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Case Comments

CONTRACTUAL VARIATIONS: CONSIDERATION AND DURESS

By GEOFFREY ENGLAND and NICHOLAS RAFFERTY*

I. INTRODUCTION

The case of *Pao On v. Lau Yiu*¹ involved the perennial problem of the legal enforceability of variations in pre-existing contractual relationships. The decision is both good and bad. It is good, first, in demonstrating a judicial willingness to apply the rules of consideration in order to uphold the reasonable expectations of the parties to the variation; and, secondly, in extending the doctrine of duress to meet the problem of variations extorted by undue pressure. It is bad in failing to take the opportunity to escape from the strait-jacket of consideration in regulating contractual variations.

The relevant facts are complicated. The plaintiffs, owners of all the shares in the Tsuen Wan Shing On Estate Co., concluded a contract (the "main agreement") with the Fu Chip Investment Co. on February 27th, 1973 for the sale of those shares. The defendants were majority shareholders in Fu Chip. Under the terms of the contract the plaintiffs were to be paid by way of shares in Fu Chip, the market value of each share being fixed at \$2.50. In addition, the plaintiffs promised that they would retain sixty percent of the Fu Chip shares allotted to them and not dispose of them before April 30th, 1974. This provision was for the benefit of the defendants, who wished to protect their investment in Fu Chip against the loss of confidence that would be occasioned by the plaintiffs suddenly disposing of their newly acquired Fu Chip shares in the market. For their part, the plaintiffs desired protection against a drop in value of Fu Chip shares during the year in which they promised to retain them. Both parties understood and accepted that the plaintiffs were to be guaranteed against such an eventuality as part of the bargain. Accordingly, a second agreement (the "subsidiary agreement") was concluded on February 27th whereby the plaintiffs promised to sell to the defendants the frozen Fu Chip shares at a price of \$2.50 each on or before April 30th, 1974.

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¹ [1979] 3 All E.R. 65, [1979] 3 W.L.R. 435 (P.C.). On many of the arguments raised in this comment, see generally Reiter, *Courts, Consideration and Common Sense* (1977), 27 U. Toronto L.J. 439; Swan, "Consideration and the Reasons for Enforcing Contracts," in Reiter & Swan, *Studies in Contract Law* (Toronto: Butterworths, 1980) 24.

Shortly after the conclusion of the "subsidiary agreement," the plaintiffs realized that they had made a bad bargain. Although they were protected against any fall in value in Fu Chip shares, they could not benefit from any increase in value. They were bound to retain the shares until the end of April 1974, and at that time were bound to re-sell them at \$2.50 each. Accordingly, the plaintiffs notified the defendants in April 1973 that they would not complete the sale to Fu Chip, as they were bound to do under the "main agreement," unless the "subsidiary agreement" with the defendants was cancelled and replaced by a guarantee by way of indemnity against any fall in the value of the shares. The evidence was that the defendants, upon receipt of this notice, took legal counsel and were advised that the "main agreement" could be specifically enforced by Fu Chip, or at least that the plaintiffs would be liable for damages for breach thereof. Moreover, the evidence was that the defendants estimated that the market value of Fu Chip shares would not fall over the next year and that the cancellation of the "subsidiary agreement" and its replacement with a guarantee of indemnity was a calculated risk worth taking in order to avoid the delay and adverse publicity of litigation over the "main agreement." Thus the parties cancelled the "subsidiary agreement" and on May 4th, 1973 concluded an agreement whereby the defendants, "in consideration of your [the plaintiffs] having at our request agreed to"² go ahead with the "main agreement," promised to indemnify the plaintiffs against any fall in value of the "frozen" Fu Chip shares below the guaranteed price of \$2.50 per share that might have occurred by the end of April, 1974. In the event of the defendants having to pay an indemnity, the plaintiffs granted them an option to re-purchase the shares at the price of \$2.50 each. The evidence was that both parties saw the contract of guarantee as part and parcel of the "main agreement" being completed and that both parties considered themselves immediately bound by it.

