

Entering a Contract at Will: a Critical Analysis of the Principles Governing Duress

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Abstract— For the purpose of forming a valid contract, the parties to a contract must have entered in to it with their own free will. The element of free will is a fundamental component of a legally valid contract and a basic principle in law of contract. Elements which can make a contract void or voidable are known as vitiating elements. If the act of entering in to the contract is corrupted by duress to person or goods, economic duress or undue influence, a contract will become voidable. A voidable contract will bind the both parties to contract unless one party repudiates it. Historically the scope of the common law concept of duress was extremely limited and could be pleaded only in circumstances where the last result was obtained as a result of exerting unlawful force or threats of unlawful force against the person of the other contracting party. Later, over the years, the doctrine of duress was formulated and widened in its ambit to deal with duress to goods and economic duress as well. The objective of this research is to distinguish the applicable principles in the relevant area which demands a clearer exposition. This research will be conducted through a review of primary sources viz. case law, and secondary sources viz. books with critical analysis, law journals and conference papers. The study concludes that the parameters of the concept of economic duress have not been made as yet and the ambiguity exists with regard to duress of goods. It is recommended that a clear set of guidelines which allow considerations of connected factors should be developed when deciding cases of economic duress, although a demand for a value judgement to some extent is unavoidable and a proper authority should be developed with regard to duress of goods that can determine the instances in which a remedy would be permitted by law.

Keywords— to person and goods, Economic Duress, Law of Contract

I. INTRODUCTION

A contract is an agreement which produces legally identifiable obligations between the contracting parties and such a contract is capable of being legally enforced (Honore, Newman and McQuoid-Mason, 1978). Peel and Trietel, (2011), mark a distinction between contractual and legal obligations as “the factor which distinguishes

contractual obligations from other legal obligations is that they are based on the agreement of the contracting parties” (Peel and Trietel, 2011, p2).

For the purpose of forming a valid contract, the parties to it must have entered in to it with their own free will. The element of free will is a fundamental component of a legally valid contract and a basic principle established in law of contract. Elements which can make a contract void or voidable are known as vitiating elements such as misrepresentation, mistake, duress and undue influence. If the voluntariness of entering into a contract is disturbed by duress to person, economic duress or undue influence, a contract will become voidable. A voidable contract will bind the both parties to a contract unless one party repudiates it.

The concept of duress, concerns situations in which contracts are entered in to by parties following a threat. Historically the scope of the common law doctrine of duress was extremely limited and could be pleaded only in circumstances where the last result was obtained as a result of exerting unlawful force or threats of unlawful force against the person of the other contracting party. As a consequence, equity developed the doctrine of undue influence which is wider in scope, to fill the gaps in law. However, over the years, the doctrine of duress was further widened in its ambit to deal with duress to goods and economic duress as well. As demonstrated by case law, a precise line marking a distinction between undue influence and duress is hard to be drawn (*Lawler v Speaker* [1969]). Some are of the view that these doctrines cannot be segregated and that the concept of undue influence constitutes a form of duress (*Trigg v Trigg* [1993]). In the case *Trigg v Trigg* [1993], the Supreme Court of Mexico, opined that it is impossible to mark an accurate line where one doctrine starts and the other ends.

II. RESEARCH PROBLEM

The area of the doctrine of duress is not completely free from doubt. Particularly the concept of economic duress

remains unclear despite its application in thousands of cases and is in need of a clearer exposition. The doctrine needs to be critically analysed for the purpose of distinguishing the principles calling for further clarifications.

III. METHODOLOGY

The researcher followed the traditional black letter approach to conduct this research. Since these concepts have been developed by judges over the years, in the absence of a statutory framework to regulate the area, case law was subjected to extensive scrutiny with an emphasis placed upon the gradual evolution of the doctrine. Qualitative data was collected through a review of primary sources viz. case law, and secondary sources viz. books with critical analysis, law journals and conference papers. The focus of this research is limited to the operation of the principles governing the relevant doctrines in English law which is considered a part of the Contract Law in Sri Lanka.

IV. EVOLUTION OF THE DOCTRINE OF DURESS

A. The traditional doctrine

Traditionally the concept of Duress developed as a creature nurtured by common law. The concept was later widened in its scope and could be arranged in to three categorized namely duress of the person, duress of the goods and economic duress. In early stages of English law, the doctrine was subjected to quite narrow interpretation where it merely indicates actual or threatened physical violence to the person of a party to a contract (*Barton v Armstrong* [1976]). When a contracting party makes a decision to enter into a contract following such violence, it is recognized as duress of person. The threats relevant in this case are those which give rise to fear of loss of life, harm to the body or fear of being imprisoned. This fear can be caused in respect of the contracting party or against a close relative of the party such as spouse and children.

