CORE TEXT SERIES

The Law of Contract

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11 Duress

SUMMARY

This chapter deals with contracts induced by duress, a vitiating factor. It considers duress to the person and duress to goods, then concentrates on the most important category, economic duress and its various requirements, as well as the question of whether a threat to do a lawful act can constitute actionable duress.

Introductory points

11.1 Duress involves one party coercing or pressurising the other party into making a contract. But it is not easy to define precisely what sorts of pressure will count as duress. At one end of the spectrum, a contract signed at gunpoint is undoubtedly vitiated by duress. At the other, a contract entered into because of pressure of circumstances (like the social 'pressure' to purchase a new car to impress the neighbours) is undoubtedly valid. Somewhere in between is the boundary of actionable duress. The most important feature of duress is that it generally involves pressure applied by means of an *illegitimate threat*, although occasionally a threat to do something lawful made for an unlawful purpose will suffice (see paras **11.29–11.33**). An *express* threat is not necessary: the law is subtle enough to recognise that a threat can be implicit (such as where a robber twirls a gun menacingly while asking for money, without expressly threatening his victim that he will use it). The Court of Appeal in *B & S Contracts and Designs Ltd v Victor Green Publications Ltd* (1984) treated a 'veiled threat' to breach a contract as sufficient for economic duress. Moreover, a threat that is carried into effect may equally establish duress—a contract signed after a beating is just as tainted by duress as a contract signed under threat of a beating.

11.2 Notice that some cases involve one party seeking to set aside or resist enforcement of a contract (or contractual variation) entered into as a result of duress; others involve a restitutionary action to recover money paid under duress. The courts do not seem to draw any real distinction between the two sorts of claim—the elements of duress are the same in both. And the justification for relief is the same too, which is that the victim's consent to enter the transaction was vitiated by the wrongful pressure to which he

was subjected. It is also clear that, just as for misrepresentation, rescission of a contract for duress will be barred where the party seeking rescission cannot offer substantial *restitutio in integrum* (see *Halpern v Halpern (No 2)* (2006)). In contrast with misrepresentation, there is at present no independent remedy of damages for duress (though sometimes the conduct amounting to duress will give rise to separate tortious liability), so if rescission is barred the victim is without a remedy. In *Ruttle Plant Ltd v Secretary of State for the Environment and Rural Affairs* (2008) Ramsey J noted that, 'there are good arguments for the existence of a remedy in damages for duress'.

Duress to the person

11.3 A threat of violence, known as duress to the person, is the most obvious form of duress and was for some time the only form for which relief was given at common law. There are really only two controversial issues regarding duress to the person, namely what the relevant test of causation is and whether the resulting transaction is void or voidable. The Privy Council considered both issues in the extraordinary case of *Barton v Armstrong* (1976). A was the chairman of a company and B was its managing director. A made death threats against B to persuade B to buy out A's shareholding in the company, but ironically B wished to do this anyway because he thought (wrongly, as things turned out) this was a commercially desirable course of action. So B executed a deed purchasing A's shares, but later regretted the transaction and sought to undo the transaction. A argued that B would have executed the deed even if there had been no threats; his threats were not a 'but for' cause and thus there should be no relief. The Privy Council disagreed. As Lord Cross explained:

> *…if A's threats were 'a' reason for B's executing the deed he is entitled to relief even though he might well have entered into the contract if A had uttered no threats to induce him to do so.*

11.4 Notice how unusual the facts of *Barton v Armstrong* were. In the vast majority of cases of threatened violence, there will be no doubt whatsoever that the threat was the overwhelming cause of the resulting transaction. But, as *Barton v Armstrong* demonstrates, it seems wholly right that the defendant should not benefit just because, by sheer coincidence, some other factors served to reinforce his threats of violence. As we will see, this relaxation of the test of causation is only made for the benefit of victims of duress to the person and is analogous to the position for fraudulent misrepresentation (see para **10.45** onwards). In less serious forms of wrongdoing, in particular economic duress, a strict test of factual causation applies.

11.5 The other notable feature of *Barton v Armstrong* is that the Privy Council decided that the deed executed by B was *void*, not merely voidable (an issue which made little difference on the facts, but which is critical if the subject matter of the contract

has been sold on to a third party). Some commentators have criticised this as being inconsistent with other forms of duress (particularly economic duress), which render transactions voidable only, but this criticism smacks of over-generalisation. It is perfectly understandable that the more serious form of duress should have a greater vitiating effect on transactions and it seems right in principle that if you hand over your goods at gunpoint, the legal effect should be the same as if the goods had been stolen from you.

