Contract Law
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The law of contract recognises that an agreement is dependent on consent and this, therefore, implies that an agreement obtained by threats or undue persuasion will be insufficient. Many contracts in practise involve a degree of 'arm twisting' and this raises the question as to what level of pressure is acceptable to exert over another contracting party? This problem is dealt with by the common law doctrine of duress and the equitable doctrine of undue influence. The courts have developed these doctrines over a long period of time and since the Judicature Act 1873 it has been the duty of all courts to administer both doctrines concurrently. Both common law and equity agree that a party cannot be held to a contract unless he is a 'free agent'. A party who is subject to duress or undue influence is said to have had his will 'overborne' so that he is incapable of making a free choice or even acting voluntarily. It has been argued that the way in which these doctrines have been developed has meant that not enough importance is placed on whether the contract is fair or not. It is the aim of this essay to analyse the development in the law of duress and undue influence and determine the validity of this argument.

The common law doctrine of duress allows a party to avoid any promise extorted from him by terror or violence. A contract that has been made under such circumstances is said to have been made under duress. If duress is established it has the effect of rendering the contract voidable. As mentioned previously, agreement in the law of contract depends upon consent. The juristic basis for duress is that agreement obtained by improper pressure operates to vitiate consent. This, however, raises problems in determining what constitutes improper pressure. Not all pressure is illegitimate; indeed, not all threats are illegitimate. In the course of normal commercial activity, pressure and even threats occur regularly and are often perfectly proper. Consequently it is essential to distinguish between forms of pressure that are legitimate and those that are not. The scope of duress was originally very limited in its application and was confined to actual or threatened unlawful physical violence. The case of Barton v Armstrong (1976)[1] illustrates an important limitation on legal duress in that the actual violence, or threat of violence, must be against the person and calculated to cause fear of bodily harm or loss of life. Not surprisingly, duress is a part of the law which nowadays seldom raises an issue. This limitation was open to the objection that it failed to give adequate consideration to the coercive effect of other illegitimate conduct or threats.

Originally the courts would not acknowledge 'duress of goods', i.e. a threat to damage a person's property as constituting duress. This view is supported by a number of nineteenth century cases, the most notable of which is Skeate v Beale (1840)[2], where it was held that an agreement to pay money for the release of goods (that had been unlawfully obtained) was valid. It is certainly fair to say that duress of goods has developed rather inconsistently as the later case of Maskell v Horner (1915)[3] held that

[1] *Barton v Armstrong* [1976] AC 104
[2] *Skeate v Beale* [1840] 11 Ad & El 983
[3] *Maskell v Horner* [1915] 3 KB 106

money paid under duress of goods could be recovered. This has been supported by Astley v Reynolds (1731)[4] and the more recent case of T D Keegan Ltd v Palmer (1961)[5]. Clearly these two rules are difficult to reconcile and serve to strengthen the argument that the courts do not accurately assess the fairness of the agreement. A threat against a person's property, made to reach an agreement, is clearly unfair and could perhaps even be as coercive as a threat of violence, yet the law imposes a narrow restriction. This is further compounded given the fact that commentators have roundly condemned the duress to goods rule in recent years[6].

Legal duress has also developed to include certain forms of intimidation. The cases of Cumming v Ince (1847)[7], Biffin v Bignell (1862)[8] and Smith v Monteith (1844)[9] held that threatened imprisonment could invalidate a contract if it is unlawful. The threat of civil proceedings has been considered in Powell v Hoyland (1851)[10] and in such a circumstance it is not, as a general rule, voidable for duress. In order to do so the courts have stipulated that it must be established that the threats were a reason for entering into the contract. Once again it appears that the law is assessing the events leading upto the contract as opposed to the fairness of the agreement.

The limitations of a law of duress that focuses on physical violence to the victim has meant that the courts, led by Lord Denning, have paid far greater attention to the requirement of fairness in bargaining. The result of these developments has been the emergence of a new and potentially more significant doctrine of economic duress. The doctrine concerns threats by one party to breach the contract in circumstances where there will be severe adverse economic consequences for the other. Typically this occurs as a contract is renegotiated between parties that are already in an existing contractual relationship. An early example of the doctrine is D & C Builders v Rees (1966)[11] where Denning refused to apply the promissory estoppel doctrine to enforce a promise to accept a payment in final settlement of a debt, on the express ground that the promise had been extracted by undue pressure and intimidation; this has also been referred to as unequal bargaining power. The evolution of the doctrine has been fraught with difficulty, as the courts have attempted to distinguish unlawful economic duress from legitimate business pressure. Consequently, there is extensive case law that has attempted to determine in what circumstances the doctrine can be pleaded. The courts have adopted a narrow approach, as with legal duress.

