

**AN EVALUATION OF THE DOCTRINE OF ECONOMIC DURESS: A CASE OF
*TOBACCO BOARD OF ZAMBIA V. TOMBWE PROCESSING LIMITED.***

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LLB
MWE
2013
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by

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**A dissertation submitted to the University of Zambia in partial fulfilment of the
requirements for the award of the degree of bachelor of laws (LLB).**

The University of Zambia


Lusaka

2013.

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ACKNOWLEDGEMENTS

I would like to acknowledge the assistance given to me in form of advice and guidance by my principal supervisor Mrs Chipu Mushota Nkhata. Her guidance during the preparation of this dissertation made this study a success.

ABSTRACT

The doctrine of economic duress is a recent development in English law and has always been surrounded by uncertainties. Its development was rather expected because the usual law concepts such as undue influence and consideration failed in dealing with the problems set by the way economic evolution progressed. The finding of economic duress has not been an easy one. This is because the line between economic duress and normal hard commercial bargaining is blurred or thin.

The main objective of this dissertation is to consolidate the case of economic duress as a factor that undermines the free will of parties to contract. The historical development of the doctrine is considered as well as comparing it to other contractual doctrines. These contractual doctrines include undue influence and unconscionability. The paper narrowed down to the decision in *Tobacco Board of Zambia v Tombwe Processing Limited* in its analysis.

In *Tobacco Board of Zambia v Tombwe Processing Limited* the successful defendant pleaded economic duress for failing to honour its acknowledgement of debt to the plaintiff. The court held that the defendant was coerced to sign the acknowledgement of debt when the plaintiff gave this as a condition for issuance of the licence to the defendant. The court noted that the defendant's operation and survival was dependent on the licence. Based on this the court nullified the document and the contract vitiated.

The work concludes that, this doctrine is still developing in English contract law. Like in the Tobacco Board of Zambia case, courts have not come with precise guidelines to be used in each case. When compared to undue influence and unconscionability, it is concluded that the three doctrines are similar but can not completely replace each other. This is because they do not have exactly the same scope.

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CHAPTER 1 Objects

1. Introduction



The very foundation of our law of contract is based upon the premise of the unilateral voluntary exchange. In a market economy, such exchanges involve a process in which the parties bargain voluntarily, each surviving to maximise his own economic advantage on terms that are acceptable to the other party¹.

One of the ways in which parties to a contract can avoid responsibility for their actions is to show that they were coerced into acting in the way that they did act. It is commonly understood that a person who can show that he or she acted under compulsion should be excused the normal consequences of his or her act. From a legal perspective, the mechanism that exists to handle this problem is the doctrine of duress.²

The doctrine of duress is a common law concept, which if established, renders the contract voidable³. The scope of duress at common law was originally very narrow and confined to actual or threatened physical violence or constraint of the other party. Thus, in an Australian case of *Barton v. Armstrong*⁴, where A threatened to have B killed if he did not buy A's shares in a company where B was managing director. The majority of the Privy Council held that the agreement was vitiated by duress.

In recent times, the courts have extended the concept of duress from its earlier limits of duress to goods and to a person, so as to recognise that certain forms of commercial pressure could amount to economic duress⁵. The previous mechanism used to prevent illegitimate

1. Daniel Graham, "Contract Modification: An economic analysis of the hold up game." Law and Contemporary problems 52, No. 1 (1989):11

2. Graham Glover, "The doctrine of duress in the law of contract and unjustified enrichment in South Africa." (PhD Thesis, Rhodes University. (2003) 1.

3. <http://www.lawteacher.net/contract-law/lecture-notes/duress> [accessed 03/10/2012]. A voidable contract is a contract that is valid unless rejected by a party with the legally protected option of doing so. See also <http://www.law.comell.edu/work/voidable>.

4. (1975) 2 All ER 465 Privy Council.

5. <http://www.lawteacher.net/contract-law/lecture-notes/duress> [accessed 03/10/2012]95t

commercial pressure being exerted on persons who contract was the doctrine of consideration.⁶

When a party is coerced to enter a contract due to compulsion, courts may excuse the coerced party from performance, finding the contract involuntary due to economic duress.⁷ The Zambian judiciary, being under common law, renders a contract voidable, when economic duress is established as long as the party claiming acts promptly otherwise he/she may be deemed to have affirmed the agreement. This is reflected in the recent case of *Tobacco Board of Zambia v. Tombwe Processing limited*.⁸ In this case the Court nullified the acknowledgement of debt signed by the defendants citing economic duress.

It is easy to conclude that a person who acted under duress is not legally responsible for the ordinary consequence of his or her conduct. The difficulty comes in determining whether or not a person's act was in fact induced by duress; or, to put in the context of this study, whether the aggrieved party who claims to have made a contractual promise, or to have handed over money or property under pressure, has actually been coerced in the eyes of the law.⁹

In light of these developments, the purpose of this study is to critically evaluate the doctrine of economic duress and how it was applied by the Zambian Court in the case of *Tobacco Board of Zambia v. Tombwe Processing Limited*.¹⁰ Other contractual doctrines such as consideration, undue influence and unconscionability will also be examined in comparison to the doctrine of economic duress. Further, this paper will propose that the doctrine of economic duress in Zambia be explored further so that it is placed on a firm and coherent

6. *Stilk v. Myrick* (1809) 2 Camp 317, 6 Esp 129, 134

7. George B. Smith and Thomas J. Hall, "The Heavy Burden of Proving Economic Duress," New York Law Journal 247, No.76 (2012).

8. *Tobacco Board of Zambia v. Tombwe Processing Limited* (2011) H.C./0059

9. Graham Glover, "The doctrine of duress in the law of contract and unjustified enrichment in South Africa," (PhD Thesis, Rhodes University, (2003) 1.

10. (2011) H.C./0059

jurisprudential foundation that is not only consistent with other developed common law jurisdictions but also capable of handling modern realities, from a practical perspective.

This paper will begin with an examination of the theoretical basis of the doctrine of economic duress, which will bring out the statement of the problem. The historical development of this doctrine in traditional common law will also be considered. This will be done by analysing the early cases of economic duress. Further, the coercion of the will theory which is the basis for the doctrine will also be analysed and how Courts later moved away from this theory to concentrate on the search for a causal link between the pressure applied and the entry into the contract.

Later, a comparative analysis of the doctrine of economic duress to other related contractual doctrines such as consideration, undue influence and unconscionability will be made, illustrating the similarities that exist. These doctrines are closely related to the doctrine of economic duress and there is substantial overlap between the four. In order to simplify and clarify the law, the debate concerning whether some or all of these doctrines can be merged will be considered in the conclusion. This comparison will also highlight shortcomings if any in these doctrines. It will also bring out the significance and relevance of the doctrine of economic duress in modern- day contract law.

In the final chapters of this paper, a discussion and analysis of the decision in *Tobacco Board of Zambia v. Tombwe Processing Limited* will be made. In conclusion, the analysis of the decision will indicate whether the Zambian Courts handle economic duress cases in the same way that high jurisdictions like the English legal system do.

1.1. Theoretical basis of the doctrine of economic duress

The law of contract is usually seen as a panel of power giving rules that enable individuals to enter into agreements of their own choice and on their own terms. This has consequences in common law, that freedom of contract and sanctity of contract are referred to as basic principles that govern the whole contract ideology.¹¹

The “will of the parties” as referred to by some authors entails that parties should always be free to decide their terms of the contract, and that courts should not interfere in the contractual relationship.¹² However, this has not always been practical as evidenced from the development of doctrines such as consideration, duress or undue influence which is a clear sign that courts try more and more to intervene in creating protecting rules for the weaker parties.¹³

McKendrick,¹⁴ argues that problems arose because “the growth of standard form contracts and the aggregation of capital in fewer hands have enabled powerful parties to impose contractual terms upon consumers or weaker parties. Indeed, not all contracts are fair and so the law should be used to redress the balance in particularly gross cases of inequality.

Traditionally, the doctrine of consideration was used to solve such problems. O’Sullivan,¹⁵ explains that only variations supported by consideration were enforced when deciding the validity of a contractual variation. However, over the years, judges found themselves facing situations where consideration was not sufficient to deal with the problems faced in this area.¹⁶ This led to courts trying to offer some new ways to protect weaker parties

11. Frank Hopkins, “*Review of Economic Duress in Common Law*,” (LLB Thesis, University of Nottingham. (2002) 17.

12. Charles Fried, *contract as a promise* (Harvard: Harvard University Press. 1982), 102.

13. Ibid. See footnote 12.

14. Ewan McKendrick, *contract law* (Palgrave Macmillan law Masters, 1997), <http://www.palgrave.com> [accessed June 15, 2013].

