced by the existence of certain legal principles, for example, the tort of inducing breach of contract and variations in burden of proof in respect of jurisdiction agreements.

[23] See *Chitty on Contracts*, *supra* note 17, at 422: "Prima facie it is thought to be clear that a threat to commit an unlawful act will constitute an improper threat for the purposes the law of duress. Certainly a threat to commit a crime of a tort as a means of inducing the coerced party to enter into some contract must prima facie be improper. " See also, *Goff and Jones on Restitution,* at 329: "The law regards the threat of unlawful action as illegitimate, whatever the demand (citing Lord Scarman in *The Universe Sentinel*, *supra*, note 2, at 401) … A threat may be illegitimate if the person making the threat knew that he would be in breach of contract if it were implemented". See too; *B&S Contracts and Design Ltd* v *Victor Green Publications* [1984] ICR 419 (CA); *North Ocean Shipping* v *Hyundai Construction Co Ltd* [1979] QB 704 at 719 (Mocatta J); *Dimskal Shipping Co. SA* v *International Transport Worker's Federation*, *supra*, note 2, and *The Evia Luck* [1992] 2 AC at 152,166,168 (per Lord Goff).

that any threat of unlawful action, for example a threat to breach a contract, is always illegitimate.[24]

III. STATE OF MIND OF THE PARTIES

Kan J's articulation of the parties' state of mind as a factor to consider in the inquiry[25] is also far from uncontroversial. There is much academic debate as to the relevance of the parties' state of mind in the "economic duress" inquiry.[26] Although it may be permissible to consider the effect that the pressure had on the decision-making process of the party claiming economic duress, it is debatable whether the court should concern itself with the state of mind of the party applying the pressure. It has been pointed out that such an approach would involve great evidential difficulties since it would often be difficult for the party pleading economic duress to prove what the party applying the pressure was thinking.[27] Moreover, the approach contradicts the general principle that both good and bad faith are regarded as irrelevant in a breach of contract. A breach is a breach, regardless of the motives underlying it.[28] An approach requiring bad faith to

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[24] Some judicial support for this proposal can be gleaned from the judgement of Dyson J in *DSND Subsea Ltd* v *PGS Offshore Technology AS*, *supra*, note 2 at 546, where his Honour was reported to have said in response to an allegation that one party in that case had told another that they would not resume work until certain issues were resolved, that, "That would clearly have been a flagrant breach of contract, and, if pressure it would in my view have been illegitimate pressure." The normative value of this statement is, however, somewhat diminished by his Honour's holding that, on the facts of the case, even if the acts of the party applying the pressure had amounted to a breach of contract, that this would nevertheless not amount to illegitimate pressure as it constituted "reasonable behaviour" on their part.

[25] *Supra*, note 1, at para 33.

[26] Birks, for example, argues that a threatened breach of contract would amount to illegitimate pressure when it is made in bad faith – when the threat was intended to exploit the victim's weakness rather than to solve financial or other problems. The learned authors of *Chitty on Contracts* seem to take a similar view when they state that a party is in bad faith unless he honestly believes that his demand is legally justified; see *Chitty on Contracts*, *supra*, note 17, at 424. However, it is clear that an inquiry as to the bad faith of the parties cannot be a complete explanation; see cases like *The Atlantic Baron* [1979] QB 605 and *Atlas Express* [1989] QB 833. The difficult question is the extent and the situations in which bad faith might be relevant.

[27] Andrew Burrows, *The Law of Restitution* (Butterworths 1993), at 179. From a restitutionary point of view, an argument is made by Virgo, *supra*, note 16, at 207, that within the restitutionary framework proposed by Birks, emphasis on the defendant's motives for making the threat makes such a test inconsistent with the majority of other grounds of restitution which look to the effects that a particular ground of restitution has on the plaintiff rather than the defendant.