A significant development in this area arose during The Siboen and the Sibotre (1976)[12] which identified two tests to determine the existence of economic duress: Did the party protest at the time? And, did the victim regard the matter as closed or open? These tests

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[4] *Astley v Reynolds* [1731] 2 Stra 915
[5] *TD Keegan Ltd v Palmer* [1961] 2 Lloyd's Rep 449
[6] As stated by Downes in *A Textbook on Contract* (1995)
[7] *Cumming v Ince* [1847] 11 QB 112
[8] *Biffin v Bignell* [1862] 7 H & N 877
[9] *Smith v Monteith* (1844) 13 M & W 427
[10] *Powell v Hoyland* [1851] 6 Exch 67
[11] *D&C Builders v Rees* [1966] 2 QB 617
[12] *The Siboen and the Sibotre* [1976] 1 Lloyd's Rep 293

were subsequently applied in North Ocean Shipping Ltd v Hyundai Construction Ltd (1978)[13] where the court recognised economic duress; that the threat not to build the ship was unlawful and coercive of the plaintiff's will, but the time delay comprised affirmation. This could, perhaps, be the strongest argument to suggest that it does not matter if the agreement was unfair unless it meets the strict criteria. The victim of alleged duress faces a difficult choice when deciding what course to follow. To sit back and fail to perform, relying on the duress as a defence, runs the risk of being interpreted as affirmation of the contract. Alternatively if the victim is persuaded to enter the contract despite its disadvantageous terms, it will also be likely the victim will not risk making an ill-timed protest causing the other party to abandon performance. It seems that the courts must accept that in practise the economic duress will prevent anything but mild protest until performance is complete. Once that occurs the victim will have to take immediate action to avoid constructive affirmation of the contract. A good example of the doctrine being successfully invoked is Atlas Express Ltd v Kafco Ltd (1989)[14] and the difficulties in arguing economic duress can be found in CTN Cash and Carry Ltd v Gallaher (1994)[15].

The basic doctrine of economic duress was expanded further in Pao On v Lau Yiu Long (1979)[16] where Lord Scarman set out a new test: First, whether the victim protested; second, whether an alternative legal remedy was available; third, whether he obtained independent legal advice and fourth, whether he took steps to avoid the contract. Clearly this places much emphasis on the events that transpired prior to the contract.

It was widely recognised that the common law of duress had a narrow scope and this led to the development of a much wider equitable doctrine of undue influence. The doctrine applies to certain situations where improper pressure (not amounting to duress at common law) was brought to bear on a party to enter a contract. Another definition is an influence exerted by one party to a contract which prevents the other party from exercising an independent judgement relative to the transaction. The effect of undue influence is to render the contract voidable. The doctrine is derived from the equitable jurisdiction of constructive fraud, which is based on the unconscionable non-disclosure of material facts in relationships of trust and confidence, as explored in Tate v Williamson (1866)[17]. Equity intervened where there had been a breach in a fiduciary relationship and this, in turn, led to the presumption of undue influence in relationships of trust and confidence. In these relationships, trust or confidence is reposed by one party in another to such a degree that the former becomes dependent on the latter. In Allcard v Skinner (1877)[18] the court held that presumed undue influence extended to religious advisors. The doctrine of undue influence allows the presumption to be rebutted by proof that the weaker party acted freely and independently, as in Inche Noriah v Shaik Allie Bin Omar

[13] *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705
[14] *Atlas Express Ltd v Kafco (Importers and Distribution) Ltd* [1989] QB 833
[15] *CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714
[16] *Pao On v Lau Yiu Long* [1979] QB 705
[17] *Tate v Williamson* [1866] 2 Ch App 55
[18] *Allcard v Skinner* [1877] 36 Ch D 145

(1929)[19]. In Williams v Bayley (1866), equity also recognised express undue influence, where the fact of undue influence had to be established.