15. Janet O’Sullivan and Jonathan Hilliard, *The Law of Contract* (Oxford: Oxford University Press, 2006), 245.

16. Charles Fried, *contract as a promise* (Harvard: Harvard University Press. 1982), 102.

in the course of the contract, such as the introduction of the doctrine of duress.¹⁷

The long standing of the doctrine of duress in common law is thus evidenced by the court's early recognisance of duress to persons¹⁸ and duress to goods.¹⁹

Over the last three decades, a new category of duress known as economic duress has been recognised in common law countries.²⁰ So far a number of cases have been decided where the courts have recognised this doctrine and most notable in situations where parties are already in an existing contractual relationship and one party takes advantage of the plight of the other to renegotiate the contract on terms advantageous to himself.²¹ The doctrine of economic duress became very applicable especially in cases of commercial monopoly situations. Atiya²²'s views are that monopolies are much more common than is usually recognised by economists. Cartwright,²³ in agreeing with Atiya also uses the micro monopoly idea to define situations where a party does not have the freedom to choose whom he is going to contract with or does not have the opportunity to contract with someone else in time.

According to Hopkins,²⁴ this usually happens in business relationships, where if such a situation arises, the economically powerful party may use his superior position to obtain further advantages from the weaker party. This imbalance if it arises in contractual relationships of such a bargain can be redressed using the doctrine of economic duress.²⁵

To prove economic duress, one has to demonstrate that he was the object of unacceptable pressures, that these pressures induced him to enter into a contract he would never have

17. <http://www.lawteacher.net> [accessed on October 19, 2012].

18. *Barton v. Armstrong* (1975) 2 All ER 465. Privy Council.

19. Kerr J. Mentioned duress to goods obiter in "*The Siboen v. the Sibotre*" (1976) 1 Lloyd's Rep 293.

20. *Occidental Worldwide Investment Corp v. Skibs A/S Avanti, The Siboen and The Sibotre* (1976) 1 Lloyd's Rep.295

21. <http://www.lawteacher.net/duress>. [accessed on September 29, 2012].

22. P. S Atiya, *An introduction to the law of contract* (Oxford: Clarendon Oxford Press, 1995).

23. P. Cartwright, *Unequal bargaining : A study of vitiation factors in the formation of contracts*, (Oxford: Clarendon Oxford Press, 1991).

24. Frank Hopkins, "Review of *Economic Duress in Common Law*," (LLB Thesis, University of Nottingham. (2002) 17.

25. Ibid. See footnote 24.

entered into otherwise, and that he had no choice but to accept to contract.²⁶ Smith and Another,²⁷ have written on how heavy the burden of proving economic duress is. They have shown in their paper how the majority of recent commercial division cases demonstrate the heavy burden parties face when bringing a claim for economic duress. This they attributed to the fact that courts have been conservative and hesitant in applying this doctrine because they do not want to allow parties to avoid their contractual obligations.

Surinder,²⁸ emphasised the need for drawing a line between negotiating hard and illegitimate pressure, which is not easy. This is important because in the current challenging economic conditions, it is not surprising that contracting parties are seeking to drive hard bargains where they can and not that parties are exploring whether they can avoid what may have turned out to be bad bargains.

According to Hopkins,²⁹ it is clear that this concept of economic duress has not been an easy one for legal jurists and he says that is the reason why courts have spent several years trying to clarify it. He further lists a number of questions which have had to be addressed by the courts in the quest of trying to solve this problem such as; which basis could be used in order to ascertain the presence of duress?, how can the victim prove that his freedom of choice was “coerced?” how to distinguish legitimate and illegitimate pressure in the course of a business? What are the criteria judges may use in order to decide if a causal link existed between the pressures and the entry into the contract?

Legal commentators such as Waddams,³⁰ have observed that duress cannot be studied as an

26. <http://www.lawteacher.net> [accessed October 18, 2012].

27. George B. Smith and T. Hall, “The Heavy Burden of Proving Economic Duress,” *New York Law Journal* 247 (2012):76.

28. <http://www.mayerbrown.com/news/detail> [accessed October 2nd, 2012].

29. Frank Hopkins, “Review of Economic Duress in Common Law,” (LLB Thesis, University of Nottingham. (2002) 17.

30. S.M. Waddams, “Unconscionability in Contract,” *Modern Law Review* 39, no.4 (1979): 369-393.

isolated and discrete legal principle; rather, its relationship with increasing judicial willingness to enforce only those contracts which the courts perceive as fair requires a discussion of its relationship to inequality of bargaining power and unconscionability. He further says, in relation to this, it is important to consider whether economic duress, as a means of policing bargains, should develop independently or whether it is better to resort to one general principle such as unconscionability.

1.2. Statement of the Problem

There is no argument on the fact that economic duress goes against the fundamental principle of contract law, that parties should act voluntarily. An agreement which appears to be valid on its face is challenged because it is alleged that it is a product of improper pressure of economic nature.³¹

The main problem faced by courts is to draw a line between legitimate negotiation and economic duress. This is so because economic duress sounds perilously close to hard competition which in other words is business.³² Since the free market system is expected to provide tough competition, the challenge is to distinguish economic duress from successful business tactics.

1.3. Objectives of the Study

The overall aim of this study is to consolidate the case of economic duress as a factor that undermines the free will of parties to contract. The specific objectives are:

a) To critically evaluate the doctrine of economic duress, its development and contribution to contract law.

31. <http://www.law-essays-uk.com/resources>. [accessed on May 10, 2013].

32. Jeffrey F. Beatty and Susan S. Samuelson, *Business and Economics* (2006) 320.

b) Show how this doctrine relates to other contractual doctrines of Consideration, Undue Influence and Unconscionability.

b) To show how the ³³ Zambian Courts in the case *Tobacco Board of Zambia v. Tombwe Processing Limited* applied the doctrine of economic duress in comparison to leading cases in other common law jurisdictions.

1.4. Hypothesis of the Study

Economic duress undermines the freedom to contract.

1.5. Significance of the Study

The doctrine of economic duress is a recent development in English law and compared to other contract law doctrines like undue influence, consideration and unconscionability, it has been around for about three decades.³³

This doctrine has always been surrounded by uncertainties. This is due to the fact it is a lively area of law and closely linked with the development of the business area in the modern world, where threats to economic interests can be just as devastating as the more traditional forms of duress.³⁴

Sometimes, lawyers have found it difficult to choose a basis for their actions because this notion of economic duress is not the only doctrine which offers a way to unbalance contractual relationships, where illegitimate pressures have induced the victim to agree to a set of terms he would have not otherwise accepted.³⁵

In most economic duress cases, the doctrine of consideration has been pleaded alongside

33. First confirmed in *North Ocean Shipping Co. Ltd v Hyundai Construction Co. Ltd, the Atlantic Baron* [1979] QB 705.

34. Frank Hopkins, "Review of Economic Duress in Common Law," (PhD Thesis, University of Nottingham. (2002) 17.

35. Lisa A. Peters, "Contract Law Update: Developments of Note." (paper presented at the Negotiating and Drafting Major Business Agreements Conference, Vancouver, 2011. <http://www.lawsonlunde11.com>) [accessed May 10, 2013].

economic duress, with the former showing some limitations.³⁶

When compared to undue influence and unconscionability doctrines, economic duress offers a good alternative as it is objective unlike the other two doctrines which are subjective. Further, economic duress doctrine is very useful as it enables courts to deal with the problem set in cases of abuse of monopolies and it also responds directly to the plaintiff's real complaint.³⁷

Most importantly, in this rights-oriented era, it is widely accepted that all persons have a right which the law should uphold to earn their livelihood in a manner acceptable to them and generally reasonable.³⁸

This doctrine of economic duress is very significant in contract law and hence worth studying and understanding because it is likely to be pleaded in the context of commercial transactions. Therefore, solicitors working in this area need to understand its parameters.

Considering that our own Zambian courts have also recognised this doctrine in *Tobacco Board of Zambia v. Tombwe Processing Limited*,³⁹ this study will also endeavour to assess whether as a country, our legal system is consistent with best practice for applying the principles of this doctrine.

