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Yihan GOH
Singapore Management University, yihangoh@smu.edu.sg

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GOH YIHAN*
Faculty of Law, National University of Singapore

E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd and another (Orion Oil Limited and another, Interveners) [2010] SGHC 270

The High Court decision of *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd and another (Orion Oil Limited and another, Interveners)* [2010] SGHC 270 ("*E C Investment*") raises several contractual issues, chief amongst which – and the focus of this note – concern duress. This note discusses three points of the judgment relating to duress: (a) the reaffirmation of economic duress as a vitiating factor; (b) the status of lawful threats; and (c) the burden of proof in economic duress cases.

Facts and decision

The High Court decision of *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd and another (Orion Oil Limited and another, Interveners)* [2010] SGHC 270 ("*E C Investment*") raises several contractual issues, chief amongst which – and the focus of this note – concern duress. The facts which gave rise to the discussion of these issues were complex, to say the least. Briefly summarised, the case concerned a property at 39A Ridout Road ("the Property"). The first defendant, a Singapore company, was the registered proprietor of the Property. The second defendant was the registered mortgagee of the Property. Two parties, the plaintiff and the second intervener, wanted the Property to be sold to them by way of specific performance. They made this claim on the basis of separate options alleged to be granted to them by the first defendant. In resisting the claim for specific performance, the first defendant argued that the options were, inter alia, vitiated by way of duress or unconscionability. It is to these issues that we now turn.

The first defendant argued that he had granted the options under duress, and therefore these ought to be vitiated. In evaluating this argument, the High Court in *E C Investment* ("the Court") made several important points on the law of duress.

Reaffirmation of economic duress as vitiating factor

First, and unsurprisingly, the Court reaffirmed economic duress as a vitiating factor in contracts in Singapore law. The Court traced the doctrine of economic duress to the influential English decision of *Occidental Worldwide Investment Corp v Skibs A/S Avanti, Skibs A/S Glarona, Skibs A/S Navalis* [1976] 1 Lloyd's Rep 293. Kerr J had in that case held

*http://law.nus.edu.sg/about_us/faculty/staff/profileview.asp?UserID=lawgohy.

that there must be coercion of the will that vitiates consent for a plea of economic duress to succeed. The Court also confirmed that there are two elements necessary to establish duress, following Lord Scarman's speech in the (similarly influential) House of Lords decision of *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366. These two elements are: (a) pressure amounting to compulsion of the will of the victim; and (b) the illegitimacy of the pressure exerted. *E C Investment* thus follows the many authorities which have endorsed these two elements as representing the law in Singapore; these cases include the (also) recent High Court decision of *Tam Tak Chuen v Khairul bin Abdul Rahman* [2009] 2 SLR(R) 240 ("*Tam Tak Chuen*").

A related point may be made with respect to the Court's reaffirmation of economic duress as a vitiating factor. Specifically, the Court preferred the "illegitimate pressure theory" to the "overborne will theory" in explaining the basis of duress. This follows another High Court decision in *Wu Yang Construction Group Ltd v Zhejiang Jinyi Group Co Ltd* [2006] 4 SLR(R) 451. However, although not specifically pointed out by the Court, it should be noted that this "illegitimate pressure theory" does not exclude all relevance of the threatened party's will. There must still be a connection between the pressure and the eventual decision to succumb to the pressure. In fact, it has been suggested academically that both the "overborne will theory" and the "illegitimate pressure theory" could possibly co-exist (see Andrew Phang, "Economic Duress – Uncertainty Confirmed" (1992) 5 JCL 147 at 151).

Another (admittedly more unrelated) point concerns the relationship between economic duress and consideration. It is noteworthy that the Court referred to the English Court of Appeal decision of *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 and analysed that as a case possibly involving economic duress, instead of the a case concerning consideration. This raises the issue (although not considered by the Court) of whether economic duress ought to replace the doctrine of consideration because the two serve the same function: to prevent the exploitation of contracting parties. In this regard, the Court of Appeal had in *Gay Choon Ing v Loh Sze Ti Terence Peter* [2009] 2 SLR(R) 332 ("*Gay Choon Ing*") explored the question whether economic duress could operate externally as a replacement for consideration. The Court of Appeal stopped short of answering this question affirmatively because it regarded economic duress as not being free from difficulties. Ultimately, the Court of Appeal in *Gay Choon Ing* also alluded to the fact that economic duress might, in addition to the doctrine of consideration as well as other doctrines such as promissory estoppel, "afford the courts a range of legal options to achieve a just and fair result in the case concerned" (at [118]). Consistent with the Court of Appeal's tentative views, it seems unlikely that the doctrine of consideration will ever be completely eclipsed by economic duress. The problem with any wholesale replacement is the difficulty with isolating the precise function of consideration. Whichever view one adopts from the palette comprising various functions for the doctrine of consideration, it is perhaps clear that no one function has been accepted conclusively as being the correct one. That makes the search for a replacement doctrine, premised on a corresponding understanding of the purpose of the original doctrine being replaced, a difficult one to begin with. Thus, even as the difficulties surrounding economic duress continue to be ironed out with cases such as *E C Investment*, the more probable development of Singapore contract law must be that economic duress will continue to co-exist with the doctrine of consideration.

