

ECONOMIC DURESS — LEGAL REGULATION OF COMMERCIAL PRESSURE

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[The exertion of commercial pressure to secure payments and contracts has long concerned the courts. In this article Mr. Stewart examines recent English decisions heralding the emergence of a doctrine of economic duress. He traces its development, particularly in Australia, and suggests an analysis of its elements.]

The recent decision of the House of Lords in *Universe Tankships Inc. of Monrovia v. International Transport Workers Federation and Others*¹ has provided the first unequivocal example in an English court of a successful claim to recover money on the ground of 'economic duress'.² It is proposed in this article to review briefly the development of the economic duress claim and to attempt an analysis of the factual elements required for such a claim to be successful. Some effort will be made to explain the complex interplay of those elements and to suggest a direction for future development of the law. This discussion inevitably concentrates on the most common form of economic pressure, the application of 'commercial pressure' as between persons carrying on business. Nevertheless pressure may be applied to another's economic interests in other contexts. *Universe Tankships* itself involved the application of economic pressure through the threat of industrial action. As the availability of economic duress claims in the industrial relations sphere raises particular problems and involves policy considerations of a somewhat different nature to the use of pressure in the commercial context, it is not proposed at present to discuss the role of economic duress in this area.³

1. THE DEVELOPMENT OF ECONOMIC DURESS

Before 1976 an orthodox statement of the English law of duress would have stressed that, leaving aside cases of duress by public authorities,⁴ wrongful use of economic pressure by D would not allow the victim, P, to recover in quasi-contract money paid under such pressure or to avoid a contract with D procured

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¹ [1982] 2 W.L.R. 803.

² See generally Dawson J.P., 'Economic Duress — An Essay in Perspective' (1947) 45 *Michigan Law Review* 253; Beatson J., 'Duress as a Vitiating Factor in Contract' (1974) 33 *Cambridge Law Journal* 97; Sutton R. J., 'Duress by Threatened Breach of Contract' (1974) 20 *McGill Law Journal* 554; Ogilvie M. H., 'Economic Duress, Inequality of Bargaining Power and Threatened Breach of Contract' (1981) 26 *McGill Law Journal* 289.

³ *Universe Tankships* appears to be the first English (or Australian) case involving duress in the context of collective (as opposed to individual) industrial relations: although see now *B. & S. Contracts and Design Ltd v. Victor Green Publications Ltd* [1982] I.C.R. 654. Such cases are however not unknown in the U.S.A.: see *Williston on Contracts* (3rd ed., 1970) §1617A.

thereby.⁵ Specifically, it was considered that a threat by D to break his contract with P could not in law amount to duress. Apart from duress to the person and abuse of legal process the only other form of duress known to English law was duress of goods. This was established where D unlawfully seized or detained or threatened to seize or detain goods rightly belonging to P. If P could prove a 'pressing necessity' for the goods then there lay an action for money had and received to recover money paid to secure their release.⁶ However in several cases, notably *Skeate v. Beale*⁷ and *Atlee and others v. Backhouse*⁸ it was stated that duress of goods was not a ground for invalidating a contract to pay money for the release of the goods.⁹ Thus if D obtained a payment of money from P to secure the return of the goods, then P could bring an action to recover it; whereas if in the same situation D provided legally sufficient consideration for the payment, so as to create a contract, or validly vary an existing one, P could not recover.

This distinction between payments and agreements to pay was, at least in recent years, roundly condemned as artificial and unjustified.¹⁰ It was not until 1976, however, that the distinction was rejected and agreements to pay placed on the same footing as payments. In a series of cases it was firmly established that the limits of the court's ability to give relief for duress do not lie along the boundaries of consideration. However, in reaching this conclusion, the courts went further. It was recognised that relievable duress was not limited to duress to the person or duress to goods but included 'economic duress' or 'business compulsion'. In particular, it was accepted that a threat of a breach of contract might amount to duress.

The first of the series of cases was *The Siboen and The Sibotre*.¹¹ The owners of a ship agreed to vary the charter rates under an existing contract because of the charterers' representation that they would otherwise go bankrupt. The owners later sought to avoid the renegotiated terms, and ultimately succeeded on the basis of fraudulent misrepresentation. However Kerr J. also considered the owners' alternative submission that the terms were voidable for duress. In so doing he

⁴ It is not proposed to deal with claims against public authorities, except where such cases have obviously been treated on the same basis as claims against private individuals. Generally, as to restitution of payments made to public authorities, see Goff R. G. and Jones G., *The Law of Restitution* (2nd ed., 1978) 171-6; Birks P.B.H., 'Restitution from Public Authorities' [1980] *Current Legal Problems* 191; *Mason v. N.S.W.* (1959) 102 C.L.R. 108.

⁵ Attention will be confined in this discussion to these claims, for the simple reason that they are the most common. Also, if property is supplied under duress title does not usually pass, so that the owner has the usual remedies in tort, with a *quantum valebat* (claiming the value of the goods) as a possible alternative. If services are rendered as a result of duress there will have been a request for them by the person applying the duress, and therefore a *quantum meruit* will lie for payment of reasonable remuneration. See Goff R. G. and Jones G., *op. cit.* 161.

⁶ See e.g. *Astley v. Reynolds* (1731) 2 Str. 915; *Somes v. British Empire Shipping Co.* (1860) 8 H.L.C. 338; *Maskell v. Horner* [1915] 3 K.B. 106. For an Australian example, see *Baldwin v. Elliott* (1854) 2 Legge 868.

⁷ (1841) 11 Ad. & E. 983.

⁸ (1838) 3 M. & W. 633.

⁹ See also *Liverpool Marine Credit Co. v. Hunter* (1868) L.R. 3 Ch. App. 479. Cf. *Tamvaco v. Simpson* (1866) L.R. 1 C.P. 363.

¹⁰ See especially Beatson J., *op. cit. passim*; Goff R. G. and Jones G., *op. cit.* 169-170. The point has never been settled in Australia as, with a single exception, none of the Australian cases involved agreements to pay: see *infra* at n. 44 ff., pp. 417 ff.

¹¹ [1976] 1 Lloyd's Rep. 293; Beatson J., 'Duress by Threatened Breach of Contract' (1976) 92 *Law Quarterly Review* 496.

rejected a submission by the charterers' counsel that a contract could only be set aside for duress to the person. He distinguished *Skeate v. Beale* and the other authorities relied on to support the distinction between payments and agreements to pay as cases where the agreement in question was to be regarded as having been concluded voluntarily.¹² He added that in cases where payments had been successfully recovered it would not 'have made any difference if the defendants in these cases had also insisted on some purely nominal but legally sufficient consideration'.¹³ Furthermore he rejected the proposition that 'English law only knows duress to the person and duress to goods'.¹⁴ However, in so far as he felt English law was 'open to further developments in relation to contracts concluded under some form of compulsion not amounting to duress to the person', he stressed that 'the Court must in every case at least be satisfied that the consent of the other party was overborne by compulsion so as to deprive him of any animus contra-hendi'.¹⁵ In the result he held that the duress argument failed. He noted that there was no protest by the ship's captain (as agent for the owners) and that the captain all along regarded the agreement as binding. Kerr J. therefore concluded that, although the captain was acting under great pressure, it was 'only commercial pressure and not under anything which could in law be regarded as a coercion of his will so as to vitiate consent'.¹⁶

The next important step was taken in *North Ocean Shipping Co Ltd. v. Hyundai Construction Co and another, The Atlantic Baron*.¹⁷ The defendants agreed to build a tanker for the plaintiffs and it was agreed that the price, which was fixed in U.S. dollars, should be payable in five instalments. The contract required the defendants to open a letter of credit to provide security for repayment of instalments in the event of any default in performance. After the first instalment had been paid the U.S. dollar was devalued by 10%, whereupon the defendants claimed to increase the last four instalments by that amount. The plaintiffs were advised that there was no legal basis for such a claim and rejected it. The defendants then threatened to terminate the contract if their claim was not recognised. The plaintiffs, who had meanwhile secured an advantageous agreement to charter the tanker and were anxious to fulfil it, now agreed to pay the extra 10% without prejudice to their rights and requested the defendants to increase the letter of credit. The plaintiffs paid the remaining instalments and took delivery of the tanker. Eight months later the plaintiffs claimed to recover the excess 10% on the last four instalments, contending either that the agreement to pay it was void for lack of consideration and the excess recoverable as money had and received, or that it was voidable, having been made involuntarily under economic duress.

Mocatta J. held that the agreement to pay the excess was supported by consideration in the form of the defendants' promise to increase the letter of credit.

¹² *Ibid.* 335. See Beatson J., *op. cit.* n. 2 100-106, and *infra* at nn. 38-46, pp. 433 ff.

¹³ *Ibid.* 336.

¹⁴ *Ibid.* 335.

¹⁵ *Ibid.* 336.

¹⁶ *Ibid.*

¹⁷ [1978] 3 All E.R. 1170; Coote B., 'Duress by Threatened Breach of Contract' (1980) 39 *Cambridge Law Journal* 40; Adams T., 'Contract Law at Sea? North Ocean Shipping Co. Ltd. v. Hyundai' (1979) 42 *Modern Law Review* 557.

Nevertheless he accepted the plaintiff's contention that this agreement was voidable for economic duress, based on the threat to terminate (unlawfully) the contract. He found no difficulty in concluding that the plaintiffs had been compelled by this threat to agree to pay the excess. However, he denied any relief, holding that the plaintiffs had by their conduct affirmed the contract.¹⁸

In the course of his judgment Mocatta J. reviewed the authorities and agreed¹⁹ that 'compulsion' 'includes every species of duress or conduct analogous to duress, actual or threatened, exerted by or on behalf of the payee and applied to the person or the property or any right of the person who pays'.²⁰ He concluded that such compulsion might take the form of 'economic duress' and that a threat to break a contract might amount to such duress. Like Kerr J., he rejected the limitation that a contract could not be avoided for duress other than to the person.²¹

In *Pao On v. Lau Yiu*²² the Privy Council had occasion to consider the effect of these two decisions. Lord Scarman, delivering the Board's judgment, stated that 'there is nothing contrary to principle in recognising economic duress as a factor which may render a contract voidable'.²³ The facts involved a complex share transaction in which the defendants claimed that their consent to a guarantee based on an earlier contract between themselves and the plaintiffs had been vitiated by economic duress — specifically by the plaintiffs threatening to break their original contractual obligations. The Privy Council dismissed the claim, holding, as Kerr J. had done in *The Siboen*, that there had been commercial pressure but no coercion; the trial judge's finding, that the defendants had 'considered the matter thoroughly, [chosen] to avoid litigation and formed the opinion that the risk in giving the guarantee was more apparent than real', was upheld.²⁴

With the groundwork thus laid, it was only a matter of time before an economic duress claim came before the House of Lords. In *Universe Tankships Inc. v. International Transport Workers Federation*²⁵ the plaintiffs owned a Liberian-registered ship which docked at a U.K. port without a 'blue certificate'. This is a certificate issued by the defendant union (the I.T.F.) and exempting a ship from I.T.F. blacking in pursuance of its policy of improving wages and conditions for crews on ships flying flags of convenience. (This philanthropic aim is of course ultimately designed to prevent such crews undercutting I.T.F. members, whose wage rates tend to be a great deal higher and therefore far less attractive to the average unscrupulous shipping company.) The plaintiffs' ship was blacked in the usual way, port workers refusing to service the ship with tugs and thus preventing it leaving. The plaintiffs negotiated with the I.T.F. and eventually agreed to its demands. These included a demand for a payment to the I.T.F.'s Welfare Fund,

¹⁸ See *infra* at n. 51, p. 436.

¹⁹ [1978] 3 All E.R. 1170, 1182.

²⁰ *Smith v. William Charlick Ltd.* (1923) 34 C.L.R. 38, 56 *per* Isaacs J. (Italics added)

²¹ [1978] 3 All E.R. 1170, 1180-2.

²² [1979] 3 W.L.R. 435; Coote, B., 'Duress by Threatened Breach of Contract' (1980) 39 *Cambridge Law Journal* 40; England G. and Rafferty N., (1980) 18 *Osgood Hall Law Journal* 627.

²³ *Ibid.* 451. See *Alec Lobb (Garages) Ltd. v. Total Oil Great Britain Ltd.* [1983] 1 W.L.R. 87, 93.

²⁴ *Ibid.* 450.

²⁵ [1982] 2 W.L.R. 803; Wedderburn K. W., Economic Duress (1982) 45 *Modern Law Review* 556; Sterling M. J. 'Actions for Duress, Seafarers and Industrial Disputes' (1982) 11 *Industrial Law Journal* 156.

which had been established to assist seafarers around the world, particularly those serving on flag of convenience ships. The blacking was lifted and the ship left port. Twelve days later the plaintiffs commenced proceedings against the I.T.F. When the action reached the House of Lords the claim was to recover the money paid to the Welfare Fund as money had and received, the plaintiffs contending that it had been paid under economic duress.