1.6. Methodology

A qualitative method of study was used in this research. The main source of information was secondary sources by way of reviewing literature of notable legal jurists and case law. In addition to this, data was derived directly from the specific case under study.

36. Andrew Phang, "Whither Economic Duress? Reflections on 2 recent cases," *Modern Law Review* 53 (1990):107-116

37. M.H. Ogilvie, "Wrongfulness, Rights and Economic Duress," *Ottawa Law Review* 16 (1984):1

38.M.H. Ogilvie, "Economic duress, inequality of bargaining power and threatened breach of contract," *McGill Law Journal* 289 (1981):26.

39. (2011) H.C./0059

CHAPTER 2 The historical development of the doctrine of economic duress

This chapter will discuss and show the genesis of the doctrine of economic duress in the common law system. It is important to note that the development of the doctrine of economic duress was not an easy one. At first, courts relied on the ‘coercion of the will’ test to ascertain the presence of economic duress. Then, after criticisms made by some authors, courts began to distance themselves from this test, and started to look at the causal link between the pressures applied and the entry into the contract.

2.1 Development of the doctrine of economic duress in traditional common law.

It must be understood that the emergence of the doctrine of economic duress in common law was sort of expected, because the usual law concepts such as consideration and undue influence failed in dealing with the problems set by the way economic evolution progressed. Its genesis is based on the coercion of the will doctrine.⁴⁰

2.1.1 The early cases.

The first cases of economic duress were first given recognition in Australia in the twenties. *Smith v. William Charlick Ltd*⁴¹ was one leading case that was inspirational for English renaissance of economic duress. The facts are that the Australian Wheat Harvest Board, a monopoly supplier, threatened not to supply a miller with flour in the future. This refusal was not a breach of any existing contract. The demand was made for the payment of a ‘surcharge’ which was legally unjustified. The High Court said that the surcharge could not be recovered because as a general principle, refusing to deal (not being in breach of contract), should not amount to economic duress.

Half a century later, English courts relied on this inspiration and this notion of economic duress appeared in English law in the famous case known as ‘*The Siboen v the Sibotre*’.⁴²

40. Frank Hopkins, “Review of Economic Duress in Common Law,” (LLB Thesis, University of Nottingham. (2002) 20.

41. (1924) 34 CLR 38

42. (1976) 1 Lloyd’s Rep. 295

The significance of Lord Denning's remark was not lost on Kerr J. in *The Siboen and the Sibotre*, which is the fresh starting point for recent cases which recognize economic duress by threatened breach of contract. The facts are that two oil tankers were chartered in 1970 to Concord Petroleum Ltd,^{*} at the rate of £ 4.40 *per ton per month* on standard charter parties, for use in transporting oil from the Persian Gulf in the event that Concord was shut out from its Libyan supplies. The market slumped and Concord's parent company, Occidental Petroleum Inc., sought to renegotiate the rate, and they devised a scheme to give the owners the false impression that they had no substantial assets and had suffered great losses. Occidental threatened to repudiate the charter and allow Concord to go into liquidation if the rates were not lowered. The pressure on the owners was exacerbated by the fact that if the charter parties were repudiated the ships would have to be laid up because of the depressed market. The ships were mortgaged and the owners relied on the charter parties' income to repay the mortgages, as the charterers well knew. In such a squeeze the owners seemed to have no alternative but to concede the rate reduction. By mid-1973 the market was rising steeply again and the charterers were making huge profits. The owners asked them to revert to the original rate or the charter parties would be cancelled on the ground of coercion. The charterers declined to reinstate the original rate, the owners withdrew the ships and the charterers sued. The owners alleged that the renegotiated terms were void for misrepresentation or for duress, and Kerr J. held that the charterers were liable for misrepresentation, but that the action in duress could not succeed.

The learned judge conceded that there was room for the development of the law in regard to contracts concluded under some form of compulsion not amounting to duress to the person, and stipulated the appropriate test: '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 animus

contrahendi. This would depend on the facts of each case [...].⁴³

One relevant and important factor to consider here would be whether the party relying on the duress made any protest at the time or shortly thereafter. Another would be to consider whether or not he 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.⁴⁴

In this instant case Kerr J. decided that there was neither sufficient coercion of the will nor protest, and that the owners had admitted that they regarded the agreement as binding, thus "acting under great pressure, but only commercial pressure, and not under anything which could in law be regarded as a coercion of his will so as to vitiate his consent."⁴⁵ This argument is unsatisfactory.

This is because undoubtedly, it was convenient for the Court that the threatened breach of contract took the form of misrepresentation. But the question should be, if there had been no misrepresentations would the charterers have escaped liability? Or would the judge have made an extra effort to find an alternative ground of liability? One would hope so.⁴⁶

Kerr J. suggested several other relevant factors in the determination of the presence of economic duress, notably whether the victim protested or regarded the agreement as forever binding.

Even though the presence of economic duress was rejected here, this case opened the way for a lot of others. And it became clear from Lord Kerr's judgement that this notion was going to be implanted in English law.

Three years later after the *Siboen and the Sibotre*, the doctrine of 'economic duress' was confirmed in English law in the leading case called '*The Atlantic Baron*.'⁴⁷

Here, the builders of a ship demanded a 10% increase on the contract price from the owners

43. Ibid. See footnote 42.

44. Frank Hopkins, "Review of Economic Duress in Common Law," (LLB Thesis, University of Nottingham. (2002), 22.

45. The "*Siboen v. the Sibotre*" (1976) 1 Lloyd's Rep. 295

46. Frank Hopkins, "Review of Economic Duress in Common Law," (LLB Thesis, University of Nottingham. (2002)

47. North Ocean Shipping Co. Ltd v. Hyundai Construction Co. Ltd, The '*Atlantic Baron*' (1979) Q.B. 705

(because the value of the US dollar fell by 10%), or threatened not to complete the ship. The owners paid the increased rate demanded from them, protesting that there was no legal basis on which the demand could be made. The owners had no option but to pay, because at the time of the threat, they were negotiating a very lucrative contract for the charter of the ship being built.

Mocatta J decided that this case was dealing with economic duress. The building company exerted an illegitimate pressure with their threat to break the contract. Where a threat to break a contract leads to a further contract, that contract, even though made for good consideration, is voidable by reason of economic duress.⁴⁸

In this case, the right to have the contract set aside was lost by affirmation. Indeed, the plaintiffs had delayed for reclaiming the extra 10% until eight months later, after the delivery of a second ship.

It is undoubtedly clear that in the two famous cases mentioned, the existence of an economic duress doctrine was recognised in English law. However, it is important to note that these two cases were the first ones and so the doctrine was not well constructed. The judges focused so much on finding out in each case whether the victim's mind was overborne.

2.2. The basis for the doctrine: the coercion of the will.

The basis on which the courts intervened to set aside a contract on the ground of duress in the early cases, was where the victim's will had been coerced in such a way as to vitiate his consent. This idea, as we have previously seen, was first expressed in the '*Siboen and the Sibotre*' case, by Lord Kerr, when he employed such words as: '...coercion of his will such as to vitiate his consent.'

This statement has also been developed in some other cases, such as '*Pao On v. Lau Yiu Long*'.⁴⁹ This case was important because for the first time, the Privy Council had to deal with

⁴⁸ Some authors discussed this. It seems that in case where renegotiations of the contract leads to a fairer contract, courts will not set aside the contract on the grounds of duress. See also *Pao On v Lau Yiu Long* (1980) AC 614.

⁴⁹ *Pao On v Lau Yiu Long* (1980) AC 614.

a case of economic duress, and was entitled to set the basis of the notion or doctrine.

In the latter, the plaintiff had threatened not to proceed with a contract for a sale of shares unless the other party agreed to renegotiations of certain subsidiary arrangements. The defendant knew that they could claim specific performance of it. But they chose to accept because they were anxious to complete the agreement and wished to avoid litigation. Later, the plaintiff tried to enforce these arrangements. The defendants claimed that they have been extracted by duress, and were so voidable. But as the court held, the defendant chose to avoid litigation. Thus, there was commercial pressure, but no coercion.

