ECONOMIC DURESS AND THE LAW COMMISSION PAPER ON "UNFAIR CONTRACTS"

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Submitted for the LLB(Honours) Degree at the Victoria University of Wellington

2 September 1991

CONTENTS

PART I INTRODUCTION

Over the last two decades, the courts have gradually developed an independent doctrine of economic duress. Regrettably, the doctrine has failed to develop in a clear and rational manner. In response to this, the Law Commission has recently recommended codification of the doctrine.[1] This paper will analyse the common law doctrine, with reference to the Law Commission proposals.

Part II of this paper highlights particular areas of uncertainty within the common law. The courts have tended to rely on what some commentators have termed the "overborne will theory".[2] The writer suggests that as the rationale of economic duress, this theory is flawed. Furthermore, an analysis of the cases suggests that in applying the doctrine the courts are actually relying on factors which are inconsistent with an adherence to the overborne will theory.

In Part III the writer advances a model of duress that is an alternative to the overborne will theory. This model better explains the way the courts are dealing with duress and is more consistent with the fundamental aims of the doctrine.

The Law Commission paper is examined in Part IV. Despite the Law Commission's recommendation to codify the doctrine, the proposed scheme represents a significant departure from the common law. The writer suggests that as it stands, the Law Commission paper fails to deal with the problems existing at common law. The proposal has the potential to both perpetuate the uncertainty surrounding duress, and in fact to create unfairness.

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[1] The New Zealand Law Commission "Unfair" Contracts A Discussion Paper-Preliminary Paper No 11(Wellington,1990).

[2] P S Atiyah "Economic Duress and the 'Overborne Will'" (1982) 98 LQR 197.

PART II THE COMMON LAW

A An Overview

Before proceeding to a more detailed analysis of the doctrine of economic duress, it is necessary to set out the facts of the relevant cases. Part II A of this paper summarises the facts of the duress cases that the writer intends to discuss. It also sets the economic duress cases in perspective by briefly outlining the rationale which the courts have purported to adopt when dealing with duress.

All the duress cases to date have placed some reliance on what Atiyah terms the overborne will theory[3]. The basis of this theory is that the victim did not enter the contract voluntarily, but was forced to do so by the application of pressure. There was therefore no true consent to the agreement.

That the application of duress results in absence of consent has long formed the basis of recovery in cases involving duress to the person and duress to goods.[4] This notion was first extended to cases involving economic pressure in The Siboen and The Sibotre.[5]

In that case, the court was required to consider the validity of an agreement varying the rates due under a tanker charter. The plaintiffs were in financial difficulties and wished to reduce the rates of hire due to the defendant. Central to the plaintiffs' strategy was to represent that their charter company

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[3] Above n 2.

[4] Chitty on Contracts:General Principles (26 ed, Sweet and Maxwell,London,1989) 333.

[5] Occidental Worldwide Investment Corp. v Skibs A/S Avanti, Skibs A/S Giarona, Skibs A/S Navalis (The Siboen and The Sibotre) [1976] 1 Lloyd's Rep 293.

had no substantial assets and that the parent company would be prepared to allow it to become insolvent unless a reduction was negotiated.

Kerr J stated that in order to find economic duress, the court must "be satisfied that the consent of the other party was overborne by compulsion so as to deprive him of any animus contrahendi."[6] Kerr J's approach has been adopted in later cases, most notably Pao On.[7]

In Pao On, the plaintiffs and the defendants entered into a business agreement in which shares in the plaintiffs' company were sold to the defendants' company Fu Chip. In order to protect the plaintiffs it was agreed that the defendants would, in one year's time, purchase 60 per cent of the Fu Chip shares at the same price the plaintiff had received them under the main agreement. The plaintiffs realised that they were effectively depriving themselves of any increase in the value of the shares. They decided not to complete the main agreement unless an indemnity could be substituted for the subsidiary agreement. The defendants then gave the plaintiffs an indemnity that they would buy the shares if their value fell below $2 50. Subsequently Fu Chip shares fell to 36c per share. The defendants claimed that neither the subsidiary agreement nor the indemnity had any legal effect.

The Privy Council ruled that "duress...is a coercion of the will so as to vitiate consent."[8] The Board were content to follow the decision of the trial judge that the facts of the case did not disclose duress.

Universe Tankships Inc of Monrovia v International Transport Workers Federation[9] contains definite indications of a move away from overborne will as the basis of economic duress, to absence of choice.

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[6] Above n 5, 336.

[7] Pao On and Others v Lau Yiu Long and Others [1980] AC 614.

[8] Above n 7,635.

[9] Universe Tankships Inc of Monrovia v International Transport Workers Federation and Others [1983] AC 366.

The appellants in Universe Tankships owned and operated the Universe Sentinel, a flag-of-convenience ship. The respondents ('ITF') were an international federation of trade unions.

The Universe Sentinel was unable to sail from port as scheduled because it was "blacked" by tugboats procured by the ITF. The ITF demanded that the owners of the Universe Sentinel employ their mariners on certain terms. These terms were the usual ones as between trade unions and employers, but included a provision that the appellants must contribute to the ITF's welfare fund.

It became clear that unless the owners signed the agreements tendered and paid the moneys demanded, the blacking would continue. It was accepted that the financial consequences to the appellants of the loss of the ship from continued blacking would have been "catastrophic."[10] On July 28, the appellants signed the agreements and paid the US $80 000 due.

Shortly after the Universe Sentinel sailed, the owners took steps to recover the $80 000. The only sum at issue before the House of Lords was the $6 480 paid as the contribution to the welfare fund.[11]

The owners claimed the $6 480 on two grounds, trust and duress.[12] Lord Scarman recognised that pressure amounting to compulsion of the will was an element of duress but considered that "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 other practical choice open to him."[13]

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[10] Above n 9,383 per Lord Diplock.

[11] For a history of the proceedings, see above n 9,382.

[12] The House of Lords unanimously rejected the trust argument. The sum paid was not held on the trusts of the welfare fund but was part of the general assets of ITF and could be used for any purpose. There could therefore be no resulting trust in favour of the owners. See above n 9,391 per Lord Cross.

[13] Above n 9,400; see also 384 per Lord Diplock.

Universe Tankships was not, however, a decisive rejection of the overborne will theory. Lord Diplock referred to "coercion of the will," and also to "apparent consent".[14] The fact that His Lordship appeared to accept that consent had been given although the law would treat it as revocable,[15] indicates that some residue of the overborne will theory remains.

Nevertheless, on balance, the case represents a move away from the overborne will theory. This is not reflected in later cases, which have shown a tendency to still favour this theory.

In B & S Contracts[16] the plaintiffs agreed to erect exhibition stands at Olympia for the defendants. A dispute arose between the plaintiffs and their workers, who then stopped work and demanded severance pay. The defendant discussed the matter with the plaintiff and offered £4 500 intending it to be an advance on the contract price. The plaintiff initially understood the offer to be over and above the contract price. When the plaintiffs realised that the money was merely an advance, they informed the defendants that the offer was unacceptable. The plaintiffs made it clear that they would be unable to carry out their obligations under the contract unless the builders could be persuaded to stay at work.

Under this threat the defendant agreed to pay the £4 500 to the plaintiff. The plaintiff then sought payment.

The Court of Appeal unanimously found for the defendants on the basis of duress. Eveleigh J considered that "if the claimant has been influenced against his will to pay money under the threat of unlawful damage to his economic interest he will be entitled to claim that money back ".[17]

It is submitted that "influenced against his will" amounts to the same thing as overborne will.

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[14] Above n 9, 384.