Duress to goods

11.6 Historically duress to the person was the only form of duress recognised as deserving of legal redress, but this changed in 1731 in *Astley v Reynolds* when a pawnbroker who refused to release the claimant's goods until the claimant paid far more than the agreed interest rate was held liable to repay the excess. The pawnbroker tried to argue that the claimant was not really compelled to make the payment because he had an alternative course of action open to him, namely suing in the tort of trover for the return of his goods, but the court was not convinced:

> *We think also that this is a payment by compulsion. The plaintiff might have such an immediate want of his goods that an action in trover would not do his business.*

It was later established that the same reasoning applies to contracts (and not just payments) executed because of duress of goods. Once the common law recognised that the unlawful seizure or detention of the claimant's goods (or a threat to do the same) might amount to illegitimate compulsion, at least where the alternative of resisting and suing in tort for the return of the goods was not realistic, it became hard to justify drawing the line at duress of goods. After all, *economic* pressures will often have much the same impact on the claimant. If I threaten to breach our contract unless you pay or promise to pay me more than the contract price, you could in theory resist and sue me for damages (if I breach as I have threatened), but in practice this may be unrealistic if you need performance immediately. English law eventually recognised that economic duress might vitiate a contract in *The Siboen & The Sibotre* (1976), although the claim failed on the facts.

Economic duress

11.7 It is now well established that certain forms of economic pressure can count as duress. Some cases involve threats to induce third parties to breach their contracts with the claimant, usually in the context of industrial disputes. The best known derive from the campaign by a maritime union to improve the terms and conditions of sailors working

on ships flying 'flags of convenience', by persuading dockworkers to 'black' such ships by refusing to load or unload them, explored by the House of Lords in *The Universe Sentinel* (1983) and *The Evia Luck* (1992). For the purposes of this chapter, we will focus on the simpler form of economic duress, in which one party threatens to breach an existing contract *with the other party*, unless the other party acts in a particular way (usually paying or promising to pay more than the contract price, or entering into a new contract).

11.8 As we have seen in Chapter 6, English law traditionally had no need of a principle of economic duress when deciding the validity of a contractual variation, because only variations supported by consideration were enforceable in any event. This helped to weed out variations induced by unfair pressure, but was a blunt way of doing so. Since *Williams v Roffey Bros & Nicholls (Contractors) Ltd* (1991), in effect even a unilateral variation is enforceable unless it was made as a result of economic duress, so economic duress has assumed greater importance by replacing consideration as the limiting principle in such cases. Notice the 'other side of the coin' when considering the relationship between economic duress and consideration: the *presence* of consideration is not fatal to a finding of economic duress. So it is possible for the court to decide that a contract or contractual variation is voidable for economic duress, even though there *was* some consideration for it. Overall, this means that it is now crucial to be able to identify the necessary elements of economic duress.

11.9 This is no easy matter, because this area is bedevilled with problems of terminology. To impose some order on the cases, there seem to be three distinct requirements for economic duress:

step 1: illegitimate pressure or threat;

step 2: which (subjectively) caused the victim to act as he did; and

step 3: which (objectively) would have caused a reasonable person in the victim's position to act in the same way (ie, there was no realistic alternative course of action).

11.10 This division is logical, because step 1 says something about the sort of pressure or threat, whereas steps 2 and 3 concern the victim's reaction to it. But beware that the cases often adopt slightly different terminology and commonly say, 'the threat was not illegitimate' to express an *overall conclusion* about whether there is actionable economic duress. For example, Dyson J in *DSND Subsea Ltd v Petroleum Geo-services ASA* (2000) (who repeats the same analysis in *Carillon Construction Ltd v Felix (UK) Ltd* (2000)) appears to adopt a similar threefold analysis, stating that:

> *The ingredients of actionable duress are that there must be pressure (a) whose practical effect is that there is compulsion on, or a lack of practical choice for, the victim, (b) which is illegitimate, and (c) which is a significant cause inducing the claimant to enter into the contract.*

However, he goes on to expand on the meaning of illegitimate pressure as follows:

> *In determining whether there has been illegitimate pressure, the court takes into account a range of factors. These include whether there has been an actual or threatened breach of contract; whether the person allegedly exerting the pressure has acted in good or bad faith; whether the victim had any realistic alternative but to submit to the pressure; whether the victim protested at the time; and whether he affirmed and sought to rely on the contract… Illegitimate pressure must be distinguished from the rough and tumble of the pressures of normal commercial bargaining.*

In other words, when considering whether there has been 'illegitimate pressure', Dyson J is asking questions relevant to *all three* of our (and his) steps, not just questions relating to our step 1. This is confusing and, for the sake of clarity, it is preferable to organise those factors to make clear which relate to the pressure or threat and which relate to the victim's reaction to it.