It was conceded before the House that the plaintiffs had been compelled to make the payment. The only issue was whether the economic pressure applied by the I.T.F. was 'illegitimate' pressure, so that it amounted in law to economic duress against which the court would grant relief. The House held by a majority that the pressure was not 'legitimate' and that the plaintiffs could recover their money.

The decision must be seen against the background of the statutory immunities system which operates in the U.K. Briefly, the system seeks to prevent unions, their officials and their members from becoming liable for certain types of industrial action. Unlike the position under the various State systems in Australia,^{25a} there are in general no penal sanctions attached to the use of the strike weapon. Rather, employers will seek to impose liability in one of the 'economic torts'²⁶ on those engaged in industrial action and thus obtain damages or, more commonly, an injunction to restrain the action. Given the fact that almost all industrial action is, in one way or another, tortious,²⁷ it has been regarded as necessary since 1906 to grant immunity from such liability in certain circumstances. As things stood when these facts occurred the relevant immunity provided that 'an act done by a person in contemplation or furtherance of a trade dispute shall not be actionable in tort on the ground only' that it amounted to one of the various economic torts.²⁸ In the present case there was no doubt that the I.T.F. officials, in procuring the blacking of the plaintiffs' ship, had threatened to induce breaches of the tugmen's contracts of employment and thus committed the tort of intimidation. An earlier decision of the House of Lords had indicated that the officials were protected.²⁹ But that protection exists only against actions in tort, and thus there was no direct relevance to the plaintiffs' action, which was of course a restitutionary action to recover money had and received.

Nevertheless the House was not content to ignore the statutory protection and hold that the I.T.F.'s actions amounted to 'illegitimate pressure' because they were tortious, albeit perhaps not actionable as such. Their Lordships unanimously

^{25a} See Sykes E. I., *Strike Law in Australia* (2nd ed., 1982), ch. 7.

²⁶ See generally Clerk & Lindsell on Torts (15th ed., 1982), ch. 15; Heydon J. D., *Economic Torts* (2nd ed., 1978).

²⁷ This is particularly so since the development of the tort of intimidation in *Rookes v. Barnard* [1964] A.C. 1129 and the application, suggested in *Torquay Hotel Co. Ltd. v. Cousins* [1969] 2 Ch. 106 and now confirmed by the House of Lords in *Merkur Island Shipping Corp. v. Laughton* [1983] 2 W.L.R. 778, of the tort of inducing breach of contract to a situation where there is merely interference with the performance of contractual obligations. The development of the tort of 'unlawful interference', covering any intentional interference with economic interests by illegal means, threatens to overshadow the other economic torts: see *J. T. Stratford & Son Ltd. v. Lindley* [1965] A.C. 269 per Lord Reid and Viscount Radcliffe; *Sid Ross Agency Pty. Ltd. v. Actors and Announcers Equity Association of Australia* [1970] 2 N.S.W.R. 47; and authorities cited in Clerk & Lindsell, *op. cit.* §15-19. The existence of the tort was apparently assumed by the House of Lords in the *Merkur Island* case.

²⁸ Trade Union and Labour Relations Act (U.K.) 1974, s. 13.

²⁹ *N.W.L. Ltd v. Woods* [1979] 1 W.L.R. 1294.

considered that the question of legitimacy must be answered by determining whether or not the actions were protected by the legislation. Although the statutory protection was not of course directly in point, it was taken as

an indication, which your Lordships should respect, of where public policy requires that the line should be drawn between what kind of commercial pressure by a trade union upon an employer in the field of industrial relations ought to be treated as legitimized despite the fact that the will of the employer is thereby coerced, and what kind of commercial pressure in the field does amount to economic duress that entitles the employer victim to restitutionary remedies.³⁰

It was pointed out that, 'Parliament having enacted that such acts are not actionable in tort, it would be inconsistent with legislative policy to say that, when the remedy sought is not damages for tort but recovery of money paid, they become unlawful'.³¹

A majority of the House (Lords Diplock, Cross and Russell) went on to hold that the I.T.F.'s actions here fell outside the statutory immunity, with Lords Scarman and Brandon dissenting.

In looking at the judgments it must of course be borne in mind that a large part of the case against the I.T.F. was conceded. Nevertheless Lord Diplock (with whom Lord Russell concurred on this point) and Lord Scarman ventured general observations on the law of duress. It is clear from both judgments that the development of economic duress in the decisions outlined above was well founded. Lord Diplock attempted to identify the rationale of this development —

It is not that the party seeking to avoid the contract which he has entered into with another party, or to recover money that he has paid to another party in response to a demand, did not know the nature or the precise terms of the contract at the time when he entered into it or did not understand the purpose for which the payment was demanded. The rationale is that his apparent consent was induced by pressure exercised upon him by that other party which the law does not regard as legitimate, with the consequence that the consent is treated in law as revocable, unless approbated either expressly or by implication after the illegitimate pressure has ceased to operate on his mind. It is a rationale similar to that which underlies the avoidability of contracts entered into and the recovery of money exacted under colour of office, or under undue influence or in consequence of threats of physical duress.³²

Similarly Lord Scarman considered that it was 'already established law that economic pressure can in law amount to duress'.³³

The importance of this decision and its consequences for the future development of economic duress will be discussed later. At this point, however, it may be convenient to summarise the two principal developments effected by these cases —

(1) Legal relief for duress does not lie along the boundaries of consideration:³⁴ a

³⁰ [1982] 2 W.L.R. 803, 814 *per* Lord Diplock.

³¹ *Ibid.* 829 *per* Lord Scarman. *cf.* Jones G., note to B. W. Napier 'Economic Duress Restitution and Industrial Conflict' (1983) 42 *Cambridge Law Journal* 43. 42 *Cambridge Law Journal* 47, 47-8, contending that it was not self-evident that legislative policy required consistency in this situation between restitutionary and tortious liability.

³² *Ibid.* 813.

³³ *Ibid.* 828.

³⁴ Where D does provide consideration for P's payment, so that a contract results, it may be of course that the adequacy of that consideration will be relevant to P's claim for relief. But this relevance appears to be limited. When the consideration is nominal the perceived inequality in the parties' exchange may well alert the court to the existence of duress; on the other hand 'the presence of adequate consideration *per se* may be indicative of an absence of duress, but it cannot be a primary determinant of its absence': Ogilvie, *op. cit.* 316. There have been numerous successful claims in the U.S.A. where no inequality of exchange was apparent. Generally, as to the relationship between doctrines of adequacy of consideration and fair exchange, etc., and the development of economic duress, see Dawson, *op. cit.* 276ff.

contract procured by pressure which in law amounts to duress may be avoided in the same way as money may be recovered in quasi-contract. There is no valid distinction in this context between a payment and an agreement to pay.

(2) Relief against duress at common law is not confined to cases of duress to the person or duress of goods: use of economic pressure (or 'business compulsion') to procure a contract or a payment may in certain circumstances amount to 'economic duress' against which relief will be granted. A breach of contract, or a threat thereof, may amount to 'economic duress'.

Before going on to analyse the elements which are, or should be, prerequisites to a successful economic duress claim, the English decisions must be put in context. The innovations which they apparently embody were in large measure inspired³⁵ by several Australian decisions dealing with claims involving, or at least analogous to, economic duress and in particular duress through threat of breach of contract. To a large measure these authorities can be seen to have anticipated the establishment of the second proposition set out above.

2. THE AUSTRALIAN DECISIONS

The surprisingly late development in England of economic duress can in part be explained by the fact that, with very few exceptions, the cases coming before the courts involving use of economic (as opposed to physical) pressure were restricted to threats made directly against property.³⁶ The result was that the courts developed the doctrine of duress of goods, while at the same time not feeling constrained to establish a more general principle: cases involving more indirect economic pressure do not seem to have been brought before the courts.

But this was not the case in Australia. From the latter half of the nineteenth century there has been a fairly steady trickle (if not a stream) of duress cases involving claims based upon various forms of economic pressure. Although the trickle has more or less dried up since 1956, the principles established in these decisions have provided a valuable foundation on which the English judges of more recent times have been able to build.

Before the decision of *Smith v. Charlick*³⁷ in 1923 several claims came before Australian courts which today would be classed as economic duress cases. These met with varying degrees of success. In *Wright v. Kelly*³⁸ the New South Wales Supreme Court held that the plaintiff could recover money he had paid to induce the defendant to perform a contract for the sale of his station property to the

³⁵ See especially *The Siboen* [1976] 1 Lloyd's Rep. 293, 335 and *The Atlantic Baron* [1978] 3 All E.R. 1170, 1180-2.

³⁶ One exception may be the situation where a mortgagee wrongfully threatens to sell the mortgaged land unless paid more than is due. This has traditionally been treated as a case of duress of goods, on the basis that there is a threat to the mortgagor's equitable proprietary interest: see e.g. Goff R. G., and Jones G., *op. cit.* 168. However in *The Atlantic Baron* it was treated as a case of a threat to break a contract and thus a "true" economic duress situation: [1978] 3 All E.R. 1170, 1179. A claim to recover money paid in such circumstances had been recognised in *Close v. Phipps* (1844) 7 Mac. & G. 586 and *Fraser v. Pendlebury* (1861) 31 L.J.C.P. 2. See also *J. & S. Holdings Pty. Ltd. v. N.R.M.A. Insurance Ltd.* (1982) 41 A.L.R. 539.

³⁷ (1923) 34 C.L.R. 38.

³⁸ (1884) 5 L.R. (N.S.W.) 297.

plaintiff. The defendant had threatened not to complete unless the plaintiff paid the necessary stamp duty which, it was later conceded, the defendant was in fact obliged to pay. The judgments do little more than say that the payment was made under 'undue pressure': it is not made clear precisely on what ground the plaintiff was able to recover. The court was content to say that he had clearly not conceded the validity of the defendant's claim that he should make the payment and had protested at the time of submitting.³⁹

The Victorian Supreme Court was not however as amenable to such claims as its New South Wales counterpart. In *Harris v. National Bank*⁴⁰ the defendant bank, which was one of the plaintiff's creditors, refused to assent to a composition agreement giving each creditor 8 shillings in the pound unless it was paid 15 shillings in the pound. The plaintiff submitted to the bank's demand, under protest, and gave it bills at the higher rate; at the same time one D became surety for the plaintiff, being himself secured by an absolute conveyance of land belonging to the plaintiff. When the bills became due the plaintiff intended not to pay the bank, but was forced to do so on advice from counsel that the bank would have recovered from D, who would then have sold the plaintiff's land. So the plaintiff secured a re-conveyance of his property from D and then sought to recover the amount of the bills from the bank. Rather strangely a Full Court denied him recovery on the basis that he had paid 'voluntarily'. The ground for the decision appears to be that the plaintiff had not in fact definitely assured himself that D would not stand up to the bank and resist payment, although there was apparently evidence that D was always going to side with the bank. The decision is perhaps best regarded as anomalous,^{40a} as should be the decision of Cussen J. in the same court in *Donaldson v. Gray*.⁴¹ There, on facts somewhat similar to those in *Wright v. Kelly*, relief was denied to the plaintiff, who had paid a fee which should have been paid by the defendant, on the ground that the plaintiff had 'chosen to pay' and that was that. (In fact the plaintiff had all along made it clear that he was only paying to preserve his legal rights and that he intended to reclaim the money later). Again the Court took a stringent view of a similar claim in *Lord v. Proctor*,⁴² although the decision can be explained on orthodox grounds and will be mentioned later.⁴³

The most interesting of the early cases is the decision of Curlewis J. in the New South Wales Arbitration Court in *N.S.W. Association of Operative Plasterers v. Sadler*.⁴⁴ The defendant was able to resist an action brought against him by his union to recover unpaid subscriptions by successfully pleading that his contract of membership was voidable and had been avoided by him when he resigned. The

³⁹ See *infra* at nn. 38-46, pp. 433 ff.

⁴⁰ (1869) 6 W. W. & a B. (L.) 261.

^{40a} If the bank's assent to the composition agreement could be regarded as consideration for P's payment, then it may be that P should have been able to recover on the basis of money paid under an illegal contract (the bank's demand being a fraud on the other creditors): *Smith v. Cuff* (1817) 6 May & Sel 160. And see *infra* n. 60, p. 419.

⁴¹ [1920] V.L.R. 379. The decision was distinguished on its facts in *Re Hooper and Grass' Contract* [1949] V.L.R. 269, 273, where it was said that the judge must not have been satisfied that there was 'practical compulsion'.

⁴² [1923] V.L.R. 524. See also *Paterson v. Greenland* [1930] S.A.S.R. 340.

