DAVID GILMOUR and 2 Ors v JANUSZ KUBS

MAMA'O KUBS v DAVID GILMOUR and 2 Ors (HBC239 of 2003)

HIGH COURT — CIVIL JURISDICTION

JITOKO J

30 January 2007

Damages — contract — economic duress — whether Defendants were coerced into agreeing to dispose their shares — claim for duress was against the Plaintiff in person, not against the companies — no commercial pressure imposed by the first Plaintiff on the Defendants to sell their shares and interest in the company — Plaintiffs were not liable for any damages.

The Defendants were able to set up a bottling plant at Vatuwaqa as they realised the potential of the local market for locally bottled water. They named their company Natures Best Products Co Ltd (NBPCL) and incorporated in May 1993. The first Plaintiff (P1) learned about the bottling venture of the Defendants and directly expressed his interest in the business. P1 was permitted to buy shares in NBPCL and became the majority shareholder. In January 1996, a new company was formed, the Natural Waters of Viti Ltd (NWVL), which was responsible for the sales outside Fiji. In April 1997, the shareholders agreed to set up a US company to be known as Fiji Water LLC to be responsible for selling and distributing the product in the USA. There were major issues as to the smooth entry of the company and its products into the US market. The Plaintiffs questioned the competence of the Defendant in the management of the company. The P1 wrote a letter to the first Defendant (D1) expressing his dismay regarding the poor quality of the product. D1 denied that the shipments had defects and did not meet the US standards.

The shares of the Defendants in the company were later on sold to P1. The Defendants contended that they were coerced into agreeing to dispose of their shares and that, because of P1's overwhelming power and position in the company, they had no alternative but to give in to his demand. P1 denied any coercion was used to sell the shares of the Defendants. P1 alleged that the Defendants voluntarily proposed to sell their shares. The Defendants sought damages based on economic duress.

Held — (1) The court found that the claim of duress by the Defendants was against the Plaintiff in person. There were no allegations made against the companies. The only threats and pressure given in evidence by the Defendants were against P1, and although the shares of the companies were involved, neither was a party to their sale. The argument that the companies were vicariously liable for economic duress could not be sustained in law. There was no commercial pressure imposed by P1 on the Defendants to sell their shares and interest in the company to such an extent that they were forced under duress to succumb to P1's demand.

(2) The court found that the Defendants' conduct, by choosing to accept the money paid for their shares which they proceeded to spend, and failing to protest after the contract was concluded, had in fact and in law affirmed the contract. Even if duress was proved, the Defendants would have lost their right to seek the appropriate remedy. The court, having heard all the evidence from both sides, and equally importantly listening to the witnesses and the particular parties in the proceeding, had concluded that there was no arguable evidence to support the Defendants' claim for economic duress. Accordingly, the Plaintiffs were not liable for any damages.

Application dismissed.

Cases referred to

Maskell v Horner [1915] 3 KB 106; *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705; [1978] 3 All ER 1170; [1979] 3 WLR 419; *Occidental Worldwide Investment Corporation v Skibs A/S Avanti* [1976] 1 Lloyd's Rep 293, cited.

Barton v Armstrong [1976] AC 104; [1975] 2 All ER 465; [1973] 2 NSWLR 598; (1973) 3 ALR 355; *Pao On v Lau Yiu Long* [1980] AC 614; [1979] 3 All ER 65; [1979] 3 WLR 435, considered.

J. R. Fardell QC and *M. Moody* for the Plaintiffs

A. Herman for the Defendants

Jitoko J. This is an action in contract. The Defendants' claim in damages is based on economic duress. The Plaintiffs applied by summons pursuant to O 33 r 3 of the High Court Rules 1998, for split trial seeking to have the question of liability heard and decided first before quantum. The application opposed by the Plaintiffs, was allowed in the court's ruling of 4 October 2005.

Background

Mr Janusz Kubs, the first Defendant (D1), is of Polish ancestry and Belgian nationality. According to his evidence, he attended the sea academy in Stettin, Poland and graduated with an engineering degree in 1968. He first joined the Polish merchant navy and also served in various European countries merchant fleet, where he rose to become in 1977, a captain with a diploma of master mariner (Foreign — Goings). In 1978 he joined a Belgian company Poll & Company, which specialises in maritime survey, as a surveyor and maritime consultant. He was also at this time a registered Lloyd's surveyor, as well as in the German and Japanese firms of Germanische and Nippon Kaiji and Norske Veritas of Norway. The D1 said that he became involved as a transport coordinator and consultant, in various big international projects in Iraq, Turkey, Iran and the Philippines.

Mr Kubs's first contact with South Pacific came about following his survey of one of the ships belonging to Warner Pacific Line, based in Samoa and Tonga. The owner, Peter Warner invited him to become the company's managing director. He accepted a 1-year contract and in 1985 moved to Samoa. According to him, he set up his own shipping agency in American Samoa before the end of his contract, while he remained as agent of Warner Shipping. He in addition, operated a mariner and industrial survey bureau and dealt mainly with surveys of oil tanks coming into the Samoa. Around 1987, he became agent of a German government funded project on upgrade and improvement of the Apia water supply system. The second project he became involved in was a hydro power plant.

The D1 first visited Fiji around 1991 for the repair of his fishing boat at the Suva shipyard. The vessel's repairs was later transferred to Whangarei in New Zealand due to the extent of the works that needed to be done. It was during this time that he met and married his wife, Mama'O Kubs, a local, the second Defendant (D2).

Janusz and Mama'O Kubs came back to Fiji in 1992 from Samoa to, as the D1 explained, "see if we could establish ourself in Fiji, a bigger country". In his evidence, the D1 stated that he first broached the subject of locally "bottled water" in Fiji, with his wife, on that plane flight to Fiji. She was not aware of any local efforts and this way subsequently proven correct through his own investigation.

Mr Kubs quickly realised the potential of the local market for locally bottled water given the population of 800,000 and its 350,000 annual visitors. His background in marine engineering and water desalination as well as previous experiences in water generally, placed him well qualified to pursue the project of a local water bottling plant.

With the assistance of two others, Kevin Murphy and Fasio Jione, he was able to set up his bottling plant at Vatuwaqa. The water, proven of good quality after the University of the South Pacific lab test, was from underground source at Nabukavesi, on the Queens Road, in Namosi, drilled and transported by water trucks, to the factory in Vatuwaqa.

