

## UNDUE INFLUENCE AND DURESS By Dov Ohrenstein, Radcliffe Chambers

### What exactly is Undue Influence?

*“The striking feature of this appeal is that fundamental misconceptions persist even though the doctrine is over 200 years old and its basis and scope were examined by the House of Lords in depth (in 374 paragraphs) less than 3 years ago in the well known case of RBS v Etridge. The continuing confusions matter. Aspects of the instant case demonstrate the need for a wider understanding, both in and outside the legal profession, of the circumstances in which the court will intervene to protect the dependant and the vulnerable in dealings with their property.”* Mummery LJ **Niersmans v Pesticcio** [2004] EWCA Civ 372

1. *“Persuasion is not unlawful, but pressure of whatever character if so exerted as to overpower the volition without convincing the judgment ..., will constitute undue influence, though no force has been either used or threatened”.* Sir J P Wilde **Hall v. Hall** LR 1 P&D 481, at p. 482
2. If the donor intends to enter into a transaction, but the intention was produced by means which lead to the conclusion that the intention thus procured ought not fairly to be treated as the expression of the donor's free will, the law will not permit the transaction to stand.
3. The test of free will has been expanded upon in **Daniel v Drew** [2005] EWCA Civ 507, [2005] WTLR 807 CA in the speech of Ward LJ (at paragraph 36):  
  
*“.... in all cases of undue influence the critical question is whether or not the persuasion or the advice, in other words the influence, has invaded the free volition of the donor to accept or reject the persuasion or advice or withstand the influence. The donor may be led but she must not be driven and her will must be the offspring of her own volition, not a record of someone else's. There is no undue influence unless the donor if she were free and informed could say ‘This is not my wish but I must do it.’”*
4. Lord Nicholls: **Royal Bank of Scotland v. Etridge No. 2** [2002] 1 AC 773 para. 8 - described the two forms of undue influence:
  - a. *“Overt acts of improper pressure or coercion, such as unlawful threats”*
  - b. *“A relationship where one has acquired over another a measure of influence or ascendancy of which the ascendant person then takes unfair advantage... without any specific acts of coercion”.*
5. The principle is not confined to abuse of trust or confidence. It also extends to the

exploitation of the vulnerable. Important points to note:

- a. Rationale: protection of vulnerable in property dealings.
  - b. No need to show misconduct by transferee:
6. NB *“the court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which exist between the parties and the influence arising therefrom being abused” Allcard v Skinner (1887) 36 Ch D 145,171*
7. Lifetime Transactions: mortgages, gifts, right-to-buy, contracts at undervalue etc are the usual subject matter of undue influence litigation.

## Two types of Undue Influence?

8. Frequently there is a division of the cases into two types of Undue Influence:
- a. Actual Undue Influence: improper pressure/coercion.
  - b. Presumed Undue Influence - which if established, shifts the evidential burden of proof onto the recipient/influencor.

*“In the broadest possible way, the difference between the two classes is that in the case of actual undue influence something has to be done to twist the mind of a donor whereas in cases of presumed undue influence it is more a case of what has not been done namely ensuring that independent advice is available to the donor” Daniel v Drew [2005] EWCA Civ 507 Ward LJ para 31*

9. The categorisation into actual and presumed undue influence was criticised in **Royal Bank of Scotland v Etridge (No.2)** [2002] 1 AC 773. In that case Lord Clyde stated at para 92:

*“Correspondingly the attempt to build up classes or categories may lead to confusion. The confusion is aggravated if the names used to identify the classes do not bear their actual meaning. Thus on the face of it a division in to cases of “actual” and “presumed” undue influence is illogical. It appears to confuse definition and proof. There is also room for uncertainty whether the presumption is of the existence of an influence or of its quality as being undue..... English law has identified certain relationships where the conclusion can prima facie be drawn so easily as to establish a presumption of undue influence. But this is simply a matter of evidence and proof. In other cases the grantor of the deed will require to fortify the case by evidence, for example, of the pressure which was unfairly applied by the stronger party to the relationship, or the abuse of a trusting*