It transpired that the value of Fu Chip shares slumped between May 4th, 1973 and April, 1974. At no time did the defendants put the plaintiffs on notice that they did not consider themselves bound by the May 4th agreement. In April 1974 the defendants refused to indemnify the plaintiffs under the terms of the agreement. The plaintiffs sued in the alternative for damages or for specific performance of the May 4th agreement.

The case involved two issues: first, whether the May 4th agreement of indemnity was supported by consideration in order to render it enforceable; secondly, assuming that the May 4th agreement was supported by consideration, whether the defendants' consent to it was procured by economic duress so as to render it voidable. At trial, judgment was given for the plaintiffs. In the Hong Kong Court of Appeal, the majority found for the defendants on the first issue but agreed unanimously with the trial judge that there was no evidence of economic duress. The Privy Council held in favour of the plaintiffs on both issues.

² *Id.* at 73 (All E.R.), 444 (W.L.R.).

II. THE CONSIDERATION ISSUE

The courts have enforced a modification of an existing contractual relationship where there has been a mutual rescission of the old contract and the substitution of a wholly new one, or some extra consideration flowing from the promisee over and above his promise to perform the existing contract, or a seal, or possibly a promissory estoppel operating against the promisor.³ In *Pao On* the Board of the Privy Council was able to find consideration to support the defendants' promise of an indemnity in two ways.

First, the Board held that the defendants' promise of indemnity was supported by the plaintiffs' promises to Fu Chip under the "main agreement." In the Board's opinion, the plaintiffs' promises under the "main agreement," although they pre-dated the formation of the May 4th agreement, could not be regarded as past consideration. The Board, applying the well known passage of Bowen L.J. in *Re Casey's Patents, Stewart v. Casey*⁴ held that an act done before the making of a promise can amount to consideration for that later promise provided that: (1) the act was done at the promisor's request; (2) both parties understood that the act was to be paid for by some subsequent conferral of a benefit; (3) the subsequent benefit would have constituted valid consideration had it been conferred in advance of the performance of the act.

As to the first requirement, the plaintiffs' contractual promises to Fu Chip under the "main agreement" were clearly procured at the request of the defendants, majority shareholders in that company. Moreover, the language of the May 4th agreement of indemnity expressly stated that the defendants' promise of indemnity was "in consideration of your [the plaintiffs] having at our request agreed to"⁵ enter into the contract of sale with Fu Chip.

As to the second requirement, the Board considered that the realities of the transaction between the parties as well as the wording of the May 4th agreement showed that both sides clearly intended that the plaintiffs were to be offered protection against potential loss in value of the shares as an essential component of the entire transaction. In effect, the parties always contemplated that, as part of the whole bargain, the plaintiffs would be protected against a fall in the value of the shares that they had promised not to sell for one year. The Board said that it did not matter whether the indemnity was regarded as,

the best evidence of the benefit intended to be conferred in return for the promise not to sell, or as the positive bargain which fixes the benefit on the faith of which

³ Estoppel and the seal were not issues in the *Pao On* case. The Privy Council mentioned the possibility of a mutual rescission of the "subsidiary agreement" as supporting the May 4th replacement agreement. The rescission, however, did not stand alone; rather the cancellation of the "subsidiary agreement" was "part and parcel of a comprehensive settlement accepted by Lau [the defendants] as the best and most effective way of securing early completion of the main agreement. . . ." *Id.* at 72 (All E.R.), 443 (W.L.R.).

⁴ *Re Casey's Patents*, [1892] 1 Ch. 104, 40 W.R. 180, 9 R.P.C. 9 (C.A.).