[15] H Carty & A Evans "Economic Duress" (1983) J Bus L 218,220.

[16] B & S Contracts & Design Ltd v Victor Green Publications Ltd [1984] ICR 419.

[17] Above n 16,423.

In Atlas Express[18] the plaintiff and the defendants entered into a contract under which the plaintiff would deliver cartons of the defendants' basketware. The plaintiff estimated the rate per carton on the basis of a minimum number of cartons per delivery. The number of cartons in the first load was smaller than the plaintiffs claimed they had expected. The plaintiffs refused to carry any more goods unless the defendants agreed to a minimum rate per load.

The Court found that the defendant's agreement to the plaintiff's demand was void for duress. Although Tucker J quoted Lord Diplock's statement of the true rationale of the doctrine,[19] he did not follow it. The Judge went on to rely on Eveleigh J's "influenced against his will" dicta, and eventually concluded that "the circumstances of the present case vitiate[d] the defendants' apparent consent to the agreement".[20]

Economic duress has also been considered by the New Zealand courts.

In Moyes & Groves, Cooke J was prepared to accept that "in New Zealand law, economic duress can be a ground for avoiding liability under a contract. But it is certainly something which should not be lightly found."[21] Cooke J adopted the "coercion of the will" test from Pao On and found that the facts of the case did not disclose economic duress.

The New Zealand Court of Appeal recently considered economic duress in Mann v Buxton.[22] The parties had set up a partnership between their respective companies to export asparagus to the United States of America.

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[18] Atlas Express Ltd v Kafco (Importers and Distributors) Ltd [1989] 1 All ER 641.

[19] Above n 9,384.

[20] Above n 18,646.

[21] Moyes & Groves v Radiation New Zealand Ltd [1982] 1 NZLR 368,372. See also Shivas v Bank of New Zealand [1990] 2 NZLR 327; Walmsley v Christchurch C C [1990] 1 NZLR 199; Countrywide Banking Corporation Ltd v Fuller Unreported, 6 December 1990, High Court Palmerston North Registry,CP 87/90.

[22] Mann v Buxton Unreported, 31 July 1990, Court of Appeal,CA 49/90.

The appellant gave a land title to the respondent as a security for the advance of funds. The asparagus venture was a disaster and the partners agreed to split up. The respondent registered a caveat against the title. It was agreed that the appellant provide a promissory note for outstanding liabilities. In exchange, the respondent was to return the land title and withdraw the caveat.

The respondent commenced proceedings to recover the money due under the promissory note and the appellant raised a defence of duress.

The Court of Appeal found that "coercion or the overbearing of the defendant's will must be at the foundation of any claim to avoid a contract for duress".[23] The Court was content to follow the finding of Holland J that although Mr Mann wished to obtain the certificate of title, he was not influenced by the retention of his title to such an extent as to amount to coercion of the will.[24]

The Court of Appeal has taken a very traditional approach to duress. It has continued to rely on the overborne will theory and the Pao On factors. There is no evidence of any move towards a Universe Tankships approach.

In summary, early cases on economic duress claimed to rely on the overborne will theory as the basis of the decisions. In Universe Tankships the House of Lords supported a move towards absence of practical choice as the true rationale of the doctrine. Despite powerful dicta from the House of Lords, later courts have predominantly adhered to the overborne will theory.[25]

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[23] Above n 22,12.

[24] Above n 22,12. In fact the case contains very little discussion of economic duress. The issue of economic duress is confused by an alternative submission of duress to goods.

[25] It is not entirely clear why this has occured. The House of Lords in Universe Tankships was careful to restrict its decision to the area of industrial relations to which special considerations apply, above n 9,384 per Lord Diplock. Nevertheless courts have not been slow to cite the Universe Tankships decision in other areas. See for example B & S Contracts and Atlas Express.

B The Overborne Will Theory

The overborne will theory has come under much criticism from commentators[26]. Clearly the theory is inherently contradictory. The fact that duress is a defence presupposes the existence of a contract. Absence of consent would mean that no valid contract could ever have come into existence; no defence should be required. Judicial recognition that the existence of duress renders a contract voidable rather than void[27] supports this view.

The overborne will theory is also inconsistent with the concept of duress in criminal law. In Lynch v DPP Northern Ireland[28] the House of Lords discussed the theoretical basis of the criminal law of duress and rejected the overborne will theory.[29]

Furthermore, the theory does not accord with reality. The victim of duress does normally know what he or she is doing, does choose to submit, and does intend to do so. In fact, the more extreme the pressure, the more real the consent.[30]

To an extent this citicism was vindicated by the dicta in Universe Tankships in which the House recognised the existence of an intentional submission arising from the lack of practical choice.

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[26] Above n 2; P S Atiyah "Duress and the Overborne Will Again" (1983) 99 LQR 353; B Coote "Duress By Threatened Breach of Contract" (1980) CLJ 40.

[27] Above n 7,635; North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd and Another [1978] 3 All ER 1170,1183.

[28] [1975] AC 653.

[29] For a discussion see above n 2.

[30] Above n 2,200.

C The Factors

Not only is the overborne will theory inherently contradictory, but the factors which the courts are relying on in considering duress, are not consistent with an adherence to the theory.

It is the writer's submission that the courts, particularly in the later cases, only state that they are relying on the overborne will theory. A closer examination of the cases, however, shows that the courts are basing their decisions on entirely different considerations.

Part II C of this paper will examine these factors.

1 The presence or absence of protest.

In The Siboen and The Sibotre, whether or not "the party relying on duress made any protest at the time [of making the contract] or shortly thereafter," was one of two points that led Kerr J to conclude that no duress existed.[31] The second was the owner's testimony that he regarded the agreement as binding and closed.

With respect, the existence of a protest at the formation of an agreement or of any indication that the agreement is not regarded as binding at the time the agreement was made, goes to a more fundamental aspect of the law of contract than economic duress. If either of these two events occurred it might be unreasonable to infer the existence of an intention to form a contract, in which case no contract would be formed. No question of a defence of duress should arise.

In any event this factor has assumed less importance in light of the Universe Tankships decision. Lord Scarman considered that "The victim's silence will not assist the bully, if the lack

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[31] Above n 5,336.

of any practical choice but to submit is proved."[32] The absence of protest will not preclude a finding of duress, because the emphasis is now on absence of choice.

2 The existence of independent advice.

As stated, the Privy Council in Pao On upheld the decision of the lower courts that the defendant had not been forced to enter the contract under duress. The Board was content to rely almost exclusively on the trial judge's findings. Li J had found that the defendant had received proper legal advice and that he knew that the main agreement was still valid as a separate document.[33]

The writer questions the usefulness of this factor. In a duress situation, the victim does know what he or she is doing. Legal advice will simply confirm what the victim already knows, that he or she is faced with two unpalatable alternatives. The provision of legal advice potentially does little to alleviate the duress.

This can be contrasted with the situation in unconscionability cases, which are based on the victim's inherent vulnerability and in which the existence of independent advice is an important consideration.

The writer suggests that what really concerned the trial judge in Pao On was that the agreement was a normal, commercially acceptable transaction. This is illustrated by Li J's emphasis of the fact that the defendant had considered the matter thoroughly and taken a calculated risk in order to pacify the plaintiffs. Regrettably for the defendant it proved to be "an error of judgment in a business deal."[34]

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[32] Above n 9,400.

[33] Above n 7,626.

[34] Above n 7,627.

3 The existence of an alternative course of action.

(a) No alternative course of action or no practical alternative course of action.