[28] See *Chitty on Contracts*, *supra*, note 17, at 1245 where it is observed that there is no distinction is drawn between "deliberate" and "normal" failures of performance for the purposes of determining whether they amount to a breach of contract. See also, Lord Wilberforce in *Suisse Atlantique Societe d' Armement Maritime SA* v *N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C 361 at 435 where his Lordship was reported to have said: "To create a special rule for deliberate acts is unnecessary and may lead astray."

be demonstrated before the court is willing to set aside a contractual variation for economic duress seems to suggest that lack of bad faith (or good faith as the case may be) is a justification for breaching the initial contract.

Moreover, as regards cases involving unlawful threats (of which this case is one), such an approach is novel. Cases such as *CTN Cash and Carry Ltd* v *Gallaher Ltd*[29] and *Huyton* v *Peter Cremer*,[30] where bad faith is taken into account in the economic duress inquiry, do not provide support for the proposition that the state of mind of the party applying the pressure is always relevant. It is clear that these cases involve "lawful act duress"[31] and do not provide authority for the proposition that the same approach should apply where there are unlawful acts[32]. The one case which comes close is *DSND Subsea Ltd* v *PGS Offshore Technology AS*.[33] There, one of the parties wanted to suspend work because a situation not provided for in the contract had materialised. Dyson J held that the threat to suspend work, even if it amounted to a threatened breach of contract, did not amount to illegitimate pressure as it was reasonable behaviour by a contractor acting *bona fide* in a very difficult situation.[34] However, this is difficult to reconcile with his Honour's later observation that a "flagrant breach of contract" would "clearly" have amounted to illegitimate pressure.[35] One would have to conclude that there is no clear authority for this proposition in respect of unlawful threats.

IV. Declaration A Legitimate Notice Rather Than An Illegitimate Threat

Kan J correctly observed[36] that it is not easy to differentiate between a legitimate notice and an illegitimate threat. It is odd therefore, that he then promptly proceeded to label SG's declaration of its inability to perform a 'legitimate notice' rather than an "illegitimate threat".

With respect, it is submitted that the distinction between a legitimate notice and an illegitimate threat is singularly unhelpful and should be abandoned. It is an example of *ex post facto* reasoning. In labelling the declaration a legitimate notice, the court must necessarily have concluded

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29 [1994] 4 All ER 714

30 [1999] 1 Lloyd's Rep 620.

31 *Ibid* at 637, where Mance J explained that in rare cases of 'lawful act' duress, the good faith or bad faith of the party applying the pressure would be particularly relevant.

32 This, it is argued, is consistent with both logic and principle. If the threat is one in which the law deems it lawful to make, if the variation is to be set aside on grounds of economic duress, something more than the (lawful) nature of the threat must be shown. The cases cited seem to suggest that bad faith may be this additional factor.

33 *Supra*, note 2.

34 *Ibid*, at 546, col 1.

35 *Ibid.*

36 See, *supra*, note 1, at paras 38 to 45.

(on the facts) that there is no economic duress. The task of the court must not be to short-circuit the reasoning process by interposing intermediate conclusions, but to articulate the various factors that the court looks at in determining whether there is in fact illegitimate pressure.

V. 'SPIRIT OF THE VENTURE' AND INEXPERIENCE OF SG

Kan J also appeared to take the view that the "spirit of the venture" and the inexperience of the SG (being the cause of its demand) were factors which strongly militated against a finding of economic duress.[37]

It is difficult to accept that the 'spirit of the venture' should be at all relevant.[38] In the modern day commercial world, if one were to accept such a notion of "co-operative" contracts[39] - contracts directed at a common commercial aim and evidencing a consultative approach throughout - one would be hard pressed to find any contracts between commercial entities that would fall outside such a conception! There is no reason to assume that the parties intended obligations radically extending beyond those agreed, such as to assist each other in the event that one of the parties was unable to perform his obligations under the contract.

It is even more surprising that the inexperience of one of the parties was considered to be relevant. Barring some established vitiating factor (like frustration) or a contractual term excusing non-performance, the court does not bother itself with the cause of a breach. It follows that the inexperience of one of the parties cannot be used to justify a threatened breach of contract. Commercial certainty demands that parties who have agreed to the terms of a contract, no matter how foolishly, should be held to their word. The courts should not allow parties who have made poor commercial decisions to be given the upper hand in renegotiations.