⁴³ See *infra* n. 94

⁴⁴ (1918) 17 A.R. (N.S.W.) 159.

judge accepted that his consent to join the union had been procured by the threat of the union secretary to call out his fellow employees on strike unless he joined. There was no evidence of any threat of physical violence against him; it can only be assumed that the operative threat was to call out the men and induce his employer to dismiss him. Quite apart from the implications which the decision has in the industrial context (which are not relevant for present purposes), the case raises a number of interesting points. First, it remains the only Australian case where a contract has been avoided for economic duress (thus pre-empting the rejection in the recent English cases of the payments/agreements to pay distinction). Secondly, it is interesting to note that the pressure here held to amount to duress was directed in the first instance against the defendant's employer rather than against the defendant himself.⁴⁵ If it is accepted that economic duress may be applied *indirectly* by directing pressure at a third party with a view to obtaining payment or agreement from D, this has considerable implications. For instance it would cover the case where pressure is exerted against a holding company to coerce its subsidiary, or even another company in the same group. How far this could be taken (for example, to a case of pressure directed against a supplier of goods to P where the only nexus between P and the initial target is a contractual one) must remain a matter of conjecture.

Finally, it should be noted that Curlewis J. laid down the basis for legal intervention in extremely wide terms —⁴⁶

In my opinion, this amounts to procuring consent by what is called in the Equity jurisdiction in some cases fraud, in others duress, and in others undue influence. But, whatever it is called, the effect is the same. This species of improper conduct by whatever name it may be called is defined by Lord Selborne in *Earl of Aylesford v. Morris*⁴⁷ — 'Fraud does not here mean deceit or circumvention; it means an *unconscientious use of the power arising out of those circumstances and conditions*'.

The impetus for great clarification of this jurisdiction was provided by the judgments of the High Court in *Smith v. William Charlick Ltd.*⁴⁸ Although the plaintiff's claim failed on the facts (which will be discussed later),⁴⁹ there were indications of a much wider ground for relief against duress than had hitherto been admitted by the English courts. It also appeared that decisions like *Wright v. Kelly* and *Sadler* were not the anomalies they might have appeared to be. In dismissing the plaintiff's claim, Knox C.J. stressed that there had not been any 'threat of unauthorised interference with the person or the property or *any legal right*' of the plaintiff.⁵⁰ Isaacs J., in a passage quoted in part earlier,⁵¹ was more explicit —

'Compulsion' in relation to a payment of which refund is sought, and whether it is also variously called 'coercion', 'extortion', 'exaction', or 'force', includes every species of duress or conduct analogous to duress, actual or threatened, exerted by or on behalf of the payee and applied to the person or the property or any right of the person who pays or, in some cases, of a person related to or in affinity with him. Such compulsion is a legal wrong and the law provides a remedy by raising a fictional promise to repay.⁵²

⁴⁵ Cf. duress to the person, which may be directed, for example, against the victim's family: Goff R. G. and Jones G., *op. cit.* 163-4.

⁴⁶ (1918) 17 A.R. (N.S.W.) 159, 161.

⁴⁷ (1871) L.R. 8 Ch. App. 484, 490-1, Emphasis that of Curlewis J.

⁴⁸ (1924) 34 C.L.R. 38.

⁴⁹ See *infra* nn. 91-7.

⁵⁰ (1924) 34 C.L.R. 38, 51, Emphasis added.

⁵¹ See *supra* nn. 19-20.

In *Nixon v. Furphy*⁵³ Long Innes J. held that the plaintiffs, who had contracted to purchase land from the defendants, could recover money paid in discharge of an obligation which they did not in fact owe, the defendants having threatened to rescind the contract. Applying the law as stated in *Smith v. Charlick* the judge held that 'there was not only a threat of an unauthorised interference with the property and legal rights of the plaintiffs, but the money was paid in order to have that done which the defendants were already legally bound to do'.⁵⁴ On appeal the High Court agreed, although without much discussion, that the payment was involuntary and therefore recoverable.⁵⁵

This case involved a threatened interference with the conveyance of property which, while not putting it in the category of duress of goods, might have been sufficient to divert attention from the fact that what was threatened was, as in *Wright v. Kelly*, a breach of contract or wrongful repudiation. This was true also of *Re Hooper and Grass' Contract*,⁵⁶ where Fullagar J. upheld the plaintiff's claim to recover a payment made under the defendant's threat to cancel a contract for the sale of land, the payment again being with respect to charges not in fact owed by the plaintiff.⁵⁷ The judge spoke of the defendant 'threatening to withhold that to which the other party was legally entitled'.⁵⁸

However in *Carr v. Gilsenan*,⁵⁹ which was also a 'property' case, a different emphasis emerged. The plaintiff agreed to purchase a motor car from the defendant, who refused to execute a transfer of the registration (as he was required to do) unless the plaintiff paid him a sum of money additional to the agreed price. The plaintiff did so, being unable without the registration to obtain a motor-spirit consumer's licence and hence use the car lawfully. The Queensland Supreme Court allowed him to recover this excess paid under compulsion. Macrossan A.C.J. stressed that the compulsion arose from the defendant's refusal to perform his contractual duty.⁶⁰ And in *White Rose Flour Milling Co. Pty Ltd v. Australian Wheat Board*⁶¹ Rich J., sitting as a single judge in the High Court, held that the Board was liable to repay a charge exacted from the plaintiff under threat of not supplying wheat, as it was contractually bound to the plaintiff to do. Again the

⁵² (1923) 34 C.L.R. 38, 56. This passage is often relied on: see *Nixon v. Furphy* (1925) 25 S.R. (N.S.W.) 151, 160; *The Atlantic Baron* [1978] 3 All E.R. 1170, 1180. However it has also appeared wrongly attributed to Long Innes J. (who quoted it in *Nixon v. Furphy*): see e.g. *T. A. Sundell & Sons Pty Ltd v. Emm Yannoulatos (Overseas) Pty Ltd* (1956) 56 S.R. (N.S.W.) 323, 328; *J. & S. Holdings Pty Ltd v. N.R.M.A. Insurance Ltd* (1982) 41 A.L.R. 539, 555.

⁵³ (1925) 25 S.R. (N.S.W.) 151.

⁵⁴ *Ibid.* 159-60.

⁵⁵ (1925) 37 C.L.R. 161.

⁵⁶ [1949] V.L.R. 269.

⁵⁷ Note that the defendant was *not* the payee in this case, the charges having been paid by the plaintiff to a statutory body: the plaintiff was able to recover the amount for which the defendant should in fact have been liable.

⁵⁸ [1949] V.L.R. 269, 272.

⁵⁹ [1946] St.R. Qd. 44.

⁶⁰ *Ibid.* 46. It may be that this case can be explained as one of recovery of money paid under an illegal contract, as the excess demanded took the price over the maximum figure which could, under certain statutory regulations, be demanded. The rule that money paid under an illegal contract cannot be recovered would presumably be inapplicable in this situation, as the parties would not be *in pari delicto* by reason of the defendant's 'oppression' (*Smith v. Cuff* (1817) 6 M. & S. 160; *Callaghan v. O'Sullivan* [1925] V.L.R. 664).

⁶¹ (1944) 18 A.L.J. 324.

threat not to perform a contractual obligation was stressed rather than interference with the plaintiff's property.

This shift in emphasis was decisively confirmed by the N.S.W. Supreme Court in *T.A. Sundell & Sons Pty Ltd v. Emm Yannoulatos (Overseas) Pty Ltd*.⁶² The defendants agreed to sell galvanised iron to the plaintiff at £109.15s per ton and in pursuance of this contract the plaintiff established a letter of credit in the other's favour. A subsequent sharp rise in the world price of zinc led the defendant to demand an extra 27 pounds per ton, threatening that no iron would be forthcoming unless this was agreed to. The plaintiff increased the letter of credit, though reserving its rights, and took delivery of the iron: it now sought to recover the amount paid in excess of the original price. The Court held that there was no fresh consideration for the plaintiff's promise to increase the letter of credit, so that the original contract had not been varied or a new one created;⁶³ and it upheld the plaintiff's quasi-contractual claim, holding that the money had been paid under compulsion in the sense recognised in *Nixon v. Furphy, Re Hooper & Grass' Contract* and *White Rose Flour Milling Co. Pty Ltd v. Australian Wheat Board*. The Court specifically rejected the contention that the categories of compulsion were limited and should not be extended. It had been argued that the purpose of relief on this ground had 'never been applied to a case where a compulsive threat has been made to refrain from performing merely a contractual duty as distinct from a threat to refrain from performing a statutory duty or a threat to interfere with a proprietary right of the payor'.⁶⁴ This was rightly dismissed as inconsistent with the tenor of the earlier authorities and reliance was again placed on the definition of 'compulsion' enunciated by Isaacs J. in *Smith v. Charlick*.⁶⁵

The last 25 years or so have seen a dearth of economic duress cases before the Australian courts.⁶⁶ However the Federal Court did have occasion to consider such a claim in *J.&S. Holdings Pty Ltd v. N.R.M.A. Insurance Ltd*.⁶⁷ This was a fairly straightforward case, involving the wrongful refusal by a mortgagee to discharge its mortgage unless it was paid a larger amount than it was entitled to demand. The Court had no difficulty in holding that this amounted to compulsion against which the law could give relief by allowing recovery of the excess in quasi-contract.⁶⁸ The general principle of recovery was rested on the dictum of Isaacs J. and its adoption in *Sundell v. Yannoulatos*. The omission of any reference to the recent English decisions was perhaps surprising, but the case was indeed a simple one and dealt with as such by the Court.

It is obvious from these cases that Australian courts have not attempted to generalise about legal regulation of economic pressure. Nor have they shown much inclination to do more than identify 'compulsion' as the reason for such intervention, compulsion being broadly defined to cover any intervention with P's

⁶² (1956) 56 S.R. (N.S.W.) 323.

⁶³ Cf. *The Atlantic Baron* [1978] 3 All E.R. 1170.

⁶⁴ (1956) 56 S.R. (N.S.W.) 323, 327-8.

⁶⁵ *Ibid.* 328.

⁶⁶ Although see *G. A. Investments Pty Ltd v. Standard Insurance Co Ltd* [1964] W.A.R. 264.

⁶⁷ (1982) 41 A.L.R. 539.

⁶⁸ See authorities cited in n. 36, *supra*.

'rights'. To the extent, therefore, that a doctrine of economic duress is revealed by the decisions, it stems from the variety of factual situations in which the courts have been prepared to identify compulsion. Although perhaps one might criticise this piecemeal process of development as 'ad-hockery', Australian judges have in general appeared unwilling to adopt the more artificial and stultifying restrictions favoured until recently by their English counterparts. The two decisions which achieved a 'breakthrough' for a more coherent doctrine of economic duress, *The Siboen*⁶⁹ and *The Atlantic Baron*,⁷⁰ placed great emphasis on the innovations of the Australian courts. It is to be hoped, however, that Australian judges will now in turn seek to establish a more rational and better articulated conceptual basis for economic duress.

3. THE ELEMENTS OF ECONOMIC DURESS

We now turn to examine to what extent the courts have in fact been able to rationalise the doctrine of economic duress. For this purpose attention will be focussed on the interaction between the three elements which, it is suggested, will require consideration in any situation where D exerts economic pressure on P, where that pressure results in P making a payment to, or concluding a contract with, D. These are the nature of the pressure exerted by the coercer, D; the mental state of the 'victim', P; and the consequences to P in resisting that pressure.

In so doing, reference to the considerable body of American authority on economic duress⁷¹ is unavoidable. American judges in the nineteenth century took over where the English courts had left off by relating the duress of goods cases to more generalised notions of economic pressure. At the same time a separate line of authority developed in relation to excessive charges exacted by common carriers. In the twentieth century these doctrines, together with the existing protection afforded by equity to persons in impaired bargaining positions, formed the basis of a broad head of legal intervention, that of economic duress.⁷² This evolution had much to do with the writings of three 'pioneers', Hale, Dalzell and Dawson,⁷³ who were able to weave the different threads into a more coherent body of law. The relevance of this developed case-law is obvious. The insights (and errors) of American courts in grappling with the problems of legal intervention into commercial relationships are extremely valuable for the assistance they provide in forecasting the difficulties facing English and Australian courts in taking this path.

Two notes of caution should however be sounded with regard to the use of the American authorities. It is not proposed to give a comprehensive exposition of these decisions, nor indeed to make any detailed reference to individual cases. Instead an attempt will be made to refer, where appropriate, to trends in those cases

⁶⁹ [1976] 1 Lloyd's Rep. 293.

⁷⁰ [1978] 3 All E.R. 1170.

⁷¹ See generally Palmer G. E., *The Law of Restitution* (1978) ii, ch. 9; Williston, *op. cit.* ch. 47.

⁷² Dawson J.P. *op. cit. passim*.