(Step 1) Illegitimacy of the threat

11.11 This requirement is all about what sort of threat was made. The most important point is that the threat must be to do something illegitimate and so, for our purposes, requires a threat to *breach* an existing contract. This is very different from a threat to do something that the defendant is entitled to do, which as a general rule will *not* amount to an illegitimate threat (although see paras **11.29–11.33**). In *Huyton SA v Peter Cremer & Co* (1998) the purchaser of a consignment of wheat, which had been duly delivered by the seller, refused to pay for it unless the seller presented shipping documents in proper form and agreed not to arbitrate over disputed 'demurrage' charges. Mance J held that the purchaser was not contractually obliged to pay the price unless and until it received proper shipping documents from the seller, and so its threat not to pay was *not* illegitimate and, accordingly, the seller's agreement not to arbitrate had not been procured by economic duress.

11.12 The more difficult question is whether or not a threat to breach a contract is *automatically* illegitimate, leaving just the second and third steps to determine whether there is actionable duress. The courts generally say that a threat to breach a contract is *not* automatically illegitimate. For example, Kerr J in *The Siboen and The Sibotre* rejected as 'much too wide' counsel's submission to this effect and (as Kerr LJ) said much the same thing in *B & S Contracts and Design Ltd v Victor Green Publishing Ltd* (1984), remarking that 'a threat to breach a contract… can, but by no means always will, constitute duress'. However, the *context* of remarks of this kind is usually that the court wishes to exclude threats which were not causative of the victim's subsequent action, or where the victim had alternative courses of action and so objectively should not be treated as having been coerced. In other words, the court has in mind factors better regarded as nothing to do with step 1, the legitimacy of the threat, but concerned with our steps 2 and 3.

11.13 On the other hand, it is noteworthy that, generally, cases in English law in which the victim has succeeded in pleading economic duress have involved not just a threat to breach the contract, but additional *bad conduct* by the other party in making the threat. A good example is *Atlas Express Ltd v Kafco* (1989). K was a small basket weaving firm, which received a large order to supply basketware to Woolworths. K made a contract with A, a large haulage company, to deliver the baskets at a rate of £1.10 per basket. In fact, A's manager had made an error when calculating the rate (through no fault of K) and had overestimated the number of baskets that would fit into each lorry. (A's unilateral mistake had no impact on the validity of the contract so the contract rate stood at £1.10 per basket: see paras **3.37–3.43**). So A tried to 'renegotiate' the deal by threatening that, unless K agreed to double the rate, no further deliveries would be made. It would have been almost impossible for K to have found another haulier in time to honour their contract with Woolworths, business which they could not afford to lose, so they reluctantly agreed to the price increase. Tucker J held that K's agreement to the alteration was procured through economic duress. Although he did not accept that every threat to breach a contract was illegitimate per se, he was content to accept that this threat was, primarily because of the *manner* in which A exerted the pressure. The threat was made by A's driver, at the last possible opportunity, knowing that the Woolworths' contract was essential for K's economic survival.

11.14 This suggests that a threat to breach a contract will only count as 'illegitimate' where the party making the threat was in *bad faith*, a proposition that attracts some commentators. For example, Birks (1990) argues that bad faith should be a prerequisite to recovery, so that a threatened breach of contract made to exploit the other party's difficult position would be illegitimate, whereas a threatened breach made with a view to solving financial or other difficulties of the threatening party would not. Burrows (2002) takes the view that a threat should not be considered illegitimate if 'the threatener is merely seeking to correct what was always a clearly bad bargain'.

DSND Subsea Ltd v Petroleum Geo-services ASA (2000) supports the view that, for a threatened breach of contract to count as illegitimate, it must have been made in 'bad faith'. DSND and PGS had a complex contractual arrangement in connection with the development of an oilfield in the North Sea. Technical disputes arose and DSND informed PGS that it was ceasing its part of the work, until aspects of the insurance arrangements for the work were clarified. PGS then reached agreement with DSND on the disputed issues. Dyson J dismissed PGS's claim of economic duress, even though DSND had threatened to breach the contract. One reason was that DSND had been 'entirely justified' in wanting to resolve the dispute, particularly the insurance position. The threat was not, in the circumstances, illegitimate, since it was 'reasonable behaviour by a contractor acting bona fide in a very difficult situation'.

