

**KEY DEVELOPMENTS IN CONTRACT LAW:
ECONOMIC DURESS**

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Background

1. When is the existence of a threat to damage someone's financial interests a basis for setting aside an agreement? What remedy exists for someone who, having entered into a contract, finds that the counterparty threatens not to perform unless the contract is varied in his favour, eg by requiring an increase in the price payable to him? What type of economic threats are illegitimate and could make a contract vulnerable to subsequent challenge? How can you protect yourself if you believe you are being wrongly pressured into an agreement? These are just some of the many questions that regularly arise in relation to the doctrine of economic duress and that this seminar will address.
2. The doctrine of economic duress is a relatively modern part of English law. It has evolved from the trade union decisions such as **Universe Tankships v International Workers Federation ("The Universe Sentinel")**¹ and **Dimskal Shipping v International Works Federation ("The Evia Luck")**².
3. In **The Universe Sentinel** the owners of a Liberian registered ship faced a situation where their ship was black listed by a trade union. As a result of the union's black-listing of the ship no tug boats would be available so the ship could not sail and there were potentially disastrous consequences. The union insisted on a payment to its welfare fund as a condition of removal of the ship from the black list. The ship owner paid the money to the union but then brought a successful claim for recovery of the money by reason of economic duress.³ Important findings of fact by the trial judge

¹ [1983] 1 AC 366

² [1992] 2 AC 152

³ The nature of the welfare fund (and that it was not connected with '*terms and conditions of employment*') meant that the union did not have a statutory defence, see Trade

included:

“It was a matter of the most urgent commercial necessity that the plaintiffs should regain the use of their vessel. They were advised that their prospects of obtaining an injunction were minimal, the vessel would not have been released unless the payment was made, and they sought recovery of the money with sufficient speed once the duress had terminated.”

4. A similar situation arose in **The Evia Luck** where a ship owner was faced with a threat that the ship would be black-listed unless various union demands, including a payment to the union, were met. Initially the demands were not met and the ship was black- listed but then the plaintiffs signed the various contractual documents which the union insisted upon so that the ship could sale. The ship owner applied successfully on the grounds of duress for declarations that it had lawfully avoided the various agreements it had entered into.

The ingredients of an economic duress claim

5. The necessary ingredients for a successful economic duress claim are:
 - (a) Pressure which is illegitimate;
 - (b) that the pressure is a significant cause inducing the Claimant to enter into the contract;
 - (c) that the practical effect of the pressure is that there is compulsion on, or a lack of practical choice for, the victim.
6. If the above ingredients are established then the victim of the duress is entitled to avoid the resulting contract and claim restitution of any monies paid under it. Such entitlement will be lost if the victim either expressly or by its conduct affirms the contract.

Union and Labour Relations Act 1984.

What amounts to illegitimate pressure?

7. In determining whether there has been illegitimate pressure the court takes into account a range of factors.

“Illegitimate pressure must be distinguished from the rough and tumble of the pressures of normal commercial bargaining.” See **DSND Subsea Ltd v Petroleum Geo Services ASA**⁴.

The relevant factors include:

- (a) Whether there has been an actual or threatened breach of contract;
- (b) whether the person allegedly exerting the pressure has acted in good or bad faith;
- (c) whether the victim had any realistic practical alternative but to submit to the pressure;
- (d) whether the victim protested at the time; and
- (e) whether he affirmed and sought to rely on the contract.

When does a threat to break a contract constitute Economic Duress?

8. A threat to break a contract is one of the forms of economic duress that has had most success in reported cases.
9. In **The Siboen and The Sibotre**⁵ there was a threat by charterers of two ships to break their charterparties by not paying the agreed charter rate unless that rate was lowered. The owners were informed that the charterers had no substantial assets and that the parent company of the charterers would allow it to go into liquidation unless

⁴ [2000] EWHC 185

⁵ [1976] 1 Lloyds Rep 293

the hire rates were reduced. That information was untrue but nevertheless caused the owners to agree a reduction in the charter rate. The Court found for the owners on the basis of misrepresentation but accepted the principle that economic duress could apply.