⁷³ Hale R. L., 'Coercion and Distribution in a Supposedly Non-Coercive State' (1923) 38 *Political Science Quarterly* 470; 'Bargaining, Duress and Economic Liberty' (1943) 43 *Columbia Law Review* 603. Dalzell, J., 'Duress by Economic Pressure' (1942) 20 *North Carolina Law Review* 237, 341. Dawson J.P. *op. cit.*

(as perceived by American commentators) and only to discuss individual decisions where absolutely necessary. The lack of a coherent body of Anglo-Australian authority on the subject would make any true comparative analysis meaningless. It should also be noted that American judges proceed against a background of a law of restitution which has evolved to a much greater extent than in either England or Australia. Any generalised concept of unjust enrichment still appears, despite the efforts of Lord Mansfield,⁷⁴ to be anathema to English and Australian judges.⁷⁵ Care should therefore be taken where translating the approach of American courts to the Anglo-Australian context.

A. THE NATURE OF THE PRESSURE EXERTED

Crucial to the development of an economic duress doctrine must be recognition of the part that commercial pressure legitimately plays in the ordinary course of business dealings. The outcome of any negotiated transaction will depend on the parties' respective bargaining positions⁷⁶ — that is, on the need for each other's services or goods, on the limits on the price that either will pay for the exchange to remain profitable, on the availability and cost of alternative transactions, and so on. In any situation where constraints are imposed by reason of time, money or any other factor, then an element of pressure will be present in the dealings. This 'coercive' element may become explicit in various situations — for example the loss-making firm which threatens liquidation if creditors do not provide financial concessions to assist it; or the supplier which holds out for an exorbitant price for goods which it knows only it can supply within the necessary time for a particular buyer; or the supermarket chain which temporarily cuts its prices below a profitable level in order to force small local shops out of business.

At bottom the free market system, and the economic individualism which still nominally underlies it, basically assume the existence of, and submission to, commercial pressure. As Dawson observed, in discussing the formative process of economic duress doctrines in the U.S.A. —

It was not yet fully recognised that the freedom of the 'market' was essentially a freedom of individuals and groups to coerce one another, with the power to coerce reinforced by agencies of the state itself. Even though the larger implications of this idea were by no means understood, one simple and quite obvious deduction had already been made — that is, that if the 'market' was to be free, any form of external regulation was objectionable. Regulation by court-enforced rules of private law seemed just as unwise and dangerous as regulation by statute or administrative action. From this point of view, where urgent need or special disadvantage compelled agreement to the terms proposed, these circumstances must be disregarded since they differed only in degree from the basic conditions which governed the exchange of goods and services throughout society.⁷⁷

At the same time of course this system of institutionalised coercion is felt to require a certain degree of protective intervention if it is not to destroy itself. The

⁷⁴ See *Moses v. Macferlan* (1760) 2 Burr. 1005, 1008; 97 E.R., 676, 678.

⁷⁵ *Orakpo v. Manson Investments Ltd* [1978] A.C. 95, 104 *per* Lord Diplock; Goff R. G. and Jones G., *op. cit.* 11-13. And see the vehement rejection of such a generalised right to restitution by Mahon J. in *Avondale Printers & Stationers Ltd v. Haggie* [1979] 2 N.Z.L.R. 124, 144-55.

⁷⁶ This is even more apparent in the case of adhesive or non-negotiated transactions, where one party's superior bargaining power enables the presentation of terms on a 'take it or leave it' basis. As to adhesive contracts generally, see Rakoff, T. D., 'Contracts of Adhesion: An Essay in Reconstruction' (1983) 96 *Harvard Law Review* 1173.

⁷⁷ *Op. cit.* 266.

obvious example is the perceived necessity for legal regulation of monopolies and other restrictive practices. Here, intervention to restrain freedom to act in commercial self-interest is justified by the long-term aim of ensuring that competition is preserved and that the freedom to compete is meaningful. In this sense legal standards are established to govern the kinds of commercial pressure that must be regulated if the system is to survive. The basic problem which must now be dealt with is how far this rationale can be extended towards control of individual commercial relationships — how far economic pressure-regulation can intrude into the freedom to use commercial pressure to secure a business advantage.

The central problem in the law of economic duress is to determine when it is advisable to exercise judicial control over the use of power, economic or otherwise, to obtain some private advantage by cancelling that advantage. In any situation in which persons with adverse interests deal with each other, each party presumably exercises whatever power he has; and if a transaction results, it will not be set aside merely because it is the product of such exercise. Nor will it be set aside merely because one person's power was superior to that of the other. Nonetheless, limits will be placed on the proper exercise of such superior power for private advantage . . .⁷⁸

These limits obviously must be drawn according to some value-judgment of the economic pressure utilised. Whether P will be relieved against a submission will depend upon whether or not the law recognises D's pressure as 'legitimate' when used in that context. There are at least two ways in which this judgment may be made: on the one hand from the standpoint of the coercer, and on the other from that of the victim. If these are seen as alternatives then the former would demand a concentration on the wrongfulness of such conduct being engaged in by D; conversely the latter would exclusively require an assessment of the *effect* on P of any coercive behaviour.

Now it is fairly obvious that the legitimacy of the pressure cannot be deduced solely from considering the victim's standpoint. The fact that P has been placed in a position where there is 'no choice' but to submit cannot of itself justify a finding of economic duress, for the result would be commercial chaos. To allow business decisions to be reopened on the ground alone that 'overbearing' pressure, of whatever nature, had been exerted would be to defeat the very notion of a free market and the 'freedom to coerce' (within limits) which it presupposes. It matters little whether the assessment of the victim's submission is made on a subjective basis, by ascertaining whether or not the will has been 'overborne' or 'coerced',⁷⁹ or objectively, by inquiring whether the pressure was 'sufficient to alarm a reasonable man in the position of the [victim]'.⁸⁰ To invalidate a commercial

⁷⁸ Palmer G. E., *op. cit.* ii, 241-2.

⁷⁹ The test adopted in *The Siboen* [1976] 1 Lloyd's Rep. 293, 336 and *Pao On v. Lau Yiu* [1979] 3 W.L.R. 435, 450. The notion of the will being 'overborne' in situations of duress may of course be criticised as conceptually unsound, in that it implies that P must not be capable of rationale judgment, whereas in fact 'a victim of duress *does* normally know what he is doing, *does* choose to submit, and *does* intend to do so': Atiyah, P. S. 'Economic Duress and the Overborne Will' (1982) 98 *Law Quarterly Review* 198, 200; Dawson, *op. cit.* 266-7. Cf. Tiplady E., 'Concepts of Duress' (1983) 99 *Law Quarterly Review* 188, replied to by Atiyah P. S., 'Duress and the Overborne Will Again' (1983) 99 *Law Quarterly Review* 353. Holmes J. summed up the point — 'The fact that a choice was made according to interest does not exclude duress': *Union Pacific Railway Co. v. Public Service Commission* 248 U.S. 67, 70 (1918). For further criticisms of the test, based on the evidentiary difficulties of satisfying it, see Ogilvie M. H., 'Contracts — Economic Duress — Inequality of Bargaining Power — Quo Vadis' (1981) 59 *Canadian Bar Review* 179, 186. Wedderburn K. W., 'Economic Duress' (1982) 45 *Modern Law Review* 556, 559.

⁸⁰ *Nixon v. Furphy* (1925) 37 C.L.R. 161, 172 *per* Isaacs J.

contract or payment merely because one party was 'forced' to do something would be absurd: if something further is required it must surely come from an examination of the *type* of pressure exerted.⁸¹

On the other hand it is quite possible to construct an economic duress doctrine by concentrating on the conduct of the coercer, that is by assessing the justifiability of the use of particular pressure in a particular situation. Beyond the bare finding of fact that the victim was coerced (in the sense discussed in the next section) it is evident that the specific effect of the pressure, or its *degree*, need not be critical to the finding that the pressure amounted to duress. Whether or not the extent of the coercion from the victim's point is in fact relevant is discussed in a separate section, below.⁸² Irrespective of the answer to that question, it can be asserted that the limits to what constitutes relievable economic duress will, primarily at least, be determined according to a value-judgment of D's conduct.

The judgments of the House of Lords in *Universe Tankships*⁸³ appear to recognise that this inquiry, into the nature of the pressure, is both appropriate and of primary importance. Thus Lord Diplock (with whom Lord Russell concurred) stated that the rationale of economic duress is that the victim's 'apparent consent was induced by pressure exercised upon him by [the] other party which the law does not regard as legitimate'.⁸⁴ Similarly Lord Cross said that the question of recovery turned on whether the demand, and therefore the pressure, was 'legitimate'.⁸⁵ Lord Scarman, following the approach of the dissenting judgment in the Privy Council in *Barton v. Armstrong*,⁸⁶ preferred to identify the 'illegitimacy of the pressure exerted' as one element in a two-stage test, the other being 'compulsion of the will of the victim'.⁸⁷ Despite the lip-service paid to the latter requirement (which, as we shall see,⁸⁸ in reality amounted to the adoption of a wholly different criterion) Lord Scarman concentrated most of his attention on the question of 'legitimacy'. It is suggested that the House has acted correctly in shifting attention away from P's state of mind to the nature of the pressure exerted by D. Moreover it is thought that Australian courts would have no difficulty in following this conceptual lead. Indeed, as will become apparent, the Australian decisions have concentrated almost exclusively on the question of the legitimacy

⁸¹ The fallacies of an exclusively consent-based test are evident in the distinction, drawn in *The Siboen and Pao On*, between economic duress, that is, pressure coercing the will, and 'mere commercial pressure'. The decision in *Pao On* is symptomatic of the spurious conclusions which that sort of distinction tends to spawn. The defendants were held not to have been coerced because they chose the rationale course of submission in preference to litigation: but did that choice make their submission any the less a submission to duress? (But see *infra* n. 63, p. 437.) See also *Ronald Elwyn Lister Ltd v. Dunlop Canada Ltd* (1982) 135 D.L.R. (3 d) 1: criticised by Ogilvie M. H., (1982) 60 *Canadian Bar Review* 733. An even more extreme example is provided by *Gill v. Reveley* (1943) 132 F.2d 975 where relief was denied for lack of evidence that the plaintiff was 'frightened or otherwise disturbed in mind' when he submitted. A similar attitude appears to have been an important deciding factor in *Donaldson v. Gray* [1920] V.L.R. 379, *supra* n. 41.

⁸² See *infra* n. 54 ff., pp. 436 ff.

⁸³ *Universe Tankships Inc. of Monrovia v. International Transport Worker's Federation* [1982] 2 W.L.R. 803.

⁸⁴ *Ibid.* 813.

⁸⁵ *Ibid.* 820.

⁸⁶ [1976] A.C. 104, 121 *per* Lord Wilberforce and Lord Simon.

⁸⁷ [1982] 2 W.L.R. 803, 828.

⁸⁸ See *infra* nn. 54-5, pp. 436-7.

of the pressure to the virtual exclusion of any consideration of its coercive qualities from P's point of view.

*Defining 'illegitimate pressure'*⁸⁹

The question naturally arises as to how the law is to distinguish 'legitimate' from 'illegitimate' pressure. Perhaps the obvious answer is to ask whether the act (or omission) threatened, or the actual threat itself, is independently unlawful.⁹⁰ There is little doubt that the Australian decisions favour this approach. Thus in *Smith v. Charlick*⁹¹ the plaintiff bought wheat from the Wheat Harvest Board. The Board, discovering that the plaintiff still had a large quantity of this wheat in their possession, demanded a 'surcharge', not on any legal basis but on the ground that, as the controlled price of flour was increased in correspondence with the high price of wheat, the wheat-growers were morally entitled to the higher price, inasmuch as the wheat had originally been sold for weekly requirements only and the surplus proved that the plaintiff had overstated its requirements. The plaintiff paid this surcharge because of the Board's threat that if it was not paid it would cease to supply the plaintiff, who would inevitably be unable to carry on business. Despite the fairly broad definitions of relievable duress advanced by the High Court⁹² the plaintiff was unable to recover the surcharge. It was stressed by the majority that the Board was not threatening an unlawful act: it was not contractually bound to the plaintiff to supply wheat and its threat therefore amounted to a threat not to contract with the plaintiff in the future, something it was perfectly free to do. Isaacs J. said it was 'plain that a mere abstention from selling goods to a man except on condition of his making a stated payment cannot, in the absence of some special relation, answer the description of "compulsion"', however serious his situation arising from other circumstances may be . . .'.⁹³ Nor was the Board threatening a breach of any statutory duty imposed on it. Thus the majority clearly drew the line between legitimate and illegitimate pressure according to the independent illegality of the act threatened.⁹⁴

However, Higgins J. dissented strongly. He agreed with the judge at first instance that 'the compulsion which prevents the payment from being voluntary

⁸⁹ See Rafferty N., 'The Element of Wrongful Pressure in a Finding of Duress' (1980) 18 *Alberta Law Review* 431.

