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| Institution: UNIVERSITY OF BIRMINGHAM |
| Unit of Assessment: C20 Law |
| Title of case study: Developing the law of duress |
| <p>1. Summary of the impact</p> <p>Professor Enonchong's research has had a direct and significant effect on the development of the law relating to economic duress in Singapore and the Commonwealth. Prior to the relevant impact, the law relating to lawful act duress was in a state of flux. The High Court of Singapore relied directly and exclusively on Enonchong's research to extend the scope of duress in a completely novel way, so as to encompass a threat to do an act that is lawful. The beneficiaries of the impact are all those (such as courts, arbitral tribunals, lawyers and their clients) who rely on the law of Singapore, which is influential throughout the Commonwealth, particularly as currently there is no decision on the point in other Commonwealth jurisdictions.</p> |
| <p>2. Underpinning research</p> <p>Professor Enonchong joined Birmingham Law School as Barber Professor of Law in 2001 and researches in banking and commercial law. The underpinning research is a monograph entitled <i>Duress, Undue Influence and Unconscionable Dealing</i>, published by a leading academic/professional publisher (output R1 below). The research was carried out in 2001-2005 and Enonchong was the sole researcher.</p> <p>Enonchong's research emanated from the fact that the law was in a state of flux, in England and throughout the Commonwealth. First, it was unclear whether a threat of lawful action could ever constitute duress. Secondly, even if it could, there was no clear guidance as to the circumstances when such a threat could be regarded as illegitimate so as to constitute duress.</p> <p>The book examined the law relating to the circumstances when courts will give a remedy to a person who has made a payment or entered into a contract because of pressure which the law considers unacceptable, or where one party took unfair advantage of another party's circumstances of serious disadvantage to impose unfair contract terms on the weaker party. Under English law, and the law of many Commonwealth jurisdictions, there are three main grounds on which the courts can intervene in these circumstances: duress (or overt pressure), undue influence and unconscionable conduct.</p> <p>The arguments underpinning the impact relate to the law of duress. Prior to the impact (i.e. the decision of the court) it was unclear in what circumstances a threat by one person to do something that he had a right to do (i.e. a threat of lawful action) could amount to duress (that is to say, unacceptable pressure) that can give rise to a judicial remedy.</p> <p>In Chapter 3 Enonchong made three key points. First, he argued that a distinction should be drawn between a threat of lawful action which can become unlawful if made to back a particular demand (e.g., an unwarranted demand to pay money) and a threat of lawful action which is not unlawful even if made to support a demand (paragraphs 3-016 to 3-021). In the latter case, where the threat of lawful action is not unlawful, prior to publication of the research there was no reported case where it had been decided that such a threat constituted duress. Secondly, Enonchong argued that a threat of lawful action that was not unlawful could be illegitimate and therefore constitute duress in certain circumstances (paragraph 3-021). Thirdly, Enonchong identified four circumstances where he argued such a threat of lawful action could constitute duress (paragraphs 3-022 to 3-031). These are:</p> <ul style="list-style-type: none"> (a) where the threat is an abuse of legal process; (b) where the demand is not made bona fide; (c) where the demand is unreasonable; and (d) where the threat is considered unconscionable in the light of all the circumstances. <p>In England, and many other Commonwealth countries, this area of research is not covered by legislation and the development of the law is left to judges.</p> |

The insights advanced by Enonchong introduced innovative ideas on how courts should deal with the issue of lawful act duress. No commentator (or court) had ever proposed the distinction between a threat of lawful action that becomes unlawful because of the demand, on the one hand, and a threat of lawful action that is not unlawful even if made to support a demand, on the other hand. Moreover, although some commentators had expressed conflicting views as to whether or not a threat of lawful action could constitute duress, no one had identified and explained the four circumstances when such a threat could constitute duress. Enonchong's approach in proposing the four circumstances outlined above is completely new.

3. References to the research

R1) Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (Sweet & Maxwell, 2006). ISBN 0 421 770 201. **[Available from HEI on request]**

4. Details of the impact (indicative maximum 750 words)

Enonchong's research had a direct effect on the decision of the High Court of Singapore in the case of *Tam Tak Chuen v Khairul bin Abdul Rahman and Others* [2009] *Singapore Law Reports* 240 (source 1 below). The court fully adopted all three main insights of his research.

In *Tam Tak Chuen*, the court was faced with the question whether a threat to do something that the defendant had the right to do (i.e. to institute proceedings for the winding up of a company) could be regarded as illegitimate so that it could constitute duress. In answering that question in the affirmative, thereby developing the law of Singapore, the court was guided by the relevant section of the monograph.

