Variations and the Doctrine of Consideration

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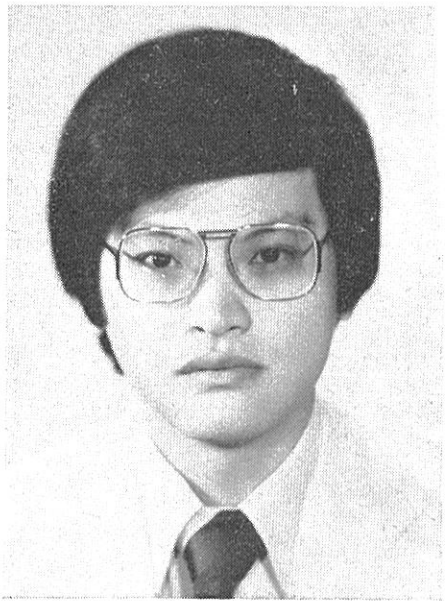
Consider the situation of a building contract which was made on a fixed price basis, running over a period of two years. Six months after the award of the contract the prices of materials took a sharp ascent which would have landed the contractor with substantial losses if he proceeded with the contract on the original price. The contractor immediately threatened to terminate the contract unless the employer agreed to pay an increased price for the works. The employer, desiring that the project should be completed on time, agreed to pay the additional amount "without prejudice" to his rights. The project was then completed and the question then arises as to whether the additional amount paid by the employer is recoverable by him on the grounds that firstly it was made for lack of consideration, or secondly it was made involuntarily under duress. The recent case of *North Ocean Shipping Co Ltd* v *Hyundai Construction Co Ltd* (1978) 3 AER 1170 affords an opportunity to re-examine these two issues which were thought, for a long time, to have been permanently settled.

The doctrine of consideration is well entrenched in the law of contract as understood in common law legal systems. Briefly it requires that a party suing on a contract to show that he has given something in exchange for the other's promise; the only exception being where the contract is made by deed. The term "consideration" is technically defined in the famous passage in *Currie* v *Misa* (1875) LR 10 Ex 153 as "some right, interest, profit or benefit accruing to the one party or some forebearance, detriment, loss or responsibility given, suffered or undertaken by the other". In other words, the plaintiff must have either conferred on the defendant some advantage or suffer some disadvantage as a result of the consideration being extended to the defendant. It follows that there is no consideration if all that the plaintiff does is to perform or promise the performance of an existing contractual duty which he owes to the defendant.

The parties in *North Ocean Shipping Co Ltd* v *Hyundai Construction Co Ltd* entered into a contract under which the defendants agreed to build a ship for what was, to all intents and purposes, a fixed price, payable in five instalments. The conditions of the contract provided that the defendants should execute a letter of credit in order to provide security for the repayment of the instalments in the event of default by the defendants during the course of the contract. In 1973 the US dollar was devalued and this affected the defendants adversely. The event led the defendants to claim an increase of 10 per cent in respect of the four remaining unpaid instalments to compensate for the devaluation. The plaintiffs



agreed to pay for the increase as a result of the defendants' threats to terminate the contract but they did so "without prejudice to (the plaintiffs') rights" and requested the builder to increase his letter of credit to correspond with the increased sum. The defendants agreed. Accordingly all the four remaining instalments of the contract price were paid with the 10 per cent surcharge and the plaintiffs eventually accepted delivery of the ship – all, apparently, without any protest. Subsequently the plaintiffs claimed the return of the additional sums paid and the dispute was referred to an arbitrator. The arbitrator dismissed the plaintiffs' claim and the case thereupon came before Mr. Justice Mocatta in the Queen's Bench Division in the form of a special case.

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The arguments submitted by counsel for both parties at first instance appears to indicate some difficulties in reconciling existing judicial decisions on the matter, notwithstanding the fact that it has been generally supposed that the principles involved have been well settled since the middle of the nineteenth century. The owners framed their arguments on the authority of *Stilk* v *Myrick* (1809) 2 Camp 217, a case which lies at the heart of the doctrine of consideration. In that case, on a voyage from London to the Baltic, two sailors deserted from a ship en route. The ship's captain, unable to find replacements, promised the rest of the crew additional wages if they worked the ship home short handed. An action brought to enforce this promise was dismissed because it was held that the crew, in bringing the ship home, were only performing their existing obligations and hence failed to provide consideration for the captain's promise to pay additional wages. Counsel for the defendants relied on two dicta laid down by Lord Denning in *Ward* v *Byham* (1956) 2 AER 518, and *Williams* v *Williams* (1957) 1 AER 505, where the Master of Rolls suggested *orbiter* that "a promise to perform an existing duty is, I think, sufficient consideration to support a promise". With due respect, this seems a rather difficult position for counsel to maintain since, in the cases referred, Lord Denning was clearly referring to situations of family arrangements where it would be quite conceivable that some benefit or advantage could be attributed to a promise by the promisor's performance of an existing obligation. It is thus open to doubt that the Master of Rolls ever intended the dicta to apply to commercial disputes.

