

Duress and Undue influence

In certain instances, the fact that an agreement was made under pressure is an adequate reason to terminate what would in other respects be a good contract; The rules that provides regulations for these circumstances can be found in textbooks under the heading of Duress and Undue Influence (Smith, 1997, p. 343). Duress is commonly examined alongside the doctrine of Undue Influence; Both are grounds in which a contract can be voidable because of consent given by one party to the other as a result of pressure which the law deems to be unlawful (Lawble, 2019). Historically, the common law doctrine of duress would narrowly make a contract voidable in circumstances where one party had gained the other's consent through physical violence or threats of it, or illegal constraints (Quinn, 2019, p. 216). For instance, in *'Antonio v Antonio'* (2010), a wife who owned a business entered into a shareholder's agreement with her husband following multiple illegitimate threats made by one party to the other, as a result, the court stated that the agreement had been made under duress and so it was voidable. However, the courts have moved away from their original position that only a threat to physical violence could amount to duress and added that duress can occur towards personal goods and economic duress, as it is reviewed in the modern day (Lanham, 1966, p. 615); Both concepts of Duress and Undue Influence, will be examined below in modern day context along with the extent to which the courts will uphold a contract entered into by one party due to threats or pressure by another party to enter into the contract.

As a general rule, English law will seek to uphold contracting parties to the terms of their deals and the courts sometimes may be reluctant to disrupt contracts arising in

commercial negotiations (Enticknap, 2021). Nevertheless, the law has recognised to a certain extent that a party should be relieved of any obligation to execute a contract because of threats or pressure which it was vulnerable to at the time the contract was formed or at the time of an agreement for variations to an existing deal (Enticknap, 2021). It should be noted, that the doctrine of duress was traditionally limited to just threats of physical violence, but now, according to Bar-Grill and Ben-Shahar (2003), the scope of the doctrine has expanded towards Duress to person's goods rather than the individual themselves, and Economic Duress. Furthermore, in order for there to be a finding of duress, Lord Scarman identified two major elements in the case of '*The Universe Sentinel*' (1982) that must be established and these are: 1) Pressure must be applied to the contracting party, and 2) The pressure must be illegitimate (Quinn, 2019, p.216). To demonstrate, in '*Barton v Armstrong*' (1973), after a company's managing director bought shares from the company due to murder threats (physical violence) by the former chairman of the company, the Privy Council ruled that the contract to buy the shares was voidable for Duress due to illegitimate pressure; Additionally, since there was evidence that the managing director wanted to buy the shares in spite of the threat, it could be inferred that duress does not have to be the only reason or the main reason for undertaking a contract, but it does have to be one of the reasons. Since duress has not been fully developed in common law or in equity as a defence on which contracts may be avoided, the courts rely on the circumstances of the cases to make a judgement which can create uncertainties in certain areas such as duress to goods (Cornish, 1966, p. 428). In the case of '*Skeate v Beale*' (1840), the tenant's belongings were unlawfully detained by his landlord who threatened to sell them if the tenant did not pay more than

he owed for his overdue rent, something he was not legally entitled to do; When the issue was brought into court, the case was not approved because it was stated that the claimant had the option to use lawful remedies against the seizure and sale of his property instead of entering into a contract he did not plan to keep. Importantly, what this implies is that the law is unwilling to uphold claims for illegitimate pressure in commercial situations where the party has agreed to enter a contract which was unfavourable to them mainly because of fear of excessive cases being raised like '*Skeate v Beale*' (1840) (Beatson, 1974, p. 98). Conversely, in the case of '*Maskell v Horner*' (1915), the court was willing to allow the claimant to get his money back after he had entered into a contract to pay for a toll he was not obliged to do as a result of threats from the defendant to shut down his market stall and detain his merchandise. Certainly, the different results in these two cases are deemed problematic because they highlight the inconsistency and ambiguity of the modern view on illegitimate pressure since the courts are solely relying on facts from cases as expressed by Mitchell (2017). However, a more dependable view was given in the case of '*Occidental Worldwide Investment Skills v Skibs*' [1976] in which Lord Justice Kerr made the following statement:

[...] If I should be compelled to sign a lease or some other contract for a nominal but legally sufficient consideration under an imminent threat of having my house burnt down or a valuable picture slashed through without any threat of physical violence to anyone, I do not think that the law would uphold the agreement... The true question is ultimately whether or not the agreement in question is to be regarded as having been concluded voluntarily (Oxford Journal of Legal Studies, 1986, p. 6);

Moreover, this test was applied in a later economic duress case, namely the '*The Atlantic Baron*' (1979), where the judges expressed that the courts needed to ask whether there was 'compulsion of the will' when determining whether there had been duress and this compulsion can come from economic pressure as well as from physical force.