In paragraph 21 of the judgment, Prakash J stated that there are two elements to the wrong of duress. Then, relying on Enonchong's argument, she continued:

“In regard to the second element, that of illegitimate pressure, a threat has been described as illegitimate where the:

‘terms secured as a result of the threat of lawful action are so “manifestly disadvantageous” to the complainant as to make it unconscionable for the defendant to retain the benefit of them.’ (See p. 34 of *Duress, Undue Influence and Unconscionable Dealing* by Nelson Enonchong (London, Sweet & Maxwell 2006) (“*Enonchong*”))’.

After recounting the facts of the case, the judge turned to the question whether illegitimate pressure was exercised by the defendant. Again she turned to the book for guidance, and stated at paragraph 50:

“*Enonchong* classifies the circumstances which, according to the authorities, indicate when a threat of lawful action that is not unlawful is illegitimate. These categories are:

- (a) where the threat is an abuse of legal process;
- (b) where the demand is not made bona fide;
- (c) where the demand is unreasonable; and
- (d) where the threat is considered unconscionable in the light of all the circumstances.

Then, adopting the four factors stated in the book, she applied them to the facts of the case.

The first factor, whether the threat was an abuse of the legal process, was applied in paragraphs 52 to 53. The second factor, whether the demand was made bona fide, was applied in paragraphs 54 to 57. The third factor, whether the demand was unreasonable, was applied in paragraph 58. And the fourth factor, whether the demand was unconscionable, was applied in paragraph 59. As the court concluded that all the factors were satisfied, it held that the defendant's threat of lawful action was illegitimate and therefore constituted duress, since the other element of duress was also present. This was the first reported case in the Commonwealth to decide that a threat of lawful action, which was not unlawful, was illegitimate and constituted duress.

Impact case study (REF3b)

Thus, Enonchong's research had a direct impact on the court's decision. The judge fully accepted and adopted all three main insights of the research: (i) the distinction between a threat of lawful action that is unlawful and a threat of lawful action that is not unlawful; (ii) that a threat of lawful action that is not unlawful can constitute duress and (iii) that the four factors proposed in the research are the relevant ones to consider when deciding whether or not a threat of lawful action that is not unlawful is illegitimate and so can constitute duress.

This ruling was approved by different judges in two subsequent cases in the same court. First, in *E C Investment Holding Pte Ltd v Ridout Residence Pte Ltd* [2011] 2 SLR 232, Loh J approved the passage in Enonchong's book relied on in the *Tam Tak* case, although he advocated caution when approaching the fourth of the four circumstances identified by Enonchong and adopted in the *Tam Tak* case (source 2). Secondly, in *Tjong Very Sumito v Chan Sin En* [2012] 3 SLR 953 Chong J cited Enonchong's book and the two previous decisions (*Tam Tak* and *EC Investment*), in support of the proposition that four factors are relevant to the question whether a threat of lawful action is illegitimate and adopted the four factors identified in Enonchong's book (source 3). This means that in Singapore the law on lawful act duress is now largely settled.

Thus Enonchong's research has had a direct and significant effect on the development of the law of economic duress in the Commonwealth. This area of the law is vitally significant in both domestic and international business transactions where parties seek to exert pressure on each other by threatening to do a variety of lawful acts. Prior to these court decisions there was much uncertainty in the Commonwealth about the extent to which lawful act duress was actionable. Following these rulings, based exclusively on Enonchong's arguments, the law on lawful act duress in Singapore is now largely settled.

The beneficiaries of the impact are all those (including judges, arbitrators, lawyers and their clients) who rely on the law of Singapore, both in Singapore and jurisdictions where the law of Singapore is applicable (including international commercial arbitrations). This area of the law has particular relevance to threats made in the course of commercial transactions, whether domestic or international. While it is impossible to quantify the number of cases on this issue, allegations of economic duress are common in everyday commercial life and practising lawyers advise on it frequently.

5. Sources to corroborate the impact (indicative maximum of 10 references)

[1] *Tam Tak Chuen v Khairul bin Abdul Rahman and Others* [2009] *Singapore Law Reports* 240.

[2] *E.C. Investment Holding Pte Ltd v Ridout Residence Pte Ltd* [2011] 2 *Singapore Law Reports* 232 at [48] and [49].

[3] *Tjong Very Sumito v Chan Sin En* [2012] 3 *Singapore Law Reports* 953, at [249], [252] and [269].