10. Economic duress was established in **North Ocean Shipping Co v Hyundai (The Atlantic Baron)**⁶ where the builders of a tanker who were being paid in dollars insisted on an additional 10% payment to compensate them for the devaluation of the dollar. The owners, who at that time were negotiating a very lucrative contract for the charter of the tanker, replied to the ship builders that although they were under no obligation to make additional payments, they would do so "*without prejudice*" to their rights. Payments of various instalments were made at the increased rate and without protest. The Court held that the ship builder's threat to break the contract without any legal justification unless the owners increased their payments by 10% did amount to duress in the form of economic pressure and, accordingly, the agreement was a voidable contract which the owners could have either affirmed or avoided; that, since there was no likelihood that the company would resile from the contract to build the tanker at the time she was due for delivery, the owners, by making the final payments without protest and also by their delay from before making a claim for the return of the extra payments, had so conducted themselves as to affirm the contract and, accordingly, their claim failed. It is apparent from this case that economic duress can arise even when the perpetrator of the duress knows nothing about the victim's susceptibility to being pressed.

11. The mere fact that a party has agreed a contractual variation after the other side has threatened to break the contract does not necessarily mean that the doctrine of economic duress will apply, but there have been several threatened breach of contract cases where a plea of economic duress has succeeded. For example:
 - (a) In **B&S Contracts and Design Ltd v Victor Green Publications**⁷ where a firm

⁶ [1979]QB 705

⁷ [1984] ICR 419

(which was facing a threat of a strike) impliedly threatened not to perform its contractual obligation to erect exhibition stands unless it received an additional payment of £4,500.

- (b) In **Atlas Express v Kafko**⁸ and **The Alev**⁹ where carriers of goods refused to transport goods unless additional payment was made.
- (c) In **Carillon Construction Ltd v Felix**¹⁰ where a subcontractor threatened not to supply goods in accordance with the terms of his sub contract unless the head contractor agreed a final account sum which was £500,000 more than the head contractor thought was a reasonable compromise. Here the head contractor felt compelled to accept the figure so that it ensured delivery of the cladding units. The threat was also considered to be illegitimate pressure because: (i) withholding deliveries was a clear breach of contract; (ii) there was no entitlement under the contract to agree the final account before the sub-contract works had been completed; and (iii) there was no right under the contract to suspend deliveries until the final account had been agreed. The timing of the threat was significant because the head contractor would not be able to meet the main contract deadline dates unless the subcontractor completed the works, thus leaving the head contractor with no practical choice.
- (d) In **Adam Opel GmbH v Mitras Automotive**¹¹ where the court held that a van manufacturer was entitled to rescission of a varied contract, and restitution of the extra payment made where its supplier of van parts had threatened to refuse to honour its supply contract unless paid extra. David Donaldson QC sitting as a Deputy High Court Judge stated:

⁸ [1989] QB 833

⁹ [1989] 1 Lloyds Rep 138

¹⁰ [2001] BLR 1

¹¹ [2007] EWHC 3481 (QB)

“the list of matters to be considered in assessing legitimacy is not exhaustive, and the weight to be attached to each of them will depend on the facts of the individual case. And the decision on the fundamental question whether the pressure has crossed the line from that which must be accepted in normal robust commercial bargaining involves at least some element of value judgment”.

It is significant that the manufacturer had initially applied to the Court on a without notice basis for injunctive relief compelling the supplier to supply. After the Court required that any such application be on notice, the van manufacturer wrote a letter agreeing to the supplier’s demands but making clear that it considered that it had no liability to make the payment.

- (e) In **Kolmar Group AG v Traxpo Enterprises Pvt Ltd**¹² the Claimant buyer brought proceedings against the Defendant seller in relation to an agreement between the parties for the sale of methanol. K had agreed to purchase a specified amount of methanol, plus or minus 5% at its option, at a specified price for shipment within a specified time frame. The buyer wanted the methanol in order to sell it to a very important client who had an urgent requirement for it. The parties agreed to amend the letter of credit so that the potential 5 per cent either way was at the seller’s option. Later the seller informed the buyer that it would not be able to keep to the original agreement and was only able to provide less than the specified amount at a price higher than agreed. It eventually presented the buyer with a *“take it or leave it”* proposal, which the buyer stated that it had no alternative but to accept. Meanwhile, the sailing vessel for the transport of the methanol had been berthed and had incurred various costs including demurrage and for shifting the vessel from the berth when it was not being loaded. The buyer submitted that the seller’s actions had been wholly unlawful and amounted to economic duress, and that it was entitled to recovery of \$1.4 million by way of restitution or as damages for intimidation plus damages for short delivery of cargo, demurrage and expenses. Judgment was given for the buyer as it had agreed to increase the price and reduce the quantity as a result of illegitimate pressure amounting to economic duress on the part of the seller that left

¹² [2010] EWHC 113 (Comm)

it with no practical choice but to agree to pay an increased price for such methanol as it did receive. However, the earlier agreement about the plus/ minus 5% was found not to be the result of any duress. Importantly the buyer made contemporaneous protests and later acted promptly in asserting its legal rights and bringing proceedings.