The effect of a contract being tainted with duress is that it becomes voidable and the party that exercised duress will be obliged to pay damages for the purpose of restitution of the aggrieved party. In circumstances where the aggrieved party decides to continue with the contract, damages will be awarded in respect of any losses resulted from duress.

B. Duress of goods

The restricted scope of the traditional concept of duress had been subjected to strong criticism and was later disapproved since it proved to be unsuccessful in giving due consideration to the results following other forms of illegitimate conduct and threats. As demonstrated by early English cases in the area of duress, rationale for not identifying duress of goods in the early stages was that the expectation that a reasonable person may have the capacity to resist any pressure exercised in respect of goods in contrast to duress of person since the goods are not irreplaceable and any loss can be rectified through monetary compensation (Peel and Trietel, 2011, p2). Parke B. stated in *Atlee v. Blackhouse* [1838] "in order to avoid a contract by reason of duress, it must be duress of a man's person and not of his goods". As pronounced in *Skeate v Beale* [1841], any person is expected to exercise a normal degree of steadiness and therefore, the fear arises in respect of goods cannot be considered sufficient to deprive anyone of their free will.

Nevertheless, with the development of law and economy, this standpoint was identified as unreasonable and was rejected for the first time in the case *Occidental Worldwide Investment Corporation v Skibs (The Sibeon & The Sibotre)* [1976] in which Kerr J., analysed the effect of duress to goods with the example of having someone compelled as a result of threat to burn down his house. Following this approach number of cases including *Universe Tankship of Monrovia v International Workers Federation* [1983] continued to extensively analyse the concept.

C. Economic Duress

The scope the doctrine of duress was extended over the years and initially *Occidental Worldwide Investment Corp v Skibs* [1976] decision accepted illegitimate business compulsions which pose an adverse effect on the financial eudemonia of a person as one of the grounds based on which a contract can be vitiated. Further, in the 18th century case, *North Ocean Shipping Co Ltd v Hyundai Corporation Co* [1979], threats to breach a contract were recognized as constituting economic duress. This doctrine was further evolved following cases such as *Dimskal Shipping v International Works Federation (The Evia Luck)* [1992] and *Universe Tankship of Monrovia v International Workers Federation* [1983] where the courts recognized that economic pressure will constitute duress when such

pressure is not legitimate and has been a basic factor that made the aggrieved party enter into the contract.

The doctrine has played a vital role in construction cases as well (Krol, 1993). For instance, in the case *Carillion Construction Ltd v Felix (UK) Ltd* [2001] decided in 2001, the court thoroughly instituted the doctrine of economic duress in the area. Further, the courts formulated the device for policing renegotiation of contracts through a broad analysis of the doctrine, in another construction case, *Williams v. Roffrey Brothers* [1991].

V. DISCUSSION AND ANALYSIS

Analysis of cases in this area demonstrates that compulsion, economic duress and commercial pressure overlap and are clearly interconnected. As specified by Lord Diplock in *Universe Tankships of Monrovia v International Workers Federation* [1983] mentioned that "Commercial pressure in some degree, exists whenever one party to a commercial transaction is in a stronger bargaining position than the other party." Kerr J. in the *Siboen* [1976] and Mocatta J., in *North Ocean Shipping Co Ltd v Hyundai Corporation Co* [1979] recognized commercial pressure as a ground which can amount to duress that operates as a ground for vitiation of a contract.

Yet, in the case, *Pao On v Lau Yiu Long* [1980], the judges stated that commercial pressure cannot be considered as duress in the absence of vitiation of consent. Later, in *Universe Tankships of Monrovia v International Transport Workers Federation* [1983], courts replaced the element of vitiation of consent with the compulsion of will which refers to the absence of a choice. However, in *Pao* [1980] Lord Scarman recognized the possibility of considering unreasonable use of strong bargaining position, that is commercial pressure short of duress as a basis for repudiating a contract and identified this issue as a question of both degree and fact.