The Defendants meanwhile had obtained the necessary FTIB approval for non-nationals to engage in business ventures in the country. They then set up their company, the Natures Best Products Co Ltd (NBPCL), incorporated in May 1993. The company started production and it began supplying some local outlets. It also received some local media attention. According to Mr Kubs, it was after a report of the company's new business appearing in one of the dailies, that one Robert Miller visited him. Mr Miller, according to Mr Kubs, explained that he was the managing director of the Wakaya resort, and that he was representing David Gilmour, its owner. He added that Mr Gilmour was very much interested in the water bottling venture and that he would very much like to meet with Mr Kubs. As a result of this contract, Mr Kubs flew to Wakaya, a few days later where he met Mr Gilmour. At the Wakaya meeting Mr Gilmour directly expressed his interest in the business and the company, NBPCL. The follow-up meeting in Suva a few days later resolved that Mr Gilmour be permitted and was allowed to buy shares in NBPCL. Soon enough Mr Gilmour became the majority shareholder (51%) in the company and he injected a further $36,000 capital outlay into its operation.

As of March 1994, the company's shareholders were the two Defendants, and Mr Gilmour through a holding company Pacific Resources Holdings Ltd (PRHL). PRHL was subsequently succeeded by Wakaya Group Holdings Ltd (WGHL). Its office moved from Vatuwaqa to the Wakaya resort office in Suva.

The company's product began to pick up its sale both locally and in overseas market and with it the need for a bigger scale operation together with better water source grew. Mr Janusz travelled extensively around Viti Levu looking for fresh source of water in the months of 1994, until he reached Yaqara in Tavua in October 1994, where he found with the assistance of some Japanese engineers, water from boreholes which he tasted and described as "smooth like silk, it was beautiful, no after taste of any kind".

The land on which the water was discovered was leased from the Government of Fiji in May/June 1995 and Mr Kubs went in search of bigger and better equipment and machines. The company purchased them from Japan and Germany. Mr Kubs said that he then prepared a fresh business plan for the company incorporating all the new technology. The plan also included the landscaping of the operational area including the design of the plant, the position of other buildings, including the homesteads. This was ready by the end of 1995. There is in fact no debate over the fact that Mr Kubs was responsible for all the preparations that went into the setting up of the new plant. The P1 Mr Gilmour, readily conceded that he was happy to leave all the work for the setting up of the new operation to Mr Kubs given his qualifications and experience, while he concentrated on finding the market and additional investors.

The next significant development, while the new plant at Yaqara was being set up, is the decision to form a new company, the Natural Waters of Viti Ltd (NWVL). In January 1996, a meeting was held in Los Angeles, USA. At the meeting was Mr Kubs, Mr Gilmour, John Calvert Jones, identified as an investor from Australia, and lay Boland, the President of the Wakaya Club Inc in California. The meeting discussed and agreed to a deal memorandum submitted by Mr Gilmour on the future of the Fiji operations. Essentially, the memorandum recommended the following:

(1) That NBPCL continued to trade and supply bottled water to the local market.

(2) That a new company, NWVL be set up and will be responsible to bottle water and sell it outside Fiji.

The make-up of the Natural Water Viti Ltd

Under the proposal, Mr Gilmour recommended the share capital of NWVL as follows:

(i) authorised capital of 40,000,000 shares of F$0.25 each;

(ii) initial issue of 5,100,000 shares, and

(iii) further share options of 1,500,000.

In the event of the share options being taken up, the final issued shares in the company will total 6,600,000 shares at F$0.25 each.

The allocation of shares of the initial issue of 5,100,000 was as follows:

Party	Number	Percentage	Price (F$)
Wakaya Group Holdings	1,600,000	31.37	400,000
Janusz Kubs	400,000	7.84	100,000
Mama'O Kubs			
DH Gilmour	1,600,000	31.37	400,000
HMG Worldwide	500,000	9.80	125,000
John Calvert-Jones	1,000,000	19.60	1,000,000
	5,100,000	99.98	2,025,000

The proposal in the allocation of the issued shares of significant to Mr and Mrs Kubs, is the offer by Mr Gilmour to grant:

(a) Mama'O Kubs an option to acquire 300,000 of his shares "at any time during a period of 3 years from the date of the opening of the Factory, such option to be exercised at a price of F$0.25 at the rate of not less than 100,000 shares per annum".

(b) Janusz Kubs a similar option of another 300,000 shares under the same conditions.

In either case, the offer makes clear, that if an annual option is not exercised, it automatically lapsed.

If these options were exercised by Mr and Mrs Kubs, then at the end of the third year of the company's operation the allocation of issued shares would be as follows:

Party	Number	Percentage
Wakaya Group Holdings	1,600,000	31.37
Janusz Kubs	1,000,000	19.61
Mama'O Kubs		
DH Gilmour	1,000,000	19.61
HMG World wide	500,000	9.80
John Calvert-Jones	1,000,000	19.61
	5,100,000	100.00

The optional 1,500,000 shares that were to be granted in addition to the original issuance, were to be allocated in the following manner:

1. The company to grant Janusz and Mama'O Kubs 500,000 shares at a price of F$0.25, exercisable within 5 years of the opening of the Yaqara factory, and in minimum lots of 50,000 shares and for cash only. The offer was conditional on the repayment of the company's term loan, discussed below.
2. The company to grant Mr Gilmour and Mr Calvert-Jones 500,000 shares each at a price of F$0.25 each, and in minimum of 550,000 lots for cash. The cash/ consideration however was by way of both Messrs Gilmour and Calvert-Jones procuring and/ or guaranteering the term loan and working capital for the company. This option was always exercisable within 5 years of the opening of the factory.

If all the options were taken up, the final shareholding in the company should be as follows:

Parties	Number	Percentage
Wakaya Group Holdings	1,600,000	24.24
Janusz Kubs	1,500,000	22.73
Mama'O Kubs		
DH Gilmour	1,500,000	22.73
John Calvert-Jones	1,500,000	22.73
HMG Worldwide	500,000	7.58
	6,600,000	100.1

The working capital for the company were to be provided from:

(i)	Shareholders funds	F$1,000,000
(ii)	Term loan procured/guaranteed by Messrs Gilmour and Calvert-Jones	2,000,000
(iii)	Working Capital Overdraft	500,000
		F$4,500,000

The term loan was to be for a period of 5 years with interest on the first year only. Thereafter, there was to be equally quarterly capital repayments, while interest was payable 3 months in arrear on the balance of the term loan outstanding from time to time. The company reserved the right to make earlier capital repayments.

The deal memorandum suggested that until the term loan has been repaid in full, only 25% or the company's profits be available for distribution to the shareholders. The balance, unless Mr Gilmour and Calvert-Jones think otherwise, to go to the reduction of the term loan.

The memorandum further noted that according to Mr Janusz Kubs's cash flow projections, the company will show a positive cash balance by June 1997 of F$901,940 after loan and interest repayments at F$66,500 per month. It therefore estimated that within 3 years from the opening of the new plant, the term loan would have been repaid in full freeing all the profits of the company, available for distribution.