12. In circumstances where a supplier says that unless a contract is varied in its favour it will be unable to perform, eg because of its financial difficulties which will cause the supplier to become insolvent and the customer agrees the variation that is unlikely to amount to actionable duress if what the supplier said was true.

Unconscionable conduct

13. An example of economic duress arising from seriously unconscionable conduct is **Borrelli v Ting**¹³ where a former chairman of a Hong Kong company opposed the liquidator's proposed scheme of arrangement and had apparently resorted to forgery to do so. The process of establishing the forgery and nullifying the votes procured by the chairman was slow and would not be completed before the deadline for approval of the scheme which would cause substantial losses. The liquidator entered into an agreement not to pursue claims against the chairman if the opposition to the scheme of arrangement was dropped. The Privy Council concluded:

“The Board is of the view that in the present case the liquidators entered into the settlement agreement as the result of the illegitimate means employed by James Henry Ting, namely by opposing the scheme for no good reason and in using forgery and false evidence in support of that opposition, all in order to prevent the liquidators from investigating his conduct of the affairs of Akai Holdings Ltd or making claims against him arising out of that conduct. As the Board has already observed, by adopting these means James Henry Ting left the liquidators with no reasonable or practical alternative but to enter into the settlement agreement..... It was also submitted that the settlement agreement was so widely drafted that it excluded the right of the liquidators to withdraw their agreement, even on the basis that it had

¹³ [2010] UKPC 21

been procured by illegitimate means. The Board reject this submission, which necessarily involves a further unacceptable proposition, namely that it is possible, by the use of illegitimate means, to obtain a binding agreement from which the party subject to the duress cannot withdraw.”

Can lawful conduct amount to illegitimate pressure?

14. It is possible but rare for lawful conduct to amount to illegitimate pressure.
15. In **CTN Cash and Carry Ltd v Gallaher Ltd**¹⁴, a buyer had paid money following the supplier's threat to stop the buyer's credit facilities if the money was not paid. In circumstances where the supplier genuinely believed the money was owing, the court had to decide whether the doctrine of economic duress enabled the buyer to recover the payment. It was held that the Defendant's conduct did not amount to economic duress because:
 - (a) The parties were in dispute over *'arm's length commercial dealings between two trading companies'*. The fact that the Defendant was in a monopoly position as the sole distributor of popular brands of cigarettes was irrelevant and could not convert what was not otherwise duress into duress since the common law does not recognise the doctrine of inequality of bargaining power in commercial dealings.
 - (b) The supplier was legally entitled to refuse to enter into any future contracts with the buyer for any reason or indeed for no reason at all and it could legally refuse to grant credit to the buyer.
 - (c) The supplier genuinely believed the money was owed to it and had exerted commercial pressure in order to obtain payment of a sum it considered due.
16. Although economic duress was not established in **CTN Cash and Carry**, it is significant that Steyn LJ said in that case:

¹⁴ [1993] EWCA Civ 19

“I also readily accept that the fact that the defendants have used lawful means does not by itself remove the case from the scope of the doctrine of economic duress On the other hand, Goff and Jones, “The Law of Restitution” , third edition, at p. 240, observed that English courts have wisely not accepted any general principle that a threat not to contract with another, except on certain terms, may amount to duress. Outside the field of protected relationships, and in a purely commercial context, it might be a relatively rare case in which “lawful-act duress” can be established. And it might be particularly difficult to establish duress if the defendant bona fide considered that his demand was valid. In this complex and changing branch of the law I deliberately refrain from saying “never” . But as the law stands, I am satisfied that the defendants' conduct in this case did not amount to duress.”