The Courts are hesitant to intervene in commercial matters and repudiate contracts, mainly to respect the idea of contractual freedom, except in most serious factual circumstances. The act of dismissing the 'strong bargaining position' in *Pao* [1980] resulted from the issue of avoiding the contract. Nevertheless in the modern day context, an aggrieved party generally does not seek to avoid contracts but merely seek to reverse unjust enrichment of the defendant (*CTN Cash and Carry Ltd v Gallagher Ltd* [1993]).

When considering the issue of proving economic duress, the cases decided so far do not provide a clear picture and the position of law with regard to this area remains unsettled. However, decided cases seem to suggest that the elements to be proved for the purpose of establishing economic duress are not much different from those which required to be proved in cases of duress to person.

As elaborated by Lord Scarman in *Universe Tankships* case [1983], two elements are to be fulfilled namely the illegitimacy of the pressure and the compulsion of the will that denotes absence of choice which make the coerced party run out of any other option than to comply with the demand. When deciding whether there has been an absence of choice, the court will take into account the facts of the each case as there are no specific criteria to look at. A compulsion of will does not merely refer to complete absence of alternatives but to the absence of a reasonable alternative. Consequently, an aggrieved party will be granted relief by law based on duress only in the event such party did not fail to resort to the reasonable alternatives. As indicated by *Hennessy v Cragmyle* [1986], a less tempting alternative may be considered as a reasonable alternative. In *Hennessy*, a failure to pursue an available statutory remedy disqualified the aggrieved party from establishing duress.

As elaborated in the case, *Atlas Express Limited v Kafco Limited* [1989] the matter to be decided most of the time is whether the threat can be characterized as serious. Whether the threat is illegitimate, majorly depends on the manner how the aggrieved party viewed the possible consequence of not abiding by the duress when exercised. Nevertheless, accepting the existence of duress when the victim has no choice than to comply with the compulsion, had been viewed by many, as an unfitting position which can result in commercial chaos (Stewart, 1984). Rather than depending on the victim's standpoint, concentrating on the coercer's outlook, and thereby assessing the justifiability of using the pressure in the context in which it has been used, is argued to bring more satisfactory results (Stewart, 1984). Further, Rafferty (1980) views that assessing the purpose of the coercer can decide the legitimacy of the threat.

A free market system accepts existence of legitimate commercial pressure (Stewart, 1984). Therefore, marking a clear distinction between legitimate commercial pressure and the illegitimate commercial pressure is

crucial. In the New Zealand case, *Equiticorp Finance Ltd (in liq) v Bank of New Zealand* [1983] the ultimate danger of making the remedy for economic duress readily available, in situations where the contracting parties have equal bargaining power has been recognized.

In *Adam Opel GmbH v Mitras Automotive* [2007], as stated by Donaldson J., the elements to be given consideration when determining whether the pressure exercised in a case is legitimate or not, are not well settled and not exhaustive. He further stated that making of a value judgement is unavoidable when deciding whether the exerted pressure has exceeded the limit of common and general commercial pressure.

Another noteworthy point is the absence of unequivocal judicial agreement as to the requirement of the presence of an illegal threat to establish duress. , although not common, a conduct which is not unlawful sometimes can amount to illegitimate pressure. As stated by Steyn L.J., in the case, *CTN Cash and Carry Ltd v Gallaher Ltd* [1993] p.719,

“Goff and Jones, “The Law of Restitution”, third edition, at p. 240, observed that English courts have wisely not accepted any general principle that a threat not to contract with another, except on certain terms, may amount to duress. Outside the field of protected relationships, and in a purely commercial context, it might be a relatively rare case in which “lawful-act duress” can be established. And it might be particularly difficult to establish duress if the defendant bona fide considered that his demand was valid. In this complex and changing branch of the law I deliberately refrain from saying “never”.

As suggested by Lord Scarman in *Universe Tankship* [1983] nature of the act or the omission threatened by the coercer, will decide the legitimacy of the pressure. In this context, a threat made by a person to do something, he/she has a legal right to do would never amount to duress. Nevertheless, in some cases, a threat to something clearly lawful, can make the threat illegal as a result of the circumstances of the demand. A case of blackmail can provide a sound example for this. Therefore, concentrating on the illegality and the legality of the threatened act or omission will form an artificial barrier which produces absurdity. Analysis of the decisions in *Smith v. Charlick* [1956] and the *White Rose Flour Milling Co Pvt Ltd v Australian Wheat Board* [1944] will further support this argument. Further, the court

should have freedom to accept, in appropriate circumstances, the legitimacy of pressure regardless of its unlawful nature.