⁵ *Supra* note 1, at 73 (All E.R.), 444 (W.L.R.).

the promise was given, though where, as here, the subject is a written contract, the better analysis is probably that of the "positive bargain."⁶

As to the third requirement, the Board followed its earlier decision in *New Zealand Shipping Co. v. A.M. Satterthwaite and Co.*⁷ which held the performance of, or the promise to perform, a pre-existing contractual duty owed to a third party can amount to valid consideration because "the promisee obtains the benefit of a direct obligation."⁸ Thus the plaintiffs' promise to honour the "main agreement" with Fu Chip at the request of the defendants was enough to support the defendants' promise of an indemnity in the May 4th agreement. Although there may be logical difficulties in justifying this rule in terms of the benefit-detriment analysis of consideration,⁹ there is no doubt that, as a matter of convenience and reality, the defendants obtained what they considered to be a valuable commercial advantage from the plaintiffs going through with the "main agreement." To have invalidated the May 4th agreement for technical deficiencies in consideration would have flown in the face of both sides' reasonable expectations. As with the *Satterthwaite* case, this decision is a good example of the courts' willingness to be flexible in their application of the doctrine of consideration in order to uphold the reasonable expectations of contracting parties who may wish to re-adjust certain particulars of their relationship within the framework of one, overall transaction.

The second way in which the Board was able to find consideration for the promise of indemnification lay in the granting of an option by the plaintiffs to the defendants in the May 4th agreement to buy back the shares at \$2.50 each. That option could be exercised by the defendants only if they were called upon to indemnify the plaintiffs under the terms of the agreement. The plaintiffs had, therefore, undertaken an extra obligation, albeit of a contingent nature, which supported the defendants' promise of an indemnity. This again illustrates the courts' willingness to find consideration to support variations where one party technically undertakes some extra obligations, as was the case in *The Atlantic Baron*,¹⁰ which is discussed below.

The defendants also argued that a promise to perform, or the performance of, an existing contractual duty can amount to an illegal consideration as being contrary to public policy, if there has been an abuse of a dominant bargaining position by means of a threat to repudiate a pre-existing contractual obligation. The Privy Council firmly rejected the defendants' contention. Where consideration exists, as in *Pao On*, a contract cannot be attacked on such vague public policy grounds unless the elements of a success-

⁶ *Id.* at 75 (All E.R.), 446 (W.L.R.). The parties, in effect, would be fixing the value of a *quantum meruit* claim for services rendered. See Treitel, *The Law of Contract* (5th ed. London: Stevens & Sons, 1979) at 59-60.

⁷ [1975] A.C. 154, [1974] 1 All E.R. 1015, [1974] 2 W.L.R. 865 (P.C.).

⁸ *Id.* at 168 (A.C.), 1021 (All E.R.), 871 (W.L.R.) *per* Lord Wilberforce.

⁹ See Treitel, *supra* note 6, at 75-77.

¹⁰ *North Ocean Shipping Co. v. Hyundai Construction Co.*, [1979] Q.B. 705, [1978] 3 All E.R. 1170, [1979] 3 W.L.R. 419.

ful defence of duress have been established.¹¹ Furthermore, such a rule of public policy would lead to an anomaly: a contract that is contrary to public policy is void, whereas a contract coerced by duress is merely voidable.¹²

The Privy Council was right in holding that the doctrine of duress must determine the effect of an abuse of a dominant bargaining position. The unfortunate aspect of the Board's judgment lies in its refusal to break away from the rigours of consideration in the context of contractual variations. Within that framework, there is no doubt that the courts will strive to find some technical consideration, especially where a party has relied on the variation, as in *Pao On* itself. Nevertheless, the Privy Council upheld the position that one party does not furnish consideration to another by performing, or promising to perform, an existing contractual duty owed to that other party. Whatever doubts¹³ exist about the true explanation of cases like *Stilk v. Myrick*¹⁴ and *Harris v. Watson*,¹⁵ those decisions must be rationalized, according to the Privy Council,¹⁶ on the basis of no consideration.¹⁷

The result of the *Stilk* doctrine is that a court may be compelled to strike down perfectly reasonable business arrangements. Conditions existing at the time of the formation of a contract rarely remain static during the life of that contract. Often it is reasonable for a seller, for example, to pass on a price increase to his buyer. Cases such as *Gilbert Steel Ltd. v. University Constr. Ltd.*,¹⁸ however, show that such variations must be forced into the straitjacket of consideration.