Two possible approaches exist in relation to this factor. The first approach is that the factor requires that the coerced party be faced with no alternative course action. The second approach is that the party may merely be faced with no practical alternative. Both approaches have been used by the courts in economic duress cases.

In North Ocean,[35] the respondent shipbuilders (the 'Yard') had entered into a contract with the claimants (the owners) to build the Atlantic Baron. The Yard subsequently requested a 10 per cent increase in the contract price because of a currency devaluation. The Yard would not complete the contract unless the owners agreed to the increase. Meanwhile, the owners had fixed the vessel to Shell for a time charter for three years. The owners believed that any default of the Shell charter would be detrimental to their relationship with Shell and would expose them to liability.

Eventually the owners agreed to the Yard's demands to pay the additional 10 per cent. Eight months after the Atlantic Baron was delivered, the owners attempted to recover the extra 10 per cent paid.

Mocatta J held that the threat of non-performance of an existing contract amounted in the circumstances to economic duress.[36] In the event, the owners claim was unsuccessful because they were held to have affirmed the agreement.

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[35] North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd and Another [1978] 3 All ER 1170.

[36] Mocatta J also rejected the owners' contention that the agreement was void for lack of consideration. The judge held that consideration had been provided when the Yard increased the letter of credit. The contract in North Ocean had been performed so technically consideration was not an issue. The owners should have sought a restitutionary action. See above n 35,1178.

In establishing duress, Mocatta J considered that:[37]

"The owners might have claimed damages in arbitration against the Yard with all the inherent unavoidable uncertainties of litigation, but in view of the position of the [owners] vis-a-vis their relations with Shell it would be unreasonable to hold that this is the course they should have taken...."

The owners did therefore have an alternative to entering the contract, albeit one which was impractical for them to take in the circumstances.[38]

North Ocean can be contrasted with Pao On, in which the Privy Council stated that the "commercial pressure alleged to constitute duress must...be such that the victim...must have had no alternative course open to him".[39]

This factor necessarily includes the practicality of actually resisting the pressure. In Pao On Li J considered that even if the defendants had refused to give the indemnity they would have suffered only a paper loss of profit and would not have been subject to financial ruin. This was therefore a viable alternative to giving the indemnity.[40]

On the face of it, the Privy Council appears to accept the view that the coerced party must have no alternative course of action.

Universe Tankships, supports the approach taken in North Ocean. Lord Scarman considers that the essence of duress is that the victim has no other practicable choice but to submit.[41]

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[37] Above n 35,1182.

[38] In fact an examination of the case shows that the owners may have had a number of choices. There was no evidence to suggest that the owners would have suffered financial ruin by resisting the Yard's demands. Furthermore, the owners did not investigate the possibility of finding a replacement vessel or made any approach to Shell to attempt to negotiate an agreement.

[39] Above n 7,636.

[40] Above n 7,626.

[41] Above n 9,400.

It is submitted that there is implied support for Universe Tankships and North Ocean in the later cases.

In B & S Contracts, Griffiths LJ considered that a refusal on the part of the defendants to pay the £ 4 500 would result in grave damage to their reputation and subject them to heavy claims. His Lordship does not discuss whether this result meets the financial ruin standard imposed by Pao On, although Kerr J clearly considers the result to be "serious and immediate".[42] All three judges concluded that the defendants had no alternative course of action. It is nevertheless arguable that if serious and immediate falls short of financial ruin, then the defendants did have an alternative, admittedly an impractical one.

In Atlas Express it was sufficient to establish duress that the defendants "...believed on reasonable grounds that it would be very difficult, if not impossible, to negotiate with another contractor".[43]

On balance, the duress cases seem to be supporting absence of practical choice as a factor in assessing duress rather than no alternative choice. This is important for two reasons. The first reason is that it makes it easier for a coerced party to establish duress. The second reason is because it represents a move towards a more objective assessment of duress.

(b) objectively or subjectively tested?

An objective element had always been present in duress. In Pao On, for example, the defendants believed that if the main agreement was not completed then the public would lose confidence in Fu Chip in which the defendants had invested a lot of money. This subjective assertion of the defendants' position was not enough. Li J found that the defendants would not be subject to financial ruin of the deal fell through, and was not prepared to find duress.[44]

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[42] Above n 16,428.

[43] Above n 18,644.

[44] Above n 7,626.

It is submitted that the courts are increasingly placing more emphasis on objectivity, and that this is inconsistent with reliance on the overborne will theory.

Absence of practical choice is now of paramount importance in assessing duress. Other factors such as the presence or absence of protest are of mere evidential value. Focusing on the parties' choices, requires an objective assessment of the circumstances surrounding the formation of the contract, and is inconsistent with examining state of mind.

Tucker J's express statement of unreasonableness in Atlas Express is also indicative of a greater emphasis on objectivity and is consistent with a move away from the overborne will theory.

5 Legitimacy of pressure.

This factor was emphasised in Universe Tankships and there is some early support for it in North Ocean in which Mocatta J relied on the finding that there was no legal justification for the demand.[45]

The meaning of legitimacy is uncertain but the speeches suggest that a number of factors may be relevant.

(a)the nature of the pressure

Lord Scarman contended that:[46]

The origin of the doctrine of duress...suggests strongly that the law regards the threat of unlawful action as illegitimate, whatever the demand. Duress can, of course,exist,even of the threat is one of lawful action....."

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[45] Above n 36,1182.

[46] Above n 9,401.

Clearly, unlawfulness is not necessary in order to have illegitimacy. Whether or not unlawfulness is sufficient to establish duress is left open.[47]

It is likely that the dicta in Universe Tankships were shaped by the parties' concessions. The precise nature of the concessions is unclear. Lord Diplock's speech suggests that the parties had conceded that the circumstances amounted to economic duress[48]. Accepting that duress exists, Lord Diplock then superimposes the legitimacy requirement on top of the economic duress. This is evidenced by the statement that sections 13 and 29 of the Trade Union and Labour Relations Act 1974 (UK) are "relevant only for such indications as they give of the public policy as to what kinds of demands ought to be regarded as legitimate ... notwithstanding that compliance with them is induced by economic duress."[49] The result is the possibility of cases in which duress was established, but relief was not obtained because it was legitimate duress.

Lord Scarman's version of the concession is that if the blacking was "unlawful, it is conceded that the owner acted under duress and can recover. If it was lawful, it is conceded that there was no duress and the sum sought by the owner is irrecoverable."[50] This makes illegitimacy an element of the initial finding of duress. It is also consistent with the parties' submissions.[51]

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[47] A Stewart "Economic Duress - Legal Regulation of Commercial Pressure" (1984) Melb ULR 410,428.

[48] Above n 9,383.

[49] Above n 9,391.

[50] Above n 9,401.

[51] Above n 9,369,371,374. This concession makes it unnecessary for the House of Lords to discuss duress itself, and there are explicit statements to this effect. See above n9,383 per Lord Diplock. This did not prevent any of their Lordships from discussing duress at length. Technically, however, many of the statement made by the House of Lords are obiter dicta. This may help explain the reluctance of later courts to adopt the Universe Tankships approach to duress. See also above n 25.

The writer adopts Lord Scarman's version of the concession for the purposes of this paper. It is submitted that the great emphasis placed by the House of Lords on unlawfulness may be in part a product of the concession.

In B & S Contracts, Eveleigh J restricted the nature of the pressure to the threat of unlawful damage to the claimant's economic interest.[52] This is narrower than in Universe Tankships in which the House of Lords held that damage may be lawful and yet still constitute duress. The plaintiffs in B & S Contracts contended that even if there was no alternative course of action, the threat was not unlawful because they were entitled to take advantage of the force majeure clause and cancel the contract.