Setting up of the company

As part of the original corporate plan, the company was intended to be Mineral Waters of Fiji Ltd. It was changed to mineral Waters of Viti (Export) Ltd, at the instigation of the Registrar of Companies, and finally became Natural Waters of Viti Ltd on 26 February 1996. It is this company the NWVL that is engaged in the extraction, processing, bottling and sale of the brand name known as "Fiji Natural Artesian Water" from its Yaqara plant. A new 99-year lease (Crown Lease No 12700) was issued by the Director of Lands to NWVL in February 1996 over the 8.076 ha of land involved.

It is accepted that Mr and Mrs Kubs were both employed by NWVL until 30 November 1997. Mr Kubs was employed in a managerial capacity while Mrs Kubs was a plant supervisor. According to the terms of the deal memorandum, the joint salaries of the Kubs at the date of the opening of the factory/plant would be F$50,000, and "subject to the business meeting certain cash flow criteria" their salaries will increase to F$75,000 for the next year and further rising to F$100,000 for the following year.

It is also accepted that Mr Kubs was primarily responsible for all the necessary groundworks in the setting up of the bottling plant from acquisition of the land to the purchase of the machineries to employment of labour. As the magnitude of the project became clearer, Mr Kubs re-appraised his initial estimate of the start up costs from the $750,000 to approximately $4.5 million. The details of these proposals and changes are contained in what is referred to as the "Business Plan" of April 1996 which Mr Kubs gave to Michael Garvin of Lassi Slat, Garvin of London, solicitors for Mr Gilmour as well as to the other shareholders.

The paid up shares and the bank loan that provided that initial capital outlay for the project were soon found to be inadequate due to underestimation of the costs. This necessitated further equity contributions from the shareholders. Thus between the period 1996–97, there were further share allocations made in three tranches, in June and November of 1996 and February of 1997. A total of 1,812,200 ordinary shares at $0.25c each were issued, increasing the issued paid up capital to 9,662,200. The 8 November 1996 and 12 February 1997 share allotments were taken up by four of the shareholders only. Mr and Mrs Kubs took 15,000 each in the first and 15,695 each in the second, making their total shares in the company at 230,605 each. DH Gilmour Investments Ltd on behalf of Mr Gilmour was allotted 1,237,451 shares in the first and 699,990 shares in the second, bringing his total shares in the company to 3,537,441. The fourth shareholder, Seafirst Pty Ltd representing John Calvert-Jones interests, took 482,549 in the first and 268,620 in the second, taking his total shares in the

company to 1,751,169. HMG Worldwide soon was to relinquish its 500,000 shares in March 1997 and these were taken up by DHG Investments and Seafirst Pty, at 250,000 shares each.

The share allocation as envisaged and agreed to in the deal memorandum at the Los Angeles meeting did not come about. The first of the options granted to Mr and Mrs Kubs to acquire 600,000 of Mr Gilmour's shares could not be realised, at least on the first of the 100,000 shares per annum offer, principally because they did not have the money. The second option of 500,000 new shares could not be granted to Mr and Mrs Kubs because the condition precedent had not been met at the time they decided to sell their shares.

The marketing of the product

According to the plan, the estimated 24 million bottles of water that the Yaqara plant was capable of producing annually were solely for the United States market. This was agreed among the shareholders given the continuing growth of the US consumer demand, which according to Mr Kubs's report, was in excess of 15% annum, and equally important, the knowledge and contacts that Mr Gilmour possessed in North America. It was further agreed that a Mr Kick Butera, an associate of Mr Gilmour, be the sole distributor/agent for the marketing of the product throughout the United States. The costs for marketing, sales and distribution of the product in the US market was to be met by the distributor.

As it turned out, arrangement with Mr Butera came to nought. Instead, the shareholders agreed to the setting up of a US company to be known as Fiji Water LLC to be responsible for selling and distributing the product in USA. Fiji Water LLC was subsequently registered in Delaware, US, in April, 1997.

The marketing plan also envisaged the future export markets around Asia and the Pacific. However this and further expansion of the market was to depend on the feedback from the US market. It was important therefore for the company that the entry into the US market was a success.

There were however two major issues that were to provide initial difficulties to the smooth entry of the company and its product into the US market, and they believe, in turn sowed the seed of what became a hesitant if not strained relationship between Mr Kubs and Mr Gilmour and his US representatives. Each and the way it was handed by Mr Kubs, raised in the minds of the other shareholders, principally Mr Gilmour, the question of his competence in the management of the day to day running of the company.

First was the seemingly inordinate delay in the obtaining of US Food and Drug Administration (FDA) certificate of competence. This was, according to Doug Carlson the managing director of the company, due in part to Mr Kubs's earlier misleading report of 1995 on the Yaqara plant site, which stated that "All test confirmed the water readily meets the requirements of the Food Standard Code — Australia, and the United States Food and Drug Administration (FDA)", and Mr Kubs statement in his operations summary book dated September 1996 which stated that "the water satisfied that water chemistry criteria of Japan ((1988 Ministry of Health and Welfare Ordinance 56), United States (1996 FDA Regulations)) …" In fact, Mr Carlson expressed dismay that the tests that were subsequently carried out fell short of the FDA standards or requirements. The fact that the Department of Agriculture of the three main US consumer states of California, New York and Florida to which the product was targeted, may have different requirements depending on whether the product was borehole water or

spring water, only contributed to the delay in the final certification by the FDA. The delay in its turn resulted in the finalisation of other matters such as collateral and the labelling of bottles being held up. This at the end contributed to additional costs to the company.

The second issue dealt with the quality of the sample or trial shipments of bottled water to the US. This generated a lot of unfriendly exchanges between Jay Boland, the executive vice-president, marketing and sales for NWVL, Doug Carlson and Mr Kubs. Random sampling of palletised cases of bottled water arriving in the US from April–May 1997 showed that the condition of labelling of every size of bottles was "very, very poor" and in Mr Boland's facsimile memorandum to Mr Kubs of 22 May 1997, he stated:

> We cannot accept any further production in this condition. I have reviewed the situation with Doug. We do not want any further produce of this poor workmanship.
>
> Do not send the twelve containers unless the workmanship is perfect. I will advise the altitude of the stores to their receipt of the first shipments as soon as possible.

In addition to labelling, there were other "defects" such as bubbles, wrinkles and water spots that were also the subject of numerous exchanges between the US company representatives and Mr Kubs. Mr Kubs personally flew up to Los Angeles to meet Doug Carlson and Jay Boland on 20 May 1997 to sort out the problems of substandard product and try to iron out management and personal differences. What were discussed in this meeting are explained fully in Doug Carlson's facsimile memorandum to the major shareholders, David Gilmour and John Calvert-Jones, on 22 May 1997. Mr Carlson revealed that they had discussed (Carlson/Kubs) the importance of trust, respect and personal integrity in the dealings and relationship between the company officers. As to the inferior quality of the first shipment of commercial product that had been shipped without internal shrink wrap as a test to ascertain if the company can do without it, Carlson noted that:

> … Janusz found the product to be unacceptable as to the labels. Janusz felt that it was possible that the plant had sent rejects (because of label problems) for this test, and later confirmed that this was the case. He stated that it was a "stupid mistake" to have sent reject in the first place …

The memorandum was copied to Mr and Mrs Kubs.