The deficiencies of the traditional "consideration" approach to enforcing contractual variations are highlighted by judicial willingness to find some further nominal consideration and by the increasing use of promissory estoppel as a protective device for parties who act in reasonable reliance upon a variation being binding. Recent cases suggest that the courts are applying very liberally the traditional requirements of the doctrine of promissory estoppel in order to protect the reasonable expectations of the parties. Grange J., for example, in *Re Tudale Explorations Ltd.*¹⁹ stated *obiter* that he could not see the logic of the distinction between allowing estoppel to be used as a shield and not as a sword where one party is seeking to enforce a modification in an

¹¹ *Supra* note 1, at 77-79 (All E.R.), 448-50 (W.L.R.). The duress issue is discussed below in section III of this comment.

¹² *Id.* at 78 (All E.R.), 449 (W.L.R.).

¹³ These doubts are best expressed in Gilmore, *The Death of Contract* (Columbus: Ohio State Univ. Press, 1974) at 21-28.

¹⁴ (1809), 2 Camp. 317, 170 E.R. 1168 (N.P.).

¹⁵ (1791), Peake 102, 170 E.R. 94 (N.P.).

¹⁶ *Supra* note 1, at 77 (All E.R.), 448 (W.L.R.).

¹⁷ The Privy Council did recognize that some of the cases dealing with a pre-existing duty imposed by law could be explained on public policy grounds. However, "such cases are also explicable on the ground that a person who promises to perform, or performs, a duty imposed by law provides no consideration." *Id.*

¹⁸ [1973] 3 O.R. 268, 36 D.L.R. (3d) 496, *aff'd* 67 D.L.R. (3d) 606 (C.A.).

¹⁹ (1978), 20 O.R. (2d) 593 (Div. Ct.).

existing contractual relationship.²⁰ It has been convincingly argued²¹ that the doctrine should be available to enforce consensual variations in cases like *Gilbert Steel*²² because its effect is merely to modify the balance of the bargain in a manner agreed upon by the parties and not to foist a new bargain on an unwilling party. To re-adjust the scales of the original consideration in this way is not to challenge the need for some consideration.

Similarly, the Ontario Court of Appeal has recently stated that, for the purpose of determining whether the promisor has the requisite intention to modify an existing legal relationship, the courts can infer such intent where the promisor knows, or ought to know "as a matter of common business sense," that the promisee is likely to regard the promise as affecting their legal relations.²³ The parties need not actually sit down together and mutually agree to alter their existing relationship.²⁴ Rather, the courts will look to the reasonable expectations of the promisee, having regard to normal business practices, to fix the promisor with the requisite intent.²⁵

Promissory estoppel, however, is not the perfect solution to the regulation of contractual variations. There is still doubt as to whether a promisor can retract his promise upon giving reasonable notice, notwithstanding that its scope is permanent.²⁶ Moreover, it is questionable whether the promisee must incur some detriment, on the strength of the promise, over and above performing his obligations as varied.²⁷ Finally, there are decisions like *Gilbert Steel*,²⁸ which reject the use of promissory estoppel to enable one party to enforce positively a contractual variation so as to obtain an extra benefit, such as a price increase.

It can be argued that the doctrine of consideration can be utilized to serve a valuable purpose. If one party (A) threatens to break his contract in order to compel the other party (B) to confer some further benefit on A, such as a price increase, and A knows of B's precarious financial position, then the consideration doctrine may prevent such extortion from being effective.²⁹

²⁰ *Id.* at 597.

²¹ McRae, *The Extension of Options and Equitable Estoppel* (1979), 3 Can. Bus. L.J. 426.

²² *Supra* note 18.

²³ *Owen Sound Public Library Bd. v. Mial Dev. Ltd.* (1979), 26 O.R. (2d) 459, 8 R.P.R. 113 (C.A.).

²⁴ Contrast the approach taken in the *Owen Sound* case, *id.*, with that taken by the Supreme Court of Canada in *John Burrows Ltd. v. Subsurface Surveys*, [1968] S.C.R. 607, 68 D.L.R. (2d) 354.