17. The difficulty that often arises in establishing lawful act duress is illustrated by the following cases:
 - (a) The case of **GMAC Commercial Credit Ltd v Dearden**¹⁵ where the Claimant obtained summary judgment. The Claimant had entered into an invoice discounting arrangement but insisted that the Defendants should provide personal guarantees. The Defendants said that the guarantees should be set aside on the basis of economic duress, a submission in which the court found little merit.
 - (b) **Wright v HSBC Bank plc**¹⁶ where the Claimant had made various complaints against the bank and had eventually entered into a settlement agreement. She later tried to set that agreement aside on various grounds including economic duress. The court found on the facts that the allegations of economic duress had no foundation. Although Mrs Wright was in a difficult and vulnerable position because she owed the bank money which she could not pay without giving up her home the bank was entitled to demand that money. Jack J found that the bank had not put any pressure on Mrs Wright to settle and she was not told that she must settle with the bank if they were to continue lending but, importantly, he said that the bank would have been

¹⁵ [2002] All ER (D) 440 (May)

¹⁶ [2006] EWHC 930 QB

entitled to take that position if they had so wished.

Does lack of subjective intention on the part of the wrongdoer matter?

18. Although in cases like **Kolmar Group AG v Traxpo Enterprises Pvt Ltd** the Court considered that the wrongdoer “*cannot have thought that there was any legal or moral justification in the stance he was taking*” an examination of wrongdoers’ subjective intentions and beliefs does not play a part in all the reported cases. However, if malice or bad faith or unconscionable behaviour can be established then that is potentially helpful (albeit not essential) in persuading a court to grant a remedy in cases of economic duress.

19. In **Cantor Index Ltd v Shortall**¹⁷ the Defendant had an account with the Claimant spread betting company. The terms of the account provided that ‘*margin requests are due immediately and must be met within a maximum of four working days*’ and that the Claimant had the power to unilaterally close a customer’s bets where the customer failed to make a payment when it became due. The Claimant insisted on an immediate payment at a time when both parties believed that it had the right to do so and as a result the Defendant closed his betting positions. The Claimant brought proceedings for money lost by the Defendant on his bets. The Defendant argued that the Claimant had in fact had no right to immediate payment and that insistence of such payment amounted to economic duress. The Court held that the conduct of the Claimant constituted economic duress and intimidation. On the true construction of the contract, the Claimant was not entitled to demand immediate payment. However, the Claimant maintained that such was its right and insisted on an immediate payment, failing which the Claimant would unilaterally close down the bets. Although the Claimant was under no obligation to advise the Defendant as to what its terms and conditions truly were, it was unrealistic to suggest that the compulsion under which the Defendant was placed was not a significant cause of his agreeing to close down the bets and that one had to assume against the Defendant that he should have had the terms and conditions and legal advice on hand such as his misunderstanding of the

¹⁷ [2002] ALL ER (D) 161

true legal position should be discounted whereas the Claimant's misunderstanding of its own terms and conditions should prevail. Accordingly, the pressure deriving from the Claimant's insistence on immediate payment was illegitimate, and, in all the circumstances, was a significant cause of the Defendant closing his bets down.

20. In the light of **Cantor Index** it is apparent that a economic duress can be exercised in circumstances where neither the perpetrator nor the victim realise that anything improper or illegitimate is occurring.

What is the relevant causation test?

21. Must the economic duress be the overwhelming or predominant cause of the relevant conduct by the victim or is it sufficient that *but for* the economic duress the relevant conduct would not have occurred? The latter test is clearly a lower hurdle and that is the approach adopted by the Courts.
22. The “*but for test*” applies in cases of mistake and misrepresentation so there seems to be no justification for the contention that a higher test should apply in cases of economic duress. However, the causation hurdle in cases of economic duress should not be further lowered to equate to that which applies in cases of duress to the person and the burden of proof of proving causation should be on the victim. See **Huyton SA v Peter Cremer GmbH**¹⁸ where Mance J said:

“The relaxed view of causation in the special context of duress to the person cannot prevail in the less serious context of economic duress. The minimum basic test of subjective causation in economic duress ought, it appears to me, to be a ‘but for’ test. 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. There may of course be causes where a common sense relaxation ... is necessary, for example in the event of an agreement induced by two

¹⁸ [1999] 1 Lloyds Rep 620

concurrent causes, each otherwise sufficient to ground a claim of relief, in circumstances where each alone would have induced the agreement”

23. For reasons of public policy, causation in cases duress to the person is treated rather differently and the burden of proof is reversed. For example in **Barton v Armstrong**¹⁹, where a former company chairman threatened the managing director with death if he did not agree to purchase some shares, the agreement was set aside even though there was evidence that the managing director might have been willing to buy the shares even if he had not been threatened.