Lawful threats

Secondly, the Court explained the situations in which economic duress can be successfully made out. More specifically, the Court explored the situation wherein the threat was entirely lawful, and made within the realities of commercial bargaining. The question was when such a threat will become illegitimate, thereby fulfilling one of the two elements of economic duress. The law in this regard is relatively clear. Generally, a threat of a lawful action with a

reasonable demand does not amount to illegitimate pressure. An illustration of this proposition can be found in the English Court of Appeal decision of *CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714. Indeed, in *E C Investment* itself, the Court said that it certainly will be a very rare case for a contract to be set aside for duress when only lawful means or pressure was used, although the court refused to say that lawful duress can never amount to duress (at [51]).

While the law is easily stated, its application is not without difficulties in practice. In particular, the line between mere commercial pressure and illegitimate pressure, whilst established, is not always clear. The prevalent judicial practice seems to regard lawful acts between two commercial parties as amounting to nothing more than commercial pressure. This potentially has the effect of nullifying any allegations of economic duress. Such a practice really reflects the courts' concern not to interfere with commercial agreements. It may be that the distinction between legitimate and illegitimate commercial behaviour is a matter best to be decided by the legislature in drafting any statutory competition law rules. Quite apart from such an overarching policy consideration, the Court in *E C Investment* accepted four general factors identified by Professor Enonchong as being relevant in considering whether the threat of a lawful action is illegitimate (at [48]). These factors are:

(a) The threat involves an abuse of the legal process.

(b) The demand is not made bona fide.

(c) The demand is unreasonable.

(d) The threat is considered unconscionable in the circumstances.

With regard to factor (d), it may be unclear what an "unconscionable threat" means. One aspect of unconscionability could relate to the terms secured. In this regard, Professor Enonchong has stated that if the threat comprises lawful action, but the terms secured "...are so 'manifestly disadvantageous' as to make it unconscionable for the defendant to retain the benefit of it...", then that might be illegitimate pressure (see Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (Sweet & Maxwell, 2006) at [3-031]). However, the Court warned that Professor Enonchong's proposition should not be adopted "without a degree of caution" as this might come too close to re-writing disadvantageous contracts (at [49]). Once again, this reflects the more general policy consideration against disturbing commercial agreements, already referred to above. If this is reflective of the Singapore courts' practice, then it may that Professor Enonchong's factors (a), (b) and (c) will be applied more commonly. This also reflects the broader approach of the courts in approaching economic duress as concerning the "procedural" aspects of the arrangement (as reflected by factors (a)–(c)), rather than the "substantive" aspect (as reflected by factor (d)).

Indeed, on the facts, the Court did not find any illegitimate pressure. It noted that the only shareholder and director of the first defendant was a seasoned businessman. Although he was in desperate need of funds whilst in negotiations with the plaintiff, this only meant that the plaintiff had the upper hand in negotiations. This alone was not illegitimate pressure. In a related vein, the shareholder/director had the benefit of legal and financial advice when signing the agreements. There was therefore no economic duress on the facts.

Burden of proof

Thirdly, the Court also considered the burden of proof in cases of economic duress. It accepted the High Court's pronouncement in this regard in *Tam Tak Chuen*. In that case, the High Court held that once the victim proved the first element of duress, it was up to the

person alleged to have applied pressure to disprove the second element, viz., that the pressure had contributed nothing to the victim's decision to execute the decision, and his consent had not been vitiated. In other words, the burden of proof would be reversed upon proof of the first element of duress. The High Court in *Tam Tak Chuen* relied on *Barton v Armstrong* [1976] AC 104 in support for this proposition. However, the High Court in *Tam Tak Chuen* did not consider the contrary authority of *Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyd's Rep 620, in which Mance J thought that the burden of proof should not be reversed in economic duress cases as it is done for physical duress cases. *Tam Tak Chuen* might be contrasted with another High Court decision in *Holcim (Singapore) Pte Ltd v Kwan Yong Construction Pte Ltd* [2009] 2 SLR(R) 193. In the latter case, the High Court held that "it should be made clear ... that the burden is on the defendant to prove it signed the [agreement concerned] under economic duress" (at [65]). This seems to suggest that there is no reversal of the burden of proof. However, with the reaffirmation of *Tam Tak Chuen* by the Court in *E C Investment*, the reversal of burden of proof seemingly applies across all types of duress in Singapore.

It is suggested that this state of affairs ought to be re-examined by the Court of Appeal at the next possible opportunity. Indeed, there is the very forceful critique by Professor Enonchong to the effect that a different burden of proof ought not be required in economic duress cases (see Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (Sweet & Maxwell, 2006) at pp 43–45). Principally, the learned Professor is of the view that the presence of different burdens of proof may introduce an unnecessary complexity in the law. It also makes the distinction between categories of duress an important one, since that is the prior question that determines whether the burden of proof is reversed. These are all unnecessary complexities on what is already a difficult area of law. If these concerns are correct, then the Singapore position as endorsed in *E C Investment* is to be preferred to the other (apparently) contrary local cases.