The Court rejected this argument because the plaintiffs had not taken reasonable steps to avoid the strike, as was required if the plaintiffs were to rely on the force majeure clause.

This creates something of a dilemma. If unlawfulness is a requirement for finding duress then the Court of Appeal must be stating that the plaintiffs threat to break the contract is unlawful.

Similarly in Atlas Express Tucker J adopted Eveleigh J's restriction of illegitimacy to unlawful pressure. Tucker J also found that the facts disclosed a defence of duress. Again impliedly the threat to break the contract was unlawful.

This is inconsistent with the Pao On decision in which the plaintiffs' threat to break the main agreement was not considered improper at all.

The writer suggests that the real reason that the court in Atlas Express found in favour of the defendant was the element of impropriety or bad faith in the plaintiff's behaviour.

Tucker J found that the plaintiff knew that the continued delivery of goods was essential to the defendants' business success and commercial survival. The plaintiff was probably also aware that at that time of the year it would be almost impossible

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[52] Above n 16,423.

for the defendants to find an alternative carrier. The plaintiff's driver was instructed to take the amended agreement to the defendants' premises. If the defendant would not sign the agreement then the driver was to take the trailer away empty. Tucker J also found that the plaintiff was deliberately unavailable during this time to prevent the defendants from protesting.

Much of Tucker J's judgment consists of findings of fact about the moral unacceptability of the plaintiff's behaviour. It is the writer's contention that despite the Judge's reference to vitiation of consent, it was the above findings which really led to the finding of duress.

(b) the nature of the demand.

In Universe Tankships the "nature of the demand determine[d] whether the pressure threatened or applied, ie the blacking, was lawful or unlawful."[53] The nature of the demand depended on whether the demand was an act done in furtherance of a trade dispute within the meaning of section 29 of the Trade Union and Labour Relations Act 1974 (UK).

It is submitted that it was the nature of the plaintiff's demand in B & S Contracts in terms of its unreasonableness, that was truly instrumental in the court's decision.

Under the force majeure clause the plaintiffs were bound to take reasonable steps to avoid the strike. There were no grounds on which the plaintiffs could demand that the defendants make an extra payment towards the workers' severance pay. Both Eveleigh J and Griffiths J devote much attention to what it would have been reasonable for the plaintiffs to do in the circumstances.[54] Eveleigh J concludes that the plaintiffs ought to have paid an extra £4500 or indeed the whole £9000.

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[53] Above n 9,401.

[54] Admittedly this is due in part to the fact that the plaintiff's must have acted reasonably in order to rely on the force majeure clause.

This can be contrasted with North Ocean, in which it can be argued that the Yard's request for a 10 per cent increase in the contract price was a proper and reasonable demand. Although there was no legal justification for the demand, there were grounds in the form of the devaluation.[55]

It could also be argued that in Atlas Express, the demand was perfectly reasonable because it sought to bring the rates charged up to a commercially realistic level. Conversely, the plaintiffs had every opportunity to calculate the rate correctly and should not be able to vary the contract on the basis of their own mistake.

(c) unconscionability.

In discussing the meaning of "illegitimate," Lord Scarman quotes from Barton v Armstrong,[56] "[T]he pressure must be one of a kind which the law does not regard as legitimate".[57] Greig and Davis argue that the context of this statement means that their Lordships regard illegitimate as synonymous with unconscionable.[58]

In Barton, Lord Cross actually said that:[59]

> There is an obvious analogy between setting aside a disposition for duress or undue influence and setting aside it aside for fraud. In each case...the party has been subjected to an improper motive for action.

The writer agrees that economic duress does have a thread of unconscionability in the sense that the doctrine is concerned with behaviour which goes beyond that which is normally

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[55] Above n 35,1173.

[56] [1976] AC 104.

[57] Above n 9,400.

[58] DW Greig & JLR Davis The Law of Contract (The Law Book Company Ltd,Sydney,1987) 955.

[59] Above n 56,118.

acceptable. With respect, however, it goes too far to state that economic duress is synonymous with doctrines such as unconscionability and undue influence. The latter exist where a contracting party has an inherent vulnerability. The focus of economic duress is not the party's vulnerability, but the circumstances surrounding the formation of the contract.

6 Affirmation.

The Privy Council in Pao On considered that a further factor in determining whether duress existed was whether after entering the contract the coerced party took steps to avoid it.

In North Ocean, the lack of protest after signing the agreement and after the duress had ceased to operate on the plaintiffs was crucial. The plaintiffs were held to have affirmed the variation.

By contrast in Atlas Express, the defendants were unable to protest directly to the plaintiff at the time the contract was made. Nevertheless, protest occurred after the signing of the contract, by the solicitor's letter of 2 March 1987.[60]

But again, if the court is going to accept overborne will as the foundation of duress, then the focus of the court's attention should be the events at the time of signing the contract, not those many months later.

D Conclusion

Part II of this paper has shown that despite moves by the House of Lords towards absence of practical choice as the basis of duress, the courts have predominantly adhered to the overborne will theory.

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[60] Above n 18,645.

The writer maintains that the overborne will theory is inherently contradictory. Futhermore, although the courts are stating that they are relying on the overborne will theory, the factors which the courts are using are not consistent with an examination of a party's state of mind.

The presence or absence of protest at the time of making the contract, for example, may be more indicative of no actual intention to enter the contract than of overborne will. Protest after signing the contract is not relevant to a party's state of mind when forming the contract.

The existence of independent legal advice has received little discussion by the courts. The court in Pao On were not concerned with the existence of legal advice per se, but with the fact that it indicated a well-considered business decision.

Tucker J in Atlas Express emphasised the objective component of absence of practical choice. Although not wholly inconsistent with the overborne will theory, the emphasis on objectivity suggests that the Judge is moving away from looking at the party's state of mind.

It was suggested that the legitimacy factor that was introduced in Universe Tankships had a number of components; the nature of the pressure and of the demand, and unconscionability. All of these factors are concerned with the outward manifestation of the duress in terms of its acceptability. This is supported by the emphasis in B & S Contracts and Atlas Express on the unreasonableness of the demand made, and the plaintiff's bad behaviour.

The cases show that the nature and application of the doctrine of economic duress is unclear. Part III of this paper will set out the way in which the writer believes the courts should be dealing with duress instead of the rhetoric discussed above.

PART III AN ALTERNATIVE APPROACH TO DURESS

Part III of this paper advances a model of dealing with duress which the writer believes both more accurately describes the way in which the courts have dealt with duress, and is more consistent with the fundamental aims and premises of the doctrine.

The analysis in Part II of this paper has shown that the courts have made an almost imperceptible shift from a will-based theory of duress, to one based on wider considerations.[61] This is shown by the reliance that the writer maintains the courts are now placing on the commercial reasonableness of the pressure exerted and the unacceptability of the coercing party's behaviour.

Fundamental to the law of contract and to commercial dealings, is the certainty that contracts will generally be maintained and upheld. The task of the courts in duress cases is to achieve a balance between that certainty and the recognition that in some instances there is the need to grant relief to parties who have formed contractual obligations under some form of pressure.[62]

Obviously in many contractual situations, one of the parties securing the contract will be subject to some form of pressure, if only on a "take it or leave it basis". What is required then, is a working definition of duress that allows the courts to evaluate when the pressure has gone beyond that which is acceptable in normal commercial transactions and reached the point where the law should intervene.

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[61] M H Ogilvie "Wrongfulness, Rights and Economic Duress" (1984) 16 Ottawa LR 1,24.

[62] Above n 58,949.