11.15 However, *DSND*'s suggestion that a threat to breach a contract will only be illegitimate if made in bad faith is not universally accepted. Bigwood (2001) comments that:

> *To suggest…that it may not be illegitimate for D to breach or propose to breach his contract with P (in support of D's demands) if D is acting 'reasonably' and 'bona fide in a very difficult situation' is effectively to suggest that P's rights are somehow destructible by D unilaterally and without compensation if D is acting from the right commercial motives.*

Mance J in *Huyton SA v Peter Cremer & Co* is also doubtful, noting that it is 'difficult to accept that illegitimate pressure applied by a party who believes bona fide in his case could never give grounds for relief against an apparent compromise'. The issue did not matter in the *DSND* case, because the other requirements for relief were not satisfied either, but in some cases it might be critical.

11.16 It is suggested that a threat to breach a contract should always count as an illegitimate threat, leaving the causal requirements (steps 2 and 3) to filter out inappropriate pleas of duress, because this accords with English law's strict approach to frustration of contracts. For example, a dramatic rise in prices may make it very difficult for a contractor to honour his contractual obligations, but this alone does not relieve him of them. For the law to say that, in those circumstances if the contractor in good faith persuades the other party to pay more than the contract rate by threatening to breach the contract, the other party can get no relief (even if he agrees purely because of the threatened breach of contract, having no realistic alternative), would come close to allowing one party to relax the frustration rule by threatening to breach the contract. The law should not bend over backwards to assist a threatener who is trying to escape the consequences of his own bad bargain, contrary to the suggestion of Burrows (2002).

11.17 Some commentators, like Halson (1991), regard English law's strict frustration regime as a *good* reason to enforce contractual renegotiations in these circumstances (and so find that there has *not* been duress), at least where the contractor is unable to perform because of an unforeseen change in circumstances beyond his control (such as dramatic price rises). But this seems to reward contractors who bid too low and undermines the function of contracts in allocating in advance who will bear the risk of such unforeseen changes in circumstances. Smith (1997) meets the point by distinguishing between a threat and a warning, arguing that a contractor who *warns* that he is about to breach the contract for reasons beyond his control is not applying illegitimate pressure and should be treated differently from a contractor who *threatens* to breach for reasons within his control, though goes on to suggest (discussed in para **11.27**) that the other party's lack of genuine consent when faced with a 'warning' of this kind should, in certain circumstances, be a separate reason for vitiating the contract. It is suggested that a distinction between threats and warnings in this context is complex and unreal, since in many cases, no clear line can be drawn between reasons outside and within a

party's control (like a contractor who feels the effect of external price rises because he has not priced his job or controlled his costs sensibly).

(Step 2) Factual causation—did the threat cause the victim to act as he did?

11.18 Unlike duress to the person, relief will only be given for economic duress if the threat or pressure was the main and overwhelming reason why the victim agreed to act or acted as he did: as Mance J in *Huyton SA v Peter Cremer & Co* said,

> *The illegitimate pressure must have been such as actually caused the making of the agreement, in the sense that it would not otherwise have been made either at all or, at least, in the terms in which it was made. In that sense, the pressure must have been decisive or clinching.*

In other words, this is the 'but for' test (in contrast to the more favourable test applied for the benefit of the victim of duress to the person, discussed in paras **11.13–11.14**). But factual causation will not be established if the victim was only persuaded to contract because of the combined effect of the illegitimate threat and other reasons. In *Huyton*, Mance J concluded that the buyer's refusal to pay for the goods was not an illegitimate threat (see para **11.11**), but went on to decide that, if it had been illegitimate, it was in any event *not* the decisive cause of the seller's agreement to give up its right to arbitrate. A number of other issues combined to persuade the seller to reach the agreement, such as its misconception that the buyer was untrustworthy and its realisation that there was a risk that its own interpretation of its contractual rights might turn out to be wrong.

11.19 Traditionally, this factual causation test was phrased as a requirement that the victim's 'will' must have been 'coerced' or 'overborne'. This language was adopted by Kerr J in *The Siboen and The Sibotre*, and approved by the Privy Council in *Pao On v Lau Yiu Long* (1980), in which Lord Scarman said that economic duress:

> *must amount to a coercion of will which vitiates consent. It must be shown that the payment made or the contract entered into was not a voluntary act.*

Today, the language of 'coercion of will' is unpopular. For example, Atiyah (1982) argues that it is inappropriate: 'the victim of duress does normally know what he is doing, does choose to submit, and does intend to do so—indeed the more extreme the pressure, the more real is the consent of the victim.' This criticism is somewhat unfair: the concern of the law of contract is with voluntariness not intention, so it makes sense to say that a victim of duress deserves relief because he did not have a *free* choice, whilst recognising that he entered the contract intentionally (see Tiplady (1983)). The courts tend now to ask instead whether the threats or pressure induced or caused the victim to enter into the contract (see Lord Goff in *The Evia Luck*), but have recognised that the difference

between the old and new approach is only terminological. In particular, the factors that were used to determine whether the victim's 'will' was 'coerced' are precisely the same as the factors used to determine causation today.