⁹⁰ Presumably an 'unlawful act' would include at least commission of a crime or a tort or, of course, a breach of contract. *Quaere* whether breach of other obligations might suffice: the cases on the 'illegal means' requirement in the economic torts may be relevant here — see e.g. *Lonrho Ltd v. Shell Petroleum Co. Ltd* [1981] 2 All E.R. 456 (breach of statutory provision 'penalising' certain conduct); *James v. Commonwealth* (1939) 62 C.L.R. 339 (breach of common carrier's duty); and see generally Clerk & Lindsell, *op. cit.* §15-15, §15-20.

⁹¹ (1923) 34 C.L.R. 38. And see *Eric Gnapp Ltd. v. Petroleum Board* [1949] 1 All E.R. 980.

⁹² See *supra* at nn. 48-52.

⁹³ (1923) 34 C.L.R. 38, 56.

⁹⁴ See also *Lord v. Proctor* [1923] V.L.R. 524, where relief was also denied on the basis that the act threatened was not in itself illegal. There a lessor threatened to withhold his consent to an assignment of the lease: since he had reasonable grounds for so doing he was not in breach of a covenant in the lease stipulating that such consent should not be arbitrarily withheld. And see *Paterson v. Greenland* [1930] S.A.S.R. 340. Cf. *Sadler v. N.S.W. Association of Operative Plasterers* (1918) 17 A.R. (N.S.W.) 159, which appears to be an exception to the pattern, in that there was no specific finding that any illegal acts had been threatened by the union: moreover Curlewis J., as noted earlier, couched his judgment in terms of 'unconscientious use of power': *supra* at nn. 44-7.

may be the threatened exercise of right by the party receiving the money . . .'.⁹⁵ He added — 'The question in each case of payment under compulsion is, was the compulsion justifiable or not — was the party receiving entitled to use, or threaten to use, the whip'.⁹⁶ He was prepared to condemn the Board's action as unjustifiable because he considered that it had acted in excess and even in fraud of its powers, even though technically it was under no obligation to contract with the plaintiff in the future.⁹⁷

The majority's judgment has not subsequently been challenged. This is hardly surprising, as the issue has not since arisen before a full High Court. Moreover in all the later cases the act threatened was clearly unlawful, being in each case a threatened breach or unlawful termination of a contract and the courts have thus been able where necessary to distinguish *Smith v. Charlick* on its facts.⁹⁸ Thus in *White Rose Flour Milling Co. v. Australian Wheat Board*⁹⁹ the Board, as in *Smith v. Charlick*, threatened not to supply the plaintiff with the wheat it needed, on this occasion in order to pass on a charge imposed on it for its use of terminal elevators in storing wheat supplies. However Rich J. held that the plaintiff could recover its money: in this instance there was an existing contract between the parties, and the Board's threat thus amounted to threatening a breach of its contractual obligation.

It is less simple to analyse the approach taken by English judges. Although it is assumed by some commentators that the threat of some illegal act is required,¹ there is no unequivocal judicial statement to that effect. In *Barton v. Armstrong*² the minority (Lord Wilberforce and Lord Simon) said that the means of pressure must be 'illegitimate' — but that is obviously not necessarily the same thing. The question was not adverted to in *The Siboen*³ or *The Atlantic Baron*.⁴ However in *Universe Tankships* Lord Scarman's analysis of 'illegitimate pressure' does suggest that he equates the term with independent illegality. The point he was concerned to make was that in most cases the nature of the act threatened will determine the legitimacy of the pressure; however in some cases it will be necessary to look to the nature of the demand accompanying the threat. Thus it may be duress to threaten to do what is strictly lawful because the circumstances of the demand may make the threat itself illegitimate: the classic example of course being blackmail, where frequently a lawful act is threatened.⁵ This tends to suggest that Lord Scarman was laying down a requirement of independent illegality, albeit in an extended sense.

⁹⁵ (1923) 34 C.L.R. 38, 64.

⁹⁶ *Ibid.* 65.

⁹⁷ The particular problem of finding duress in a refusal to contract in the future is dealt with by Rafferty N., *op. cit.* 453-6.

⁹⁸ *Nixon v. Furphy* (1925) 25 S.R. (N.S.W.) 151, 159-160; *Re Hooper and Grass' Contract* [1949] V.L.R. 269, 272.

⁹⁹ (1944) 18 A.L.J. 324.

¹ Goff R. G. and Jones G., *op. cit.* 177; Beatson J., Duress by Threatened Breach of Contract (1976) 92 *Law Quarterly Review* 496, 498-9; Evans A., 'Economic Duress' [1981] *Journal of Business Law* 188, 192-3.

² [1976] A.C. 104, 121.

³ [1976] 1 Lloyd's Rep. 293.

⁴ [1978] 3 All E.R. 1170.

There are undeniable advantages in adopting a test based on independent illegality. The obvious one is that of greater certainty of application.⁶ Moreover it allows the courts to 'steer clear of the rather murky waters of inequality of bargaining power'.⁷ Given the failure of English law to develop a coherent and independent doctrine allowing the rewriting of bargains on the ground of unconscionability⁸ it might be seen as anomalous that money could be recovered or transactions avoided merely because superior bargaining power has been asserted.

Nevertheless there is considerable force in the argument that the lawful/unlawful distinction is a highly artificial limitation on the power to interfere in situations of commercial pressure.⁹ To say that 'it is never duress to threaten to do what one has a legal right to do' is to ignore the fact that the threat of a technically lawful act may be as coercive and as unjustifiable in commercial terms as the threat of an unlawful act.¹⁰ The contrasting decisions in *Smith v. Charlick* and the *White Rose* case provide an excellent illustration of the problems associated with the distinction. In each case the plaintiff's position was the same, the threat was the same, the extent of coercion was the same. The only distinction was that *White Rose Flour Milling Co.* was lucky enough to have a standing contractual relationship with the Australian Wheat Board. Unless some distinction can be drawn with regard to the motivation of the respective Boards,¹¹ surely policy would dictate that the result be the same in each case.

Again, suppose that P commits what D claims to be a repudiatory breach of their contract; D threatens to accept P's 'unlawful repudiation' as determining the contract, knowing that to do so would mean economic disaster for P, and using that threat D 'extorts' money from P. On the orthodox test the success of P's claim to recover that money will depend on the court deciding whether the initial breach amounted to a repudiation or not. If the answer is yes, then D was merely threatening to exercise a lawful right to terminate and there can be no recovery; if not, then D's threat was itself a threat to repudiate the contract, in which case P can recover. In this sort of case the distinction between legitimate and illegitimate pressure becomes something of a lottery, and ignores the basic question raised by

⁵ [1982] 2 W.L.R. 803, 828-9.

⁶ This will usually be the case: but if the test develops along the lines of the illegal means requirement in the economic torts it may prove illusory. See *supra* n. 90 and *infra* n. 10.

⁷ Evans A., *op. cit.* 193.

⁸ Cf. *Lloyds Bank Ltd. v. Bundy* [1975] 1 Q.B. 326, 339 *per* Lord Denning M. R.; *Schroeder Music Publishing Co. v. Macaulay* [1974] 1 W.L.R. 1308, 1315-6 *per* Lord Diplock.

⁹ Again the illegal means requirement in the economic torts provides an interesting analogy. See Wedderburn K. W., *op. cit.* 557-60. With the exception of the 'anomalous' (see *Lonrho Ltd. v. Shell Petroleum Co.* [1981] 2 All E.R. 456) tort of conspiracy to injure and also direct inducement of breach of contract (considered 'wrongful' in itself), economic tort liability will depend on proving that D used, or threatened to use, illegal means. The result of the rejection of the proposition, that it is unlawful *per se* intentionally to interfere with or injure a person's economic interests, even without recourse to independently unlawful acts (*Allen v. Flood* [1898] A.C. 1), has been to encourage the sort of artificial distinctions and judicial contortions (see e.g. *Morgan v. Fry* [1968] 2 Q.B. 710) that are here being criticised in the economic duress context.

¹⁰ Rafferty N., *op. cit.* 442ff.; Ogilvie M. H., *op. cit.* 314-5.

¹¹ It might be argued that in *Smith v. Charlick* the Board was merely attempting to act in the best interests of the wheat producers, given the plaintiff's apparent overstatement of its requirements: whereas in the other case the Board was trying to pass on a charge which it ought to have borne itself.

duress doctrines: whether 'it is "rightful" to use particular types of pressure for the purpose of extracting an excessive and disproportionate return'.¹² As Holmes J. put it, 'it does not follow that, because you cannot be made to answer for the act, you may use the threat'.¹³

Nevertheless rejection of the proposition that it is never duress to threaten to do what one has a legal right to do, does not exhaust the potential relevance of independent illegality to the inquiry as to whether pressure is legitimate. It may be that independent unlawfulness should not be necessary for economic duress to be established: but should it be sufficient? In other words, could it be said that, regardless of whether the limits of relievable duress extend beyond the confines of the legal character of the pressure, that pressure will at all events *necessarily* be illegitimate when it is independently unlawful?

On principle the answer would appear to be in the negative. If it is appropriate for present purposes to stigmatise pressure as illegitimate on grounds which go beyond the question of technical illegality, then equally it would appear permissible to excuse pressure which, while unlawful, is commercially justifiable. Such a view, of course, only has force if the threat of an unlawful act to gain a commercial advantage can ever be described as justifiable.¹⁴ Such a question can perhaps only ever receive a speculative answer. The major difficulty lies in ascertaining the standards by which to judge this issue. Obviously the threat is 'commercially justifiable' from the coercer's point of view, but not from the victim's standpoint: it all depends on which party is on the receiving end. If a subjective viewpoint is unhelpful any attempt to establish objective criteria fares little better: can one truly postulate a 'commercial morality', so as to give a definitive indication that that which is unlawful is necessarily unjust in commercial terms? The cynic would say that nothing is unjustifiable when it comes to making a profit. However, it may be possible to say that in certain commercial situations it is accepted practice to threaten breach of contract, at least where the action is taken on grounds of commercial necessity — that is to avoid (unforeseen) loss rather than to make a gain. Evidence is necessarily lacking, as studies of commercial practices and attitudes with respect to contracts are uncommon,¹⁵ but it may be that it is true in the case of the charterparty market.¹⁶ On balance it may be best to conclude, on the assumption that independent illegality is not a necessary element of economic duress, that it is nevertheless *prima facie* sufficient to establish that an illegal act

¹² Dawson J. P., *op. cit.* 288.

¹³ *Silsbee v. Webber* 50 N.E. 555, 556 (1898).

¹⁴ Certainly in the industrial context there may be a clear distinction between the 'legitimacy' of industrial action and the unlawful character of acts done in pursuance of that action. Leaving aside tort liability, it appears clear that the mere act of striking will ordinarily constitute a breach of contract (*Simmons v. Hoover Ltd.* [1977] 1 All E.R. 775): yet there would be few who would argue that the taking of industrial action is invariably and inevitably unjustifiable.

¹⁵ A valuable bibliography of those studies that have been made in recent years is contained in Macaulay S., 'Elegant Models, Empirical Pictures and the Complexities of Contract' (1977) 11 *Law and Society Review* 507. For an excellent examination of the rules associated with breach of contract in the light of business attitudes to legal and self-help remedies, see Beale, *Remedies for Breach of Contract* (1980).

¹⁶ See Sterling M. J., (1982) 11 *Industrial Law Journal* 156, 158-9: *infra* n. 18.

has been threatened. It should still be open, however, for the court to hold exceptionally that the pressure is legitimate despite its unlawful character.¹⁷

Returning however, to the possible abandonment of independent illegality as a pre-requisite to the finding of illegitimate pressure, obviously another standard must replace it, at least in the situation where the act threatened is not itself unlawful. There are some signs in *Universe Tankships* that the House of Lords is moving away from the rigid 'unlawful acts' test and towards a broader inquiry as to the justifiability, in moral and commercial terms, of the pressure used.¹⁸ Thus Lord Diplock spoke of pressure 'which the law does not regard as legitimate' without identifying the issue as one of ascertaining illegality. He noted that 'commercial pressure, in some degree, exists whenever one party to a commercial transaction is in a stronger bargaining position than the other party', although he did not find it necessary 'to enter into the general question of the kinds of circumstances, if any, in which commercial pressure, even though it amounts to a coercion of the will of a party in the weaker bargaining position, may be treated as legitimate and, accordingly, as not giving rise to any legal right of redress'.¹⁹ Although obviously there is no positive commitment to adopt the broader test, there is some indication of flexibility: to that extent one can see Lord Diplock moving away from the more rigid doctrine of independent illegality. Lord Scarman's judgment may be susceptible of the same analysis, although, as indicated above, that would appear to be rather more doubtful. In any event it is not without significance that their Lordships ultimately might have held legitimate pressure consisting of threats which undoubtedly constituted the tort of intimidation (albeit not actionable): although there is obviously scope for an argument that, since in this particular context legislative policy would clearly have invited courts to disregard this illegality, industrial pressure should be regarded as very much *sui generis* as far as economic duress is concerned.