The writer suggests that the factors which are relevant when assessing duress, can be subsumed under two main headings, "illegitimate pressure" and "no practical alternative." It is proposed to first discuss these factors independently, and then to explore the relationship between the two.

A Illegitimate Pressure

In order to find economic duress, the pressure exerted must be illegitimate. It will recalled that in Universe Tankships, Lord Scarman considered that although the origin of duress suggested that the threat of unlawful action is illegitimate whatever the demand, duress can exist even if the threat is one of lawful action. Whether it does or not depends on the nature of the demand.[63] The writer adopts this approach to illegitimacy, but with some modifications.

1 Unlawful Pressure

Lord Scarman failed to clarify whether, if the pressure was unlawful, this was enough to find that the pressure was illegitimate. It is submitted that this should be true of some types of pressure.

If the pressure exerted is unlawful because it is an independent tort or crime, then this should be sufficient to render the pressure illegitimate. Furthermore, the writer suggests that a special category be created for such cases. If the pressure is an independent tort or crime then this should be sufficient to establish duress. Under the writer's model, no further inquiry is needed into the existence of practical choice on the part of the victim. To hold otherwise, is to allow contract law to condone behaviour which is wrongful in tort or crime.

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[63] Above Part II C 5 a.

It could of course be argued, that in such a case the law is really stiking down the contract for illegality. The agreement is founded on illegality and therefore falls within the Illegal Contracts Act 1970.[64]

So far, the assessment is reasonably straightforward. If the contract is going to be illegitimate with respect to another branch of law, then no inquiry into the meaning of illegitimacy is necessary.[65]

In Atlas Express and B & S Contracts, the courts implied that the threat to break a contract was unlawful. The writer argued that this conflicted with the decision in Pao On in which the threat to break the contract was perfectly reasonable in the circumstances.[66]

These cases can be reconciled in the following way. A threat to break a contract should not be unlawful per se. Such a threat may be lawful, where circumstances exist such as it is commercially reasonable or proper to claim extra remuneration or an extra-contractual concession.[67]

In Pao On, for example, the plaintiffs were not prepared to enter the main agreement unless they were given protection from the restriction on selling shares. The subsidiary agreement did not provide such protection. It is submitted that the plaintiffs therefore had reasonable grounds for seeking such protection in the form of the indemnity.

In the writer's opinion, no such grounds existed in Atlas Express. The plaintiffs had already carried cartons for the defendants and had every opportunity to inspect the load. In Atlas Express therefore, and in B & S Contracts, the court found that the threat to breach the contract was unlawful. On the writer's model of duress, the threats would therefore constitute

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[64] Above n 61,27.

[65] Above n 61,27.

[66] Above Part II C 5 a.

[67] Above n 4,509; P A Chandler "Economic Duress: Clarity or Confusion" (1989) LMCLQ 270,274.

illegitimate pressure. To establish duress the courts would then need to consider the absence of a practical alternative requirement.

The factors which the courts need to consider when deciding whether a threat to break a contract is unlawful are the same as those that are relevant when considering whether technically lawful pressure is in fact illegitimate.

2 Lawful but Illegitimate Pressure

The writer adopts Lord Scarman's proposition that duress can exist even if the threat is one of lawful action. Pressure which is lawful may be just as unacceptable and unjustifible as the threat of an unlawful act.

It is not possible to lay down in advance rules as to when such pressure will be illegitimate. This will be depend on the facts of each case. It is possible, however, to formulate a number of factors which the courts should consider in making such an assessment. Stewart suggests,[68] and the writer agrees that essentially this becomes a value judgment about the moral and commercial justifiability of the pressure exerted.[69]

Firstly the court should distinguish between situations in which there are genuine, reasonable grounds for making the demand, and those in which the demand is merely capricious.

The emphasis which the Court of Appeal in B & S Contracts placed on the unreasonableness of the plaintiff's demand has already been discussed.[70] The Court of Appeal was concerned with the fact that it was totally unreasonable for the plaintiffs to demand the £4 500 over and above the contract price. The plaintiffs had no proper grounds on which to make the demand.

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[68] Above n 47,429,430.

[69] The inclusion of a "moral" component is consistent with a trend in commercial areas towards making morality and ethics a part of business practice. See for example, R Cranston "Commerce, The Common Law and Morality"(1989) 17 Melb ULR 87.

[70] Above Part II C 5 b.

The writer also suggested that the 10 percent devaluation in North Ocean constituted grounds on which the Yard could reasonably demand an increase on the contract price. Admittedly the reasonableness of the demand may depend on the extent to which the devaluation had translated itself into extra costs. This was not clear from the facts of the case.

The illegitimacy of the pressure may also depend on whether pressure is an established, commercial practice. In The Siboen and The Sibotre, for example, the plaintiff's signed the final addenda when the shipping market was at an unprecedented low. At such times, individual tanker owners were more vulnerable than the oil companies and there was competition between tanker owners for charters. As a result, the oil companies would often seek to renegotiate charters with the owners.[71]

The fact that the pressure was part of everyday, normal commercial practice supports the proposition the pressure was not illegitimate.

Similarly, in North Ocean it was common practice for Yards to ask for an upward adjustment in the prices of the vessels which they are building and owners sometimes agreed to such adjustments.[72]

A third factor is the conduct of the coercing party. If the party exerting the pressure knows that the other party has no practical alternative but to submit and deliberately takes advantage of that fact, then this should be a strong factor indicating that the pressure is illegitimate.

This was most evident in Atlas Express. Much of Tucker J's judgment in Atlas Express concerned findings of fact about the moral unacceptability of the plaintiff's behaviour.[73] Tucker J

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[71] Above n 5,297.

[72] Above n 27,422. With respect to Mocatta J an analysis of the facts of the case does not support his initial finding of economic duress. Not only did the owners have a number of alternatives to submitting, and there is evidence to suggest that the Yard's demand was consistent with accepted commercial practice. See Ogilvie MH "Economic Duress, Inequality of Bargaining Power and Threatened Breach of Contract" (1981) 26 McGill L J 289,300.

[73] Above Part II C 5 a

placed emphasis on the fact that the plaintiff knew that the defendant had no real choice but to submit to the contractual variation.

It is clear from Atlas Express that in most cases the conduct of the coerced party will colour or affect the court's assessment of the reasonableness of the demand. In practice it will be extremely difficult to separate out the various factors which the writer considers are relevant in assessing whether illegtimate pressure exists. This merely stresses the writer's contention that all the elements of illegitimate pressure are interconnected.

Knowledge of the coerced party's position should encompass both actual knowledge and constructive knowledge. In Atlas Express, the plaintiff knew that the defendants had secured a large order from Woolworths, which was essential to their commercial survival. The plaintiff also knew that it was early November, a time when demands on road haulers and deliverers are heaviest. From knowledge of the latter circumstances Tucker J found that the Plaintiff must have known that it would be almost impossible for the defendants to find alternative carriers.[74]

In some circumstances then, a lawful threat will constitute illegitimate pressure. The courts will then have to consider whether the coerced party has any practical alternative.

B No Practical Alternative

Except in the case of pressure that is an independent tort or crime, illegitimate pressure should not be enough to establish duress. The coerced party must also have no practical alternative to entering the contract.

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[74] Above n 18,644.

This requirement is necessary in order to establish the causal link between the pressure exerted and the acts against which relief sought.[75] There must be a subjective agreement to the lesser of the two evils.[76] The existence of protest may have some limited evidentiary value in establishing this agreement.

There is also an objective component to this requirement. This was stressed by Tucker J in Atlas Express, who found that the defendants believed on reasonable grounds that they had no alternative.