11.20 Those factors were identified by the Privy Council in *Pao On*, a case involving contracts for the acquisition of shares. The basic issue was that, having contracted to sell shares to a public listed company controlled by D, the claimants realised that one aspect of their deal was very disadvantageous and so 'persuaded' D to replace a very unwise 'buy-back' contract with a more balanced 'price guarantee' contract. D agreed, but later regretted its decision (when the share price slumped) and sought to avoid liability under the price guarantee, alleging that there was no consideration for it (see Chapter 6) and that it was procured by economic duress. The Privy Council rejected the plea of economic duress, holding that D's will had not been coerced. Lord Scarman emphasised four relevant factors:

(1) whether the victim did or did not protest;

(2) whether he did or did not have an alternative course open to him such as an adequate legal remedy;

(3) whether he was independently advised; and

(4) whether after entering into the contract he took steps to avoid it.

On the facts, the crucial feature was that D was in a strong position to resist the claimants' pressure, since (unusually) it had available to it the powerful alternative remedy of seeking specific performance of its original buy-back agreement and only agreed to replace it with the price guarantee because it was worried about the effect the dispute would have on its commercial reputation as a public company. Moreover, it had been advised that it need not accommodate the claimants' demands, but had done so without protest at the time.

11.21 In *Pao On*, these four factors were said to be aspects of the factual causation enquiry (our step 2), but on reflection, matters are not quite this simple. First, the factors are definitely not of equal weight. By far the most important is undoubtedly (2), the adequacy of other alternative courses of action, including other legal remedies, open to the victim, which is invariably the decisive factor in the cases. So in *Atlas v Kafco* (see para **11.13**) the judge emphasised that K had no real alternative but to submit to A's demand, because the alternative course of resisting and suing A for damages for breach of contract would not have allowed K to honour its contract with Woolworths. But, second, this factor makes most sense as part of an objective test of causation (our step 3)—it really tells us whether it was *reasonable* for the victim to have resisted the pressure. For this reason, the courts are beginning to recognise that there is a strong objective element involved in the causal test for economic duress.

(Step 3) Objective causation—would a reasonable person have acted as the victim did?

11.22 In *Huyton*, Mance J advocated an objective approach to causation for economic duress, in addition to asking whether the 'but for' test was satisfied, explaining that:

> *…relief must, I think, depend on the Court's assessment of the qualitative impact of the illegitimate pressure, objectively assessed…relief may not be appropriate, if an innocent party decides, as a matter of choice, not to pursue an alternative remedy which any and possibly some other reasonable persons in his circumstances would have pursued.*

So for Mance J, the most important of the *Pao On* factors is an *objective* question. Where the courts say that the victim had no 'real' choice, they are better understood as meaning that the victim had no 'reasonable' choice and thus the reasonable person would have acted in the same way. This certainly accords with the reasoning (if not the terminology) in cases where economic duress has been established, such as the recent decision in *Borrelli v Ting* (2010) in which the Privy Council used a graphic metaphor to illustrate the claimant liquidators' objective lack of reasonable choice: 'Put colloquially Ting had the Liquidators over a barrel'.

11.23 A good example is *B & S Contracts and Design Ltd v Victor Green Publishing Ltd* (1984). VG was putting on an exhibition at Olympia and B & S contracted to erect stands for VG at a contract price of just over £11,000. Shortly before the exhibition, B & S (faced with an industrial dispute with its workers) threatened that it would cancel the contract (purportedly under an express *force majeure* clause) unless VG agreed to pay an additional £4,500 on top of the contract price, to meet the workers' demands. VG agreed, since it had no realistic choice in the circumstances with the exhibition imminent, and B & S erected the stands as promised. When B & S sued for the extra £4,500, VG counterclaimed, alleging that its promise had been procured by economic duress. The Court of Appeal held that B & S could not have relied on the *force majeure* clause to cancel the contract and so its threat to cancel was illegitimate. Moreover, the economic consequences for VG if the stands had not been erected would have been disastrous. As Kerr LJ put it, an illegitimate threat will constitute economic duress:

> *if the consequences of a refusal would be serious and immediate so that there is no reasonable alternative open, such as by legal redress, obtaining an injunction etc.*

11.24 In *Adam Opel GmbH v Mitras Automotive UK Ltd* (2007) the claimant told the defendant, a company with a contract to supply vehicle parts for the manufacture of vans by the claimant, that it would be changing to a new supplier in six months' time. In response, the defendant threatened to stop the supply of parts with immediate effect (a breach of contract) unless the claimant paid it over £400,000. The claimant reluctantly paid the money, to keep production of the vans going, but later reclaimed the amount

on the basis that it was procured by the defendant's duress. The judge allowed the claim, even though the claimant had seriously contemplated seeking an injunction to prevent the defendant from breaching the contract:

> *Given [the claimant's] legitimate concern to ensure security of supply, I do not in these circumstances consider that the injunction route was an alternative adequate to nullify the pressure created by [the defendant's] threat.*

Controversies

11.25 We have seen that the availability of alternative remedies, the most important of the *Pao On* factors, is best understood as relating to objective causation. So how should the other, subsidiary factors be classified?