Lord Scarman, indeed, stated:

Duress, whatever form it takes, is a coercion of the will so as to vitiate consent... In their lordship's view, there is nothing contrary to principle in recognising economic duress as a factor which may render a contract voidable, provided always that the basis of such recognition is that it must amount to a coercion of the will, which vitiates consent. It must be shown that the payment made or the contract entered into was not a voluntary act.⁵⁰

In confirming the existence of the doctrine, and in relying on principles exposed four years before by Lord Kerr,⁵¹ the Privy Council took an important decision.

Lord Scarman, in his discussion, agreed with the observations of Kerr J in the *Siboen and the Sibotre* that in a contractual situation, commercial pressure is not enough. There must be present some factor: '...which could be regarded as a coercion of the will.'

In the '*Universe Sentinel*,'⁵² another really important case for the development of the doctrine, Lord Scarman took a similar line for expressing what he felt was the essence of economic duress at that time, though some authors saw some premises of a change in his discussion.

In the latter, the defendant trade union 'blackened' the claimant ship. They refused to let it go

50. Lord Scarman in *Pao On v Lau Yiu Long* (1980) AC 614.

51. Lord Kerr in the *Siboen and the Sibotre*

52. *Universe Tankship Inc. Of Monrovia v. International Transport Workers's Federation* (1982) 2 All ER 67

unless a certain sum of money was paid. In view of the catastrophic financial consequences that the shipowners would have suffered if these threats had been carried out, it was conceded that they constituted economic duress, vitiating the shipowners' consent to the agreement.

The House of Lords held⁵³ that the payment was recoverable. Lord Scarman said:

Compulsion is variously described in the authorities as coercion or the vitiation of consent. The classic case of duress is, however, not the lack of will to submit but the victim's intentional submission arising from the realisation that there is no other practical choice open to him...⁵³

Some authors saw in that statement the beginning of the end for the 'coercion of the will' theory. This sounds difficult to admit. Indeed, Lord Scarman chose to apply a different approach from what was usually done when speaking about the coercion of the will theory.

The discussion about the basis of the theory made by Lord Scarman proves that some uncertainty about the foundation of the notion was present in the judge's mind. Nevertheless, the coercion test was the main point on which courts were focusing in the early eighties.

Lord Scarman's discussions in *'Pao On v Lau Yiu Long'*⁵⁴ and to a lesser extent in the *'Universe Sentinel'* led to a number of criticisms and uncertainties on how they were to be used.

Although it is clear that the nature of the threat must be coercive, proving the coercion of the will soon appeared as inefficient and this led to a progressive move away from the coercion of the will's theory.

From the decisions in the last decade (at least the ones from the highest jurisdictions), it can be seen that the focus of the judge is no longer on whether the victim's mind has been coerced. Judges later focused more on the search of a causal link between the pressure applied and the entry into the contract.

53. Ibid. See footnote 52

54. (1980) AC 614

McKendrick proposed this analysis and said that courts would abandon the coercion of the will test completely. According to him, courts would instead have regard to the consent of the claimant only. This would be for the purpose of ensuring that there is a sufficient causal link between the pressure applied by the defendant and the entry into the contract.⁵⁵

2.3. Causal link between the pressure applied and the entry into the contract.

From the beginning, Courts have tried to define which factors could amount to a: ‘coercion of the will so as to vitiate the consent’.

From the discussion in this part of this paper, it is evident that this test today is not of such a great importance and that its move away is due to the fact that Courts had, little by little, drawn guidelines. Judges use rationale material in order to define whether the victim’s freedom of choice has been denied or not.

In ‘*The Siboen and Sibotre*,’⁵⁶ Lord Kerr’s statement relied for instance on:

...The Court must in every case be satisfied that the consent of the other party was overborne by compulsion [...] This would depend on the facts of each case. One relevant factor would be whether the party relying on duress made any protest at the time...Another would be to consider whether or not he made it clear that he regarded the position as still open...

The problem with these factors is that none of the cases were clear about the relative importance of each of them.

It took a long time to define precisely the criteria which were to be used in order to prove a causal link between the pressures applied and the entry into the contract.

In order to prove the existence of a causal link, some factors are taken into consideration as discussed below.

Nevertheless, it must be said that all of these matters have emerged progressively from the

55. Ewan McKendrick, *contract law* (Palgrave Macmillan law Masters, 1997 <http://www.palgrave.com>) [accessed June 15, 2013].

56.(1976) 1 Lloyd’s Rep. 295

Courts decisions, and that they cannot be taken as decisive in each case. The courts have failed to present a coherent list of factors. Thus, one needs to have a look at the various factors described in the authorities in order to know which of these elements could be used in a particular situation. ❁

First, economic duress could not be proved if the party alleging coercion has subsequently affirmed the contract. This happened in '*The Atlantic Baron*', where the right to claim economic duress was lost by the claimants, because they waited after the delivery of a second ship before seeking legal redress. At this time, the pressures had long ceased.

Secondly, Lord Scarman offered in '*Pao On v Lau Yiu Long*' that in determining if the pressure was improper enough to coerce the will of the victim, it could be necessary to enquire, '...whether the person alleged to have been coerced did or did not protest...' ⁵⁷

But it is sure from recent decisions that even if it could be a crucial factor in rare cases, it is not in every case that judges will discuss about it. Therefore, it can not be looked at as a determinant factor.

The third point which could be emphasised from the decisions looked at was that it is the claimant who will have to show that the pressures applied were a 'significant cause' inducing him to enter into the contract. ⁵⁸

One needs to prove that the decision to submit to the demand was a direct consequence of the illegitimate pressure applied. The reason for this is that marketplace is an area where courts cannot set aside contracts easily. Indeed, pressures are part of a normal activity, and giving judges the keys to set aside commercial contracts easily would bring too much uncertainty in the way the doctrine would have to be pleaded, and even in commercial relationships.

An important point is whether an 'alternative course' was open or not for the victim. It seems

57. *Pao On v. Lau Yiu Long* (1980) AC 614

58. Lord Goff developed this idea in *Dimskal Shipping Co. v ITWF*, the '*Evia Luck*' [1992] 2 AC 152.

to be the one on which courts have had the most difficulties dealing with. It is the fact that the party alleging coercion had no practical alternative course open to him at the time he entered into the contract. Mr Andrew Phang called it the 'umbrella factor.'⁵⁹ Mr Phang, senior lecturer in the faculty of law of Singapore, exposed his theories in an article that was published in January 1990.⁶⁰

Despite facing severe criticism, this factor is theoretically important at least, because it admits the fact that economic duress is more likely to arise in monopoly situations. If the victim had the choice to do something else (for example to contract with someone else), she would not have entered the contract. The emphasis on the 'alternative course' open may be seen as the way courts are recognising the existence of monopoly situations when dealing with economic duress.⁶¹

In a strict law point of view, an 'alternative course' can cover several ways of acting for the victim. From lord Scarman statement in *'The Universe Sentinel'*,⁶² it can be: '...proved in lot of ways, for instance by protest, by the absence of independent advice, or by declaration of intention to go to law to recover the money paid...'

But in the *Huyton case*,⁶³ Mance J. stated that: 'it is not necessary to go so far as to say that it is an inflexible [...] essential ingredient of economic duress that there should be no or no practical alternative course open to the innocent party.'

All of these matters may be decisive in order for the victim to claim and to prove economic duress. Although some authors have argued that the alternative course open to the victim was the most important factor, we can assume from recent cases that judges did not choose to follow this point of view. All the matters are equally important, and it is precisely this aspect that give judges the relative freedom they need to decide in this uncertain law's area. This can

59. Andrew Phang, "Whither Economic Duress? Reflections on 2 recent cases," *Modern Law Review* 53 (1990), 107-116

60. As cited above in footnote 59.

61. Frank Hopkins, "Review of Economic Duress in Common Law," (L1.B Thesis, University of Nottingham, (2002)

62. *Universe Tankship Inc. Of Monrovia v. International Transport Workers's Federation* (1982) 2 All ER 67

63. *Huyton SA v Peter Cremer GmbH & Co Inc* [1999] 1 Lloyd's Rep 620

also be explained by the fact that the situations faced by judges are really different from one another and generally take place in the course of complex business relationships. It is therefore difficult to ascertain precisely what factors are to be used. Thus, it is better for courts to keep a relative freedom in deciding which criterions may fit the best the facts of the case.⁶⁴

Thus from the above discussion, it can be seen the way the doctrine of economic duress has implanted itself in English law over the last two decades. The courts applied the coercion of the will test at first and later moved away from it though judges still rely on the state of the mind of the victim in order to be sure that the pressures applied were truly the reason for the entry into the contract.