Is it necessary to establish an overborne will or lack of consent?

24. Some senior judges have referred to “*overborne wills*” and “*lack of consent*” in cases of economic duress but such descriptions and language are not necessarily appropriate and can be misleading.
25. Lord Scarman said in **Pau On v Lau Yiu Long**²⁰:

“Duress, whatever form it takes, is a coercion of the will so as to vitiate consent... 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.' In determining whether there was a 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 an adequate legal remedy; whether he was independently advised; and whether after entering the contract he took steps to avoid it. All these matters are relevant in determining whether he acted voluntarily or not.”

26. The Court of Appeal in **Hennessy v Cragmyle** [1986] 1 ICR 461 considered a case

¹⁹ [1976] AC 104

²⁰ [1980] AC 614, 635

where an employee was faced with the choice of summary dismissal or redundancy with compensation on terms that he would make no further claims. The employee after consultation with ACAS accepted the offer of redundancy but later claimed that he was subject to economic duress, an argument which the Court of Appeal rejected stating:

“However, like the well-established duress to the person, it is a ground of avoidance only if the duress is such that the will of the contractor is overborne. His consent must be vitiated.”

27. However, care should be taken when asserting that economic duress caused there to be a lack of consent or that a will was overborne. The reality is more likely to be that the victim intended to choose the lesser of two evils:

“The classic case of duress is not the lack of will to submit but the victim’s intentional submission arising from the realisation that there is no practical choice open to him.... The absence of choice can be proved in various ways, e.g. by protest, by the absence of independent advice, or by a declaration of intention to go to law to recover the money paid or the property transferred But none of these evidential matters goes to the essence of duress. The victim’s silence will not assist the bully, if the lack of any practicable choice but to submit is proved. The present case is an excellent illustration. There was no protest at the time, but only a determination to do whatever was needed as rapidly as possible to release the ship. Yet nobody challenges the judge’s finding that the owner acted under compulsion.”²¹

28. Useful analysis can be found in **Lynch v DPP of Northern Ireland**²², a criminal case but one which has regularly been cited in the civil courts, where Lord Wilberforce specifically stated that:

“ ... duress does not destroy the will, for example, to enter into a contract, but

²¹ **The Universe Sentinel** at 400

²² [1975] AC 653

prevents the law from accepting what has happened as a contract valid in law.”

Similarly, in the same case, Lord Simon of Glaisdale said that in the law of contract:

“Duress again deflects without destroying, the will of one of the contracting parties. There is still an intention on his part to contract in the apparently consensual terms; but there is coactus volui on his side. The contract is with non est factum. The contract procured by duress is therefore not void: it is voidable-at the discretion of the party subject to duress.”

29. One may think that it does not matter whether or not the legal theory behind the doctrine of duress is based on absence of consent. However, if the doctrine of duress is treated as resting on an absence of consent, or absence of a voluntary act, it would seem immaterial what has caused the absence of consent, or the act to be involuntary. Duress would then be a question of fact, and not of law. Further, absence of consent would logically render a contract void and not voidable. Such conclusions would be inconsistent with **Lynch** and many other decisions. Because duress does not destroy the will or the consent of the putative contracting parties, it is not possible to treat the issue as one of pure fact, nor is it immaterial what caused the will to be deflected, or the consent to be distorted. Further, because duress does not truly deprive a party of all choice, but only presents him with a choice between evils, it is not possible to inquire simply whether the party relying on duress had “no choice”; the inquiry must necessarily be as to the nature of the choices he was presented with.²³

The need to establish the lack of a reasonable alternative

30. The lack of a reasonable alternative is an important factor in any successful claim or defence based on economic duress.
31. In **B & S Contracts and Design Ltd v Victor Green Publications**²⁴ Griffiths LJ

²³ See **Chitty on Contract** 30th Edition at 7-006

²⁴ [1994] ICR 419

said:

“[He] was over a barrel, he had no alternative but to pay; he had no chance of going to any other source of labour to erect the stands”

Kerr LJ said in the same case

“... a threat to break a contract when money is paid by the other party can, but by no means always will, constitute duress. It appears from the authorities that it will only constitute 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”

32. Similarly Mance J said in **Huyton SA**:

“It seems ... self evident that 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.”