Economic duress occurs in contracts where one party threatens to damage a person's financial interest by actual or threatened breach of contract unless that person agrees to the variation of a term which in most circumstances puts the victim at a disadvantage according to Pigott and Bates (2018). Unfortunately, the courts will not uphold any claim for economic duress if the economic pressure is deemed as a normal pressure of a market system (i.e paying higher rent in order to live in a specific area for work) (Tan, 2001, p. 268). Due to the challenges in differentiating economic duress with commercial bargaining, the following policy was developed to determine when the court should uphold contracts initiated through economic pressure: Firstly, when the practical effect of the pressure is that there is a compulsion on or a lack of realistic alternative or practical choice for the victim; Secondly, the pressure must be illegitimate (no realistic justification); Thirdly, the pressure must be a significant cause inducing the claimant to enter into the contract (Tan, 2001, p. 268). In '*Pao On v Lau Yiu Long*' (1979), it was accepted that not all threatened breach of contract to which an individual submits to should amount to economic duress; Instead, Lord Scarman stated that when determining whether there has been coercion of will as to vitiate the contracting party's consent, the following factors should be taken into account: Did the alleged victim protest?; Was there an alternative course open to him such as an adequate remedy

during the time he was allegedly coerced into making the contract?; Was he independently advised?; and whether he took steps to avoid the contract after entering it? (England and Rafferty, 1980, p. 637). Moreover, in the case of *'Atlas Express Ltd v Kafco Ltd'* (1989), the courts refused to uphold Kafco's agreement to pay extra money to the claimant after they insisted on raising prices for a shipment Kafco desperately needed because it had been obtained by duress; the factor which was considered in this case and outlined in *'Pao On v Lau Yiu Long'* (1979), was that Kafco had no realistic alternative at that time but to agree, thus making the pressure illegitimate (Phang, 1990, p. 109). Certainly, an unlawful act such as breaking a contract will always be illegitimate, but in *'Atlas Express Ltd v Kafco Ltd'* (1989) however, it was demonstrated by the court's decision that if a lawful act is unreasonable (depending on the situation) then it can also become illegitimate, which is why the court will refuse to uphold such contracts (Quinn, 2019, p. 219). Consequently, the law needed further guidance in distinguishing between the 'rough and tumble' of the pressures of regular commercial bargaining from illegitimate pressure, and so Lord Dyson provided the courts with the following factors to consider when establishing illegitimate pressure in the case of *'DSND Subsea Ltd v Petroleum Geo-Services ASA'* (2000):

[...] 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 contracts [...]

Undoubtedly, these factors can be traced to Lord Scarman's dictum in '*Pao On v Lau Yiu Long*' (1979), however, the major difference between the two statements is that Lord Scarman's factors were relevant to the plea of duress in general whereas Lord Dyson's factors are to do with finding what constitutes illegitimate pressure (Loke, 2017, p. 422). For instance, if Lord Dyson had not provided guidance on how to identify an illegitimate pressure, then the contract made in the case of '*Attorney-General v R*' (2003) would have not been upheld since there was surely pressure exerted on the defendant which had amounted to a compulsion of will because the threat of demotion gave the defendant no choice but to sign; However, the Ministry of Defence, in this case, was genuinely concerned that the special forces' effectiveness may be undermined if its secrets were published, and so the courts viewed their actions as lawful and reasonable thus upholding the contract. Certainly, Lord Dyson's approach is deemed to be useful as it has been applied successfully in later cases such as '*Kolmar Group AG v Traxpo Enterprises PVT Limited*' (2010); It was clear from this case that the claimant agreed to a reduction in quantity and increase in the price of methanol due to illegitimate pressure which amounted to economic duress on the part of the defendant because Kolmar was expecting to fulfil their customers' orders and was heavily reliant on the goods and had no other alternative, so the court upheld their claim.