Indeed, pressures are part of the economic activity, and the line is thin between a legitimate and an illegitimate pressure. It is important to note that the emphasis on legitimacy of pressures made by judges in the cited cases permitted the development of the doctrine. In defining exactly what kind of threats should amount to duress and what should not, courts gave the doctrine a good rationale basis. The expanding number of economic duress pleading cases courts had to deal with confirmed that the doctrine was well implanted in common law. This has led the economic duress notion to impose itself alongside other doctrines like consideration, undue influence and, though to a lesser extent, inequality in bargaining power.

2.4. Legitimacy of the pressures and its place in English law

Judges today face a challenge in distinguishing legitimate and illegitimate pressures in economic duress cases. Before examining what belongs to legitimate and illegitimate pressures, one has to keep in mind that the essence of competition is aggression and

64. Frank Hopkins, "Review of Economic Duress in Common Law," (LLB Thesis, University of Nottingham. (2002)

pressure.⁶⁵ And in the marketplace, competition, or being competitive is the objective each company wants to achieve.

The role of the courts, therefore, will be to find and to rule the permissible limits of pressures. But because business is one of the vital nerves of our societies and it needs to be protected, courts cannot make the finding of economic duress easy to prove. That being said, it is important to try to reference the sort of pressures that may be seen as legitimate and the kind of pressures courts usually regard as illegitimate.

Mainly, not every kind of pressures can constitute illegitimate pressure able to give rise to economic duress. The problem with the legitimacy of the pressure is that it is an area where exceptions to the rules are common, and courts rely on the facts of each cases in order to know if the pressure was legitimate or not.⁶⁶ Usually, authors deal with the problem of the legitimacy of the pressures in dividing different threats between lawful and unlawful threats. In the course of a business, most of the pressures applied are just part of the normal activity and cannot constitute illegitimate pressures. For instance driving a hard bargain is referred to as the typical usual way of acting in the market and this kind of pressure may not be considered as illegitimate.

This was dealt with in the Australian case of '*Wardley Australia Ltd v McPharlin*,'⁶⁷ where the judges found no economic duress in the conduct from one party who was threatening to enforce existing legal rights so as to obtain additional security. The judges refer to this behaviour as: 'commercially harsh and exacting' and 'driving a hard bargain,' but held that this could not amount to illegitimate pressures. However, in the '*Alev*'⁶⁸ case, Hobhouse J, seemed to justify that economic duress might arise in case of hard bargain.

On the other hand, there has been a problem with what exactly constitutes illegitimate

65. Ibid. See footnote 64.

66. <http://www.lawteacher.net> [accessed on February 10, 2013].

67. *Wardley Australia Ltd v. McPharlin* (1984) 3 BPR 9500

68. *Vantage Navigation Corporation v Suhail and Saud Bahwan Building Materials LLC (The 'Alev')* [1989] Lloyd's Rep. 138.

pressure. Lord Scarman discussed this point in the ‘*Universe Sentinel*.’⁶⁹ He said:

In determining what is legitimate two matters may have to be considered. The first is as to the nature of the pressure. In many cases this will be decisive, though not in every case. And so the second question may have to be considered, namely, the nature of the demand which the pressure is applied to support [...]. The origin of the doctrine of duress in threats to life [...] or to property, suggests strongly that the law regards the threat of unlawful action as illegitimate, whatever the demand. Duress can, of course, exist even if the threat is one of lawful action: whether it does so depends upon the nature of the demand.

Hence it can be concluded that pressure may be illegitimate either because: The thing threatened is unlawful, or; because even though the thing is lawful, the way the pressure is exerted is illegitimate (see the famous example of blackmail given by Lord Scarman in the case).⁷⁰

The main problem with illegitimate pressures arises where the threat is one of breach of contract. This category of threat is regarded as the paradigm of economic duress. Most of the cases where economic duress was pleaded involved situations where threats were to breach the contract. Where one party threatens to breach an existing contract unless he is given some further advantage, then, although this does not amount to a tort, it will satisfy the requirement of an illegitimate act. The question therefore will be whether the threat is sufficiently overwhelming to constitute economic duress.

69. *Universe Tankship Inc. Of Monrovia v. International Transport Workers's Federation* (1982) 2 All ER 67
70. Lord Scarman: ‘the ordinary blackmailer normally threatens to do what he has a perfect right to do [...], what he has to justify is not the threat, but the demand for money.’ This is an important point, mainly because it is recognised here that in some cases, a lawful act may amount to duress. But in order to do so, one has to prove that though the threat was lawful, the nature of the demand that the threat supported was not.

CHAPTER 3 A comparison of Economic Duress, Undue Influence and Unconscionable Behaviour

Chapter three will cover a comparative analysis of the doctrine of economic duress to other related contractual doctrines such as Consideration, Undue Influence and Unconscionability and their shortcomings if any. This will help in highlighting the significance and relevance of this doctrine in modern-day contract law.

3.1. Economic duress and Consideration

In most of the economic duress cases referred to in this paper, it has been common practice for economic duress to be pleaded alongside consideration. Most of the time, the aggrieved party would plead that there is insufficient consideration or that there has been economic duress. If one of these doctrines is proven then the contract can be set aside.⁷¹

In *Currie v Misa*,⁷² it was held that a valuable consideration in the sense of law, may consist of either some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.

Basically, consideration is concerned with the problem of the conclusion of the contract. Economic duress on the other hand, is a vitiating factor. Hence, an otherwise valid contract could be set aside on this ground.⁷³

In *Atlas Express v Kafco*,⁷⁴ Tucker J. held that the defendants were not bound by the terms of the new agreement. This was so because not only had economic duress vitiated their consent, but there was also no consideration for it.

71. Frank Hopkins, "Review of Economic Duress in Common Law," (LLB Thesis, University of Nottingham. (2002)

72. (1875) LR 10 EX 153

73. Frank Hopkins, "Review of Economic Duress in Common Law," (LLB Thesis, University of Nottingham. (2002)

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

The carriers in "*The Atlantic Baron*"⁷⁵ pleaded, along with duress, that the agreement to increase the purchase price was void for lack of consideration. Mocatta J. rejected the claim based on consideration. He argued that the promises went beyond that of a promise to fulfil an existing contractual duty. Ogilvie⁷⁶ has criticised this judgement. He argued that if there was no economic duress, consideration found by the judge was doubtful. It was based upon finding consideration in the promise to perform an existing duty. Further, he argued that the judgement highlights the fact that duress is more appropriate than consideration in order to deal with coerced bargains. This he said was because consideration does not expressly address the concerns which might undermine the court's decision.

Atiya⁷⁷'s views on the other hand, were that courts have never set out to create a doctrine of consideration. They have been concerned with a much more practical problem of deciding in the course of litigation whether a particular promise in a particular case should be enforced.

According to him, the first time the courts probably used the word consideration, they meant no more than there was a reason for the enforcement of a promise.

In reference to recent cases, Atiya observes that the doctrine of consideration at one time was used as a way of controlling the validity of contractual variations which might have been obtained by undue pressure. He however, notes that modern decisions are shifting the basis of the law away from consideration toward the new doctrine of economic duress.⁷⁸

The leading case of *Williams v Roffey Brothers & Nicholls (contractors) Ltd*⁷⁹ exposed the difficulties that exist in the relationship between these two doctrines. The facts of the case are that the defendants were contractors who had entered into a contract to renovate a block of

75. *North Ocean Shipping Co. Ltd v Hyundai Construction Co. Ltd, the 'Atlantic Baron'* [1979] QB 705.

76. M.H. Ogilvie, "Economic duress, inequality of bargaining power and threatened breach of contract," McGill LJ 289. (1981):26

77. P.S. Atiyah, *Consideration: a restatement*, in *Essays on Contract* (Oxford: Oxford University Press, 1986).

78. Ibid. See footnote 77.

79. *Williams v Roffey Bros & Nicholls (contractors) Ltd* (1991) 1 QB.1

flats. The contract stated that a penalty should be payable if the work was not done in time. The defendant subcontracted the plaintiffs to perform the carpentry work. But the latter fell behind because they had agreed for a low price, which placed them in financial difficulties. In order to avoid the use of the penalty by the main contractor, the defendant proposed an extra payment to the plaintiff. The latter therefore asked for the money, but the defendant refused to pay, arguing that the agreement was not supported by sufficient consideration. The Court of Appeal found for the plaintiffs and held that the agreement was enforceable. The issue here was that this case involved a consideration problem. Indeed, economic duress was not even pleaded. Based on the scope of the decision, it nevertheless appears that it was the defendant who requested the variation.