VI. MOTIVE FOR DEMAND

Another important thread in Kan J's reasoning is his finding that SG was not seeking to "exploit the situation to increase its profits" or "shift the entire burden to the defendant".

One wonders what his Honour meant when he said that SG was not seeking to exploit the situation to increase its profits.[40] Although it was to SG's disadvantage to pay additional freight, Kan J failed to take into

[37] *Ibid*, at paras 33 to 35.

[38] That aside, it is difficult even to see the basis on which his Honour inferred the 'co-operative nature' of the agreement as it is clear from the facts that the parties had never entered into business with each other before (para 2).

[39] *Supra*, note 1, at para 34.

[40] *Ibid*, at para 37.

consideration its the broader commercial gains,[41] such as the preservation of its commercial reputation and the avoidance of litigation in respect of damages for non-performance.[42] The concern of the courts should be the general commercial advantage to the party making the demand and not merely any monetary increase in the profits obtained.

The learned judge also considered it relevant that SG agreed to bear half the costs. Again, it is difficult to see the relevance – this simply fails to appreciate the fact that SG was still better off by half the increase in freight costs. A lesser illegitimate demand is still an illegitimate demand. Evidentially speaking, it would also be all too easy in future cases for well-advised parties seeking renegotiation to offer to bear a portion of the "potential demand" in an attempt to stave off potential economic duress claims.

The court is again proffering the contract breaker's "good faith" as a reason why he should be entitled to the benefit of the renegotiated contract, thereby "excusing" his initial breach.[43] Once again, such an approach is impossible to reconcile with the general principle that, in the absence of an express contractual term, liability for breach of contract is independent of fault.[44]

VII. Causation And Compulsion

As regards causation, Kan J correctly considered that the party raising economic duress must show that the duress placed it in such a position that it was compelled to accede to the other party's demands.[45] Nevertheless, the reasons given for LG's failure to demonstrate such compulsion require close examination.

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41 See *Dorimex SRL anor* v *Visage Imports Ltd* (18 May 1999) (unreported), where the Court of Appeal held that economic duress existed in respect of a transaction whereby the party exerting the pressure obtained a 50% discount on the purchase price of goods it had already contracted to purchase.

42 It is difficult to imagine that any reasonable businessman, no matter how inexperienced, would demand a variation unless it is to his advantage to do so.

43 This is because, often, in threatening to breach the contract, the party applying the pressure would be in (anticipatory) repudiatory breach of the initial contract. If the court were to disallow otherwise actionable œconomic duress on account of the bona fides of the party applying the pressure (and allow the renegotiated contract because of this) this would, in effect, be saying that it is permissible to proffer the bona fides of the party applying the pressure as an excuse for the breach of the initial contract. Accordingly, if good faith in breach of contract is irrelevant, *a fortiori*, good faith in excusing economic duress (in upholding the renegotiated contract and excusing the initial breach) must equally be irrelevant.

44 See, for example: *Raineri* v *Miles* [1981] AC 1050 at 1086; and even more pertinently on the facts, *Lewis Emanuel & Son Ltd* v *Sammut* [1952] 2 Lloyd's Rep 629.

45 *Supra*, note 1, at paras 43 and 44.

A. *No reasonable alternative?*

Kan J found, as a matter of fact, that LG did not say that it could not bear the financial repercussions of non-performance, neither did it specify the nature of the damage that non-performance would inflict on the relationship with third parties.[46] His Honour held that with regard to LG, he "did not have a clear picture that it had *no alternative* but to accept the plaintiff's terms because it had to fulfil its obligations to POSCO *under any circumstances*" [emphasis mine].

It is argued that the relevant standard to be applied for the purposes of causation is that of "no reasonable alternative",[47] not simply "no alternative".[48] His Honour's concluding words "under any circumstances" make it clear that he had in mind a situation where LG had no choice whatsoever but to submit to the threat. That is not the law.