Unfortunately, but perhaps understandably, the other Law Lords, like Lord Diplock, did not find it necessary to articulate the criteria which courts should

¹⁷ The American cases provide little assistance on this point. Certainly pressure has often been held not to be illegitimate despite the threatening of an unlawful act, but this has usually been on the ground that a further requirement was not satisfied, viz., that serious harm must be likely to befall P if the threatened consequences ensue: see *infra* at n. 54 ff.

¹⁸ It is possible, as Sterling M. J., (*loc. cit.*) demonstrates, to explain the earlier English cases in terms of the legitimacy of the pressure used in the sense contended for. Thus he points out that in *The Siboen* ([1976] 1 Lloyd's Rep. 293) it was 'legitimate' for the charterers, on the assumption that was made, viz. that their representation of imminent bankruptcy was not fraudulent, to threaten breach of contract to secure lower rates. Not only are renegotiations of charters apparently common, but it would seem reasonable to attempt to force renegotiation of an agreement with a major creditor in order to avoid liquidation, a course which would also benefit the other party, who would not become merely a general creditor in liquidation proceedings. In *North Ocean Shipping Co. v. Hyundai (The Atlantic Baron)* [1978] 3 All E.R. 1170, on the other hand, it was

'illegitimate for the yard, which was to suffer as a result of the devaluation, to redistribute the contractual risk which it had impliedly assumed when entering the original contract without a price-variation clause which covered the contingency, and force the buyer to suffer the adverse consequences of the devaluation which was a hazard the buyer would not expect to have to meet given the terms of the original contract' (*op. cit.* 159).

Ogilvie, on the other hand, concludes that the cases were wrongly decided (in terms of the findings as to duress), which reflects his concentration on the position of the victim rather than the conduct of the coercer: *op. cit.* 298-302, 317-9. See *infra* at n. 69.

¹⁹ [1982] 2 W.L.R. 803, 813.

utilise in making the necessary value-judgment as to the use of *commercial* pressure. It is difficult therefore to predict how far, if at all, their Lordships might really wish to see the concept of illegitimate pressure divorced from that of independent illegality in that area. Nevertheless, as we have seen, the House did embark on an extremely careful analysis of the question of legitimate pressure in the specific context of the appeal and their willingness to do so provides some ground for optimism that a similar approach will be adopted in future cases of commercial pressure.

However it cannot be denied that any approach resting on a value-judgment of the justifiability of commercial pressure presents considerable problems.²⁰ It is obvious that the approach will not be of value unless the courts are prepared to articulate the considerations of policy which underlie such a judgment and the reasons for proscribing certain forms of economic pressure. But the factors involved will always be likely to generate uncertainty, and it is this fact which undoubtedly lies behind the reluctance in some quarters to countenance an extension of the legitimate pressure inquiry beyond the task of ascertaining independent illegality. It may be that one can refine the investigation to ask whether there has been an 'unconscionable exercise of a superior contractual bargaining position':²¹ or an 'excessive gain that results from impaired bargaining power':²² or an improper exercise of superior power for private advantage.²³ But such assertions do little more than restate the problem. What is inequality of bargaining power? When is there an 'abuse of superior bargaining power'? It would seem that such questions can only be answered on a case-by-case basis: and that it is impossible to do more than generalise about the sort of factors that will influence the resolution of situations of commercial pressure.

It is interesting to note how those commentators who advocate a broader test for illegitimate pressure deal with these objections. Ogilvie²⁴ argues strenuously that the greatest difficulties with any examination of unconscionability are encountered at the level of ascertaining any *initial* inequality of bargaining power between the parties. He concedes that the doctrine of inequality of bargaining power per se cannot be the primary determinant of economic duress because (1) 'the mere existence of a superior bargaining position does not guarantee the use or abuse of it', (2) the problems of uncertainty and imprecision for the courts and for commercial advisers are overwhelming, and (3) the political consequences of judicial disruption of the 'established socio-economic structure' may be too great, either in

²⁰ Rafferty N., *op. cit.* 449ff., points out that even in the U.S.A. courts have been reluctant to extend relief for duress to situations where no unlawful act is threatened, beyond the 'recognised' categories of improper application of legal process and threats amounting to criminal blackmail. With the exception of threats to employment, where clearly there may be great potential coercion in the threat of a 'lawful' termination of P's service, most American jurisdictions have been cautious about equating illegitimacy of pressure with any wider theory of unconscionable use of power. Nevertheless some courts, notably those in New Jersey (see especially *Wolf v. Marlton Corporation* 154 A. 2d 625 (150)) have been more than willing at the very least to examine the 'fairness' of the threat of a perfectly legal act.

²¹ Ogilvie M. H., (1981) 59 *Canadian Bar Review* 179, 187.

²² Dawson J.P., *op. cit.* 289.

²³ Palmer G. E., *op. cit.* 242.

²⁴ *Op. cit.*, n. 2 311 ff.

terms of the courts going too far or in their being over-cautious for fear of appearing revolutionary. The answer, he argues, lies in examining *subsequent* inequality of bargaining power: given the fact of D's superior position as a result of the effect of circumstances on an established commercial relationship with P, has he abused that power? Ogilvie defines abuse in terms of placing P 'in the position of having no commercially viable alternatives to submission' and his views in this regard will be examined later.²⁵

Rafferty²⁶, on the other hand, argues that the determinant of illegitimate pressure, at least where otherwise lawful acts are threatened, must be the *purpose* behind D's demand. He points out that 'this is the basis for duress by the improper application of the legal process and the basis for the crime of blackmail and hence duress constituted by criminal blackmail. It must also be the determinative factor in the question of when duress can be constituted by threats of lawful acts'. But one is thrown back on the question, what is it 'proper', in commercial terms, to demand? Rafferty admits that it is a question of 'reasonableness'. But the objection remains that, leaving aside the problems of monopolistic and restrictive practices (which attract more attention from legislators, lawyers and economists, although no less controversy), there is little material from which to construct well-defined guidelines of what is commercially 'moral'.

When one considers the failure of English and Australian courts to adopt a general theory of unconscionability²⁷ and the denial of any generalised right to recover on the basis of unjust enrichment,²⁸ it would hardly be surprising if the courts felt unable to follow the American example and develop economic duress by extending regulation of economic pressure along the lines of judicial perception of unconscionability.

B. THE FACT OF COERCION

In the preceding section it was indicated that it is inappropriate to use a consent-based test to mark out the limitations on legal intervention into the field of commercial pressure. Nevertheless it is obvious that P's mental state is a relevant, indeed a most important, consideration. Although subjective analysis of the fact of P's coercion does not and should not mark out the boundaries of economic duress, it is necessarily of importance in deciding whether or not relief should be granted in individual cases for the wrongful use of economic pressure.

(1) *Problems of causation*

It is obvious that P's mental state will be relevant to establishing the necessary causal link between the pressure exerted by D and the acts against which relief is sought. Put simply, it must be proven that P was *compelled* to act.²⁹ However a

²⁵ Ogilvie M. H. *op. cit.* 318.

²⁶ *Op. cit.* 456-7.

²⁷ See *supra* n. 8, p. 427.

²⁸ See *supra* n. 75.

²⁹ One obvious point that arises is that there is no 'compulsion' where P makes the payment or contract in the hope of a making a gain, even if it can be said that D's pressure 'caused' the action taken — see authorities cited in Williston, *op. cit.* §1617, *supra* nn. 9 and 10, p. 411.

difficulty arises as to how strong a causal link P must prove. It would appear from the American cases that P is required to show that the action would not have been taken but for the pressure exerted by D.³⁰ But this appears to conflict with the Privy Council's decision in *Barton v. Armstrong*.³¹ In that case the plaintiff was allowed to avoid a contract which he had entered into with the defendant, who had threatened to have him murdered. This was despite the trial judge's finding, which was accepted, that the plaintiff would have entered into the contract anyway, his predominant reason for acting being 'commercial necessity'. Lord Cross, who delivered the majority judgment, stressed that it was sufficient for the plaintiff to prove that the threat contributed to his decision. The rule laid down for fraud by Lord Cranworth L.J. in *Reynell v. Sprye*³² was applied: once it is shown that the threat affected P's judgment in some measure, D cannot defeat the claim for relief merely by showing that there were other, more weighty, causes contributing to the decision. However it is submitted that in cases of economic duress the American rule should prevail.³³ To apply the *Barton v. Armstrong* rule to such cases would mean bringing far too many commercial decisions within the potential reach of the doctrine. Such decisions are, after all, to some extent the products of varying degrees of commercial pressure exerted by competitors. If the disruptive effect of legal intervention on grounds of economic duress is to be kept to a reasonable minimum it is essential that courts should only be prepared to reopen those decisions unequivocally procured by D's illegitimate pressure. The rule in *Barton v. Armstrong* should be confined to cases of duress to the person. In such cases there are no compelling policy considerations, as there are in the cases of economic pressure, to be balanced against the basic policy of penalising the use of threat of violence to secure private advantage. Threats of personal violence will only rarely be justifiable, and therefore it may be appropriate for the law to intervene whenever they are used to induce a contract or a payment, provided they do have some influence on the victim's decision.

Before leaving causation, it should be noted that P must prove that there has been coercion by pressure exerted by or on behalf of D. It will not be sufficient to

³⁰ Palmer G. E., *op. cit.* 247-8.

³¹ [1976] A.C. 104.

³² (1852) 1 De G. M. & G. 660, 708.

³³ Cf. Beatson J., (1976) 92 *Law Quarterly Review* 496, 499.

³⁴ *Alec Lobb (Garages) Ltd. v. Total Oil Great Britain Ltd.* [1983] 1 W.L.R. 87. In that case the plaintiffs charged their filling station to the defendants as security for a loan, the charge containing an exclusive petrol tie in the defendant's favour. When the plaintiffs got into financial difficulties they sought help from the defendants and it was agreed that the premises should be leased to the defendants for a premium and then leased back. The plaintiff's claim to have the lease and underlease set aside for economic duress failed: the judge pointed out that the plaintiffs were responsible for their financial situation and that any pressure in this case came not from the defendants but from other creditors. Cf. *B. & S. Contracts and Design Ltd. v. Victor Green Publications Ltd.* [1982] I.C.R. 654. There the plaintiffs engaged the defendants to erect stands for their exhibition. The defendant's workforce, due to be made redundant when the job finished, refused to work without severance pay, which the defendants declined to provide. The plaintiffs, apparently quite of their own accord and without prompting from the defendants, paid the men the sums demanded and the work went ahead. It was held that this money was paid under duress, and could be set off against the contract price. This is a very strange decision, because any duress appeared to come from the employees, although the judge considered that the defendants had implicitly threatened to repudiate if nothing was done. Moreover the defendants, who were under no obligation to provide severance pay, were in no way enriched by the payment to their employees. Nevertheless, the decision has since been upheld on appeal: see (1984) 128 *Solicitors' Journal* 279.

prove that pressure amounting to economic duress was exerted on P resulting in a gain to D in the form of a payment or a contract, if the pressure was not in fact exerted by D or at D's bidding.³⁴ However it would seem that it is irrelevant, providing D exerts the pressure, that the result is not a payment to or a contract with D:³⁵ though presumably where P makes a payment to another person P will have to prove in order to recover it that D is unjustly enriched thereby, for instance if the payment discharges a liability in fact owed by D.³⁶ Moreover, as we have seen,³⁷ P may be able to recover even if D's pressure is directed in the first instance against someone else, provided of course that harmful consequences are thereby in turn threatened to P.

(2) *The nature of the submission*

One particular difficulty with establishing the fact of coercion (beyond the bare question of causation) relates to the weight to be attached to the quality of P's submission. Consider the situation where D asserts, or purports to assert, a valid claim, where the assertion of that claim (or the threats used to reinforce it) would otherwise amount to illegitimate economic pressure. It is well established that if P submits to such pressure, then a subsequent claim to relief will only be successful if P can prove that there was no voluntary submission to D's claim. At first sight that might seem inconsistent with the rejection above of the test based on the coercion of the will and with the suggestion that the true test for economic duress depends on the kinds of pressure which the law regards as illegitimate. The answer is that in this situation, while of course there will have to be an inquiry into the legitimacy of the pressure, ultimately whether or not P is granted relief will depend on his proof that the submission was not intended to be final. If that is not the case then the submission will be a 'voluntary one', in the sense that it will not be regarded as having been compelled.