A direct result of the inspection of the product carried out in Los Angeles and the consequent meeting of 22 May 1997, was the recalling of all except three of the containers awaiting shipment from Fiji.

In his facsimile memorandum to Jay Boland dated 23 May 1997, John Lewis the production/quality assurance manager of the company wrote.

> To allay all concerns I have ordered that all but three of the containers produced since the last shipment be recalled from the wharf.
>
> These containers will be brought back to the site for inspection and re-selection. Only the bottles that are free of bubbles, wrinkles and water spots will be repacked to be sent to the USA.
>
> The three containers that will be allowed to go have product that was produced this week after we enacted a more shipment quality regime.
>
> This is probably over kill since a lot of changes have been enacted since the last container. However, I am satisfied and confidant only with the very recent production.
>
> This selection process will be going on while Doug Carlson is here next week. He will be able to assess the more recent production at that time.

On 24 May 1997, Mr Gilmour writing from Paris expressed to Mr Kubs his dismay. In a handwritten memorandum faxed to Mr Kubs on the same day, Mr Gilmour said:

> Dear Janusz,
>
> Over the last couple of days I have received several updates from Jay and Doug regarding the poor quality of the product on the shipment that arrived this week in California. I must say that I have not been able to sleep since hearing the news and have felt sick and deeply saddened over the entire episode since hearing of this disaster.
>
> I know that we are capable of producing top quality product and have seen it first hand. Very clearly, my instructions were to produce *less quantity* for the first critical orders and *perfect quality*.
>
> I remain very confused and I simply cannot see how such a situation like this could actually occur. I feel that I and my associates have been very badly let down.
>
> I don't know what else to say.
>
> Kind Regards
>
> David
>
> (Signed)

For Janusz Kubs, the frustration associated with the company's entry into the US market was not the monopoly of Mr Gilmour and his associates alone. He equally was dissatisfied with that he alleged were slow responses from Doug-Carlson on following up of verification of tests required by the US Department of Agriculture and California.

As to the substandard product Mr Kubs stressed that the initial DHL shipments of bottled samples in December 1996, had never been returned inspite of the requests of both Mr Lewis and himself. It was necessary for the damaged bottles to be returned, for the factory staff to have them examined and take whatever action to avoid these problems in the future. Mr Kubs adhered to the belief that there were no inferior samples sent in the December 1996 consignment. Similar, Mr Kubs denied that the shipments between April and May 1997, had defects and did not meet the US standards.

The sale of the Kubs's shares

Janusz and Mama'O Kubs's 461,390 shares in the company were sold by share transfers on 1 December 1997 to DHG Investments Ltd at a price of F$586,390. The price of the shares had been the subject of negotiations between the parties before the agreement for the sale was reached between Mr Gilmour and Mr and Mrs Kubs. In addition to the sale of their shares, the Kubs were also released from their share options of 250,000 each for the consideration of F$1.

The manner under which the shares of Mr and Mrs Kubs's shares were sold to Mr Gilmour's DHG Investment Ltd and the prices paid for them forms the main thrust of this action. It is the Kubs's firm contention that that they were coerced into agreeing to disposing their shares by Mr Gilmour and that because of Mr Gilmour's overwhelming power and position in the company, they had no alternative but to give in to his demand. Further, the prices paid for the shares, Mr Kubs argued, did not reflect the true value of the shares of the company. In fact, they are claiming today's value of the shares. Mr Gilmour totally rejects the suggestion of any coercion used on the Kubs to sell their shares. They had voluntarily proposed to Mr Gilmour that they wished to sell to which he had agreed.

The claim by Janusz and Mama'O Kubs

The basis of Mr and Mrs Kubs claims are set out in the Mama'O Kubs's statement of claim in CA 239/2003. She alleged, at paras 10 and 11 of the writ that:

> 10. By a course of dealing comprising Duress and represented by the artificial arrangement for repeated unjustified calls including call to pay expenses of the Second Defendant, which resulted in repeated forfeiture of shares held by the Plaintiff in the Third Defendant, the First Defendant procured the reduction of the share entitlement of the Plaintiff in the Third Defendant from the initial 20.1% of the shares to 2.5% as at August 1997, giving the First Defendant 95% control of the said Company as distinct from 41% originally.
>
> 11. The, making of said calls at the behest of the First Defendant comprised part and parcel of a campaign of Duress waged by the First Defendant against the Plaintiff and her husband comprising in addition to such calls to the following:
>
> (a) Marginalisation of the Plaintiff and her husband in the business venture by introduction by the First Defendant of a de facto counterpart taking over the execution of duties formerly conducted by her husband;
>
> (b) Concoction of false allegations of poor management, unprofessionalism and poor quality control against her husband;
>
> (c) Insistence by the First Defendant upon sale by the Plaintiff of her shares in the Third Defendant.
>
> In default of the Plaintiff agreeing to sale of her shares in the Third Defendant, the First Defendant threatened forced sale by utilisation of his overwhelmingly superior financial position, and his total control of the Third Defendant.
>
> Further, the First Defendant at all times declined to pay off the relevant bank loan owed by the Third Defendant, discharge of which was a condition precedent to the entitlement of the Plaintiff and her husband to certain options in the Third Defendant as already described, notwithstanding his both controlling repayment and having ready means at any time to effect same.

In essence the claim is one of duress. Although this was not raised in the earlier interlocutory proceedings by the Kubs in Mr Gilmour's CA 655/1998 where he obtained an injunction in January 1999, against Mr Kubs for breach of undertakings of confidentiality, it finally emerged as a counterclaim in May 2000. No particulars of duress was pleaded then until CA 239/2003 with paras 10 and 111 above. According to the Kubs, the actions and behaviour of Mr Gilmour which constituted coercion and led them transferring their shares to him were:

(1) Dilution of their shareholding in the company by repeated "unjustified" calls for further share allotment.

(2) Marginalisation of the Kubs's roles in their employment with the company.

(3) Allegations of poor management by Mr Kubs in the operation of the company. and

(4) Deliberate failure by Mr Gilmour to pay off the bank loans to prevent the Kubs from acquiring more shares of the company.