33. The importance of the need to show that there was no reasonable alternative should not be underestimated. This is clear from the decision in **DSND Subsea v Petroleum Geo Services ASA** where the Claimant was carrying out construction work for the Defendant on an oil rig but suspended its work pending the signing of a contractual variation on more favourable terms. The Defendant contended on the basis of economic duress that it should not be bound by the variation. This argument was rejected for three reasons:

- (a) the pressure from the Claimant was not illegitimate because the Claimant was acting in good faith in insisting on new terms.
- (b) the Defendant had realistic practical alternatives to accepting the variation of the contract.

- (c) the contract had been affirmed when the Defendant was free from any duress.

Dyson J said that “*compulsion on, or lack of practical choice for the victim*” was “*one of the ingredients of actionable duress*” but the view of some commentators is that, because he also stated that this was one of a range of factors that the court takes into account, he considered that it was not an absolute requirement.²⁵

34. An unattractive alternative may still be a reasonable alternative and mean that the duress claim will fail. See for example **Hennessy v Cragmyle** where Sir John Donaldson MR said:

“In Pao On’s case Lord Scarman added, at p. 636: “It must be shown that the payment made or the contract entered into was not a voluntary act.” This led Mr. Tyrrell to argue that the applicant was forced to agree to the settlement. To use a phrase beloved of politicians and trade union officials, “There was no alternative.” As is the norm when that phrase is used, in fact there was a very clear alternative, namely, to complain to an industrial tribunal and to draw social security meanwhile. It may have been a highly unattractive alternative, but nevertheless it was a real alternative. Economic duress can only provide a basis for avoiding a contract if there was no real alternative. With the benefit of hindsight, Lord Scarman’s meaning might have been better expressed if he had said: “It must be shown that the payment made, or the contract entered into, was an involuntary act.”

The most recent cases

35. In **National Merchant Buying Society v Bellamy**²⁶ the Defendant contended that a guarantee was procured by duress because the Claimant society threatened to withdraw credit facilities which would have had a drastic effect on the Defendant’s

²⁵ see **Chitty** 30th Edition para 7-003 where the authors write “*It is submitted that absence of a reasonable alternative is not an absolute requirement but rather very strong evidence of whether the victim was in fact influenced by the threat*”

²⁶ [2012] EWHC 2563 (Ch)

business. This argument had no success:

“In this case, there was no express contract to maintain credit facilities. Arguably, it was implicit in the agreement to give credit facilities that reasonable notice of their withdrawal had to be given unless there was a good reason not to do so. But the existence of bad debts and the absence of accounts clearly justified withdrawal. On no construction of the agreement could the Society be obliged to continue to grant credit when it had become significantly less secure to do so than when the credit had been agreed. Therefore, a threat to withdraw credit was legitimate and there was no economic duress: in circumstances in which the accounts were overdue and credit insurance was withdrawn the Society was entitled to require personal guarantees as a condition of continuing credit. To do this could only have amounted to economic duress if the Society had been in breach of a contractual obligation, which it was not. There is therefore nothing in this point.”

36. However, those seeking to run economic duress arguments may find some encouragement from three of the other reported 2012 decisions.
37. The question of lawful conduct duress was considered in **Progress Bulk Carriers Ltd v Tube City IMS LLC** ²⁷ where the court had to decide whether a settlement agreement between the parties was voidable for duress. In this case a ship owner contracted with a customer to supply a particular ship for the carriage of a cargo. In breach of contract the ship owner failed to supply the relevant ship. Initially the ship owner said it would compensate for all the customer’s consequential losses and the parties discussed the use of another vessel and a delayed shipment date. The change of shipment date caused the customer to have to discount the price it obtained from the recipient of the cargo by \$8 per ton. The ship owner made the provision of a substituted vessel part of a “take it or leave it” offer including only a \$2 per ton discount on its charges in full and final compensation of the customer’s losses. The judge found the repudiatory breach of contract by the ship owner was the *'root cause of the problem'* together with its refusal to comply with the previous assurances it had

²⁷ [2012] EWHC 273

given to pay full compensation in respect of that breach. The repudiatory breach was unlawful and the judge found the ship owner sought to '*take advantage of the position created by that unlawfulness*'. The reason for the customer's need for a replacement vessel was the repudiatory breach. Consequentially, the refusal of the ship owner to provide this substitute unless the customer waived its rights was held to amount to illegitimate pressure. The judge found that the conduct of the ship owner following the repudiatory breach left the customer without any real option but to accept the settlement agreement.