²⁵ Good examples in the context of collective bargaining administration are *Re City of Penticton* (1978), 18 L.A.C. (2d) 307 (B.C.L.R.B.) (Weiler); *Re Craftsmen Floors (B.C.) Ltd.*, [1980] 2 Can. L.R.B.R. 63 (B.C.L.R.B.) (Gallagher).

²⁶ Many of the authorities are cited in Treitel, *supra* note 6, at 94-96.

²⁷ Contrast *W.J. Alan & Co. v. El Nasr Import & Export Co.*, [1972] 2 Q.B. 189, [1972] 2 All E.R. 127, [1972] 2 W.L.R. 800 (C.A.) with *Gilbert Steel Ltd. v. University Constr. Ltd.*, *supra* note 18, and *Re Tudale Explorations Ltd.*, *supra* note 19.

²⁸ *Supra* note 18.

²⁹ An example of such duress is *D. & C. Builders v. Rees*, [1966] 2 Q.B. 617, [1966] 3 All E.R. 837, [1965] 2 W.L.R. 288 (C.A.).

The fact, however, that consideration may help prevent one party from forcing a variation in a contract by means of duress does not mean that the doctrine of consideration should be retained in these circumstances. First, there are two important limitations upon the availability of relief through the doctrine of consideration. Consideration is of no assistance if A is wise enough to furnish some extra nominal, though legally sufficient, consideration. Moreover, it is submitted that the lack of consideration is irrelevant as soon as B performs the varied contract by, for example, actually paying the price increase. While the variation is still executory, the lack of consideration prevents A from enforcing the contract as varied. Once the variation has been executed by B, however, B cannot recover the benefit conferred simply by alleging lack of consideration. B can recover the benefit only if he can establish that the conferral was not made voluntarily. If lack of consideration were sufficient to ground recovery, then any gift could be retracted. This point seems to have been recognized by Mocatta J. in *The Atlantic Baron*³⁰ where he assumed that it would not have been sufficient for the plaintiff merely to establish that there had been no consideration for the price increase once the increased payments had been made. The plaintiff would also have had to establish that the price increase had not been paid voluntarily in order to close the transaction.³¹ In fact Mocatta J. determined that consideration had been furnished for the price increase³² in that case and so this issue did not arise for decision.

Secondly, it is nonsensical to attack what is essentially a duress problem by the doctrine of consideration. The concept of duress is sufficiently flexible to deal with this problem without the need to resort to technical notions of consideration. The employment of consideration means that there is the danger of reasonable compromises being struck down as well as the danger that coerced settlements may escape the scrutiny of the courts because of the presence of further nominal consideration or because of the fact that the variation has been executed. The important point is that, in all situations of contractual variation, the relevant factor in maintaining or striking down the amendment must be whether the variation was freely and voluntarily agreed to by the parties or whether it was the product of unfair dominance by one over the other. Such a rule would enable the courts to uphold legitimate readjustments between businessmen in cases like *Pao On* and *Gilbert Steel*, having regard to the realities surrounding the variation rather than to the formalities of consideration.

III. THE DURESS ISSUE

The defendants in *Pao On* also contended that their consent to the May 4th agreement had been secured by the duress of the plaintiffs in threatening

³⁰ *Supra* note 10, at 721 (Q.B.), 1184 (All E.R.), 434 (W.L.R.).

³¹ The point is also recognized by Cornish, *Economic Duress* (1966), 29 Mod. L. Rev. 428 and Coote, *Duress by Threatened Breach of Contract*, [1980] Camb. L.J. 40.

³² *Supra* note 10, at 714 (Q.B.), 1178 (All E.R.), 427 (W.L.R.).

not to proceed with the "main agreement." The Board rejected that argument on the ground that there had been no coercion of the defendants' will so as to vitiate consent.³³ The defendants had made a reasoned decision to avoid litigation by entering into the May 4th agreement in the belief that there was no real risk involved in executing the indemnity. There was "commercial pressure, but no coercion."³⁴ The importance of the *Pao On* case lies not so much in the decision on this issue but in the recognition of the availability of relief in duress in the area of contractual variations.