The claim of duress

At common law duress is based on the principle that a transaction to which consent had been obtained by unacceptable means should not be allowed to stand. Whereas the early concept of duress was restricted to actual or threatened physical violence to the other party, it now extends to the question of whether the effect of the threat is to coerce the other into agreeing and in effect negates the

element of consent. As stated by the Privy Council in *Pao On v Lau Yiu Long* [1980] AC 614 at 635; [1979] 3 All ER 65 at 78; [1979] 3 WLR 435 (*Pao On*):

> Duress whatever form it take, is a coercion of the will so as to vitiate consent.

Economic duress which the law now recognises as a category of duress, deals with commercial pressure that is brought to bear on one of the parties, to such an extent that he was effectively deprived of his freedom to exercise his own will. On this the law lords in *Pao On* case added at AC 635; All ER 78:

> … Their Lordships agree with the observation of Kerr J in *Occidental Worldwide Investment Corporation v Skibs A/S Avanti* [1976] 1 Lloyds Rep 293 at 336 that in a contractual situation commercial pressure is not enough. There must be present some factor "which could in law be regarded as a coercion of his will so as to vitiate his consent". This conception is in line with what was said in this Board's decision in *Barton v Armstrong* [1976] AC 104 at 121; [1975] 2 All ER 465 at 476; [1973] 2 NSWLR 598 at 634; (1973) 3 ALR 355 at 368 BY Lord Wilberforce and Lord Simon of Glaisdale — observations with which the majority judgment appears to be in agreement. In determining whether there was coercion of will such that there was no true consent, it is material to inquire 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 adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. All these matters are, as was recognised in *Maskell v Horner* [1915] 3 KB 106, relevant in determining whether he acted voluntarily or not.

The American jurisdiction had long recognised that a contract maybe avoided on the ground of economic duress. But, as the Privy Council noted in *Pao On*, for commercial pressure to constitute economic duress, it must be to such as extent:

> that the victim must have entered the contract against his will, must have had no alternative course open to him, and must have confronted with coercive acts by the party exerting the pressure.

The court added at AC 636; All ER 79:

> American judges pay great attention to such evidential matters as the effectiveness of the alternative remedy available, the fact or absence of protest, the availability of independent advise, the benefit received, and the speed with which the victim had sought to avoid the contract.

This trend, recognising that commercial pressure may constitute duress the pressure of which could render a contract voidable, was followed in *Occidental Worldwide Investment Corporation v Skibs A/S Avanti* [1976] 1 Lloyds Rep 293 (above) in *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705; [1978] 3 All ER 1170; [1979] 3 WLR 419.

The danger of the possibility of equating every commercial pressure as amounting to duress was highlighted by the New Zealand Court of Appeal in *Pharmacy Care Systems Ltd v Attorney-General* (2004) 2 NZCCLR 187 (*Pharmacy Care*). It first referred to an article "Economic Duress — An Essay in Perspective" (1947) 45 *Mich L Rev* 253 by Professor Dawson, who at p 289 warned that:

> the history of generalisation in this field offers no great encouragement for those who seek to summarise the results in a single formula.

The court however added:

> Nevertheless, generally speaking, to be capable of giving rise to duress the par!icular threat will be illegitimate because what is threatened is in and of itself a legal wrong,

> or because the threat is wrongful or because it is contrary to public policy. As Treitel puts it, "Whether the threat actually gives rise to duress must then be considered by reference to its coercive effect in each case: no particular type of threat is regarded either as ipso facto having such an effect, or as being incapable, as a matter of law, of producing it".
>
> However as the reach of "duress" has broadened, so as to encompass economic duress and, in a sense, business compulsion, the danger of courts inappropriately conflating impropriety and generalised "unfairness" may become a concern. This lead the drafters of the American Restatement Second (Contract) to suggest that a distinction might be drawn between those things which are in themselves "so shocking" that the courts will not enquire into the unfairness of the resultant exchange, and, on the other hand, improper threats combined with resultant unfairness (see paras 186 and 318).

On the other hand the court acknowledged that there remains still, at least as far as the Commonwealth jurisdictions is concerned, no distinct agreement on the question on how serious or grave should a threat have to be to justify the victim succumbing. Should there be objective test that the threat is of sufficient gravity as to overcome the will of "a person of ordinary firmness"; or subjective test requiring only the threat to deprive the victim of the exercise of his free will. The NZ Court of Appeal in the *Pharmacy Care* case concluded that:

> The modern formulation appears to address this issue by a hybrid formulation: the threat must have left the particular victim "no reasonable alternative" … Whether there was a reasonable alternative will depend on all the relevant circumstances, including the characteristics of the victim, the relations of the parties, and the availability of professional advise to the victim.

Was there economic duress

In this case, the central question is whether there was commercial pressure, imposed by the Plaintiff Mr Gilmour on Mr and Mrs Kubs to sell their shares and interest in the company to such an extent that they were forced under duress to succumb to his demand.

In other words, was there coercion to the extent that it vitiated consent? Were the Kubs left in the end with no reasonable alternative but to sell their shares and get out of the company?

The court notes that the Kubs's claim of duress is against Mr Gilmour in person. There are no allegations made against the companies, both NWVL and Fiji Water, LLC. This is clear from the evidence before the court. The only threats and pressure given in evidence by both Janusz and Mama'O Kubs were against Mr Gilmour, and although the shares of the companies were involved, neither was a party to their sale. The argument therefore by counsel that the companies were vicariously liable for economic duress, cannot be sustained in law.

As far as the claim against Mr Gilmour, Mr and Mrs Kubs had identified four specific patterns of behaviour and/or actions of or taken by Mr Gilmour that amounted to duress. These are already set out above. I will deal with them in turn.

Dilution of shares

The allegation by the Kubs is that through manipulation of the company's finance projection requirements, Mr Gilmour through the company was able to make unjustified share calls, and because the Kubs were not financially in a position to meet their allotments, resulted in the balance of their allotments taken up by Messrs Gilmour and Calvert-Jones, and this directly led to the dilution to their shareholding percentage and consequently strength from 20.1% in the beginning, to 2.5% as of August 1997. On the other hand, the Kubs claim that for

the same period, Mr Gilmour, through the process of additional share allotments in the company's further capitalisation, increased his share holding and resultant control of the company from 41–95 per cent.

After carefully assessing all the evidence before it, the court is satisfied that there is enough evidence to support the argument that there were sufficient commercial and therefore logical reasons for the company to raise additional money to support the expanding company operations from 1996–97. There was no possibility of obtaining further financing from the bank. Mr Kubs himself in his evidence agreed that the company would need additional money and that his 1996 "Business Plan" had in fact re-evaluated the costs of the start-up operations to 4.5 m from the original $750,000. There were three issuance of shares in the period 1996–97. In each of these allotments the Kubs were offered share on a pro rata number basis. That they had taken only 15,000 shares each in the 8 November 1996 allotment, and 15,695 share each in the 12 February 1997 allotment, were decisions they voluntarily took and while the opportunities were there to subscribe to more, they did not take them because of financial constraint. The fact of the matter is, when the operation was at its critical stage, and there was an urgent need to inject further capital into the company to get over the hurdle, it was left to Mr Gilmour and his associates to cough up the money. If in the process it drastically reduced the shareholding capacity of the other, so be it. The company needed to, not only expand given the market needs, but also ensure that every effort be made, to guarantee the maintenance of the high quality of the product. This obviously meant the employment of skill and market management that is able to fully exploit the opportunity in minimum time. It meant in the end, making available to the company, money to facilitate its operations.