- Factor (a), the question of whether the victim *protested* at the time, is concerned with a subjective test of factual causation. If the victim did not protest at the time, it is a strong indication that he was happy to enter the contract anyway (although caution is needed, since it may indicate the opposite, that he realised that to protest would be pointless or make matters worse).

- Factor (c), whether the victim received *independent advice*, combines subjective and objective reasoning. If the victim is advised that he does have realistic alternative courses open to him, but decides to enter the contract anyway, a court is unlikely to find that it was the threat or pressure that caused him to enter the contract *or* that a reasonable person would have done so in the circumstances. However, in some cases independent advice will be totally irrelevant. If the victim is advised that there are *no* realistic alternative remedies (as the victims in the *Atlas* or *B & S* cases would presumably have been told, had they sought advice), this reinforces rather than undermines a conclusion of economic duress.

- Factor (d), *steps taken to avoid the contract*, can be explained as part of subjective causation (since a victim who is happy with the contract will find it hard to convince the court that he only entered into it because of illegitimate pressure). But a better interpretation is that it establishes a *defence*, namely that the victim has *affirmed* the contract and will thus be barred from rescinding it (see para **10.34**). This approach was taken in *The Atlantic Baron* (1979), where Mocatta J held that a shipyard's demand for a price increase on a shipbuilding contract *did* amount to economic duress, but the fact that the purchaser paid the instalments without protest for several years amounted to an 'affirmation of the variation of the terms of the original contract'.

11.26 Two important theoretical issues remain. The first is to ask whether an objective approach to causation can be justified, in addition to a subjective test. Of course, in most cases the two approaches will be identical because the victim will have acted in precisely the same way that a reasonable person would have done. So the issue only really matters when the victim *did* act solely because of the threat, but the reasonable

person would have resisted. One answer is to say that an objective approach is merely an evidential tool, to enable the court to decide whether to *believe* the victim's assertion that it entered the contract solely because of the illegitimate threat (such that step 3 is merely an aspect of step 2). This reflects the way the courts use the 'materiality' requirement in cases of misrepresentation (see para **10.19**). However, Mance J gives a reason in *Huyton* for an additional, self-standing, objective requirement. He explains:

> *…the application of a simple "but for" test of subjective causation in conjunction with a requirement of actual or threatened breach of duty could lead too readily to relief being granted. It would not, for example, cater for the obvious possibility that, although the innocent party would never have acted as he did, but for the illegitimate pressure, he nevertheless had a real choice and could, if he had wished, equally well have resisted the pressure and, for example, pursued alternative legal redress.*

11.27 It is interesting to contrast this attitude to duress as a vitiating factor with the law's treatment of undue influence. In undue influence cases, the 'victim' is not denied relief merely because, objectively, a reasonable person in the same position would not have succumbed to the influence—there is simply no enquiry of this kind. In many undue influence cases (like *Credit Lyonnais Bank Nederland NV v Burch* (1996) discussed at para **12.17**) the transaction set aside is one that no reasonable person would have entered into. This is, presumably, because duress and undue influence vitiate the consent of the victim in different ways. Undue influence operates at an unconscious level, making the victim willing to enter into a disadvantageous transaction, whereas the victim of duress knows that he is entering the transaction unwillingly, but does so (through 'gritted teeth') because there is no realistic alternative. So it makes no sense to require victims of undue influence to show that they acted in an objectively rational way, when the undue influence affected their ability to do just that.

11.28 Second, Smith (1997) argues that most duress actually involves *two* justifications for relief—wrongdoing by the threatening party *and* vitiated consent on the part of the victim—but that each justification alone should be *sufficient* for relief. His suggestion is that, in the absence of an illegitimate threat or other wrongdoing by one party, the other party should nonetheless be able to escape from a contract *merely* because he had no real choice about entering into it (giving the example of the captain of a sinking ship who enters into an onerous contract with a rescue vessel because he has no other option). However, as Smith acknowledges, this argument does not square with other areas of the law such as the objective approach to agreement, whereby an offeror is entitled to assume that the offeree is accepting it if he appears to be accepting it, whatever the offeree's subjective intention might be (see Chapter 2), and the rules on mental incapacity, which do not allow one party to escape from the contract on the basis of his own incapacity unless the other party was aware of it (see Chapter W1). It also sits uneasily with the rules on unconscionability (discussed in Chapter 13), that disadvantageous terms alone are not sufficient to invalidate a contract unless imposed because of reprehensible behaviour by one party in exploiting the other's weakness. Smith's approach

does, however, give insights into the remaining category of duress, the so-called cases of 'lawful act duress'.