*and confidential relationship resulting in for the one party a disadvantage and for the other a collateral benefit beyond what might be expected from the relationship of the parties. At the end of the day, after trial, there will either be proof of undue influence or that proof will fail and it will be found that there was no undue influence. In the former case, whatever the relationship of the parties and however the influence was exerted, there will be found to have been an actual case of undue influence. In the latter there will be none.”*

10. Lord Nicholls in **Etridge** similarly stated:

*“Generations of equity lawyers have conventionally described this situation as one in which a presumption of undue influence arises. This use of the term "presumption" is descriptive of a shift in the evidential onus on a question of fact. When a plaintiff succeeds by this route he does so because he has succeeded in establishing a case of undue influence. The court has drawn appropriate inferences of fact upon a balanced consideration of the whole of the evidence at the end of a trial in which the burden of proof rested upon the plaintiff. The use, in the course of the trial, of the forensic tool of a shift in the evidential burden of proof should not be permitted to obscure the overall position. These cases are the equitable counterpart of common law cases where the principle of *res ipsa loquitur* is invoked. There is a rebuttable evidential presumption of undue influence.”* **Etridge** [13] per Lord Nicholls

11. If Lord Clyde’s approach was followed and attention was paid to Lord Nicholls’ emphasis on looking on the evidence as a whole, (which frequently does not happen), then undue influence cases would simply turn on the question to be decided on the balance of probabilities of whether or not there was at least a 50% chance that a transaction was actually procured by undue influence. The nature of relationships, likely inferences etc would simply be factors to weigh in the balance.

## **Presumed Undue Influence: The Legal and Evidential Burden**

12. The legal burden of proving undue influence always rests on the person alleging it. The evidence required to discharge the burden of proof depends on the nature of the alleged undue influence, the personality of the parties, their relationship, the extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship, and all the circumstances of the case
13. If the expression “*presumed undue influence*” is used it should be remembered that it is merely an example of actual undue influence but where the circumstances are that there is a shift in the evidential burden.
14. If the claimant proves (a) that the donor placed trust and confidence in the donee or that the donee acquired ascendancy over the donor, and (b) that the transaction calls out for explanation, the claimant has discharged an evidential burden, which will also enable an

inference of undue influence to be drawn, and thus satisfy the legal burden, unless the donee produces evidence to counter the inference which would otherwise be drawn.

15. Two factors must be established (Lord Nicholls **Royal Bank of Scotland v. Etridge No. 2** para. 21)
  - a. The complainant reposed trust and confidence in the other party, or the other party acquired ascendancy over the complainant.
  - b. The transaction is not readily explicable by the relationship of the parties/calls for explanation.

## First Element of presumed Undue Influence: Trust and confidence/Ascendancy

### 16. Presumption of influence in certain relationships

In certain categories of relationship, for reasons of public policy, there is a legal presumption of influence (as opposed to merely an evidential one). According to Lord Nicholls in **Etridge** (paras 18 & 85), this is an irrebuttable presumption of influence. NB this is not a presumption of undue influence.

17. Recognised categories of relationship where the “*presumption presumed to apply*”! List not closed.
  - a. Parent & Guardians (until shortly after child comes of age) **Bainbrigge v. Browne** (1881) 18 Ch D 188 (impecunious father persuades child to agree to mortgage of trust reversion) **Re Pauling ST** [1964] Ch 303
  - b. Fiancée: young woman “*reposes greatest confidence in her future husband, otherwise she would not marry him ... would sign almost anything he put before her*” Maugham J **Re Lloyds Bank** [1931] 1 Ch 289  
**But not husband & wife:**