Both independent legal advice and protest when the contract was made will be irrelevant in making this objective assessment. Legal advice would merely confirm that the victim has no practical alternative. In any event, duress is not concerned with a subjective assessment of a victim's inherent weakness, but with an assessment of the circumstances surrounding the formation of the contract. Similarly protest at the time of the duress merely indicates the victim's reaction to the situation, not the situation itself.

Generally, the standard which the courts have required to exist before an option ceases to be a practical alternative has been fairly high. This is consistent with the view that duress is not a defence which should be "lightly found".[77] In Pao On, Li J set the standard at financial ruin. In Atlas Express, failure to submit would have been detrimental to the defendant's success and to their commercial survival.[78] The standard in B & S Contracts was lower. The consequences of resisting the demand in this case was grave damage to the defendant's reputation and exposure of the defendant to heavy claims from exhibitors.[79]

It is impossible to set an exact standard as to when the consequences of resisting the demand are such that it is impractical to do so. Consequences just short of commercial

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[75] Above n 47,431.

[76] Above n 61,31.

[77] Above n 22.

[78] Above n 18,644.

[79] Above n 16,426.

survival are likely to have a serious effect on a business. Despite the fact that the courts must recognise sanctity of contract, it is submitted that it is unreasonable to expect a party to resist entering a contract by putting itself in a position of virtual ruin.

The standard required should remain high and be more than paper loss or mere inconvience, but should fall short of financial ruin.

C Conclusion

The factors which are relevant in assessing duress can be subsumed under two general headings "illegitimate pressure" and "no practical alternative". Both are necessary in order to find duress.

The court's assessment should begin with an examination of the pressure exerted. If it is an independent tort or crime, then this is enough to find duress and no further inquiry is necessary. If the pressure is a threatened breach of contract or is technically lawful then the court should inquire into the commercial and moral justifiability of the pressure.

If the pressure is found to be illegitimate, then it must also be shown that the party had no practical alternative but to enter the contract. This means that subjectively the party agreed to the lesser of two evils and that objectively he or she had no practical alternative.

Potentially this model does little to satisfy requirements of certainty but the model is more consistent with the nature of duress because it presupposes the existence of a contract and treats duress as a defence. It also focuses on the circumstances surrounding the formation of the contract, not the party's state of mind. In this respect the model better accounts for the approach that the writer maintains the courts are actually taking to duress.

Part IV of this paper will examine the preceding discussion of duress in light if a Law Commission paper on "Unfair Contracts" which aims to codify the common law of duress.

PART IV THE LAW COMMISSION PAPER

A Introduction

In September 1990, the Law Commission released a discussion paper on the law relating to unfair contracts.[80] The paper outlines a scheme which proposes to codify the law relating to duress, undue influence, unconscionability, estoppel and breach of fiduciary duty.[81] The basis of the proposed scheme is that all of these doctrines are united by a common principle of "unfairness," which the scheme aims to embody.[82]

The main justification advanced by the Law Commission for intervention in the area of unfair contracts, is that the development by the courts in this area has been measured and cautious, and has left a degree of uncertainty.[83] This, the Commission argued, conflicts with the basic requirement that the law of contract should be clear, predictable and practical.[84]

This paper has already established that the law of economic duress is extremely uncertain.[85] The courts have failed to enunciate what the actual rationale of the doctrine is, and it is unclear how the factors used are relevant.

The writer concedes that the law of economic duress needs either some form of legislative intervention like the proposed scheme, or a clearer judicial development of the doctrine.

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[80] The New Zealand Law Commission "Unfair" Contracts A Discussion Paper-Preliminary Paper No 11(Wellington,1990).

[81] Above n 80,p 8.

[82] Above n 80,p 48.

[83] Above n 80,p 24.

[84] Above n 80,p 1.

[85] Above Part II C.

Nevertheless, the writer has a number of concerns about the scheme as it stands. If one of the major reasons for codifying is the existence of uncertainty in the law, any scheme which increases that uncertainty is relatively pointless. This paper will demonstrate that some aspects of the proposed scheme will increase or at the very least perpetuate,the existing uncertainty.

The Law Commission also recognised that an important part of the proposal was the need "to avoid injustices."[86] To achieve this, the scheme should at least cover the existing common law doctrine. Clause 15(1) of the proposed scheme states that nothing in the scheme limits or affects the law relating to duress in cases to which the scheme does not extend. This implies that cases which fall outside the scheme, may still be dealt with under the common law doctrine of duress.

This confusion is clarified by explanatory paragraph 133, which states that the proposed scheme is intended to subsume duress insofar as it makes contracts invalid, unenforceable or enables them to be reopened. This makes it clear that none of the common law doctrine will remain.[87]

It is the writer's submission that there are some important differences between the proposed scheme and the common law doctrine that mean that the scheme does not in fact cover the common law.

The fundamental premise on which the scheme is based is more suitable to doctrines such as undue influence and unconscionability than to economic duress. There is therefore a risk that parties with legitimate grievances at common law will not fall within the scheme. The scheme also sets a requires a high standard to be met before duress is found. Some of the provisions will be extremely difficult to satisfy.

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[86] Above n 80,p 32.

[87] See below Part IV B 4 for a possible exception.

B The Proposed Scheme

1 The general test of unfairness

Clause 2 of the proposed scheme sets out a basic test of unfairness. Clause 2 states:[88]

> A contract, or a term of a contract, may be unfair if a party to that contract is seriously disadvantaged in relation to another party to the contract because he or she:...
>
> (b) is in need of the benefits for which he or she has contracted to such a degree as to have no real choice whether or not to enter into the contract; or...
>
> (e) has been induced to enter into the contract by oppressive means, including threats, harassment or improper pressure; ...
>
> and that other party knows or ought to know of the facts constituting that disadvantage, or of facts from which that disadvantage can reasonably be inferred.

This clause initially raises a statutory interpretation problem. It is unclear whether "seriously disadvantaged" is a requirement separate from those in paragraphs (a) to (f), or whether paragraphs (a) to (f) merely establish whether or not the party was severely disadvantaged. It is submitted that the latter interpretation is correct. This is supported by the use of the words "because he or she" in clause 2(a), and by the explanatory note in paragraph 96. The writer suggests that since clause 2 is fundamental to the whole scheme, it should be more clearly drafted.

The scheme intended that paragraph (e) would refer primarily to duress.[89] However the scheme fails to define what is meant by "oppressive means, including threats, harassment or improper

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[88] Above n 80,p 33.

[89] Above n 80,p 35.

pressure." Are all threats to be understood as oppressive and therefore potentially unfair under clause 2? Presumably not if we are not to sacrifice any meaningful concept of freedom of contract. This paragraph calls for judicial interpretation of what constitutes unfairness. It is submitted that the courts' failure to come to grips with this type of interpretation has been at the heart of the problems created by the duress cases. The meaning of unfairness under clause 2(e) will probably be just as uncertain as the meaning of duress at common law.

The Law Commission recognises this problem, but argues that judging necessarily involves uncertainty.[90] The Commission cites the reasonable person test as an example. Nevertheless, it is submitted that clause 2(e) is excessively open-ended, particularly when the use of the word "may" in clause 2 renders the entire proposal discretionary. This is of especial concern when one of the main reasons for codifying is to overcome existing problems of uncertainty. The writer suggests that the scheme should provide better guidance for a court required to interpret clause 2(e).

Paragraph (b) will also be relevant to duress. In all the duress cases to date, the coerced party has allegedly been forced to enter the contract by pressure to withdraw a service or commodity that he or she desperately needs.