However, McKendrick⁸⁰ has discussed this case in relation with the doctrine of economic duress. He wonders whether a mistake was made when the defendants failed to claim economic duress. In his view, there was potential breach of contract by the subcontractors.

He noted that the probability of that breach was the reason why the defendant offered to pay more for the performance of the work. The defendant must have made the offer based on the pressure they were under (the penalty clause in the contract) because of the lack of progress of the work. The claimant was incompetent in that he failed to cost the work. This point is very pertinent in that, if William had deliberately under priced the job and then said he was unable to finish the work, judges would have been closer to an economic duress situation.

The issue in such a situation is to draw a distinction between the incompetent contractor and the one who wants to take advantage of the economic situation of the weaker party.

80. Ewan McKendrick, *contract law* (Palgrave Macmillan law Masters, 1997), <http://www.palgrave.com> [accessed June 15, 2013].

3.2. Economic duress and Undue Influence

Undue Influence like economic duress is considered as a vitiating factor for contracts.⁸¹ In both cases, it is based on the improper conduct of one party, the situation of dependence (or vulnerable) of the other or a combination of the two.

The doctrine of undue influence has a long standing in English law. Equity developed doctrines of undue influence and unconscionable conduct⁸² when it was realised that the grounds upon which common law would set aside a contract for duress were obviously limited.⁸³

The two main categories of undue influence are “presumed” undue influence and “actual” undue influence. Presumed undue influence arises where parties are in a special relationship such as doctor-patient or lawyer-client relationship. It is important to note that there must be proof of “a manifest disadvantage” for a presumption of undue influence to arise. With the presence of a manifest disadvantage, it is presumed that undue influence has vitiated the claimant’s consent. The case of *Bank of Credit and Commerce International S.A v Aboody*⁸⁴ defined a manifest disadvantage. In this case, the Court of Appeal held that a disadvantage would be a manifest disadvantage if it would have been obvious as such to any independent and reasonable persons who considered the transaction at the time with knowledge of all relevant facts. Once this is proven, the onus to prove that there was no undue influence rests on the defendant.⁸⁵

The case of *Allcard v Skinner*,⁸⁶ is an example of presumed undue influence. The facts of the case are that the plaintiff aged 27 years, voluntarily became a member of a protestant

81. Frank Hopkins, “Review of Economic Duress in Common Law,” (LLB Thesis, University of Nottingham. (2002).

82. Unconscionable conduct is generally understood to mean conduct which is so harsh that it goes against good conscience. This is to an extent that the law has to intervene. www.accc.gov.au [accessed on July 5th 2013].

83. www.lawteacher.net [accessed May 10, 2013].

84. ‘Bank of Credit and Commerce International’ [1990] 1 QB 923.

85. Ibid. See footnote 84.

86. (1887)36 Ch D 145

sisterhood. The plaintiff was introduced to the organisation by the defendant who was her spiritual adviser. She then became a sister and continued for seven years, when she left the Order. The rules of the Order included vows of poverty, chastity and obedience. The plaintiff made large gifts of property to the defendant on behalf of the Order, most of which had been applied for purposes of the Order. Some six years after she left the order the plaintiff sought to recover the unspent balance of these gifts. The court accepted that the relationship of religious adviser and follower should, without more, give rise to a presumption of undue influence. It was held that Miss Allcard was under an external influence - the influence of her vows, and it was a pressure which she could not resist until it was removed (that is, when she left the sisterhood).⁸⁷

On the other hand, “actual” undue influence appears where the party has exercised undue influence in the sense of domination over the other party. In this case it is the claimant that will have to prove the existence of undue influence. There is no need for special relationships between parties.⁸⁸

In *Williams v Bailey*⁸⁹ a father executed a mortgage in favour of his banker. However, the reason this was done was because the banker threatened to prosecute the man ‘son for forgery unless the mortgage was done. The court held that the father was entitled to rescind the mortgage on the ground of actual undue influence.

In comparison with economic duress doctrine the assumption is that both doctrines occur where one party to a contract has coerced the other or exercised such domination that the other’s independence of decision is denied. Of the two categories of undue influence, actual undue influence seems closer to duress than presumed undue influence.⁹⁰

87. Ultimately, Miss Allcard’s claim was defeated by her delay in seeking a remedy.

88. Frank Hopkins, “Review of Economic Duress in Common Law,” (LLB Thesis, University of Nottingham. (2002).

89. (1866) LR 1 HL 200.

90. Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing*, (Sweet and Maxwell: 2006), 590.

However, a notable difference is that the equitable concept of ‘pressure’ is wider in undue influence than in common law duress. Most strikingly, undue influence can be exercised and is usually exercised without any illegitimate threat or even without any threat at all.⁹¹



The equitable doctrine of undue influence is much wider than the common law concept of duress and is mainly concerned with correcting the abuse of a position of influence.⁹² The relationship of confidence of influence arises where one party occupies or assumes towards another a position naturally involving an ascendancy or influence over the other, or where a dependence or trust exists.⁹³

Thus, this appears to be the main difference between economic duress and undue influence. But basically, both doctrines are and can be used to achieve the same goal.

3.3. Economic duress and Unconscionability

The concept of unconscionability is a feature of Anglo-American systems of law. The concept owes its existence to the historical distinction between courts of law and courts of equity in England. While common law courts could not entertain cases concerning the fairness of the bargain, the courts of equity developed the defence of unconscionability to alleviate the harsh effects of the common law approach.⁹⁴

The case of *Fry v Lane*⁹⁵ is a clear example of the Chancery Division applying the defence. In that case two poor and uneducated men had been induced into concluding an onerous contract without being given the opportunity to seek legal advice. The court refused to enforce the contract for unconscionable conduct.

91. Frank Hopkins, “Review of Economic Duress in Common Law,” (LLB Thesis, University of Nottingham. (2002).

92. <http://www.lexis.com> [accessed May 10th 2013].

93. Tina Yee, “*The Etridge Influence on Undue Influence*,” (LLM Thesis, University of Canterbury, 2008), 20.

94. (1888) 40 Ch D 312, citing *Wood v Abey* 3 Madd 417 at 423.

95. Steven EnMan, “*Doctrines of unconscionability in Canadian, English and Commonwealth contract Law*,” *Anglo American Law Review* 197, No. 16 ((1987): 191.

The defence of unconscionability, however, has not played an important role in English legal system in the 20th century. Enman⁹⁶ has summed up this position by saying that the concept of unconscionability in England has been virtually dead for almost a century. However, this equitable defence has found a happier home in those jurisdictions that received the law while under the colonial yoke in 1700s. An example of the countries where it is practised is Australia and Canada.

The problem with the general defence of unconscionability is that it provides courts with great power to combat what can be described as ‘contractual unfairness’, but without giving any clear definition of the concept, nor guidance as to how it should be interpreted or wielded.⁹⁷

Leff⁹⁸ has criticised the defence of unconscionability acidly for its ‘amorphous unintelligibility.’ It has been left to the courts and academic commentators in the relevant jurisdictions to try to impart some useful meaning to the concept.

Leff further emphasises the point that the defence of unconscionability is ‘not to be taken as a panacea for adjusting any contract between competent persons when it shows a rough edge to one side or the other.’⁹⁹

According to him, mere inequality of bargaining power will not be sufficient to justify a remedy. Further, he states that this doctrine is not a free floating device of fairness that operates without constraints. Rather, it is a particular doctrine or legal institution, which can be employed by a court to prevent a particular form of contractual unfairness.¹⁰⁰

96. S.M. Waddams, “Unconscionable contracts: Competing Perspectives,” 62 Saskatchewan LR 62, No.1 (1999).

97. Robert A. Hillman, “Debunking some myths about unconscionability: A New Framework for U.C.C.,” Cornell Law review 67, No. 1 (1981): 550.