*“It is now well established that husband and wife is not one of the relationships to which this latter principle applies. In **Yerkey v Jones** (1939) 63 CLR 649, 675 Dixon J explained the reason. The Court of Chancery was not blind to the opportunities of obtaining and unfairly using influence over a wife which a husband often possesses. But there is nothing unusual or strange in a wife, from motives of affection or for other reasons, conferring substantial financial benefits on her husband. Although there is no presumption, the court will nevertheless note, as a matter of fact, the opportunities for abuse which flow from a wife's*

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*confidence in her husband. The court will take this into account with all the other evidence in the case. Where there is evidence that a husband has taken unfair advantage of his influence over his wife, or her confidence in him, 'it is not difficult for the wife to establish her title to relief'”* **Royal Bank of Scotland v. Etridge** para 19

- c. Religious adviser (incl. spiritualists, mother superiors) Leading case: **Allcard v. Skinner** (1887) 36 Ch D 145:

*“Influence of one mind over another is very subtle, and of all influences religious influence is the most dangerous and most powerful... to counteract it the Courts of Equity have gone very far.”*

- d. Medical advisers (g.p., psychiatrist etc)

- e. Solicitor

- f. Master of sexual slave?? see **Sutton v Mishcon de Reya** [2003] EWHC 3166

18. There is a lack of cogent justification for this approach which can cause inconsistent and arbitrary results:- Why distinguish between wives and fiancées? Why presume fiancées are influenced but not fiancés? In the case of an underage child why should there be a presumption where the ascendant party is a parent but not a grandparent or older sibling? How long after a child becomes of age does the presumption cease to apply?

19. Drug addiction is not a basis for a presumption of influence. **Irvani v Irvani** (2000) 1 Lloyd's Rep 412 (CA) paras 166-167

20. **Influence established on the facts**

Recognised category by factual circumstances: someone managing or assisting in financial affairs. Very common category where elderly are exploited.

21. Ad hoc relationship: is it one of trust & confidence? **Turkey v. Awadh & Turki** [2005] EWCA Civ 382 (08/03/05) father in UK, who understands English – married daughter and son-in-law abroad who do not, some past history of father acting for them.

22. Relationship of trust & confidence in relation to the transaction only: **Macklin v. Dowsett** [2004] EWCA Civ 904 impecunious D owned a bungalow which was

condemned by the local authority. He obtained planning permission to build a new bungalow on his land with a condition that the works had to start within 5 years. He demolished the old bungalow and lived in a caravan on the site. D (legally advised) sold land to Cs with rent-free tenancy for life. Shortly before the expiry of the planning permission Cs paid for preliminary works to commence so as to save the planning permission and a 2<sup>nd</sup> agreement was made that the land was to be surrendered for £5,000 if D failed to complete the new bungalow within 3 years. This was a “*hard bargain*”. Prior to 2<sup>nd</sup> agreement, there was a financial disparity in bargaining positions of which Cs aware, which was vulnerable to exploitation. Overturning the judge at first instance, the Court of Appeal held that there was a relationship of ascendancy & dependency at material time and presumed undue influence.

23. **Macklin** has widened the potential categories of persons able to prove undue influence. The case was approved by Buxton LJ in **Turkey**. The reasoning can be said to lead to the conclusion that there is a presumption of influence where one party to a commercial negotiation is known by the other to be in a weak financial position. After all, apart from the fact that they were landlord and tenant there was no evidence of any other special feature in their relationship. Prior to this case it had not generally been thought that a person entering into an otherwise arms’ length transaction could establish that he acted under undue influence simply by showing that he was known to that other party to be in commercial difficulties at the time. If the victim of the transaction was ill educated and impoverished, perhaps this was a case that better fits the doctrine of *unconscionable bargain* (as in the Privy Council case **Boustany v Piggott** (1995) 69 P& CR 298 at 303) than undue influence.
24. It is usually necessary to show that the “*trust and confidence*” relates to the management of the complainant’s financial affairs but that is not necessarily the case. See **Thompson v Foy** [2009] EWHC (Ch) at para 100, approved in **Hewitt v First Plus** [2010] EWCA Civ 312.
25. Final word[s]: Lord Nicholls **Royal Bank of Scotland v. Etridge No. 2** [2002] 1 AC 773 para. 11:

*“The test is not comprehensive... not confined to ... abuse of trust and confidence. It also includes, for instance, cases where a vulnerable person has been exploited... no single touchstone... several expressions have been used in an endeavour to encapsulate the essence: trust & confidence, reliance, dependence or vulnerability on the one hand and ascendancy, domination or control on the other. None of these descriptions is perfect. None is all embracing. Each has its proper place.”*

## **Second Element of Presumed Undue Influence: Transaction not readily explicable by relationship**

26. Massive confusion over this element in the courts.

- a. **NatWest v. Morgan** [1985] AC 686 interpreted to require “*manifest disadvantage*”.
  - b. **CIBC v. Pitt** [1994] 1 AC 200 disadvantage not a necessary ingredient of the cause of action.
  - c. **Royal Bank of Scotland v. Etridge No. 2** [2002] 1 AC 773 para. 12 “*not essential that the transaction should be disadvantageous ... the issue is likely only to arise when... the transaction was disadvantageous either from the outset or as matters turned out.*”.
27. Clear that the term “*manifest disadvantage*” is out. The 1<sup>st</sup> instance judge in **Macklin v. Dowsett** was overturned for using it. May be apt when applied to substantial gift or sale at undervalue – but can (apparently) give rise to misunderstanding.
28. Alternative description/test:
- a. Transaction which cannot be explained by reference to the ordinary motives by which people are accustomed to act (e.g. friendship, relationship, charity).
  - b. Deal which calls for an explanation.
  - c. Immoderate & irrational.
29. “*What a trial judge ought to be doing is trying to exercise his common sense and assuming the necessary relationship to consider whether, given the circumstances and nature of the transaction, it says to the unbiased observer that absent explanation it must represent the beneficiary taking advantage of his position*” (HHJ Cooke in **Turkey**, approved by CA)
30. Disadvantage to the donor is not a necessary ingredient of undue influence. However, it may have an evidential value, because it is relevant to the questions whether any allegation of abuse of confidence can properly be made, and whether any abuse actually occurred. Clearly someone seeking to set aside a transaction will be assisted if it can be shown that it was manifestly disadvantageous to them. However, those seeking to uphold transactions should note that disproving “*manifest disadvantage*” is not sufficient if for other reasons the transaction calls for an explanation.
31. The greater the disadvantage, the more cogent must be the explanation before the presumption will be regarded as rebutted. **RBS v. Etridge (No. 2)** para. 24.

## **Rebutting the Presumption:**

32. By showing the complainant entered into the matter with his/her will fully unconstrained, usually with the benefit of (separate) legal advice.
- a. Proof of 3<sup>rd</sup> party advice is one of the things the court takes into account.
  - b. Weight to be given to that advice depends on all the circumstances.
  - c. Normally advice from solicitor (or other) can be expected to bring home a proper understanding of what complainant about to do.
  - d. But a person may understand, and still be subject to undue influence, so legal advice may not be enough.
  - e. Look at all evidence to decide whether or not transaction was brought about by undue influence.
33. If independent and accurate advice (particularly from a solicitor) is obtained, that will often defeat what would otherwise be a successful claim based on undue influence. However this will not always be so - eg see **Niersmans v Pesticcio** [2004] EWCA 372 because even if a transaction takes place with *full and informed thought* such thought still might not be “free”. As Lord Hobhouse put it in para 111 of **Etridge**:
- “It is their weakness which is being protected, not their inability to comprehend”*
34. The nature of the advice required is that someone free from the taint of undue influence should put before the donor the nature and consequences of the proposed transaction. It is not necessary for the adviser to recommend the transaction. An adult of competent mind is entitled to enter into a financially unwise transaction if he or she wants to.
35. The courts sometimes ignore whether the obtaining of some (or more) legal advice would have altered the decision to enter into the transaction. In **Wright v Hodgkinson** [2005] WTLR 435 it was held:
- “But unless it is shown, whether as a result of independent legal advice or otherwise, that his intention was the result of full, free and informed thought, it is no answer in a case such as the present to demonstrate that he intended to make the gift in question; nor is it a sufficient answer that he might have gone ahead, even if he had received full and proper advice.”*
36. Solicitor can probably act for both sides, but remember:
- a. The person who will sue, is the person on the wrong end of the transaction.