In the past, substantial restrictions have been placed upon the use of duress in these circumstances. There was a reluctance to recognize forms of economic duress. Duress of goods was the only species of economic duress recognized by the courts. There was no concept of duress by threatened breach of contract. Such a concept would impeach the finality of *bona fide* settlements of contractual claims. Moreover, an illogical distinction was drawn between the recovery of money paid under duress of goods and the setting aside of contracts induced by such pressure. Money paid under such duress could be recovered but a contract could not be invalidated for the same reason.³⁵ The *Pao On* decision, following two earlier English cases,³⁶ has now done away with these restrictions and so has enabled the courts to address openly the real issues rather than hide behind the doctrine of consideration.

In recognizing the concept of duress by threatened breach of contract, the recent English decisions are by no means in the forefront of the common law. Both the United States and other parts of the Commonwealth had previously admitted the possibility of duress by a threat to refuse to perform a contract.³⁷ In particular, there is a line of Australian authority to that end. *Nixon v. Furphy*³⁸ and *Re Hooper and Grass' Contract*³⁹ each involved a contract for the sale of land and the court in each case drew an analogy with duress of goods. In effect the payer already had an equitable interest in the land because of the availability of specific performance. Nevertheless, the language used by the judges was wide enough to embrace a threatened interference with any type of contract. In *Nixon*, for instance, Long-Innes J. relied upon⁴⁰ the following broad *dicta* of Isaacs J. in *Smith v. William Charlick Ltd.*:

'Compulsion' in relation to a payment of which refund is sought . . . includes every species of duress or conduct analogous to duress, actual or threatened, exerted by or on behalf of the payee and applied to the person or the property or *any right* of the person who pays, or, in some cases, of a person related to or in affinity with

³³ *Supra* note 1, at 78-79 (All E.R.), 450-51 (W.L.R.).

³⁴ *Id.* at 78 (All E.R.), 450 (W.L.R.).

³⁵ Contrast *Astley v. Reynolds* (1731), 2 Stra. 915, 93 E.R. 939 (K.B.) with *Skeate v. Beale* (1840), 11 Ad. & El. 983, 113 E.R. 688 (Q.B.). See generally Beatson, *Duress as a Vitiating Factor in Contract*, [1974] Camb. L.J. 97.

³⁶ *Occidental Worldwide Investment Corp. v. Skibs Als Avanti*, [1976] 1 Lloyd's Rep. 293 (Q.B.) [hereinafter *The Siboen and the Sibotre*] and *The Atlantic Baron*, *supra* note 10.

³⁷ See generally Sutton, *Duress by Threatened Breach of Contract* (1974), 20 McGill L.J. 554.

³⁸ (1925), 25 N.S.W. St. R. 151 (H.C.).

³⁹ [1949] V.L.R. 269, 56 A.L.R. 1005 (H.C.).

⁴⁰ *Supra* note 38, at 160.

him. Such compulsion is a legal wrong, and the law provides a remedy by raising a fictional promise to repay. [Emphasis added.]⁴¹

The most recent step was taken in *T. A. Sundell & Sons v. Emm Yan-noulatos (Overseas) Pty. Ltd.*⁴² where relief in duress was extended to a threatened breach of a contract for the sale of goods. The Court pointed out that economic duress was not limited to situations where one party threatened to withhold some proprietary right from the other but also embraced a refusal to perform any contractual duty.

In Canada the law has not gone this far. In the leading decision, *Knutson v. Bourkes Syndicate*,⁴³ the plaintiff Syndicate had agreed to buy certain land held by the defendant. The defendant refused to transfer the land unless certain payments, over and above what were due, were made to him. This refusal was made in good faith. The plaintiff made these payments so as to secure title to the land so that a further agreement to transfer the land could be carried out. The Supreme Court of Canada held that these additional payments could be recovered. The Court pointed out that the syndicate had become the equitable owner of the land and relied upon the duress of goods cases. There has, therefore, been no Canadian case which is as far-reaching as the *Sundell* decision.