98. Arthur A. Leff, “Unconscionability and the Code: Tthe Emporor’s New Clause,” University of Pennsylvania Law Review 115, No. 485 (1967):488

99. Per Lord Radcliffe in *Bridge v Campbell Discount Co. Ltd* (1962) AC 600 at 626.

100. Arthur A. Leff, “Unconscionability and the Code: Tthe Emporor’s New Clause,” University of Pennsylvania Law Review 115, No. 485 (1967):488

Like other legal doctrines, the doctrine of unconscionability operates in a specific context. In the leading case of *Commercial Bank of Australia Ltd v Amadio*,¹⁰¹ it was held that the doctrine of unconscionability may be appealed to, 'when one party by reason of some condition or circumstances is placed at a special disadvantage vis-a-vis another and unfair unconscientious advantage is then taken of the opportunity thereby created.'

Notably, a number of characteristics can be drawn from the definition in the *Amadio* case. Firstly, the existence of some circumstances that places the one party at a disadvantage and secondly an unconscionable exploitation of that advantage by the other party in the contract.

When reference is made to Leff's model of the doctrine of unconscionability, two requirements for finding unconscionability should be met. These being procedural and substantive unconscionability.¹⁰²

Procedural unconscionability refers to a problem arising during the negotiations leading up to the conclusion of the contract. In this case the doctrine differs from economic duress in that the jurisdiction under this doctrine is based on whether the aggrieved party was suffering from some 'special advantage' or 'cognitive defect.' This was illustrated in *Blomley v Ryan*¹⁰³ where special advantage was defined to include 'illness, ignorance or other circumstances that affected his ability to conserve his own interest.'

The key is therefore that the aggrieved party must have been in a position whereby the party, due to some special advantage of this kind, was effectively unable to negotiate on an equal level and with full knowledge of what was in his or her best interests. In addition to this there

101. (1983) 151 C.L.R. 447. For an analysis of the importance of *Amadio* and the doctrine of Unconscionability in Australia in general, see Harland "Unconscionable and Unfair Contracts: The Australian Perspective." In Brownsword et al., "good faith in Contract," 243.

102. Cited above. See footnote 101.

103. (1956) 99 C.L.R. 362

must be something substantively unconscionable about the transaction that resulted. The other party must have abused this cognitive disadvantage unconscionably to impose contractual terms upon the other party which are unacceptably unfair.¹⁰⁴



When compared to economic duress and undue influence, this doctrine is distinguished by the fact that in cases of unconscionability, the courts require both procedural and substantive unconscionability to be proved.¹⁰⁵ Not only must there be the relevant procedural taint, but the resulting contract must be unfair or unreasonably harsh.

In the case of *Resource Management Company v Western Ranch and Livestock Company Inc.*,¹⁰⁶ the judge said that where only procedural irregularities are involved, the judicial doctrines of duress may provide a superior tool for analysing the validity of a contract.

However, like the doctrine of undue influence and duress, the doctrine of unconscionability as defined above operates to prevent a particular form of violation of the flexible umbrella duty of good faith that is foundational to the law of contract.¹⁰⁷

104. <http://www.marrowlaw.com> [accessed July 5th, 2013].

105. Richard E. Lord, *Williston on Contracts* (Sweet and Maxwell: 2013), 18.

106. 706 P.2d 1028, 1041 (Utah 1985).

107. B. G. Graham, "The doctrine of duress in the law of contract and unjustified enrichment in South Africa," (PhD Thesis, Rhodes University, 2003), 35.

CHAPTER 4 Analysis of *Tobacco Board of Zambia v. Tombwe Processing Limited*

4.0. Overview

This chapter will discuss and analyse the decision in *Tobacco Board of Zambia v Tombwe Processing Limited*.¹⁰⁸ The High Court for Zambia was called upon to consider the question of whether or not the plaintiff was entitled to payment of the amount claimed in form of tobacco levy. Further, the judge felt compelled to address the issue of whether there was duress exerted on Tombwe Processing Limited (defendant) by Tobacco Board of Zambia (plaintiff). Following a review of the authorities, the Court found that the plaintiff was not entitled to collect the levy and the defendant was not mandated to pay the levy. The Court also found that the defendant's acknowledgement of debt from non-payment of levy fees was procured by economic duress and was accordingly declared a nullity. The analysis of this case is very important in order to see how the Zambian courts handle economic duress cases in comparison to other high jurisdictions like the English legal system.

4.1. The Facts

The plaintiff, Tobacco Board of Zambia, is a body corporate established under the provisions of the Tobacco Act.¹⁰⁹ The defendant is a limited liability company registered under the provisions of the Companies Act.¹¹⁰

Pursuant to the Tobacco Levy Act,¹¹¹ the defendant is under an obligation to pay a prescribed levy for tobacco bought in any particular year and or season. The levy is payable to the Ministry of Agriculture and Co-operatives. However, the said Ministry through its Permanent Secretary assigns all monies owed and payable as levy to the plaintiff.

108. (2011) H.C/ 0059

109. Chapter 237 of the Laws of Zambia

110. Chapter 388 of the Laws of Zambia.

111. Chapter 238 of the Laws of Zambia.

In the agricultural seasons between 2002 and 2006, the defendant bought tobacco whose levy amounted to K863, 864, 804.73. Tombwe Processing Limited(defendant) acknowledged owing Tobacco Board of Zambia (plaintiff) K863,804.73 by an agreement dated 11th April, 2007. This acknowledgement of debt was signed by the defendant on 17th April, 2007. Arising from this agreement, the defendant commenced servicing this debt by depositing with the plaintiff two cheques in the sums of K20, 000,000.00 and K30, 000,000.00 on the 5th May, 2008. After this, the defendant neglected to make further payment despite reminders by the plaintiff.

Based on this, the plaintiff instituted proceedings against the defendant in the High Court for Zambia. The statement of claim was for the payment of K813, 864,804.73 being monies outstanding on a debt owed by the defendant to the plaintiff. The plaintiff was also claiming interest on the outstanding sums at the ruling base rates from the dates that monies fell due until date of judgement and thereafter at the ruling bank deposit rate until date of full payment. In addition to this there was also a claim of legal costs and any other such relief as the court may order.

4.2. Plaintiff's arguments

Counsel for the plaintiff, argued that the defendant did not deny that it owed the monies claimed. The defendant merely disputed the legal basis for the claim and the plaintiff's interest in the said monies. According to the plaintiff, the issues in dispute were:-

- (i) whether the plaintiff had sufficient interest in the suit.
- (ii) whether the plaintiff was entitled to claim the sums claimed and
- (iii) whether the defendant was entitled to decline to pay the sum claimed.

The plaintiff's claim was based on the statement of claim was as follows;

- (i) payment of the sum of K 813, 864,804.73 being monies outstanding on a debt owed to the plaintiff and acknowledged by an Agreement dated 11th April, 2007 and signed by the defendant on the 17th April, 2007 particulars of which are the defendants knowledge and exceed three folios; ¹¹²
- (ii) Interest on the outstanding sums at the ruling base rates from the dates that monies fell due until date of judgement and thereafter at the ruling bank deposit rate until date of full payment;
- (iii) Legal costs and any other such relief as the Court may order.

In addressing the first issue, the plaintiff began by distinguishing the facts of this case from those of *Tobacco Board of Zambia v Contaf Nicotex Tobacco Limited and Tobacco Association of Zambia*.¹¹² The argument was that in the latter case, the court found that the plaintiff had no *locus standi* to claim the tobacco levy. In the case at hand, however, the plaintiff's argument was that it was seeking to enforce an agreement entered into with the defendant. The plaintiff was of the view that the defendants executed the agreement with the full knowledge of the *Tobacco Association of Zambia* ¹¹³ case and went ahead to honour it partly by making a payment of K50, 000,000.00. Therefore, it could not now argue that the plaintiff has no *locus standi*. Counsel for the plaintiff argued that having executed the contract the defendant is bound by it and that the parties are presumed to be bound by the contract.¹¹⁴

As regards consideration, the plaintiff argued that they provided consideration. In reference to the case of *Currie v Misa*¹¹⁵ and *William v Roffey Brothers and Nicholls (contractors)*

112. (2000) HP/ 0003.

113. Ibid. See footnote 112.

114. *Biggs v Hoddinot and Rose and Frank Co. v J.R. Crompton and Brothers Limited*.

115. (1975) ALL ER page 686

Limited¹¹⁶ the term consideration was defined.¹¹⁷

The plaintiff argued that they suffered detriment by issuing the licences when the defendant had not remitted the tobacco levy. Since the defendant derived a benefit from the licences, it was under an obligation to honour the terms of the agreement it signed.