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- b. If you cannot be confident of giving that person full, careful and conscientious advice you can defend in court, don't.
- c. If you become concerned that there is a real risk that other interests/duties may inhibit advice, cease to act.
- d. Make a good attendance note at, or very shortly afterwards.
- e. Have face to face meeting, in the absence of the transferee/influencer
- f. Do not accept:
  - i. merely written instructions
  - ii. Even less instructions from the transferee/potential influencer.
- g. Do not treat meeting as a formality.
- h. Ask client to tell you in his/her words what it is s/he wants to do. Do not ask leading questions.
- i. Speak in non-technical language.
- j. Explain documentation.
- k. Explain practical consequences if the client signs.
- l. Point out seriousness of any risks - nb the "worst case scenario".
- m. Remind the transferor that the relationship with the transferee may deteriorate, or that the transferee may on divorce or insolvency lose control of relevant assets.
- n. Discuss client's means and value of property being dealt with.
- o. State clearly that client has a choice and decision is client's alone.
- p. Check client wishes to proceed, or wishes solicitor to negotiate different terms.
- q. Only if suspicion of undue influence has been aroused, is a solicitor under a

duty to satisfy him/herself that client is free from undue influence.

NB: You do not have to refuse to act, simply because the client does not accept your advice, unless “*exceptional case where glaringly obvious the client is being grievously wronged*”.

## Causation

37. It is sometimes argued that a transaction would have proceeded even if the undue influence had not taken place. In such circumstances it is difficult to see why the transaction should be set aside with potential prejudice to third parties. However, such causation arguments are clearly contrary to authority.
38. In **Hewett v First Plus Financial Group** [2010] EWCA Civ 312 it was held that a husband’s deliberate failure to disclose to his wife that he was having an affair when he was requesting that she agree to grant a mortgage over the matrimonial home to secure his debts was a breach of his duty of fairness and candour and amounted to undue influence. In response to the mortgagee’s submission that there was no evidence that had the wife known of her husband’s affair she would have refused to participate in the mortgage Briggs J. stated (at para 34):

*“That is in my judgment nothing to the point. It has never been part of the proof of undue influence that, but for the relevant abuse of trust, the impugned transaction would not have been entered into. The right to set aside the transaction arises not because, on a but for causation analysis, it would otherwise have been avoided, but because of the equitable wrong constituted by the abuse of confidence was part of the process by which the victim’s consent to it was obtained. In the present case that wrong is constituted by Mr Hewett’s breach of his duty of fairness and candour to his wife, when persuading her to agree to the remortgage.*”

## Third Parties

39. Lenders frequently find that they cannot enforce their security against a co-owner of a property because that co-owner was unduly influenced into signing the charge or guarantee documentation.
40. Where an intended charge or guarantee is not on its face to the advantage of a co-owner and there is a substantial risk that the transaction has been procured by some form of legal or equitable wrong then the lender is said to be put on inquiry. Then, unless the lender takes reasonable steps to satisfy itself that the charge was

the product of the co-owner's free will, they are deemed to have constructive notice of the wrongdoing. (See **Etridge** at para 44-49.)

41. For a lender to avoid being fixed with constructive notice it would normally be sufficient for it to insist that a solicitor certifies that independent advice has been given to the co-owner.