Modern case law on undue influence has developed from Lloyds Bank v Bundy (1975)[20] where Denning attempted to expand the scope of undue influence by bringing it within a single principle of inequality of bargaining power. Given that proof of wrongdoing is unnecessary, Denning's judgement potentially enlarges the doctrine. From this case it can be seen that this puts the emphasis on the nature of the transaction, and its substantive fairness, and is probably as close as the English law has come to recognising a general principle of unconscionability. The problem is that Denning's statement has been approached with considerable caution by the English courts since the other members of the Court of Appeal neither approved nor disapproved and, therefore, does not technically form part of the *ratio decidendi*. Lord Denning's approach was specifically disapproved by Lord Scarman in National Westminster bank v Morgan (1985)[21], who felt that the fact that Parliament had intervened to deal with many situations of unequal bargaining power (for example, the Consumer Credit Act 1974, Supply of Goods and Services Act 1982) meant that the courts should be reluctant to assume the burden of formulating further restrictions.

This case was also significant as Lord Scarman established a test of manifest disadvantage, that it must be established that one party is being dominated by another. This is particularly significant given that the courts are looking at the conduct of the stronger party it becomes defendant orientated and is, therefore, different to the traditionally plaintiff orientated law (based on quality of consent by the weaker party). It is also worth noting that this rule was not followed in Goldsworthy v Brickell (1987)[22]. The Court of Appeal decision on BCCI v Aboody (1990)[23] and the House of Lords decision in Barclays Bank v O'Brien (1993)[24] moved the law back to the historic classification in equity of *de facto* relationships. Class 1 comprises actual undue influence, where the transaction will be set aside if the claimant can establish undue influence. Class 2 contains two classes of undue influence. In Class 2A, undue influence is presumed as a matter of law to arise in certain fiduciary relationships. In Class 2B, the presumption may stand if the plaintiff can prove he was in a relationship of trust and confidence. This effectively shifts the burden of proof.

Further developments in the law incorporating the idea of constructive notice were set out in the important case of CIBC v Pitt (1993)[25]. This effectively allows the undue influence of one party to be imputed to the more, credit worthy, lending institution. Further refinements came in the later cases of Massey v Midland Bank (1995)[26], Banco

[19] *Inche Noriah v Shaik Allie Bin Omar* [1929] AC 127
[20] *Lloyds Bank v Bundy* [1975] QB 326
[21] National Westminster v Morgan [1985] 1 All ER 821
[22] *Goldsworthy v Brickell* [1987] Ch 378
[23] *BCCI v Aboody* [1990]
[24] *Barclays Bank v O'Brien* [1993] 4 All ER 417
[25] CIBC v Pitt [1993] 4 All ER 433
[26] Massey v Midland Bank [1995] 1 All ER 929

Exterieur Internacionale v Mann (1995)[27] and Credit Lyonnais v Burch (1997). The importance is the importance in ensuring that the weaker party obtains independent financial advice if the lending institution is to avoid being fixed with notice.

To conclude, it is apparent that legal duress and undue influence looks at the quality of consent by the weaker party, therefore, maintaining the free and voluntary agency of the parties. Equity, by its very nature, attempts to give a fairer result than might be achieved in common law and a good example is the analysis of unconscionable bargains. It is true to say that both doctrines attempt to enforce fairness into contracts but it is also true to say that the way in which the courts examine this is by looking at what happened prior to the contract, for example the tests seen in economic duress. As discussed, inequality of bargaining power has not been followed by the courts and, as such, has perhaps distanced their consideration of fairness in contracts. The difficulties arise in attempting to strike a balance between what can constitute illegitimate pressure or influence, after all the courts do not want to be seen as the destroyer of contracts. The English law relating to duress and undue influence is still primarily concerned with procedural rather than substantive fairness. Unconscionability would require it to focus more directly on the nature of the contract itself, as opposed to the events leading to it being formed. In cases of presumed undue influence, the requirement of 'manifest disadvantage' does have a minor role to play, but it is secondary to whether there was influence in the first place. If there had been no such influence the courts will still allow it to stand, irrespective of how disadvantageous the contract is.

[Word Count: 1941]

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[27] Banco Exterieur Internacionale v Mann [1995] 1 All ER 936