The equitable doctrine of undue influence is wider than duress and it represents a judicial discretion to set aside a contract where it seems as if one party has used their dominance over another in order to bring the contract to its completion or where trust and confidence have been abused within the contracting parties (Tiplady, 1985, p. 579). In these circumstances, undue influence occurs when a person is able to convince

another person (due to the relationship between) into making a decision which they would not have made on their own terms according to Hayes (2021). Importantly, the two types of undue influence are actual and presumed; the court will uphold a claim for actual undue influence where the claimant can prove that they agreed to a contract as a result of undue influence, whereas they will only uphold a claim for presumed undue influence where the relationship between the contracting parties and the nature of the transaction is such that undue influence can be presumed if there is no clear evidence of undue influence as stated by Oliver (2013). It should be noted that before economic duress was fully accepted as a defence, actual undue influence usually arose from the same behaviour as duress, but now undue influence cases are more likely to be concerned with influence rather than pressure (Quinn, 2019, p. 223). For instance, in the older case of *'Williams v Bayley'* (1866), a father agreed to give security for his son's debts due to threats (pressure) of having his son prosecuted and transported, and so the court refused to uphold the contract due to undue pressure rather than undue influence. In the modern-day, it appears that the courts will be observing the relationship between the person being influenced and the person doing the influencing (Winder, 1939, p. 98). Nevertheless, in the case of *'Bank of Credit and Commerce International SA v Aboody'* (1988), the following requirements were set by Slade LJ on when to uphold a claim for actual undue influence: 1) the other party to the transaction (or someone who induced the transaction for his own benefit) had the capacity to influence the complainant; 2) the influence was exercised; 3) its exercise was undue; 4) its exercise brought about the transaction. For one thing, there was evidence that Mrs Aboody's husband totally dominated her in every aspect, but to make it worse, when

Mrs Aboody was getting legal advice before signing the contract in the case of *'Bank of Credit and Commercial International SA v Aboody'* (1988), her husband rushed into the room and demanded that she sign the documents, which as result was actual undue influence. Furthermore, most cases of undue influence are concerned with presumed undue influence; Undue influence may be presumed where there is a pre-existing relationship of trust and confidence between the contracting parties (including third parties) such as parent and young child, doctor and patient, solicitor and client, trustee and beneficiary, religious superior and inferior (Quinn, 2019, p. 223). In addition to the requirement of a pre-existing relationship, the courts traditionally asked whether the transaction was one that was 'manifestly disadvantageous' to the victim alleging undue influence for a potential rebuttable (this included both actual and presumed undue influence) (Dixon, 1989, p. 360). However, this requirement was criticised and replaced by a test set down in the case of *'Royal Bank of Scotland v Etridge (No.2)'* (2002) which asked whether the transaction 'calls for an explanation' (does it look suspicious). In the case of *'Credit Lyonnais v Burch'* (1997), the court upheld the claimant's case because her contract with her boss to use her house as security for his debt (guaranteeing unlimited repayments of all her boss's borrowing) was so unjust as to 'shock the conscience of the court' and incomprehensible on any other defence but undue influence. In situations where undue influence is applied by a third party (someone other than the lender) on another person, the law will refuse to uphold a transaction if the lender knew about it or is deemed to have such awareness due to the circumstances (known as constructive knowledge), and this was the basis of the decision in *'Barclays Bank v O'Brien'* (1993). However, this test for constructive knowledge has been

replaced by the precautions set down in the case of *'Royal Bank of Scotland v Etridge (No.2)'* (2001) in which lenders must take to avoid liability for constructive notice of undue influence; The precautions state that in order to avoid the constructive notice of undue influence, lenders (typically banks) must take reasonable steps to make sure the wife has been independently advised of the implications of the transaction proposed, and the adviser (solicitor) is expected to do the following: 1) Explain the nature of the documents and their practical consequences for the wife; 2) point out the seriousness of the risk involved; 3) produce information on the husband's indebtedness, and tell the wife that the choice is hers; 4) Check whether the wife wishes to proceed (Ho, 2002, p. 629). In the case of *'Samuel v Wadlow'* (2007), despite the claimant's argument that he agreed to enter into a contract with his former manager due to undue influence, the court upheld the claimant's contract because he had received independent advice.

In conclusion, a contract that is not voluntarily entered into will not be upheld by the law due to the establishment of duress and undue influence (Quinn, 2019, p. 231). Both duress and undue influence are defences that render a contract voidable, meaning that the party who is subject to them may choose to affirm the contract or set it aside as stated by Ugbeta (2020). Although these cases come in unique circumstances, the law has developed enough guidelines through common law which readily influences their decisions on when and when not to uphold a contract entered into involuntarily as claimed by Ugbeta (2020).

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