In most cases where economic duress has been found to exist on the facts,[49] the facts are not susceptible to analysis such that the test is one of "no alternative" available to the party claiming economic duress. Often, the party submits to the pressure because the alternatives open to him are not reasonable alternatives in the sense that these would have caused him

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[46] *Ibid*, at para 44.

[47] See Elizabeth MacDonald, *Duress by Threatened Breach of Contract*, [1989] JBL 460-473 at 466. Also Donal Nolan, *Economic Duress and the Availability of a Reasonable Alternative* [2000] RLR 105-114. Dyson J in *DSND Subsea Ltd* v *PGS Offshore Technology AS*, *supra*, note 2, spoke in terms of "[no] realistic practical alternative" (at para 131 and 135). See also *Lynch* v *DPP of Northern Ireland* [1975] AC at 695 (per Lord Simon).

[48] In this respect, the dictum of Holmes J in *Union Pacific Ry Co.* v *Public Service Commission of Missouri*, 248 US 67, 70 (1918) is instructive: "It is always for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is a characteristic of duress properly so called. " See also, Lord Scarman in *The Universe Sentinel*, *supra*, note 2, at 400, where his Lordship opined: "The classic case of duress is … not the lack of will to submit but the victim's intentional submission arising from the realisation that there is no other practical choice open to him. "

[49] For example, *B & S Contracts and Design Ltd* v *Victor Green Publications, supra*, note 23, at 422. In that case, the party subject to illegitimate pressure could, of course elect not to give in to those threats and accept that the contract would not be performed. However, on the facts, this would have resulted in him being exposed to potential claims from his customers in respect of which he had contracted to provide stands for an exhibition as well as grave injury to their reputation. It is obvious, therefore, that the test cannot be that of "no alternative", since there are few cases where there is genuinely no other alternative possible. Economic duress should be made out when the illegitimate pressure compelled the contract in the sense that there was no other "reasonable" alternative but to submit to the threats. Also, in *Carillion Construction Ltd* v *Felix (UK) Ltd*, *supra*, note 2, Dyson J held that though one alternative open to the party subject to pressure could have taken would be to obtain a mandatory injunction but that it could not be said that they acted unreasonably in not pursuing that option since they could not be certain that it would be granted. This illustrates that the test only requires the party to take such alternatives which are reasonable and not that there must be "no alternative" (as suggested by Kan J) but to submit to the demand.

greater financial detriment. The test for causation must be phrased accurately to reflect reality.

B. *Acts of LG before the renegotiated contract*

His Honour also appeared to place some emphasis on the fact that LG had failed to explain why it was prepared to contribute to the freight costs even before the renegotiated contract was entered into. He thought that this was evidence that the pressure did not 'cause' the renegotiated contract.

Although the court does take into account the acts of the victim after the contract is entered into (*eg* protests, or whether action is taken to avoid the contract when the threats no longer have any effect), it is argued that in this case, acts performed before the renegotiated contract was entered into should not have been taken into account. Firstly, such a line of reasoning ignores the obvious possibility that LG was already coerced by illegitimate pressure some time before it was eventually compelled to enter into the new contract.[50] Secondly, it does appear inconsistent with the evidential rule that acts before the conclusion of the contract are not to be taken into account in interpreting it. This rule is based on the sensible observation that the negotiation process is a very fluid one. It is a process under which terms proposed on a certain day do not give a reliable indication as to what was eventually agreed since it was open at any stage of the negotiations for parties to change their minds. Similarly, the fact that LG may have been willing to pay for the part of the increased freight sometime before the actual agreement itself is, at best, a very unreliable indication that it would similarly have been willing to do the same at the date of the agreement.

VIII. CONCLUSION

The aim of this note has not been to question the result reached but to highlight certain aspects of the reasoning underlying the decision of *Sharon Global*. Due to the divergence of academic opinion and pace of development in this area of law, the court must be cautious in accepting any particular academic view on what the law is. In each case, a principled discussion of the relevance and an assessment of the reliability of each factor considered in the course of determining whether illegitimate pressure has compelled a party into entering into a renegotiated contract must be undertaken.