Mr Kubs referred to a taped telephone conversation he had with Mr Gavin in October 1997, which Mr Gavin had confirmed that the Kubs would have been further marginalised by Mr Gilmour should they have refused to sell their shares by "finding legal exercise to limit your duties and get rid of you and you will end up being a minority shareholder with an option that you would have not exercised".

While the evidence may offer some assistance to the Kubs in their arguments, the court is mindful that the view expressed is Mr Gavin's and not the views of Mr Gilmour, in any case, the Kubs had long agreed to sell their shares at the time the conversation took place.

In the end I find that the further allotment of shares in the company, were carried out with the full authority of the shareholders, including the Kubs, as a necessarily move for the company's success. The dilution of the Kubs's shares as a result, did not, under the circumstances discussed above, amount to commercial pressure that resulted in the Kubs being coerced into selling their shares to Mr Gilmour.

Marginalisation of the Kubs

The allegation, from the evidence, relates to the employment and especially the position and responsibilities of Mr Janusz Kubs with the company. From the start of the operation and the construction of the plant, Mr Kubs was more or less in charge of everything. As the company began production and different phases of the operation kicked in the company began to employ experts in the line operation. One of them, Mr John Lewis, was appointed as the production/quality assurance manager at the plant. Mr Lewis contract was for 1 year from 3 May

1996 with option of extension. He had useful background in hydrogeology and microbiology and was made responsible for the quality control and systems surveillance in the plant.

Mr Lewis contract came to an end and was not renewed. According to Mr Kubs, John Lewis left because the company did not agree to an increase in his salary. Mr Ian Lincolne was recruited to replace Mr Lewis in September 1997, and it appears that the entry of Ian Lincolne into the picture caused a lot of anxiety to Mr Kubs insofar as delineation of responsibilities in the plant and overall supervisory responsibilities are concerned. According to Mr Kubs, while he had indicated his approval to Mr Carlson for the appointment of another to replace Mr Lewis, there was in fact no need to do so, as he was capable of running the plant on his own.

There is another issue raised by Mr Kubs relating to Mr Lincolne's qualification and remuneration. Before joining the company, he was working for Kraft Foods in Sydney and before that he held jobs in a variety of food industry in Australia. He has a degree in chemical engineering from the University of New South Wales. In Mr Kub's estimation, Mr Lincolne did not possess the necessary expertise in water bottling industry. His experience was in the food industry. Furthermore, Mr Lincolne was paid as the plant manager, a salary that was more than Mr Kubs, he reported directly to Mr Carlson, the managing director and not through Mr Kubs who was supposed to be in charge of the plant.

Again after having listened to Mr Kubs and Mr Lincolne gave evidence, I find nothing to suggest that Mr Kubs was being marginalised to sidelined from the company's plant operation upon the appointment of Ian Lincolne as the plant manager. He was, contrary to Mr Kubs's assertion, very qualified in the field of quality control. It is clear that Mr Lincolne, upon appointment, had his own ideas how to improve both the level of production and as well as the quality of products. There was also the issue of the reconfiguration of the line layout, which according to Mr Lincolne, would improve product and process flow. There were other problem, which Mr Lincolne readily identified, such as quality of labelling, additional equipment, and transportation, which he believed, the improvements and obtaining of which, would significantly improve production. These concerns, it is clear from the evidence, were not readily accepted by Mr Kubs. As the one who solely responsible for the planning and setting up of the plant, one may perhaps understand his reservations, if not resentment, to new ideas especially if made by someone who was supposed to be working under you, but reporting directly to the managing director.

The evidence before me do not support the allegation of marginalisation of Mr Kubs in his employment with the Company. Mr Kubs's position remained unchanged after the hiring of Mr Lincolne.

Poor management

The allegations of poor management against Mr Kubs if not made overtly, can certainly be discerned from the exchanges between himself and Mr Gilmour. The starting point was the underestimation of the project cost by Mr Kubs, who was solely responsible for the start up of the operation. Mr Kubs asserted and Mr Gilmour conceded that the initial phase of the operation was the responsibility of Mr Kubs alone. The project costs of $750,000 estimated by Mr Kubs and which he later revised upwards to $4.5 million in his "Business Plan" proposals, and which in turn necessitated further equity contribution from the shareholders was, to Mr Gilmour, a concern. There was next the delay in the

obtaining of the US FDA Certificate of compliance contributed in part by what Mr Carlson referred to as Mr Kubs's misleading 1995 report stating that the product was FDA compliant. Again, this episode also contributed to Mr Gilmour's growing doubt of Mr Kubs's capability to perform.

The critical chapter in this souring relationship deals with the quality of the product shipped to the US market. The initial shipments (both samples and first commercial) were found to be substandard. According to the US company officials, these defects included poor labelling, existence of bubbles wrinklers and water spots. In instances, cases of the product were withheld from demonstrations and sale to avoid unfavourable first impression and reaction from the prospective clientele. Mr Kubs totally denied that the first shipments were substandard and to support his argument he claimed that not one crate of rejected bottles were returned despite his and Mr Lewis' requests to do so. By implication, Mr Kubs accused Mr Carlson and Mr Boland of fabricating the unsaleability of the product. The mystery of the "non-returned" cases of product has not been fully explained, except that they were given out from time to time by either Mr Carlson or Mr Boland for occasions such as golf tournament.

On the other hand, the evidence show that Mr Kubs, after receiving the complaint travelled to the United States on 20 May 1997, who together with Messrs Carlson and Boland, jointly inspected a substandard shipment. Mr Kubs according to Mr Carlson, in his facsimile memo to Mr Gilmour and Mr Calvert-Jones of 22 May 1997, agreed that the product's label was unacceptable. He also agreed that it was very possible that the factory had sent some rejects and that it was a "stupid mistake". This facsimile was copied to Mr Kubs. Now Mr Kubs did not deny that he travelled to the United States on 20 May 1997 to among other things, inspect the shipments of the product amid allegations of its substandard quality. He did not deny that such inspection was actually carried out in Los Angeles. He subsequently received a copy of Mr Carlson's memo of 22 May, which clearly stated that Mr Kubs agreed that the product was "unacceptable". At no stage did Mr Kubs respond or contradict Mr Carlson's report, if he maintained as he did in his evidence before me, that there was nothing wrong at all about any of the shipments. It would seem therefore contradictory for Mr Kubs to insist on his views that all the shipments of the product to the United States were acceptable, while holding the opposite view on 22 May, 1997. The court has already noted that following the joint Los Angeles inspection, almost all of the containers of product awaiting shipment at the Lautoka wharf, were taken back to the plant.