Paragraph (b) is problematic because it refers to "no real choice" which is very similar to the overborne will theory. This is supported by the Commission's reference to the fact that "the concept of unfair contracts is part of a wider family of orthodox contract doctrines that are concerned with the reality of a party's consent."[91]

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[90] Above n 80,p 28.

[91] Above n 80,p 6. The writer concedes that a more generous interpretation is that the Commission is using the words "no real choice" in the sense of "no real alternative". If so, then this ought to be made clearer and the standard should be defined. The problem with economic duress is that the victim always has some sort of choice or alternative.

If the Law Commission is basing duress on the overborne will theory, then the writer maintains that the Commission is not simply codifying the law but making a departure from it. It was suggested in Part II of this paper that the courts are not actually relying on the overborne will theory as the basis of duress.

Furthermore, if the Law Commission were to adopt the overborne will theory, it would have to ensure that other aspects of the scheme were consistent with the theory. Duress would have to be viewed not as a defence but as a factor to consider in the actual formation of a contract. Also, the factors considered by the courts would have to be consistent with an examination of a party's state of mind.

The thrust of the Commission's report is that an examination of all the circumstances surrounding the contract may indicate that the contract is unfair. It should therefore be modified or even declared invalid. It is submitted that the approach advocated by the Commission presupposes the existence of a contract and focuses on the circumstances surrounding the formation of the contract, not the party's state of mind. This is not consistent with the overborne will theory. The use of the words "no real choice" will only perpetuate the confusion already created by the courts.

Clause 2 requires that in order to satisfy the general test of unfairness the party exerting the pressure must also know of the facts constituting the disadvantage or of facts from which the disadvantage can be reasonably inferred.

This is essentially analogous to the bad faith or exploitation requirement that the writer suggested was instrumental in the Atlas Express decision. This requirement should be a very strong factor towards finding duress. It should not, however, be a mandatory requirement.[92]

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[92] See for example D & C Builders v Rees [1965] 3 All ER 837, in which Lord Denning MR considered that there was no true accord to the agreement because the creditor had been effectively held to ransom by the debtor's wife, who knew that the creditor was desperately in need of money.

A contracting party will not necessarily know what the other party intends to do with the particular goods or services contracted for. In North Ocean, for example, there was no evidence to suggest that the Yard knew of the time charter to Shell, or of any facts which meant that they should have known.

Similarly in B & S Contracts there was no evidence that the plaintiff knew that the defendants were in a disastrous situation from which there was no way out other than submitting to the plaintiff's demands. Admittedly the plaintiffs ought to have been able to infer that the defendants would have be subject to claims from exhibitors. So the constructive knowledge requirement may be satisfied in this case.

It is quite possible to have "unfairness" in the sense of conduct which is contrary to standards of good conduct in dealing with others,[93] without such knowledge. The risk inherent in making knowledge a mandatory requirement is that once its absence is established, the court cannot inquire into other factors which may indicate unfairness.

As clause 2 stands, it does not cover several of the existing duress cases. It therefore contradicts the Law Commission's stated aim to avoid injustices and to codify the common law. Clause 2 also fails to give sufficient guidance to the courts as to what is meant by unfairness.

2 Professional advice

Clause 3 of the proposed scheme provides that the provision of legal or professional advice is a relevant factor in considering whether or not a contract is unfair.

It will be recalled that the Privy Council in Pao On also considered that this factor was pertinent to duress. The writer suggested that not only is this factor not particularly relevant to duress, but also that the courts have in reality placed little reliance on it.[94]

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[93] Above n 80,p 3.

[94] Above Part II C 2.

It is submitted that clause 3 is illustrative of the fact that the underlying premise of the scheme is the vulnerability of the coerced party. As has already been discussed, duress is not primarily concerned with this type of vulnerability.[95]

3 The result must be unfair

Clause 4 provides that it is not enough that the general test of unfairness is satisfied:[96]

... [A] contract is not unfair unless in the context of the contract as a whole:

(a) it results in a substantially unequal exchange of values: or

(b) the benefits received by a disadvantaged party are manifestly inappropriate to his or her circumstances;....

Explanatory paragraph 103 makes it clear that clause 4 requires that the contract be substantively as well as procedurally unfair.[97] The problem with this is that in most duress cases the party does not receive benefits which are manifestly inappropriate. The coerced party receives benefits that are appropriate to that party's circumstances, benefits that he or she desperately needs. There is therefore no substantive unfairness.

Economic duress is concerned not so much with the result of the contract, but that the way in which the party was forced to enter the contract means that they should not be held to it. Economic duress is really about procedural unfairness.

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[95] Above Part IV, Part II C 2.

[96] Above n 80,p 36.

[97] Above n 80,p 36.

In Atlas Express, it could be argued that the plaintiff was only being required to pay what the carriage services were really worth. The transaction was therefore a perfectly fair exchange of values.

Paragraph 104 states that clause 4 is intended to cover not just cases which are objectively disproportionate, but those cases "which may appear objectively to provide a reasonable exchange of values but which given all the circumstances of one party as known to the other does not".[98] The defendant in Atlas Express was required to pay only a little more per delivery to ensure that deliveries continued. This was absolutely essential to the defendant's commercial survival and therefore extremely valuable.

Simarly in B & S Contracts the defendants had to pay an extra L4 500 to get the exhibition stands built. This was valuable to the defendants who had no alternative source of labour and would otherwise have been exposed to heavy claims from exhibitors.

The scheme requires that the exchange of values be substantially unequal. This requirement sets a high standard of inequality which will make it even more difficult for duress cases to satisfy clause 4.

The effect of clause 4 is ameliorated by the meaning given to "in the context of the contract" in clause 6, which states:[99]

(1) In considering the context of the contract as a whole, the Court may, among other things, take into account the identity of the parties and their relative bargaining position, the circumstances in which it was made, the existence and course of any negotiations between parties, and any usual provisions in contracts of the same kind.

(2) In relation to commercial contracts the court shall take into account reasonable standards of commercial practice.

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[98] Above n 80,p 36.

[99] Above n 80,p 39.

This clause allows the courts to take account of a wide variety of factors in assessing whether or not the result is unfair. This is commendable. Nevertheless there is still an important difference between the common law approach and that advocated by the scheme. If clause 6 is read with clause 4 then it determines whether the result of the contract is unfair in the context of commercial practice. The common law focus is whether the conduct surrounding the contract is reasonable commercial practice.

In a similar fashion to clause 2, clause 4 of the proposed scheme fails to cover the existing duress cases. This is primarily because the underlying premise of the scheme does not focus on the special characteristics of duress.

4 Circumstances judged at the time of the contract

Clause 7 states that whether or not a contract is unfair is to be decided with regard to the circumstances at the time the contract was made.[100]

This means that some of the factors the courts have traditionally relied on will be irrelevant. Under the proposed scheme, the courts will not be able to examine the presence or absence of a continuing protest or of steps to set aside the contract, for example.

There is one important exception. The proposed scheme is intended to subsume the various doctrines as far as they make contracts invalid, unenforceable or enables them to be reopened. Some of the doctrines may however,"have an application and relevance beyond the making and performance of contracts. Moreover some of them...may operate so as to create a binding contractual obligation. The scheme preserves them in those spheres"[101]

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[100] Above n 80,p 39.

[101] Above n 80,p 49.

It is at least arguable that this does not encompass affirmation. Under the common law, affirmation means that a previously voidable contract is now no longer able to be avoided. A binding obligation exists.[102] The writer contends that this process falls outside the proposed scheme.