'Lawful act duress'

11.29 We have seen that duress requires an illegitimate threat, which almost invariably means a threat to do something unlawful (commit a crime or a tort) or otherwise wrongful (such as breach a contract). But occasionally, a threat to do something *lawful* might itself be illegitimate. The most obvious examples involve blackmail, where a threat to do something lawful is coupled with an improper demand for money. Here, although the threat is to do something lawful, like publishing a true report in a newspaper (and may even be to do something laudable, like providing information about a criminal offence to the police), it is nonetheless an illegitimate threat if it is made with the motive of extorting money. As Atkinson J said in *Norreys v Zeffert* (1939), just because 'a person may have a legal right to do something which will injure another is not sufficient justification for the demand of money as the price of not doing it'.

11.30 Although most such cases involve the criminal offence of blackmail, this would appear not to be essential for relief from a contract entered into as a result. The term 'lawful act duress' is sometimes coined to catch these rare examples of an improper threat to do something lawful, although for some commentators this label is self-contradictory. The most significant issue today is whether a threat *not to contract* can ever ground relief on this basis. The answer seems to be that the courts have not ruled it out, but would require exceptional circumstances before such relief will be given.

11.31 In *CTN Cash and Carry Ltd v Gallagher Ltd* (1994) CTN ran a warehouse 'cash and carry business'. G, a large corporation with the sole right to distribute well-known brands of cigarettes in the UK, regularly sold cigarettes to CTN. CTN relied heavily on credit from G, but (crucially) G had no contractual obligation to sell to CTN, nor to give such credit. G sold a consignment of cigarettes to CTN, but by mistake delivered them to the wrong warehouse. G agreed to collect and redeliver them but, in the meantime, the cigarettes were stolen. G believed that CTN was obliged to pay for the cigarettes so sent an invoice for their price (£17,000) and made it clear that it would not grant any discretionary credit in the future unless CTN paid. CTN did not believe they were obliged to pay, but did so because of G's threat not to grant any more credit: they regarded paying as 'the lesser of two evils'. CTN later reclaimed the price, on the ground that G's threat not to sell to it on credit in the future amounted to economic duress.

The Court of Appeal held that, on the facts, G's threat did *not* amount to economic duress. As Steyn LJ observed, G was in law entitled to refuse to enter into any future contracts with CTN for any reason or no reason at all, and did so 'in order to obtain

payment of a sum which they bona fide considered due to them'. Interestingly, the Court of Appeal stopped short of saying that a threat not to contract can *never* amount to economic duress, but merely declined to extend the category to the case itself. For Steyn LJ:

> *…an extension capable of covering the present case, involving lawful act duress in a commercial context in pursuit of a bona fide claim, would be a radical one with far-reaching implications.*

Sir Donald Nicholls VC agreed, also stressing that it was G's good faith when it made the demand and its reasonable belief at the time that it was entitled to be paid for the cigarettes that defeated CTN's plea of economic duress. (Sir Donald Nicholls VC nonetheless expressed unease at the outcome because, somewhat bizarrely, G conceded at trial that CTN was not obliged to pay for the cigarettes, but nonetheless refused to repay the price.)

11.32 Of course, the Court of Appeal's refusal in *CTN Cash and Carry* to rule out a potential extension of duress to 'bad faith' threats not to contract must be seen in context. That case involved parties in an *existing* contractual relationship, where one party made a threat not to contract again in the future as part of a dispute about whether the price was due under that existing contract. The really interesting question is whether a 'bad faith' threat not to contract in the first place could ever suffice. On the one hand, we are free to decide whether or not to make a contract, so it should follow that there is nothing wrong with *threatening* not to contract, even in bad faith. On the other hand, many people regard English law as unethical in this regard, often citing the fact that the unpleasant practice of 'gazumping' during negotiations for the sale of land is perfectly lawful. An 'agreement' to buy land is not binding until signed written contracts have been exchanged, but before then the potential purchaser will already have spent a lot of time, effort and money on searches and surveys, plus he will have found a potential purchaser for his current house. Knowing this, the seller may threaten to pull out of the sale just before contracts are exchanged, unless the purchaser agrees to pay more than the provisionally agreed price. (Of course, sellers tend to behave like this at a time when the property market is buoyant: where the market is slow, purchasers have the upper hand and sometimes threaten to pull out of the purchase before contracts are exchanged unless the price is dropped, sometimes called 'gazundering'!) If the purchaser succumbs and agrees to pay the increased price, the resulting bargain is currently perfectly enforceable.