The alleged debacle surrounding of the NWVL product's entry into the US market was deeply felt by Mr Gilmour, being the majority shareholder in the company. He after all, stood to lose the most if the venture failed. Mr Gilmour's 24 May 1997 facsimile to Mr Kubs, which the court has already referred to above, following the reports of the inferior quality of the products ready to enter the US market, represented perhaps the watershed of the relationship. In an earlier facsimile of 17 May, 1997, Mr Gilmour summarised what he viewed as the parameters of the making of a successful company and more importantly, what he assessed to be the short comings of the existing NWVL operations and in particular Mr Kubs and his obsession with increased production level. On this issue Mr Gilmour said:

> Doug advised you that a limited production plan was required. A schedule that would produce a very limited amount of product of maximum quality "as the first impression is the lasting impression" that would maintain the plant at the lowest possible level of

production that would also maintain a core of trained personnel who could affect an immediate increase of production as the market demands.

If we have a problem achieving this, perhaps we will require *urgently* professional and experienced management input to help us at this time.

It must be clear from one's reading of Mr Gilmour's memo above that there was already existing a crisis of confidence in the ability of Mr Kubs to produce, not so much the goods but to the quality of the product to the standard expected to satisfy the US consumer. Mr Kubs may have been a successful operator in his shipping and fishing ventures, and as well as his first water bottling company, Nature's Best, but it is quite evident that with the new NWVL operation feeding the more sophisticated US market, the demand of management and skill level required by Mr Gilmour and Mr Calvert-Jones, were found lacking in Mr Kubs. All the incidents identified by the Plaintiff and discussed above are symptomatic of their growing disquiet and doubt in Mr Kubs's abilities.

Non-repayment of bank loan

According to the terms of the deal memorandum that set out the agreement on the share capital of NWLV, there was also an option available to Mr and Mrs Kubs to take a further 500,000 shares at 0.25c per share. The option was to be exercised within 5 years of the opening of the plant, in minimum lots of 50,000 and payments in cash only. The condition to the option was the requirement that the company's term loan should first be repaid. The term loan amounted to $2 million guaranteed by Messrs Gilmour and Calvert-Jones, extended over a period of 5 years with quarterly repayments but with the right to make earlier capital repayments. The company did not repay the loan during the tenure of the Kubs's employment.

The Kubs submitted that Mr Gilmour had deliberately declined to pay of the bank loan, to avoid the option being made available to them. Their taking up the options would have significantly increased their shareholding in the company.

The court is not aware of any tangible connection between this issue of option and the element of duress claimed by the Kubs, given the absence of evidence of any threat by Mr Gilmour, for example for the company to refuse or even defer repayments of the loan. On the other hand the company records, as evident from its annual reports, showed that if continued to sustain losses for the first 3 years of its operation. This is quite apart from the fact that the additional allotments, to which the Kubs were participants of, is convincing argument that the company continued to need capital injection all through the 5-year period the Kubs were employed there. In any case, the loan is owed by the company, not Mr Gilmour, and even if it have been possible for him to repay the loan, that would only have resulted in the further dilution of the Kubs's share in the company. The court therefore is unable to agree to the Kubs's contention that the non-payment of the company's term loan was a deliberate act on the part of Mr Gilmour to sabotage the Kubs's option to purchase further shares in the company. That being so, there is absence of duress.

The pressure on the Kubs to sell their shares

Much emphasis were made by Mr and Mrs Kubs on alleged pressure exerted by Mr Gilmour to the extent that they did not have any reasonable alternative but to succumb to it. In addition to those actions that has already been identified and fully discussed above, which supposedly contributed to this untenable situation, Mr and Mrs Kubs catalogued episodes of events and incidents between

themselves, Mr Gilmour and Mr Carlson, that they believed constituted threatening and aggressive conduct and behaviour that in the end, they were forced, without the exercise of their free will, to sell their shares to Mr Gilmour. Some of exchanges were related in Mr and Mrs Kubs's evidence in chief while others were recorded in their "joint" diary, pages of which were exhibited in court.

As examples of the pattern of behaviour complained of, Mr Kubs remembered Mr Gilmour threatening him around 3 June 1996 that the Kubs "must trust him or be wiped out". Again on 8 November 1996 at The Sheraton Fiji, Mr Gilmour is reported by Mr Kubs to have told him that he could fake it or leave it and added, "I can wait to take you out". In his diary entry market 14 February 1997, although the writing is spread over the 17–19 February columns, because according to him, there were no rooms in the diary, Mr Kubs wrote "Notes from phone conversation JK/DHG 14 Feb", and talked about the differences, with Mr Gilmour concluding, "you better sell your and Mam'O's stock. Your options are worthless. Go back to fishing. I will help you to get there. Don't ever cross me". The diary entry of 21 July 1997 is pre-empted by Mrs Kubs's comments stating:

> Arrival of DHG/DC, meeting with them — discussion of future of Company & Quality of products internal problems.

Mr Kubs's entry following what appeared to be some heated exchanges in their meetings with Messrs Gilmour and Carlson, reflected that Mr Gilmour once again demanded that the Kubs "must sell your shares to me" and that Mr Carlson was supposed to have added, "If not we will wait for your smallest mistakes to dismiss you". There is further entry in the diary, which according to Mr Kubs is also the record of their meeting with Gilmour and Carlson of 21 July 1997, although the entry is written across 17–19 July columns. It records Mr Gilmour allegedly saying; "One more rights issue and you both are nothing. Your options are anyway worthless. I now give you time to think about it".

Finally, Mr and Mrs Kubs diary's entry of 28 July 1997 is supposed to be a record of their meeting (Gilmour/Carlson/the Kubs) meeting held at the Tanoa Hotel in Nadi. Again the joint entry is spread over the 28–30 July columns. Mr Kubs wrote that affect a heated exchange, on the poor quality of the first shipment and his demand for the return of the rejects, and the financial statement of Fiji Water LLC, Mr Gilmour told him. "Janusz you better go back to your shipping and sell, you both must sell your stocks, no future here for you. We have already a new Plant Manager who will assist us to take you out and dump. I hope you conclusively considered our discussion of last week. I now wait for your confirmation to buy you out. Michael will prepare documents for you and Mama'O to sign. No trade on terms."