It was this Commonwealth line of authority, and in particular the Australian cases, which inspired the English courts to recognize duress by threatened breach of contract. The three English decisions cover a variety of contracts: a contract of charterparty in *The Siboen and the Sibotre*,⁴⁴ a contract for the construction of an oil tanker in *The Atlantic Baron*,⁴⁵ and a contract for the sale of shares in *Pao On*. The English courts, therefore, have not restricted duress by threatened breach of contract to contracts for the sale of land. No particular analogy was drawn with the duress of goods cases. It is hoped that these decisions will lead to a corresponding extension of duress in Canada.

In one major respect, the English cases advance the law of duress further than the Australian decisions. It is recognized that economic duress of *whatever variety* is a ground for setting aside an otherwise valid contract. No longer is any distinction to be drawn between the recovery of money and the rescission of a contract. Kerr J. in *The Siboen and the Sibotre*, gives the following example of when a contract may be set aside for economic duress:

For instance, if I should be compelled to sign a lease or some other contract for a nominal but legally sufficient consideration under an imminent threat of having my house burnt down or a valuable picture slashed, though without any threat of physical violence to anyone, I do not think that the law would uphold the agreement. I think that a plea of coercion or compulsion would be available in such cases.⁴⁶

⁴¹ (1924), 34 C.L.R. 38 at 56, 30 A.L.R. 246 at 251 (H.C.).

⁴² (1956), 56 N.S.W. St. R. 323 (S.C.).

⁴³ [1941] S.C.R. 419, [1941] 3 D.L.R. 593.

⁴⁴ *Supra* note 36.

⁴⁵ *Supra* note 10.

⁴⁶ *Supra* note 36, at 335.

This reasoning was applied by Mocatta J. in *The Atlantic Baron*.⁴⁷ In that case, a ship owning company entered into a contract with a shipbuilder for the construction of an oil tanker. The price was payable in United States dollars by instalments. After the first instalment had been paid, the U.S. dollar was devalued by ten percent and the builder demanded a corresponding price increase in the remaining instalments and threatened to terminate the contract if such an increase was not forthcoming. The owners had negotiated a profitable charterparty with a third party for the tanker when completed. Not wishing to lose that contract, they agreed to pay the ten percent increase on the remaining instalments, even though they were advised that the builder had no legal basis for his claim. The later instalments were, therefore, paid at the increased price and the ship was delivered. The owners then sued some eight months later to recover the extra ten percent on the ground that it had been paid under duress. Mocatta J. held that the builder had furnished consideration for the variation in price by increasing a letter of credit that he had opened to secure the repayment of any instalments made if he should default on his contractual obligations. Nevertheless, Mocatta J. held that the owners had been compelled to enter into the agreement to pay the additional ten percent by the builder's threatened breach of contract and that such economic duress rendered the agreement voidable. He summarized his conclusions very clearly:

First, I do not take the view that the recovery of money paid under duress other than to the person is necessarily limited to duress of goods falling within one of the categories hitherto established by the English cases. . . . Secondly, from this it follows that the compulsion may take the form of 'economic duress' if the necessary facts are proved. A threat to break a contract may amount to such 'economic duress.' Thirdly, if there has been such a form of duress leading to a contract for consideration, I think that contract is a voidable one which can be avoided and the excess money paid under it recovered.⁴⁸

The owners, in fact, were not allowed to rescind the contract because they were taken to have affirmed the contractual variation by their failure to register any protests in paying the increased instalments and by their delay in seeking recovery of the excess instalments.

In *Pao On the Privy Council*, on the basis of *The Siboen and the Sibotre* and *The Atlantic Baron*, accepted that "there is nothing contrary to principle in recognizing economic duress as a factor which may render a contract voidable, . . ."⁴⁹ The recent English decisions, therefore, have opened up the possibility of the doctrine of duress being used to prevent contractual variations being extorted by undue pressure. The doctrine of consideration is totally inadequate for this purpose.