38. In **Sapporo v Lupofresh**²⁸ (a decision which is subject to an outstanding appeal) Sapporo, a company incorporated in Japan, carried on business selling beer and hops. Lupofresh traded in hops and agreed to buy them from Sapporo. Sapporo then told Lupofresh that it was expecting a decrease in production of hops as harvests were adversely affected by bad weather and red mites and proposed to supply a reduced amount on condition of a substantial price increase. As Lupofresh had made onward sale contracts which they could only fulfil by purchasing the hops from Sapporo or in the spot market at exorbitant prices, it maintained that it had agreed to the revised purchase orders under duress. Sapporo supplied the hop pellets under the revised purchase orders but Lupofresh did not make any payment and instead counterclaimed for duress. The Court held that Japanese law applied to the contract for the supply of hops (and Japanese law did not include a concept of economic duress) but if English Law had applied then there would have been a finding of economic duress. Bean J said:

*“If English law had applied the emerging doctrine of economic duress would in my view assist Lupofresh. In **Kolmar Group AG v Traxpo Enterprises PVT Ltd** [2010] 2 Lloyd's Rep 653 Christopher Clarke J held that it applied when, while a ship was being loaded with the contracted cargo, the seller stated that only if the buyer was to pay more for the cargo would the entire cargo be loaded promptly. The buyer, facing the prospect of expensive port charges if the dispute became protracted, gave in. Mr Green [Counsel for Sapporo] seeks to distinguish that case on the grounds*

²⁸ [2012] EWHC 2013 (QB)

that the time for delivery had arrived. So it had: but while that was a factor in the judge's finding of economic duress, it does not appear to me to have been essential to it. The pressure would have been much the same if it had been applied a day or two before loading was due to start."

39. The most recent decision concerning economic duress is that of Asplin J in **Bank of India v Riat**²⁹. He held that a Chancery master had not been wrong to refuse summary judgment on a claim by the appellant bank on personal guarantees given by the respondent. The Defendant's company had defaulted on its lending from the bank and had gone into administration. The bank had called on the guarantees. The Defendant argued firstly that the bank had made a misrepresentation in relation to its intention to increase its business in real property and secondly, that there had been illegitimate pressure, amounting to economic duress, to give the guarantees. The master held that he could not conclude that those defences were fanciful and had no real prospect of success although he did consider that the defence of economic duress was implausible, albeit that it had some real prospect of success. On appeal it was held that, at least in relation to one of the guarantees, the master was not plainly wrong and that as the evidence on causation was not conclusive it would have to be dealt with at a trial.

Duress and Intimidation

40. Sometimes an allegation of economic duress is combined with a claim based on the tort of intimidation but successful claims based on the tort³⁰ will be rare as the requirements of the tort are more extensive than those for economic duress and include:³¹
- (a) the Defendant makes a demand backed by a coercive and unlawful threat;

²⁹ 5/10/12 Lawtel AC9401200.

³⁰ eg **Cantor Index v Shortall** and **Kolmar Group AG v Traxpo Enterprises**

³¹ see **Berezovsky v Abramovich** [2011] EWCA Civ 153.

- (b) the Claimant complies with that demand because of the coercive and unlawful threat;
 - (c) the Defendant knows or should have known that compliance with its demand will cause loss and damage to the Claimant and
 - (d) the Defendant intends its demand to cause loss and damage to the Claimant.
41. An essential difference between economic duress and the tort of intimidation is that economic duress is a restitutionary remedy entitling a party to avoid the agreement and to obtain a refund of the monies paid, whereas the tort of intimidation allows a party to make a claim for damages.

Conclusions

42. At a time of widespread economic hardship many individuals and businesses feel bullied into agreements which they would rather not be party to. It is clear from the numerous hopeless pleadings of economic duress that are summarily dismissed that the doctrine of economic duress is not a form of panacea. However, in appropriate cases it can be an effective way for a party to avoid contractual obligations particularly if those obligations were entered into under protest and attempt is made to rescind the contract as soon as practicable.

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