The standard of the test of causation applicable to economic duress cases, is low when compared to cases that deal with duress to person as a result of the public policy reasons. In economic duress cases the ‘but for’ test which indicates a low hurdle, has been recognized by the courts as the most appropriate since it is the same test applicable in cases of mistake and misrepresentation as well. Mance J. in *Huyton SA v Peter Cremer GmbH* [1999], suggested that “but for test’ should be the minimum standard when considering causation in economic duress cases and further stated that the pressure exerted must have been a decisive factor. He further stated that “[T]he illegitimate pressure must have been such as actually caused the making of the agreement, in the sense that it would not otherwise have been made either at all or, at least, in the terms in which it was made” (*Huyton SA v Peter Cremer GmbH* [1999] P.681). It should be noted that, this involves an assessment of the mentality of the victim which can further lead to a subjective judgement which can produce more uncertainty in the area.

VI. FINDINGS AND RECOMMENDATIONS

Distinction between commercial pressure and economic duress is a question of degree. The concept of economic duress is well defined in general terms, yet the parameters of the doctrine remain unclear. Due to the relatively recent origin of the concept, several aspects of economic duress still continue to be ambiguous. The doctrine is indeterminate and it should be applied in the light of the varying circumstances of each individual case. This results in having countless contributing factors to be subjected to consideration when offering a remedy. Although case law, over the years has established imprecise set of principles, in the absence of a clearer standard or at least a precise set of guidelines, judicial decisions may continue to lack consistency and thereby fail to provide certainty in the area.

The aim of a test in this context is to decide whether there has been an absence of genuine consent when entering or when modifying a contract. Further when distinguishing legitimate and illegitimate pressure, developing a scientific criteria to measure internal consent is impractical. However, clear guidelines to be considered when examining the exterior criteria for the above purpose can be a practical option. The operation

of solely intuitive justice, when deciding the relevancy of the factors is risky and rather a comprehensive articulated set of principles should be developed. Limits of the doctrine of economic duress are determined principally based on policy grounds. However, it is recommended that, for the benefit of cases that may arise in future, a clear set of guidelines which allow considerations of connected factors should be developed by the courts, although a demand for a value judgement to some extent is unavoidable.

Similar to the ambiguity that exists in some areas of economic duress, in cases of duress to goods, no precise guidelines exist. What can be merely stated is that, if a set remedy is to be established by law in relation to duress of the goods, it should be narrower and must be based upon a much more limited basis than the cases which involve duress of the person. Therefore, it is recommended that a proper authority should be developed to decide, what kind of instances would provide the basis depending on which a law would allow a remedy.

Another major difficulty exists in this area is lack of awareness among laymen with regard to these fundamental concepts of Law of Contract. One may enter into a contract following duress and not be aware of the remedies the law can provide. Therefore it is recommended that these standards which promote contractual free will and principles governing these common law concepts should be enshrined in Codes of Business Conducts and Ethics as far as possible.

VII. CONCLUSION

The doctrine of duress operates as a vitiating factor that can render a contract invalid in law. The doctrine involves cases where a party to contract takes unjustifiable advantage of the other party. What permits interference of courts in the area of duress is the fact that this violates the fundamental principle of Contract Law. As established by case law, when the intention to enter in to a contract is stimulated by a mode which is unlawful, the law will forbid the contract to stand [*Royal Bank of Scotland plc v. Etridge* (No.2) [2001]. Existence of a threat, real or veiled is a mandatory requirement in cases of duress and in cases where duress is present, person or persons whose rights are infringed act in a manner that he or they would not have acted normal circumstances.

Compared to economic duress and duress to goods, the traditional concept of duress to person is more straightforward. The concept of economic duress as explained above lacks well defined and set parameters. The contemporary legal framework regarding economic duress is not free from ambiguity and is based on intuitive justice. Any approach based on value judgement to distinguish legitimacy and illegitimacy of pressure can produce confusion. In the same manner the doctrine of duress to goods has in its scope ambiguous areas as well. It can be concluded that although the economic duress and duress to goods within of the general concept of duress are defined well in general terms and are strongly established in the law of contract, they demand a clearer interpretation and refinement. Although setting up sharply exact criteria to decide what is commercially moral is impractical, guidelines, precise to at least some extent, are needed in areas that lack clarity.

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