*“The furthest a bank can be expected to go is to take reasonable steps to satisfy itself that the wife has had brought home to her, in a meaningful way, the practical implications of the proposed transaction. This does not wholly eliminate the risk of undue influence or misrepresentation. But it does mean that a wife enters into a transaction with her eyes open so far as the basic elements of the transaction are concerned.”* **Etridge** at para 54

42. Contrary to some of the reported decisions (eg **Etridge** in the Court of Appeal) the solicitor advising the co-owner is not required to refuse to act if he is not satisfied that the transaction is in the co-owner's interests.

*“All that is necessary is that some independent person, free from any taint of the relationship, or of the consideration of interest which would affect the act, should put clearly before the person what are the nature and the consequences of the act. It is for adult persons of competent mind to decide whether they will do an act, and I do not think that independent and competent advice means independent and competent approval. It simply means that the advice shall be removed entirely from the suspected atmosphere; and that from the clear language of an independent mind, they should know precisely what they are doing.”* **Coomber v Coomber** [1911] 1 Ch 723, 730, approved in **Etridge** at para 60.

*“Thus, in the present type of case it is not for the solicitor to veto the transaction by declining to confirm to the bank that he has explained the documents to the wife and the risks she is taking upon herself. If the solicitor considers the transaction is not in the wife's best interests, he will give reasoned advice to the wife to that effect. But at the end of the day the decision on whether to proceed is the decision of the client, not the solicitor. A wife is not to be precluded from entering into a financially unwise transaction if, for her own reasons, she wishes to do so.”* **Etridge** at para 61

## Duress

43. Duress and undue influence are often arguments which are run in parallel.

However, it is unlikely on the facts that a court would be justified in finding that undue influence consisted both of duress and abuse of trust and confidence as people do not usually trust those who coerce them.

44. A contract procured by duress is voidable rather than void. A plea of duress requires the complainant to establish various matters:
- (a) That it was under pressure which was a significant cause of his making the contract or of the terms which were agreed.
  - (b) The duress “*must be distinguished from commercial pressure, which on any view is not alone enough to vitiate consent*” (**Atlas v Kafco** [1989] QB 833, 839) and from “*the rough and tumble of the pressures of normal commercial bargaining*” (**DSND Subsea v Petroleum Geo LTL** 4/9/00). Accordingly, it must also be established that the pressure on the complainant was “*illegitimate*”.
  - (c) The illegitimate pressure must have come from the contractual counterparty or the counterparty must have been aware of that pressure and have taken improper advantage of the situation.
45. In **D. & C. Builders Ltd. v. Rees** [1966] 2 Q.B. 617 Lord Denning M.R. said, at p. 625F-G: “*No person can insist on a settlement procured by intimidation*” and the clearest examples of duress are contracts made following threats of violence to a person or property. Cases of economic duress exist but are harder to establish. These concern an illegitimate threat of damage to the complainant’s economic interests. Most of the disputed cases have involved threats to break existing contracts. Such threats may be, but are not always, illegitimate.
46. Lord Scarman in **Pao On v Lau Yiu Long** [1980] AC 614 recognised the concept of economic duress.

*“Duress, whatever form it takes, is a coercion of the will so as to vitiate consent. Their Lordships agree with the observations of Kerr J. in **Occidental Worldwide Investment Corporation v. Skibs A/S Avanti** [1976] 1 Lloyd’s Rep. 293, 336 that in a contractual situation commercial pressure is not enough. There must be present some factor ‘which could in law be regarded as a coercion of his will so as to vitiate his consent.’ .... 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, as was recognised in **Maskell v. Horner** [1915] 3 K.B. 106, relevant in determining whether he acted voluntarily or not.”*