The defendants' arguments did not impress Mr. Justice Mocatta. He held that the rule, that a promise by one party to a contract to fulfil his existing contractual duty towards the other party did not constitute good consideration, was still good law. However, somewhat curiously, he also held that the action by the defendants in increasing the amount in the letter of credit amounts to sufficient consideration for the plaintiffs' agreement to pay the 10 per cent surcharge. It is suggested that it will be very difficult to reconcile this part of the decision with the stated facts of the case for it amounts to ruling that the plaintiffs were paying an additional amount of money in consideration for a letter of credit covering that additional amount. A preferable course of reasoning would be to adopt the arguments advanced by the defendants' counsel on this point. The defendants argued, following the American case of *Watkins* v *Carrig* (1941) 21a 2d 591, that the circumstances ought to be treated as if the original contract was rescinded by mutual agreement and a new contract substituted. Indeed this reasoning would appear to be more consonant with the fact that the drastic devaluation of the US dollar was not an event which the parties could reasonably contemplate at the time of contract.

The next question was whether the plaintiffs could recover the additional payments on the alternative ground that it was made under a threat by the defendant to termi-

nate the original contract. In *Close* v *Phipps* (1844) 7 Man & G 586, 135 ER 236, a case upon which counsel for the plaintiffs relied heavily, the attorney of a mortgagee threatened to sell the mortgaged property unless certain costs, to which he was not entitled, were paid in addition to the mortgage money. The plaintiff who paid the additional costs under protest was held entitled to recover the same. Mr. Justice Mocatta agreed that, on the facts before him, this was a case of "money paid under duress, the duress being a threatened breach of contract . . .". He cited the judgement of Issacs, J in the Australian case of *Smith* v *William Charlick Ltd* (1924) 34 CLR 38, in which it was ruled that excess money paid, even under a new contract, may be recovered if it was paid under a threat to break an earlier contract. This view appears to be in accord with that expressed by Lord Denning in *D & C Builders* v *Rees* (1965) 3 AER 837, where the Master of Rolls remarked: "No person can insist on a settlement procured by intimidation". His lordship provided a useful statement of the law on the subject which may be shortly rendered as follows:

1. The recovery of money paid under duress is not necessarily limited to duress to goods.
2. A 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".
3. If there has been such a form of duress leading to a contract, that contract is a *voidable* one, ie., it can be avoided and excess money paid under it recovered, unless the innocent party has affirmed the contract.

The point made on "economic duress" is to be welcomed for nowhere prior to the present decision has the law on this particular issue been as clearly stated. In holding the view that a contract entered under duress is *voidable* and not *void*, Mr. Justice Mocatta has the support of several distinguished writers. *Chitty*, for instance, in the twenty-fourth edition stated the position as follows:

> ". . . a person who has entered into the contract may either affirm or avoid such contract after the duress has ceased;
> . . . if after escaping from the duress, he takes no steps to set aside the transaction, he may be found to have affirmed it . . .".

On the facts, his lordship found that the plaintiffs entered into the agreement to pay the 10 per cent increase under economic duress by the defendants and that initially this agreement was voidable. However, by taking no action by way of protest between the date after which there was no danger in registering the protest and the commencement of the arbitration two years later, the plaintiffs have, by implication, affirmed the contract. The plaintiffs were thus held not entitled to recover the additional payments.

The decision in *North Ocean Shipping Co Ltd* v *Hyundai Construction Co Ltd* thus firstly reaffirms the common law principle that the performance of an existing obligation does not amount to a sufficient consideration. Secondly, the judgement clarified to a considerable extent the scope of the concept of duress and ruled that the term extends to include "economic duress". If this decision is a correct statement of the law, what then are its implications on building contract administration? It is suggested that four observations may be made.