All of the incidents reported by the Kubs in their 1997 diary and elsewhere, counsel argued, constituted a deliberate and calculated scheme to threaten, intimidate and cower Mr and Mrs Kubs into surrendering their shares. In the end, it worked and the Kubs sold their shares, under duress.

There are two aspects of the diary notes that are of concern to the court. Granted, that the diary may have been a shared or joint diary for Mr and Mrs Kubs, the double entries about the same incident or in most cases, the pre-emption by Mrs Kubs of Mr Kubs's entry, and in some cases, the actual diary entries made by Mrs Kubs from information told to her by her husband, such as one entry of the London meeting, would make one very cautious of accepting

them as the correct and full records of what transpired at these meetings. While the court is disinclined to the view or any suggestion of the diary entries being doctored, there is nevertheless a distinct impression that some entries by Mrs Kubs were made at a later time and dates, if only perhaps to clarify more of Mr Kubs's entries and/or comments. To such an extent the issue of contemporareity comes into consideration.

There is also the question of the totality of these entry records. In cross-examination, Mr Kubs was asked of other details to these meetings which appeared in the diary and especially of the statements made by either Mr Gilmour or Mr Carlson, that would tend to be in conflict with or compromise the sentiments he expressed in his entries. Mr Kubs did not appear to have any recollection of these views, nor did he agree that they were expressed at all as claimed. Yet surely, if someone is able to refresh his memory from a diary entry of a certain incident, it must be equally possible for him to recall other matters including contrary views that may have been expressed at that meeting. That Mr Kubs appeared to have shut himself out altogether from this possibility can only cast some question of credibility on his diary entries.

But even if the court were to accept the diary entries at their face value, the question is whether they support the Kubs's argument that they as a whole constitute economic pressure that amounted to duress. The court does not think so. These events do not come anywhere near the requisite elements necessary to satisfy the wrong of duress. In the first place, the pressure by Mr Gilmour on the Kubs to sell their shares, was not illegitimate. Second, I am of the view that the pressure complained of, did not amount to compulsion of the will that vitiates consent. The Privy Council said in in *Barton v Armstrong* [1976] AC 104 at 121; [1975] 2 All ER 465 at 476; [1973] 2 NSWLR 598 at 634; (1973) 3 ALR 355 at 368:

> in life … many acts are done under pressure, sometimes overwhelmingly pressure, so that one can say that the actor had no choice but to act. Absence of choice in this sense does not negate consent in law: for this the pressure must be one of a kind which the law does not regard as legitimate.

The question remains did the pressure or even threat applied by Mr Gilmour affect Mr and Mrs Kubs's decision to enter into the contract of the sale of their shares. It is agreed that following Mr Kubs's telephone call to Mr Gilmour in Paris on 15 August 1997, Mr Kubs agreed to the sale of his and Mrs Kubs's shares to the latter. There is evidence, although denied by Mr Kubs, that the sale price was negotiated and that Mr Kubs had sought and obtained independent advise as to the appropriate values of their shares. The court is therefore satisfied that the Kubs entered into the contract for the sale of their shares willingly and that they had indeed obtained independent advise on the value of their shares. As such there was no element of compulsion present in their entering the Sales and Purchase Agreement of 27 November 1997.

In the end the court is required to look at all the circumstances in which the allegation of duress took place and enquire whether the Kubs protested, whether there were alternative remedies; whether the Kubs had the opportunity and access to independent advise, including legal; and whether they took steps to avoid the contract.

It is abundantly clear from the evidence that although Mr Kubs was, at the most, reluctant to part with his shares, he and Mrs Kubs went willingly in the end. Their going was made easier first, by understandingly, the growing strained

working relationship Mr Kubs was experiencing with the two other major players in the company, Mr Gilmour, the majority shareholder, and Mr Carlson, the managing director. Mr Kubs himself acknowledged that many times he was put under extreme pressure and suffered sleepless nights worrying as how to better the quality and standard of the product as required by not so much Messrs Gilmour and Carlson, but by the US agencies. Second, Mr Kubs was slowly beginning to entertain some serious doubts that the company and the project was going to be a success. It can be seen from his conversation with Mr Lincolne, in the latter's testimony, and more directly in his telephone conversation with Michael Garvin, which Mr Kubs himself tendered into court, that he did not have the total confidence in the company's success. It certainly seems to the court that there really was no protest by the Kubs when the decision was reached for the sale of the shares.

There is also the element of affirmation of the contract in Mr and Mrs Kubs not only instructing payments in accordance with the contract terms, but they had then proceeded upon receipt to spend it.

Were there alternative remedies available to the Kubs other than selling their shares? Yes. The most obvious is that they could have resisted the approaches made by Mr Gilmour and refuse to relinquish their shares. Notwithstanding the alleged threats and/or intimidations which the court has already found did not constitute duress, the Kubs still had the ultimate right and power over their shares.

Did the Kubs have access to independent advise? Evidence again clearly show that in both the issue of seeking legal advise on the sale of shares, and the valuation of the shares, the Kubs had the opportunity to do so. In the lead up to the sale negotiations, Mr Kubs was asked by counsel for the Plaintiff whether he had sought legal advise. Mr Kubs replied that he did not need lawyers or legal advise in the negotiations of the sale. The court takes into account the fact that Mr and Mrs Kubs had more than 3 months from the date of their agreeing to sell, to the signing of the agreement, to weigh their options and also seek legal advise if they failed to do so it was of their own choice. As to the valuation of shares, record shows that Mr Kubs had sought and obtained the advise of a reputable firm of accountants.

It is a matter of fact that the Kubs did not take any step to avoid the contract. Their argument that they were not in a position to do so because payments were by instalments rather than lump sums, do not hold any water. On the contrary, it raises other issues on the genuiness or validity of the claim.

Conclusion

The Kubs's action is based on contract. They allege that they entered into the agreement to sell their shares under duress. They seek damages as the remedy. In law, if duress is proved the contract is voidable at the option of the Kubs and which may result in it being rescinded.

The court has found that the Kubs, by choosing to accept the money paid for their shares which they proceeded to spend, and in any case, failed to protest soon after the contract was concluded until 2 years later, had in fact and in law affirmed the contract. So even if duress was proved, the Kubs would have lost their right to seek the appropriate remedy.

The court, having heard all the evidence from both sides, and equally important listening to the witnesses, including in particular the parties to this proceeding, can reach one conclusion only; that there is no evidence to support

the claim for economic duress. The evidence by the Kubs, the court finds falls far short of the threshold requirement in *Pao On* (above). The facts do not support the Kubs's allegations.

In the end the court finds the claim by Janusz and Mama'O Kubs for economic duress is without merit and is hereby dismissed. Consequently, the issue of liability and damages against the Plaintiffs do not arise; and are also dismissed.

Costs to the Plaintiffs to be taxed if not agreed.

Application dismissed.