Finally, there is the difficult question of when a threatened breach of contract will amount to duress. Kerr J., in *The Siboen and the Sibotre*, rejected counsel's submission that "the defence of duress is made out whenever one party to a contract threatens to commit a breach of it and the other party agrees to vary or cancel the contract under this threat because it has no

⁴⁷ *Supra* note 10.

⁴⁸ *Id.* at 719 (Q.B.), 1182 (All E.R.), 432 (W.L.R.).

⁴⁹ *Supra* note 1, at 79 (All E.R.), 451 (W.L.R.).

effective legal remedy in respect of the threatened breach and has in this sense been compelled to agree.”⁵⁰ Not every threatened breach of contract to which one party submits should amount to duress. There is an obvious policy favouring the finality of settlements of contractual claims. A line has to be drawn between benefits conferred under duress and benefits conferred voluntarily. One party may, for example, quite freely pay a price increase demanded by another, although under no legal obligation to do so. The demand may have been made in good faith in the belief that the increase was justified by the contract itself and the payer may want to make the extra payment simply to settle the dispute. Alternatively, the demand may have been made, with knowledge that the increase is not justified by the contract, in the belief that it is morally justified because of changed circumstances since the making of the contract and the payer may pay the increase because he does not think it is an unreasonable demand in those circumstances.

The recent English decisions offer little guidance as to when a threatened breach of contract will amount to duress. They contain general statements that the pressure must be such as to overcome the will of the victim so as to vitiate his consent. In *Pao On*, the Privy Council isolated the following factors:

In determining whether there was a coercion of will such that there was no true consent, it is material to enquire whether the person alleged to have been coerced did or did not protest; whether, at the time he was allegedly coerced into making the contract, he did or did not have an alternative course open to him such as an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it.⁵¹

Some assistance can be elicited from the American cases. The American courts are particularly reluctant to find duress unless it can be established that the victim urgently required the contract to be fulfilled. Relief in duress, therefore, is made to depend upon the particular circumstances of the victim. Fuld C. J. emphasized this point in *Austin Instrument v. Loral Corp.*:

However, a mere threat by one party to breach the contract by not delivering the required items, though wrongful, does not in itself constitute economic duress. It must also appear that the threatened party could not obtain the goods from another source of supply and that the ordinary remedy of an action for breach of contract would not be adequate.⁵²

Professor Coote also favours an approach that considers the severity of the consequences for the victim of the threatened breach of contract. In his opinion, this is where the distinction lies between *The Atlantic Baron*, where duress was established, and *Pao On*, where it was not.⁵³ In the former case, the threatened breach would have deprived the shipowners of earning a substantial profit from a third party as well as forced them to break their contract with that third party. In the latter, the threatened party stood to lose little by resisting the pressure. Therefore, “given a demonstrated reluctance to enter the disputed contract, the determinant will be, not the will of the

⁵⁰ *Supra* note 36, at 334-35.

⁵¹ *Supra* note 1, at 78 (All E.R.), 450 (W.L.R.).

⁵² 29 N.Y. 2d 124 at 130-31, 324 N.Y.S. 2d 22 at 25-26, 272 N.E. 2d 533 at 535 (1971).

⁵³ *Supra* note 31, at 45.

victim as such, but the scale of the consequences to him of resisting the pressure."⁵⁴

It is submitted that it is not sufficient to consider solely the effect of the breach of contract upon the victim. The position of the "oppressor" should also be considered. A threatened breach of contract should not automatically be a sufficiently wrongful act for the purpose of duress. It should be sufficient only if the resulting transaction is inherently unreasonable. Is the "oppressor" merely seeking a way of acquiring some ready money or is he making a demand which is quite reasonable in light of all the circumstances?

The bounds of duress by threatened breach of contract will have to be established by later decisions. At least the recent English cases have made that enquiry possible. There is no longer a blanket rule that duress cannot include a threatened breach of contract or that economic duress cannot invalidate an otherwise binding contract. The doctrine of consideration, with all its faults, will no longer play a part except in so far as the presence of substantial consideration will be relevant to the question of whether a contractual variation was accepted voluntarily.

⁵⁴ *Id.*