The reason for this lies, as Beatson has explained,³⁸ in the interaction and overlap between two doctrines: those of submission to an honest claim, and duress. Consider the situation where D agrees to supply P with goods for a certain price. Before D has completed performance raw material costs dramatically increase and D wishes to pass this increase on to P. D therefore demands that P pay an additional sum to cover the increase, asserting entitlement to it under the terms of a price-variation clause in the contract. D threatens to withhold delivery of the remaining goods, which he knows P urgently needs. P pays the additional sum and the goods are delivered. Can P recover this sum? If D's interpretation is correct and the claim is a valid one, then that is an end to the matter. But what if the interpretation is wrong, and the claim is not therefore valid? Assuming that D has put forward the claim honestly, then P's precise intention must be ascertained. If payment is made because (a) P acknowledges the validity of D's claim; or (b) P

³⁵ See e.g. *Re Hooper and Grass' Contract* [1949] V.L.R. 269.

³⁶ *Cf. B. & S. Contracts and Design Ltd. v. Victor Green Publications Ltd.* *supra* n. 34, p. 432.

³⁷ See *supra* at nn. 44-5.

³⁸ *Op. cit.* n.2, p. 410, 100-6.

considers the claim doubtful but decides to pay because it is commercially advantageous not to contest the claim; or (c) P knows the claim is unfounded but cannot be bothered to contest it or, again, deems it better not to: then in each case recovery will be denied. The crucial factor is the *finality* of P's submission: in each case P did not intend that the submission should later be reopened. Thus if in this example P pays simply so as not to be prejudiced and intending to preserve the right to challenge the validity of the claim, then the case falls into the duress category. The reason for this position presumably relates to the common law's recognition of the validity of submissions and compromises. An agreement not to pursue a claim, where there is at least an honest belief in the chances of its success, may provide good consideration for a counter-promise acceding to that claim, and the result will be a valid contract of compromise.³⁹ Since such compromises, usually procured by a threat (express or implied) to take legal action to vindicate the claim, are considered to be desirable, it might seem reasonable to allow a claimant to rely on an apparently final acknowledgment of a claim, even if wrongful pressure is exerted to obtain that submission:⁴⁰ to allow contracts of compromise to be avoided for duress might in many cases be to defeat the purpose for which such contracts are upheld in the first place.

It seems clear that the same approach should not be adopted where D puts forward a claim which is known to be unfounded. (An agreement not to pursue such a claim would not of course provide good consideration for a compromise contract.) However there is apparently some conflict in the American authorities as to whether a final submission to a fraudulent claim should be held against P.⁴¹ Nevertheless even if it should it would seem that in such circumstances P would be able to rely on D's fraud to secure repayment of money, rescission of a contract or even damages in tort.⁴²

In ascertaining whether a submission was or was not intended to be final the courts inevitably pay particular regard to certain objective indications of P's state of mind, of which by far the most important is the presence or absence of protest. The courts will look for proof that at the time of submission P was not acknowledging the validity of the claim in whole or in part, but merely acquiescing in order to reserve any right to challenge the coercion. Obviously an explicit statement to this effect at the time of submission is very weighty evidence in P's favour — as is its absence against. Many of the Australian cases where the plaintiff successfully recovered money paid under economic duress involved situations where the defendant was making an allegedly valid claim: in each case reliance was placed on the fact of the plaintiff's protest at the time of submitting.⁴³ However, to repeat

³⁹ *Cook v. Wright* (1861) 1 B. & S. 559; *Callisher v. Bischoffsheim* (1870) L.R. 5 Q.B. 449.

⁴⁰ Rafferty N. *op. cit.* 434

⁴¹ See Palmer G. E. *op. cit.* 352-3.

⁴² See Goff R. G. and Jones G. *op. cit.* 95-6.

⁴³ *Wright v. Kelly* (1884) 5 L.R. (N.S.W.) 297, 303; *Nixon v. Furphy* (1925) 25 S. R. (N.S.W.) 151, 158; *White Rose Flour Milling Co. v. Australian Wheat Board* (1944) 18 A.L.J. 324, 327; *Re Hooper and Grass' Contract* [1949] V.L.R. 269, 272; *J. & S. Holdings Pty. Ltd v. N.R.M.A. Insurance Ltd* (1982) 41 A.L.R. 539, 555. The leading English example is *Muskell v. Horner* [1915] 3 K.B. 106.

an oft-quoted dictum, 'there is no magic in a protest'.⁴⁴ In some cases circumstances may be such that protest is obviously pointless and no useful purpose would be served by complaint: accordingly it may not be just to count silence against P. On other occasions what appears to be a protest may amount merely to a 'grumbling acquiescence'⁴⁵ in D's claim rather than the assertion of an 'intention of preserving the right to dispute the legality of the demand'.⁴⁶

When D is asserting a claim then it may be that there are good reasons of policy for not disturbing the finality of P's submission. It would perhaps be wrong to allow P to insist on reopening a transaction apparently closed by an acknowledgment or settlement of that claim, at least where D asserted it honestly. After all the distinction between justifiable and unjustifiable commercial pressure is at best a fine one and in many cases it may be somewhat harsh to condemn a claimant for asserting what may prove to be an unjustified claim or for using illegitimate pressure to back up a claim which that person is otherwise entitled to assert.

But should this also be the court's attitude where D makes an unlawful demand or a demand which, while not of itself unlawful, is at least not asserted as of right? It is submitted that the answer should be that in this situation P's submission should always be capable of being reopened, even if at the time of submitting he regards the matter as closed and does not intend to reopen it.⁴⁷ Several reasons may be advanced for this conclusion. Firstly, one must reiterate the evidentiary difficulties inherent in any subjective inquiry: how can one prove P's state of mind? As we have seen, the problem is overcome in the claim cases largely by relying on the objective factor of pressure or absence of protest. However one might ask why it should be incumbent on the subject of economic pressure to make it clear to the oppressor that the minute the pressure is lifted steps will be taken to recover money or avoid the contract procured.⁴⁸ In many cases such a statement may indeed be counter-productive in terms of securing the lifting of the pressure. The relevance of protest to a case where D is simply making a demand, without any assertion of right, appears questionable to say the least.

Secondly, it has been and will be asserted that the boundaries of legal intervention should be drawn along the lines of pressure regarded as legitimate by the courts: the policy is therefore to protect against such pressure. If so, how does it

⁴⁴ *Mason v. N.S.W.* (1959) 102 C.L.R. 108, 143 *per* Windeyer J.

⁴⁵ *Maskell v. Horner* [1915] 3 K.B. 106, 111 *per* Rowlatt J.

⁴⁶ *Ibid.* 118 *per* Lord Reading C.J. See Goff R. G. and Jones G. *op.cit.* 186-9 for a criticism of the Court of Appeal's decision on the facts in that case.

⁴⁷ *Cf. Deacon v. Transport Regulation Board* [1958] V.R. 458, 460. In *The Siboen* Kerr J. said that, in considering compulsion, one relevant factor would be whether or not P 'treated the settlement as closing the transaction in question and as binding upon him, or whether he made it clear that he regarded the position as still open': [1976] 1 Lloyd's Rep. 293, 336. However the reference to *Maskell v. Horner*, *supra* n. 43, p. 434, immediately following this passage suggests that he may have been referring to claim cases.

⁴⁸ But see *Lord v. Proctor* [1923] V.L.R. 524 and *Paterson v. Greenland* [1930] S.A.S.R. 340, where in each case it was suggested that there *is* such a duty. In claim cases of course it may be that where D asserts a claim which P apparently acknowledges or settles D is entitled to have some indication of P's intention, albeit D has used pressure which would otherwise be illegitimate. But neither of these cases involved claims. However both decisions rested primarily on the finding that the pressure used was lawful (see *supra* n. 94).

serve that policy to deny relief simply on the ground that there is no evidence (or even that there is positive evidence to the contrary) that the victim thought it worth while, at the time the pressure was still being applied, to think about seeking legal relief at a later date?

Thirdly, and crucially, relief should and will be denied to a victim who, within a reasonable time of the pressure being lifted, does not take steps to recover money or avoid obligations. In the case of quasi-contractual recovery of money, the only formal restriction on the remedy is to be found in limitation statutes (the common law knowing no doctrine of laches as in equity).⁴⁹ However, although there appears to be no authority on this point, it is suggested that a court would be justified in drawing the conclusion from such conduct that P was not in fact coerced (in the causal sense) by D's pressure at all.⁵⁰ Where P is seeking to avoid a contract the position is much simpler: such conduct will be held to be an affirmation of the contract. Thus in *The Atlantic Baron*⁵¹ the plaintiffs were ultimately denied relief on this ground. Although at the time of agreeing to pay the additional sums they had protested and expressly reserved their rights, they took delivery of the ship without a word and only decided to seek relief eight months later. However in less straightforward cases care should be taken to inquire as to the time when pressure is truly lifted, for in such cases even after the pressure has been supposedly lifted there may remain a threat of it being renewed at a moment's notice. In *Sadler's case*⁵² the defendant remained a member of the union for some considerable time before he exercised his right to rescind the contract of membership. During that time indeed he paid a sum of money under a judgment obtained against him by the union for subscriptions alleged to be due: in fact he did not even defend the action. Nevertheless Curlewis J. refused to hold that he had affirmed the contract. He said that he was not satisfied that the defendant, in submitting to the judgment or at any time before his resignation, was 'free from the influence of the threats that were made'. The judge added — 'To hold that a plaintiff could by threat prevent a defendant from defending an action, and then claim the judgment as an estoppel, would be a monstrous absurdity'.⁵³

C. THE CONSEQUENCES OF RESISTING THE PRESSURE: THE EXTENT OF THE COERCION

The third element in a potential situation of economic duress which may have to be considered is the gravity of the consequences to P of resisting D's demand. For the sake of brevity this will be referred to as the extent of the coercion.

In *Universe Tankships* Lord Scarman, while reiterating that there must be compulsion of the will, revised his conception of the criterion. Abandoning the emphasis on the will being 'overborne',⁵⁴ he stressed instead that the 'essence' of

⁴⁹ See e.g. *Allcard v. Skinner* (1887) 36 Ch.D. 145 (an undue influence case).

⁵⁰ The artificiality of such an approach is conceded: but the result is arguably defensible.

⁵¹ [1978] 3 All E.R. 1170; see *supra* at nn. 17-21 pp. 412-3.

⁵² (1918) 17 A.R. (N.S.W.) 159; see *supra* at nn. 44-7, pp. 417-8.

⁵³ *Ibid.* 163.

⁵⁴ *Pao On v. Lau Yiu* [1979] 3 W.L.R. 435, 450-1.

duress was the victim's lack of practicable choice but to submit. Thus if the consequences to P of resisting are so serious that there is in reality no choice open but to give in, then the 'coercive' element has been satisfied.⁵⁵ It should be noted that this inquiry requires an objective assessment: it is clear that it is not the *victim's* perception of the situation that is relevant: rather the court must consider the choices reasonably open at the time of submission.

However, Lord Scarman apart, there has been very little judicial emphasis on this factor.⁵⁶ Of all the Australian cases where economic duress claims were successful, it was only in *Sundell v. Yannoulatos* that reference was made to it and this was no more than a brief acknowledgment that the plaintiff 'urgently required the iron to carry out its commitments'⁵⁷: there was no indication that this played any significant part in the court's decision. In *Re Hooper and Grass' Contract*⁵⁸ Fullagar J. in fact cited *Shaw v. Woodcock*⁵⁹ and noted the rejection there by Bayley J. of the argument that, in a duress of goods case, the owner must be shown to be under an immediate pressing necessity of recovering the property. Moreover an examination of the cases shows that in most of them the practicability of choice requirement was barely satisfied on the facts, even if it could be argued that it had some sort of tacit influence on the decisions to allow recovery.⁶⁰ Nor does the extent of the coercion appear as a relevant factor in the decisions in *The Siboen*⁶¹ or *The Atlantic Baron*,⁶² although an attempt has been made to explain the recent English decisions in these terms.⁶³

Notwithstanding this lack of judicial recognition, however, it may be useful to examine whether the extent of the coercion should be relevant and, if so, what weight it should be given.

⁵⁵ [1982] 2 W.L.R. 803, 828.

⁵⁶ Cf. *Alec Lobb (Garages) Ltd. v. Total Oil Great Britain Ltd* [1983] 1 W.L.R. 87, 93. As an element of duress it is espoused particularly by Ogilvie, *op. cit.* 317-9, and Coote B. 'Duress by Threatened Breach of Contract' [1980] *Cambridge Law Journal* 40, 45.

⁵⁷ (1956) 56 S.R. (N.S.W.) 323, 326.

⁵⁸ [1949] V.L.R. 269, 272.

⁵⁹ (1827) 7 B. & C. 73.