If, for example, the agreement in North Ocean, was fould to be "unfair", the owners could still be excluded from refief under the scheme by the failure to register a continuing protest.

It is unfair that a party which has established duress should be denied relief in this way.

5 Remedies

Clause 22 is drawn from the Contractual Mistakes Act 1977 and the Credit Contracts Act 1981, and provides wide powers for a court to provide a remedy for an unfair contract. This is an advantage because the flexibility means that courts will be better able to fashion an appropriate remedy.

The writer has a number of concerns on public policy grounds with paragraph (d). This paragraph allows the court to vary the unfair contract. It is submitted that this potentially provides an incentive to a party to make an unfair contract on the basis that all the party risks is that the ensuing contract will be modified.

In terms of public policy it would better if the statutory scheme provided a discentive to form contracts via oppressive means and threats.

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[102] See North Ocean, above n 36.

C Conclusion

With the exception of the reference to "no real choice" in clause 2(b), the Law Commission paper bears little similarity to the way in which the courts have claimed to deal with duress.

The proposed scheme is not based on the overborne will theory but is more similar to the approach that the writer advocates that the courts should be taking to duress.[103] The emphasis of the scheme is on unconscionable conduct which goes beyond normally accepted standards of behaviour.

The writer is in favour of this move. Nevertheless the scheme as it stands creates some problems. Firstly, the scheme fails to fulfill its stated aim of fully codifying the common law.

The fundamental premise of the scheme is more applicable to doctrines such as unconscionability and undue influence. Little thought seems to have been given to the special nature of duress. Duress is concerned with procedural unfairness, so that requirements such as clause 4 sit extremely uneasily with the rest of the doctrine.

The scheme also creates a mandatory knowledge requirement. This factor is not mandatory at common law and sets a standard for establishing duress that the writer considers is too high. Some of the victims in the existing duress cases would not have received relief under the scheme. The writer suggests that the knowledge requirement be separated from clause 2 and redrafted in similar terms to the clause 3. This will emphasise the importance of the factor but not make it a compulsory requirement.

By failing to cover the existing common law, the Law Commission has created a statutory scheme that is unfair to coerced parties.

Furthermore the scheme does little to overcome uncertainty.

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[103] Above Part III.

The nature of the assessment that the courts are required to make is such that any statute can only provide guidelines. Clause 2 fails to give the courts sufficient guidelines as to what constitutes unfairness. This will create as much uncertainty as exists at common law. Something similar to clause 6 should be referenced to clause 2 to overcome this problem. The writer also recommends that the reference to "no real choice" be eliminated from clause 2(b). This could be done without destroying the meaning of the paragraph.[104]

Although a statutory scheme can provide guidelines to the courts, it is still dependent on the courts enunciating the actual policies and purposes underlying the doctrine. The courts have not done this in the past, and there is little reason to suppose that a statutory framework could bring this about.

Economic duress has only really been developed within the last twenty years. The writer suggests that the courts be given a little longer to develop duress within the flexibility of the common law. Such an approach will render a codification either more successful or even unnecessary.

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[104] It could be replaced for example with "no practical alternative course of action".

PART V CONCLUSION

This paper has shown that the common law of duress is extremely unclear. The courts have failed to sufficiently define either the true nature of the doctrine or its application.

The writer advanced an alternative model of dealing with duress. This model was not based on the overborne will theory. Instead, it was based on a wider examination of the circumstances in which it is morally and commercially justifiable to put another in a position where he or she has no practical choice but to enter a contract. It was suggested that this model was more consistent with the approach the courts are actually taking to duress than is the overborne will theory. A close examination of the cases shows that the courts are not in fact looking at a party's state of mind. Instead the courts are tending to focus on external factors surrounding the formation of the contract.

The last part of this paper examined a Law Commission proposal to codify economic duress. The Law Commission argued that codification would be fairer and more certain than the common law. The writer suggested that the proposed scheme failed to give sufficient guidelines to courts considering duress cases. This is likely to perpetuate or even increase the current confusion. The proposed scheme significantly departs in several respects from the common law. This means that a number of parties with legitimate grievances at common law will not receive any relief under the scheme. This is manifestly unfair.

Economic duress is a fact-based doctrine. It is therefore inherently uncertain. No codification or model of duress can totally overcome this. But economic duress will become more certain when the courts start stating the purposes and policies underlying the doctrine. A codification cannot force this to occur, although it can assist it by providing an appropriate framework. In this respect the Law Commission proposal also fails.

The writer recommends that either the Law Commission scheme be changed to make it more suitable for duress, or the courts be given a little longer to develop the doctrine within the flexibilty of common law.

APPENDIX A: TABLE OF CASES

Atlas Express Ltd v Kafco (Importers and Distributors) Ltd [1989] 1 All ER 641.

B & S Contracts & Design Ltd v Victor Green Publications Ltd [1984] ICR 419

Barton v Armstrong [1976] AC 104.

Countrywide Banking Corporation Ltd v Fuller Unreported, 6 December 1990, High Court Palmerston North Registry, CP 87/90.

Lynch v DPP of Northern Ireland [1975] AC 653.

Mann v Buxton Unreported, 31 July 1990, Court of Appeal, CA 49/90.

Moyes & Groves v Radiation New Zealand Ltd [1982] 1 NZLR 368.

North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd and Another [1979] 3 All ER 1170.

Occidental Worldwide Investment Corp v Skibs A/S Avanti,Skibs A/S Giarona, Skibs A/S Navalis (The Siboen and The Sibotre) [1976] 1 Lloyd's Rep 293.

Pao On and Others v Lau Yiu Long and Others [1980] AC 614.

Shivas v Bank of New Zealand [1990] 2 NZLR 327.

Walmsley v Christchurch CC [1990] 1 NZLR 199.

Universe Tankships Inc of Monrovia v International Transport Workers Federation and Others [1983] AC 366.

APPENDIX B: BIBLIOGRAPHY

Atiyah P S "Duress and the Overborne Will Again" (1983) 99 LQR 353.

Atiyah P S "Economic Duress and the 'Overborne Will'"(1982) 98 LQR 197

Birks P "The Travails of Duress"(1990) LMCLQ (?) 342.

Carty H & Evans A "Economic Duress" (1983) J Bus L 218.

Chandler PA "Economic Duress: Clarity or Confusion" (1989) LMCLQ 270.

Chitty on Contracts:General Principles (26 ed, Sweet and Maxwell, London,1989).

Coote B "Duress By Threatened Breach of Contract" (1980) 39 CLJ 40.

Cranston R "Commerce,The Common Law and Morality"(1989) 17 Melb ULR 87.

Greig DW & Davis JLR The Law of Contract (The Law Book Company Ltd,Sydney,1987).

Guest AG (ed) Anson's Law of Contract (26 ed,Clarendon Press,Oxford,1984).

The New Zealand Law Commission "Unfair" Contracts A Discussion Paper-Preliminary Paper No 11 (Wellington,1990).

Ogilvie MH "Wrongfulness,Rights and Economic Duress" (1984) 16 Ottawa L R 1.

Ogilvie MH "Economic Duress, Inequality of Bargaining Power and Threatened Breach of Contract" (1981) 26 Mcgill L J 288.

Phang A "Whither Economic Duress? Reflections on Two Recent Cases" (1990) 53 MLR 107.

Rafferty N "Contractual Variations:Consideration and Duress" (1980) 18 Osgoode Hall LJ 627.

Stewart A "Economic Duress- Legal Regulation of Commercial Pressure"(1984) 14 Melb ULR 410.

Tiplady D "Concepts of Duress"(1984) 99 LQR 188.