11.33 Should the category of 'lawful act duress' be extended to negotiating tactics of this kind? The answer is probably not. For a start, the threat will fail the relevant causal tests. In most 'gazumping' cases, the purchaser has a genuine choice whether to pull out of or proceed with the transaction, and even where the purchaser truly has no choice (for example, if he has already exchanged contracts to sell his existing house and has run out of money to pay any more search or mortgage valuation fees), objective causation

is missing because the *reasonable purchaser* would have realised that the negotiations were 'subject to contract' and that the seller was free to withdraw its offer at any time. Moreover, to condemn a threat not to contract in the first place as illegitimate would mark an unacceptable inroad into freedom of contract. This conclusion is, of course, based on English law's refusal to recognise that parties owe duties to each other in pre-contractual negotiations (see Chapter 5). If the underlying legal framework were to change, the duress conclusion would probably follow suit.

OVERVIEW

1 Duress involves improper pressure or coercion, usually taking the form of a threat to do something illegitimate, which induces the victim to contract and thus vitiates the victim's consent. Some cases involve the victim setting aside or resisting enforcement of the resulting contract or contractual variation; others involve actions to recover money paid under duress.

2 Duress to the person is straightforward. The victim of violence or threats of violence gets the benefit of a generous causation test and any contract will be rendered void, whereas lesser forms of duress merely render transactions voidable. Where a contract is made or money paid because one party wrongfully refuses to release the other's goods, duress to goods will be established.

3 English law now recognises economic duress, for example a threat to breach a contract, as potentially actionable. The cases do not adopt consistent terminology, though there is a fair degree of consensus about the factors that are relevant. A threefold division is helpful.

4 First, is the threat illegitimate? There is some support for the proposition that a threat to breach a contract is only illegitimate if made in bad faith, but the better view is that all such threats should count as illegitimate. Second, the illegitimate threat must have caused the victim to contract, judged subjectively. Third, on an objective test, the victim must have had no reasonable alternative course open to him. Other relevant, though less significant, factors are whether the victim protested, whether he received independent advice and his subsequent efforts to avoid or affirm the contract. An objective test of causation is justified in addition to a subjective test, but there is no justification for relief merely based on the victim's vitiated consent without the additional element of an illegitimate threat by the other party.

5 The courts have not entirely ruled out extending the inelegantly labelled category of 'lawful act' duress to cover threats not to contract, at least if made in bad faith.

FURTHER READING

Bigwood 'Economic Duress by Threatened Breach of Contract' (2001) 117 LQR 376

Birks 'The Travails of Duress' [1990] LMCLQ 342

Smith 'Contracting under Pressure: A Theory of Duress' [1997] CLJ 343

SELF-TEST QUESTIONS

1 What is the relationship between duress and consideration?

2 Should a threat to breach a contract invariably count as an illegitimate threat for the purposes of establishing economic duress?

3 In establishing economic duress, why is it so important to ask whether the victim had a reasonable alternative course of action open to him?

4 Why is a threat not to contract treated differently from a threat to breach a contract?

5 Edmund made a contract with Wecanvas Ltd, a small company, for the hire of a luxury white marquee for his daughter's wedding reception, which was to take place in the garden of the family home. The contract price was £6,000, of which Edmund paid a deposit of £2,000 on contracting; the balance of £4,000 was due two days before the wedding. Three days before the wedding, the managing director of Wecanvas telephoned Edmund, saying 'I am so sorry sir, I have realised that we misquoted your job: the contract price should have been £9,000. In normal circumstances I'd overlook the error, but times are very hard so I must warn you that I am going to have to ask you for £7,000 before we commence installation tomorrow.' Edmund was furious and phoned round all the other marquee hire companies in the area; all were fully booked apart from Chavtent Ltd, which had only one marquee available made of sparkly cerise pink fabric, which Edmund regarded as a wholly unacceptable alternative. He contacted his brother, a city solicitor, who told him that he would not be able to get a court order forcing Wecanvas to honour the original price and erect the marquee, but said, 'Why not pay the extra £3,000 now, you can easily afford it, then sue to get it back on grounds of duress when the wedding is over?' So Edmund paid the £7,000, the wedding was a great success, but he now seeks to reclaim the £3,000. Advise him.

For hints on how to answer question 5, please see the Online Resource Centre at **www.oxfordtextbooks.co.uk/orc/osullivan5e/.**