Firstly, in a contract which does not incorporate any provision for price variations due to market fluctuations (more commonly referred to as "fluctuation clauses") the decision is in support of the proposition that the contractor has no right to claim for excess costs incurred by virtue of inflation or other unanticipated economic losses. Secondly, if the contractor is to provide any form of additional consideration, in addition to his existing contractual obligation, however meagre such additional consideration might be, he may be entitled to sue on an employer's promise to provide compensation for fluctuations. This is so even if the agreement was made casually, provided that the promise relied upon could be imputed with an intention to produce contractual effect. In the present case, by increasing a letter of credit to cover an additional sum, the contractor was held entitled to sue on the employer's promise to pay such an additional sum. It would seem to follow that a consideration such as an undertaking to provide additional security for the additional payment would of itself be sufficient to enforce a promise to compensate for inflation losses. As mentioned earlier, it is doubted that the findings on this point are accurate, but if it remains as ruled by Mr. Justice Mocatta, the ambit of the operation of this principle seems untenably wide.

Thirdly, an employer may agree to pay an additional amount demanded by a contractor even if he disputes the right of the contractor to the amount demanded. Provided that it is clearly indicated that the payment is made under protest, the employer would still retain the right to recover the sum paid. Finally, any threat by a contractor to terminate a contract or to otherwise inflict economic loss on the employer with the view of securing concessions from the employer could render any agreement made by the employer to grant such concessions voidable at the option of the employer. This is provided that the employer did not at any time thereafter affirm the agreement to pay. This doctrine of "economic duress" would presumably extend to a threat to prevent another firm from taking on the completion contract.

Building for the Future? Staff Cuts and BRE

The Building Research Establishment, the British national centre for research for building design and construction, is again being threatened with a cut in its resources. During the last four years, owing to previous government cuts, BRE has lost over 200 non-industrial staff (more than 20%). To function efficiently a research establishment must have continuity of expertise and stability. For this reason every effort must now be made to stop further losses and, in the nation's interest, to expand BRE.

The Staff Side of the BRE Whitley Committee are publishing this document because they do not believe that there is sufficient awareness of the long-term implications in damage to the nation, of any cuts in BRE research.

BRE is largely funded by Central Government and is part of the Department of the Environment: it is for this reason that its resources are again being cut. While understanding the Government's broad objectives the staff of BRE are convinced that the cuts being planned for BRE will have serious long-term economic consequences for the country; leading to buildings which are more hazardous, less efficient, and more expensive to build and to use, than they need to be.

BRE is a national asset and one of the world's foremost establishments for building and construction research; indeed its operating pattern has been used as a model by many other countries in establishing their own national institutes. BRE currently costs the nation about £12 million per year but this must be compared with the output of the construction industry of approximately £16,000 million per year and the annual cost of energy used in buildings of £8,000 million per year. As a percentage of the output, research in the construction industry represents the lowest proportion of any of our major industries – yet construction accounts for approximately 11% of our Gross National Product.

Past benefits of work carried out at the three research stations now forming BRE are far reaching. It can be demonstrated that past BRE work is saving the country millions of pounds each year; many times its cost. Social as well as economic benefits derive from BRE's work, for example fire research has led to the proportion of the number of deaths in fires, in relation to the number of fires being reduced. Improved balance of payments have resulted from, for example, the better utilisation of wood; and an improved environment is being obtained by work such as developing uses for waste products. Finally, the large input of BRE work into British Standards and Building Codes of Practice must not be overlooked. This work is aimed at raising technical standards within the construction industry whilst ensuring that safety is maintained and that the customer receives good value for money – work which has been of direct benefit to everyone in the Nation.

BRE has a primary function to look after the client/user interest and, as this benefits everybody in the UK, it is right that a small part of the taxpayer's money should be used to fund BRE's work. This need is reinforced by the Government's use of BRE for advice to assist in making policy decisions, advice which needs to be free of the influence of commercial interest. Often this advice is only possible because of long-term research, which should be immune from short-term political pressures.

IOB – New Overseas Centre in Malaysia

Continuing its programme of providing facilities for all its members the IOB has recently formed a new overseas centre in Malaysia. The Malaysia Centre is the sixth overseas unit to be formed by the Institute. As well as Singapore, other units exist in Hong Kong, Ontario, South Africa, and Jamaica. In addition IOB representatives have been appointed in the Arabian Gulf, Barbados, Cape Province, Fiji, Ghana, Kenya, Natal, New Zealand, Rhodesia, Trinidad and Tabago, and Vancouver.