The proposition that a threat to commit an unlawful act should be regarded as illegitimate for the purposes of duress accords with the prevailing academic view and is consistent with the law's role as a protective institution. The relevance of the state of mind of the party applying the pressure conflicts with the principle that good faith is generally

[50] There are hints of this in the judgment itself. See *supra*, note 2, at paras 15 and 16.

regarded as being irrelevant in the performance of contracts.[51] The distinction between illegitimate threats and legitimate notices serves little practical use and there is no warrant for importing some civil law conception of a duty to co-operate in the performance of a contract. An approach which takes into account factors like motive and good faith is inconsistent with tenets of contract law and must be resisted in the interests of commercial certainty.

With regards to causation, the relevant test appears to be that of "no reasonable alternative" or "no realistic practical alternative"; not simply 'no alternative'. This is not a distinction without a difference. Each test has a radically different threshold. Indeed, if "no alternative" were the test, there would hardly be any cases satisfying such a strict test of causation. Some caution should also be exercised in relation to looking at conduct prior to the conclusion of the contract.

The open-ended, fact-dependent, nature of the inquiry seems to open up an endless possibility of factors for the court to consider. However, the court must guard against bringing in irrelevant factors, even if these are intended to do no more than buttress an obvious conclusion. Factors like the inexperience of one of the parties or the willingness of the party making the demand to bear half the increase in costs clearly have no role to play. The court must be careful not to impose artificial limitations – limitations unconnected with the elements of the cause of action – by taking into account matters which should properly lie outside the economic duress inquiry. If the existing elements lead to "wrong" results, then the doctrinal basis should be reconsidered and elements reformulated.

It is suggested that a more logical approach would be to hold that any threat of unlawful action, including a threat to breach a contract, always amounts to illegitimate pressure. Thereafter, whether the renegotiated contract can be set aside should depend on whether it could fairly be said that the illegitimate threat caused the renegotiated contract to be concluded – in the sense that the party allegedly under duress had no realistic practical alternative but to enter into that contract. If so, the court should find, prima facie, that the contract ought to be set aside for economic duress. It is only after this two stage process is satisfied that the court should undertake an open-ended inquiry of factors which demand, as a matter of policy, that the court should nevertheless uphold the renegotiated contract. Care must be exercised here in that only factors which can be said to be analogous to established vitiating factors (*eg* misrepresentation, frustration *etc*) or related doctrines should be considered at this stage. Such principles give the court a good indication as to the limits that policy imposes on the absolute nature of the obligations forged under contracts. Accordingly, at this last "policy" stage, only matters akin to estoppel (for example, the initiative for

[51] With regards to performance of contracts, good faith is generally regarded as irrelevant except insofar as it is equated with honesty.

renegotiation coming from the party allegedly subject to duress[52]) or frustration (for example, the terms of the contract not providing for the specific situation that arose[53]) should be considered.

If accepted, this results in a simpler and more elegant doctrine of economic duress, whilst preserving an element of flexibility at the policy stage where an open ended inquiry can be undertaken to mould the doctrine to the particular facts of the case. Delineating the different parts of the inquiry aids in clear and logical reasoning. It is a fallacy to assume that every possible factor can be pigeon-holed into the categories of "illegitimacy" and "compulsion". Indeed, explicitly recognising that certain considerations are policy-based frees the courts to articulate the "real reasons" underpinning a finding, instead of being constrained by the connotations associated with those terms, making for a more rational, accessible and predictable law of economic duress.

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[52] This is one possible explanation of the case of *Williams* v *Roffrey Bros* [1991] 1 QB 1.

[53] *DSND Subsea Ltd* v *PGS Offshore Technology AS*, *supra*, note 2. The liberal approach of the courts in viewing genuine disputes as not amounting to breaches of contract is noted by *Chitty on Contracts*, supra, note 17, at 1233.