47. The following principles as set out in **Kolmar Group AG v Traxpo Enterprises** [2010] EWHC (Comm) at para 92 apply to cases of economic duress:
- (a) Economic pressure can amount to duress, provided it may be characterised as illegitimate and has constituted a “*but for*” cause inducing the claimant to enter into the relevant contract or to make a payment. See Mance J in **S.L. Huyton S.A. v Peter Cremer GmbH & Co** [1999] 1 Lloyd’s Rep. 620
  - (b) A threat to break a contract will generally be regarded as illegitimate, particularly where the defendant must know that it would be in breach of contract if the threat were implemented
  - (c) It is relevant to consider whether the claimant had a “*real choice*” or “*realistic alternative*” and could, if it had wished, equally well have resisted the pressure and, for example, pursued practical and effective legal redress. If there was no reasonable alternative, that may be very strong evidence in support of a conclusion that the victim of the duress was in fact influenced by the threat.
  - (d) The presence, or absence, of protest, may be of some relevance when considering whether the threat had coercive effect. But, even the total absence of protest does not mean that the payment was voluntary.
48. Behaviour that has been held to amount to duress includes the following cases:
- (a) In **Atlas v Kafco** [1989] QB 833 where a carrier agreed to transport a supplier’s goods at a particular price and then refused to transport the goods unless an additional payment was made, the agreement to pay the additional sums was held to have been formed under duress. It should be noted that the judge found that it was obvious to the carrier that the supplier’s commercial survival depended on the goods being delivered and that it would be difficult for the supplier to find an alternative carrier. There was no genuine renegotiation of the contract - the supplier was “*over a barrel*”. Further, there was found to be no consideration for the additional payment as the carrier did no more than it had originally been obliged to do.
  - (b) In **B&S Contracts & Design v Victor Green Publications** [1984] ICR 419, 423 a contractor agreed to erect stands at an exhibition but only a week before said that he would not do it without extra payment to satisfy the demands of his men.

As non erection of the stands would have been disastrous for the client, the extra payment was paid but the Court held that it could be recovered as the circumstances amounted to economic duress.

- (c) In **The Alev** [1989] 1 Lloyds Rep 138 a sea carrier refused to deliver goods to the consignee unless the consignee agreed to pay certain expenses which were the sender's responsibility. The carrier took action to enforce the agreement against the consignee. That action failed as the consignee was able to rely on a defence of economic duress. The carrier's argument that the consignee could and should have applied to court for an injunction was rejected as there was no-one in the jurisdiction against whom an injunction could be enforced.
- (d) In **Adam Opel v Mitras Automotive** [2008] EWHC 3205 (QB) an agreement by an automobile manufacturer to pay compensation to one of its suppliers in respect of the forthcoming termination of the supply contract was void for economic duress because the manufacturer had only agreed to pay because the supplier had threatened to terminate supply with immediate effect, which would have had serious financial and logistical consequences for the automobile manufacturer. It should be noted that despite the fact that the supplier had already been contractually obliged to supply the goods, its promise to continue supply nevertheless amounted to legal consideration so the absence of consideration could not be relied on as an alternative or supplementary argument (see **Williams v Roffey Bros & Nicolls** [1991] 1 QB 1 (CA)).
- (e) In **Kolmar Group AG v Traxpo Enterprises** [2010] EWHC (Comm) the claimant buyer brought proceedings against the defendant seller in relation to contract for the sale of methanol. The buyer had agreed to purchase a specified amount of methanol, plus or minus 5% at the buyer's option, at a specified price for shipment within a specified timeframe as it wanted the methanol in order to resell it to an important client who had an urgent need 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. 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 said 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. It was held that the agreement to amend the letter of credit to provide that the potential 5% be at the seller's option was not the result of any duress, and that the parties had agreed a variation in respect of the contractual quantity so that the seller could deliver only 95% of the quantity. However, the further agreement by the buyer to an increased price and reduced quantity came about as a result of illegitimate pressure amounting to economic duress on the part of the seller so that the buyer was left with no practical choice but to agree to pay an increased price for the methanol that it did receive. The

buyer was entitled to damages for short delivery and the additional shipping costs resulting from the seller's refusal to load the methanol within the originally agreed contract period.