⁶⁰ *Wright v. Kelly* (1884) 5 L.R. (N.S.W.) 297; *Nixon v. Furphy* (1925) S.R. (N.S.W.) 151; *Carr v. Gilsenan* [1946] St.R. Qd. 44; *Re Hooper and Grass' Contract* [1949] V.L.R. 269; *J. & S. Holdings Pty Ltd v. N.R.M.A. Insurance Ltd* (1982) 41 A.L.R. 539. The facts of these cases reveal little more than inconvenience to the respective plaintiffs, as opposed to extremely serious consequences.

⁶¹ [1976] 1 Lloyd's Rep. 293.

⁶² [1978] 3 All E.R. 1170.

⁶³ Coote B. *op. cit.* 45, pointing out that while in *Pao On v. Lau Yiu* the defendants' credit would have been affected by going to litigation to challenge the plaintiffs' threat, the potential loss would have been small and could have been recouped. (Moreover, as Ogilvie has stressed (*op. cit.* 305), the facts revealed two parties of equal bargaining power and a business transaction with calculated risks which ended unhappily for the risk-taker. This is not to say that the criticism of the terms in which the conclusion was reached (see *supra* n. 81) is not well-founded.) Coote also attempted to explain *The Atlantic Baron* in the same way, stressing the "substantial profit" that the plaintiffs would have lost: but the prospect of losing the profit from the charter hardly put them in a situation of no viable alternatives, and Ogilvie's analysis (*op. cit.* 300-1) of the extent of the coercion as tending to the conclusion that there was no duress appears more compelling. Furthermore his examination of the facts of *The Siboen* reveals that if the charterers had repudiated the owners risked insolvency, for the charter parties' income was needed to repay the mortgages on the owners' ships: hence in this case the extent of the coercion was such that duress should have been found (*op. cit.* 297-9).

The divergence between Ogilvie's analysis of these two cases and the actual result in them merely serves to emphasise the crucial point that is not the victim's position that is primarily of relevance, but rather the wrongfulness of the coercer's conduct. If Sterling's analysis (*supra* n. 18, p. 429) is accurate, then the decisions are explicable on the basis that the coercer's pressure was, or was not, legitimate in those circumstances.

It would seem that this factor is, or may be, already relevant in at least two ways. Firstly, it has considerable evidentiary value. If P is in a situation where, commercially speaking, there is no practicable choice open but to submit, then it will be easier to satisfy the burden of proving the causal link between D's pressure and the submission, or, in the case of a claim put forward by D, to show that the submission was not intended to be final. Secondly, it may be, contrary to the argument canvassed earlier,⁶⁴ that P will not be taken to have been coerced when submitting to a demand (not being a claim) intending that submission to be final. If that is the case then the absence of practicable choice may have a considerable mitigating effect, in that it will give the court a good reason, not just to ignore a failure to protest, but generally not to look too closely at P's mental state for any intention with regard to reopening the submission. Thus in *Universe Tankships* Lord Scarman said — 'The victim's silence will not assist the bully if the lack of any practicable choice but to submit is proved';⁶⁵ he instanced the case before him, where the shipowners had not given any indication at the time of agreeing to the I.T.F.'s demands that they would later seek relief. If this is correct then the court will presumably transfer its attention to P's subsequent conduct, with the possibility of finding affirmation.

However the proposed function for the element of the extent of the coercion is not merely that it should have such an indirect bearing upon the availability of relief. What is envisaged is that it should constitute a substantive limitation on the remedy: in which case one could say that P is the subject of economic duress whenever D uses economic pressure which the law does not recognise as legitimate to put P in a situation where there is no practicable choice but to submit.⁶⁶ This, it would appear, is the position in the United States, where courts have generally recognised a threat to break a contract as duress only where the breach would cause 'serious economic harm' to P.⁶⁷ Thus, for example, where there is a threat by D to withhold goods or services to which P is entitled under their contract, relief may depend on whether P could have obtained similar goods or services from another source.⁶⁸

Can one go further and *define* duress in these terms, so that it exists only where there is use of illegitimate pressure to deprive P of practicable choice? Can it be said that there is only ever true compulsion when the victim is presented with no viable alternative to submission?⁶⁹ It is submitted that duress should not be defined in those terms: rather it should be seen to exist whenever illegitimate pressure is applied to compel P to do something which would not have been done otherwise. It is not immediately apparent why it cannot be said that P was compelled to act, simply because submission was chosen as the *best* of a number of unattractive alternatives. Of course, as has been recognised, the availability of commercially

⁶⁴ See *supra* at n. 47, p. 435.

⁶⁵ [1982] 2 W.L.R. 803, 828.

⁶⁶ Ogilvie M. H. *op. cit.* 318-9.

⁶⁷ Palmer G. E., *op. cit.* 325; Rafferty, *op. cit.* 438-40.

⁶⁸ See especially *Austin Instrument v. Loral Corporation* 272 N.E. 2d 533 (1971); Palmer, *op. cit.* 316 and cases there cited.

⁶⁹ Ogilvie M. H., *op. cit.* 317-9.

feasible courses other than submission will have considerable evidentiary value against P. Nevertheless, provided the causal link is established between illegitimate coercion and submission, it is submitted that there has been economic duress.

This is not to say, however, that it is not legitimate for the courts to take the view that *relievable* economic duress should be restricted to situations where P has no practicable choice at all. It might indeed appear somewhat harsh for the court to inform P that, although there has been economic duress, relief will be denied because there was a feasible, albeit less palatable, alternative. But the possible injustice in individual cases would arguably be outweighed by the minimised disruption of commercial bargaining and decision-making. To restrict regulation of illegitimate economic pressure so that the victim is protected only in situations where potentially extreme consequences will flow from resistance appears to be a reasonably intelligible limitation.

That the absence of practicable choice as an element of economic duress does have validity only as a potential restriction on relief rather than as a necessary component of the definition of duress is quite apparent from the failure of English and Australian courts to adopt it, at least overtly. It may be that its acceptance will come only with the articulation of a coherent doctrine of economic duress, as it is suggested the English courts are in the process of developing.

Alternative remedies

One factor which has traditionally been seen as highly relevant is inextricably linked with consideration of the extent of the coercion and practicability of choice. This is the availability to P of alternative remedies. In what circumstances will a failure to invoke a legal remedy to avoid the harmful consequences threatened by D be held against P when subsequently claiming economic duress? In so far as the modern decisions provide any guidance, they seem to follow the orthodox line that if there was available at the relevant time an 'adequate' alternative remedy, then failure to relieve the pressure applied will preclude a finding that P was coerced into submission.⁷⁰ The crucial point is that the remedy must be adequate: it must present P with a practicable alternative. In the United States, where this element is often stressed in theory, in practice the courts have almost always dismissed the relevance of an alternative remedy on the ground of inadequacy.⁷¹ The reason cited is usually the delay inevitably involved in seeking legal recourse and the consequent inability to relieve the pressure. This attitude surfaced in *The Atlantic Baron*. Mocatta J. noted that the plaintiffs might have claimed damages in arbitration proceedings against the defendants 'with all the inherent unavoidable uncertainties of litigation.' In view of their position with regard to the proposed charter, he thought it would be unreasonable to hold that they should have taken such a course.⁷²

Moreover there is at the very least a stream of authority completely denying any relevance to the existence of an alternative remedy. This is exemplified by the

⁷⁰ See e.g. *Barton v. Armstrong* [1976] A.C. 104, 121 *per* Lord Wilberforce and Lord Simon.

⁷¹ Palmer G. E., *op. cit.* 266-7.

⁷² [1978] 3 All E.R. 1170, 1182-3.

earlier duress of goods cases where there was often little or no inquiry into the adequacy of the alternative remedy (or indeed into whether P had any pressing need for the goods at all).⁷³ This is not merely an academic point. There is one remedy that may very often be considered to be adequate by a court inquiring closely into P's position, and that is the injunction. American courts have tended to disagree over the relevance of injunctive relief.⁷⁴ The point is particularly relevant in the industrial relations context. The interlocutory injunction is often a highly effective weapon in negating the effect of economic pressure applied through industrial action.⁷⁵

One might ask whether the existence of an alternative remedy, albeit 'adequate' to relieve the pressure on P before the threatened harmful consequences ensue, should ever present an obstacle to an economic duress claim. Essentially the issue is whether P should have the option of using the legal remedy available or paying up and then seeking restitution. As Palmer points out, 'it is not self-evident that he should be denied a choice, particularly since payment is the surest way to avoid the harm'.⁷⁶ The problem is thrown sharply into relief when one considers the decision in *Marotta v. Lattingtown Harbour Development Co.*⁷⁷ There the defendant refused to approve the plaintiff's building plans unless the plaintiff paid an assessment fee for which he was ultimately held not liable. The plaintiff refused to pay, proceeded with the construction without the requisite approval and sought a mandatory injunction to compel the grant of approval, plus damages for loss caused by the defendant's conduct. The court, while issuing the injunction, refused damages on the ground that the loss 'could have been easily avoided simply by paying the \$1600 under protest and then seeking to recover same' on the ground of economic duress. Thus the 'alternative remedy' was in part denied because of the availability of the economic duress claim! The possibility of P being denied relief no matter which remedy is sought on the ground that the other remedy could have been chosen, is quite stunning in its absurdity. Such problems can easily be avoided by allowing P a free choice as to the remedy. It hardly lies in the mouth of D, who has by definition employed illegitimate pressure for personal advantage, to complain that P might have relieved the pressure in a different way.

4. CONCLUSIONS

If the law of economic duress is to be developed in England and Australia then the emphasis must be on judicial initiative. The material is at hand, for every day courts are expected to resolve commercial dilemmas, and frequently there is no clear-cut precedent or obviously applicable rule to guide them. In these 'hard

⁷³ *Astley v. Reynolds* (1731) 2 Str. 915; *Shaw v. Woodcock* (1827) 7 B. & C. 73. The same attitude was apparent in *J. & S. Holdings Pty Ltd v. N.R.M.A. Insurance Ltd* (1982) 41 A.L.R. 539. For American cases see Palmer G. E., *op. cit.* 271-2. Some courts in the U.S.A. have also taken a similar attitude in relation to overcharging by public utilities: see Palmer, *op. cit.* 265.

⁷⁴ Palmer G. E., *op. cit.* 265.

⁷⁵ See *N.W.L. v. Woods* [1979] 1 W.L.R. 1294, 1305-7, 1308.

⁷⁶ Palmer G. E., *op. cit.* 268.

⁷⁷ 187 N.Y.S. 2d 348 (1959).

cases' it becomes necessary for judges to rely on their own acquired knowledge of commercial practices and standards: and it is these which, it is argued, must be applied when the use of commercial pressure is alleged to be wrongful. As a legal doctrine economic duress has acquired respectability through the recent decisions: but it will fall into disrepute if it is not fleshed out with coherent and consistent principles to regulate its application. This article has been an attempt to indicate some areas where there is a need for refinement and articulation of the basic elements which should constitute relievable economic duress. The conclusions which have tentatively been reached may now be summarised:

1. The crucial element of economic duress is the 'wrongfulness' or 'illegitimacy' of the pressure used to compel a payment or a contract.

2. 'Illegitimacy' cannot be judged solely from the fact that the victim has been 'compelled' to submit: some extrinsic standard must be established by which the 'wrongfulness' of the pressure applied by the coercer is to be judged.

3. That standard should not simply be one of 'independent illegality': i.e. there should not be a necessary equation of the (un)lawful character of the act threatened with (il)legitimacy of the pressure. In particular the proposition that 'it is never duress to threaten to do what one has a legal right to do' should be rejected. Nevertheless it should prima facie be sufficient, for economic duress to be established, to prove that the act threatened was unlawful: this presumption might be displaced if it were proven that it is generally regarded as commercially justifiable to threaten such an act in particular circumstances.

4. As for the threat of a lawful act, this should be held to constitute illegitimate pressure only if it is, in the court's opinion, 'unconscionable', or commercially unreasonable, to seek to gain an advantage by using that threat. In any further development of the economic duress doctrine it should be a priority for the courts to lay down guidelines by which such questions might be judged. It may be, however, that no coherent criteria can be established, in which case the courts may well proceed by the American example, which is more or less to attempt to achieve a 'fair' result in individual cases.

5. It must be proved that the victim was coerced, that is, compelled to do something that would not otherwise have been done. Furthermore, when the coercer is asserting a claim (as opposed merely to making a demand otherwise than as of right), it must be proved that the submission was not final, *i.e.* that the victim intended at the time to submit only in order to preserve the right to challenge the claim. In other cases apparent acquiescence should be held against the victim only in so far as it might constitute an affirmation of a resulting contract.

6. Although the seriousness of the victim's potential position if the pressure were to be resisted should not be relevant to establishing duress as such, nevertheless it may be justifiable for the courts to refuse relief except where the victim had no practicable choice but to submit.

7. The existence of an 'adequate' remedy as an alternative to submission will usually prevent the victim from claiming economic duress, although in practical terms perhaps only the availability of injunctive relief may prove an obstacle.