49. Examples of behaviour which have been held to not be illegitimate and which therefore did not amount to economic duress include the following:
- (a) In **Williams v Roffey Bros & Nicolls** [1991] 1 QB 1 (CA) the Claimant was engaged by the Defendant contractors to carry out carpentry work. The Claimant was offered bonus payments by the Defendant when it became clear that the Claimant's financial difficulties would make it unlikely that the work would be completed in time which meant that the Defendant was at risk of being penalised under its contract with a third party. It was held that the Claimant was entitled to the bonus payments. The promise to pay the bonus was enforceable because the Defendant had obtained a benefit or avoided a disbenefit where the promise had not been obtained by fraud or duress. That benefit also amounted to consideration to support the Defendant's promise.
  - (b) In **DSND Subsea v Petroleum Geo** LTL 4/9/00 a contract did not contain a provision which entitled a party to suspend work but that party had genuine concerns about their ability to carry out certain operations successfully in the circumstances which had arisen and which had not been previously contemplated by the parties and the need for insurance to be in place before such operations were attempted. Negotiations took place and amendments to the contract were agreed. Those amendments were found not to have been obtained by duress but were the result of a contractor acting *bona fide* in a difficult situation.
  - (c) A bank customer who compromises his claims for misrepresentation against a bank in return for further finance at discounted rates of interest in circumstances where the bank was threatening to appoint a receiver cannot rely on duress to avoid his obligations. See **Westpac v Cockerill** (1998) 152 ALR 267 FCA.
50. Arguably, a person contracted to work for X who finds that he can make more money working for Y and is therefore willing to break his contract with X but does not do so because X offers to pay an increased fee can enforce payment of the increased fee.
51. Economic duress is more likely to be established where:
- (a) A party is perfectly able to perform but acting in bad faith refuses to do so to exploit the vulnerability of the other party.
  - (b) The non performing party is insisting on additional payment or other more favourable contractual terms.

- (c) The innocent party agrees to pay, or does pay under protest (although protest is not essential).
  - (d) The innocent party has no realistic alternative to agreeing to pay.
52. Economic duress is less likely to be established where:
- (a) A party has encountered genuine difficulties in performing.
  - (b) One party does not intend to exploit the other party.
  - (c) The party alleging duress is not particularly vulnerable.
  - (d) The party alleging duress suggests or offers the new contractual terms or there is an element of genuine compromise.
  - (e) The party alleging duress has realistic alternative courses of action.
53. There may be a rare category of “*lawful act*” duress but it is hard to foresee circumstances in which a threat to take lawful action could found a cause of action that a contract (such as a consent order) should be set aside on the grounds of economic duress. See **H v A Firm** [2004] EWHC 1316 (QB):
- “There is no authority that specifically excludes the power of the court to set aside an agreement, whether or not it is embodied in an order of the court, where one party has procured the agreement of the other by threatening to do a lawful act. In CTN Cash and Carry Ltd v. Gallagher [1994] 4 All E.R. 713 Steyn L.J. said that “..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 this demand was valid. In this complex and changing branch of the law I deliberately refrain from saying never”. In my view, therefore, the court should look to see to what extent the other relevant ingredients of duress have been made out and then decide whether this is one of those “relatively rare” cases.”*
54. Traditionally the cases referred to a party being coerced and consent being vitiated (eg see **Pao On v Lao Yiu Long**, per Lord Scarman). More recently (eg see **Evia Luck** [1992] 2 AC 152) duress has been described in less strict terms i.e. that the duress must be at least a significant cause of the decision to enter into the contract.
55. The inability of a party to give substantial restitution is likely to be an obstacle to the rescission of a contract on the grounds of duress. However, if rescission was not available the courts could seek to find an appropriate alternative remedy such as damages. See **Halpern v Halpern** [2007] EWCA Civ 291.



## Conclusions

56. Some academics have attempted to characterise undue influence and duress as related aspects of a unified doctrine relating to good faith or lack of unconscionability or have argued that such a doctrine should be formulated. In practice though such an approach is not helpful as the two areas of the law continue to develop on a case by case basis along distinct paths.

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