Counsel for the plaintiff also emphasised the fact that the defendant was estopped from going back on the agreement.¹¹⁸ However, this paper will not discuss the doctrine of estoppel.

The plaintiff further argued that the defendants were precluded from alleging other terms agreed between the parties in form of oral evidence. This was because the parties had reduced their agreement to writing and so precluded from advancing oral evidence to add, vary or contradict its terms.¹¹⁹ Counsel went on to argue that the assignment of debt by the Ministry of Agriculture and Co-operatives was in order. The same was legal and does not become unenforceable merely because the assignee has to commence litigation to recover debt.

On the defence of economic duress raised by the defendant, the plaintiff argued that there must be proof that illegitimate threats were made that affected a person's economic interests. The defendant must have had no choice other than to comply with the request to be successful in a claim for duress.¹²⁰

It was also argued that the plaintiff was entitled to assert an equitable assignment for collection of tobacco levy on behalf of Ministry of Agriculture and Co-operatives.

The plaintiff further argued that there was no proof that it had threatened the defendant prior to signing the agreement or that it had declined to issue the licence to the defendant. Counsel

116. (1991) 1 QB

117. *Currie v Misa* (1975) All ER (defined above in footnote 78 as a right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other, constitutes consideration.).

118. *Combe v Combe* (1951) 2 KB 215., *Smith v Hughes* (1871) LR 6 QB page 597., *Oades v Spafford* (1948) 2 KB page 74., *Scriven v Hindley* (1913) 3 KB page 564., *Merrit v Merrit* (1970) 2 ALL ER page 760.

119. David Baker and Collin Padfield, *Law of Contract*, (Butterworths-Heinemann, 1998).

120. Peter Heffey, Teannie Marrie Patterson and P. J. Hocker, *Contract, Commentary and Materials*, (Law Book Co of Australasia, 1998).

emphasised the fact that the agreement was signed in the course of business and the fact that the defendant had the option not to sign shows that there was no duress and that the agreement was signed freely.¹²¹ Counsel ended by stating that the defence is defeated further by the fact that the purpose of the agreement was legitimate.

4.3. Defendant's arguments

Counsel for the defendant anchored his defence on the fact that the defendant was not required by law to pay tobacco levy. Secondly, the plaintiff had no legal right to collect tobacco levy. Finally, the Counsel argued that the acknowledgement of debt was signed by the defendant under duress and such was null and void. This paper is more concerned with the third ground of defence and therefore will not dwell on the first two grounds of the defence. It will only do so to contextualize the arguments on duress.

On the first ground, the defendant argued that the plaintiff's witness already conceded that tobacco levy is chargeable to growers and that the defendant is not a tobacco grower.¹²² The defendant also argued that there was no proof to show that the Ministry of Agriculture and Co-operatives assigned the collection of tobacco levy to the plaintiff. Counsel for the defendant told the Court that the plaintiff refused to issue a licence to the defendant prior to the signing of the acknowledgement of debt. It took the intervention of the Minister of Agriculture and Co-operatives for the licence to be issued to the defendant.

Regarding ground two, counsel noted that the Tobacco Act which establishes the plaintiff also provides for its functions.¹²³ It was argued that it is not the Plaintiff's function to collect

121. *Zambia Export and Import Bank Limited v Mukuyu Farms Limited and Others (1993-1997) ZR.*

122. Section 5(1) of the Tobacco Levy Act.

123. Section 3 of the Tobacco Act CAP 237 of the Laws of Zambia establishes the Plaintiff and Section 14 provides for functions of the plaintiff.

levy. The tobacco levy is supposed to be collected by the Ministry of Agriculture and Co-operatives.¹²⁴ Further, the defendant argued that the plaintiff had no locus standi.¹²⁵

The last limb of argument is core to this paper. The defendant argued that the acknowledgement of debt was signed under duress after the intervention of the Minister. There was evidence to show that the signing of the acknowledgement of debt was signed “after some protracted indulgence.” Thus, the defendant argued that it had no realistic alternative but to submit to the plaintiff’s request to sign the acknowledgement of debt. In line with this, the defendants asked the court to render the document null and void in accordance with the *Lynch*¹²⁶ case.

4.4. The Judgement of the Court

His Lordship, Nigel K. Mutuna disposed of the entire contract argument in favour of the defendant. This was on the basis of the interpretation of the provisions of the Tobacco Act, Tobacco Levy Act and the principles applied by the court in the *Alec Lobb*¹²⁷ case.

He found that the plaintiff was not entitled to collection of levy and neither was the defendant subject to the payment of the levy. He noted that among the functions of the plaintiff provided under the Tobacco Act,¹²⁸ the collection of tobacco levy was not one of them.

His Lordship also found that the delegation of collection of tobacco levy was not done as prescribed by the law.¹²⁹ He went on to state that:

124. Section 4(1), 5(1) and 6 of the Tobacco Levy Act.

125. Section 13 of Tobacco levy Act states that a levy is due to the Zambian government. Also see *Tobacco Board of Zambia v Contaf Nicotex Tobacco Limited and Tobacco Association of Zambia*. Note that there was no proof to show that procedure was followed in delegating powers by the Ministry of Agriculture to the plaintiff as provided for under section 7 of the Statutory Functions Act. Also see *Zulu v Avondale Housing Project and Galaunia Farms Limited v National Milling Company Limited and National Milling Corporation Limited*.

126. *Lynch v. DPP* (1975) AC 653.

127. *Alec Lobb v Total Oil Great Britain Ltd* (1983) 1 ALL ER page 944. The principles are discussed in detail below in footnote 138.

128. section 14, 41 and 42 of the Tobacco Act Cap of the Laws of Zambia.

129. Section 7 of the State Functions Act.

“the Tobacco Levy Act¹³⁰ prescribes the manner, from whom and to which office the levy will be remitted. The wording of the sections is clear. The levy is payable to the minister and later remitted to the Permanent Secretary. Further, the entities subject to the levy are growers and not buyers like the defendant.’

His Lordship rejected as irrelevant to bring in issues of consideration, estoppel and parole evidence raised by the plaintiff.

On duress, his Lordship was of the view that the duress that was being alleged by the defendant was in fact economic duress. In defining it, he quoted the Blacks Law Dictionary¹³¹ as: ‘an unlawful coercion to perform by threatening financial injury at a time when one cannot exercise free will.’

His Lordship extensively cited the *Alec Lobb*¹³² case to support his view as to the significance of the doctrine of economic duress to the matter. He noted that according to the case there are three requirements that the claimant must establish to prove economic duress and these are; “(i) that they entered into the transaction unwillingly with no real alternative but to submit to the defendant’s demand, or

(ii) that their apparent consent to the transaction was extracted by the defendant’s coercive acts, or

(iii) that they repudiated the transaction as soon as the pressure on them was relaxed.”

His Lordship found that the predicament the defendant found itself in prior the execution of the acknowledgement of debt satisfied all the three tests highlighted above. The defendant was reluctant to pay the levy. Further, it had no alternative but to sign the acknowledgement of debt in order to get the licence on which its survival depended.

130. Section 5(1) and 6(2)

131. Bryan A. Garner. *Blacks Law Dictionary*, 8th edition (2004).

132. *Alec Lobb v Total Oil GB Ltd* (1983) 1 ALL ER page 944.

In addition to this, his Lordship stated that it was clear from the wording of the acknowledgement of debt that, payment of levy was a coercive means the plaintiff used against the defendant. Further, he stated that the coercion was unlawful since the defendant was not supposed to pay levy as provided for by the law.¹³³

Further, his Lordship said that the defendant had repudiated the agreement as soon as the pressure was relaxed. This, he said was done when the defendant refused to make further payment beyond the K50,000,000 paid.

Based on this, his Lordship rendered the acknowledgement of debt a nullity on account of economic duress.

4.5. Comment on the Judgement

The focus of this comment will be on the court's judgement on the doctrine of economic duress. The decision interestingly seems to give a picture of how the Zambian courts interpret this important contractual doctrine.

The requirement of certainty in commercial dealings has forced many courts in the common law jurisdiction like Zambia to be reluctant to make a finding of economic duress. This is especially in the context of what are prima facie lawful commercial acts. This partly because courts have recognised that pressure is a natural part of the bargaining process.¹³⁴ Further, that these pressures will, in many cases, lead to inequality of bargaining power. The law however, must make a distinction between pressure that is acceptable, and pressure which is not.

The Court was very careful in handling this case. It is clear that there was no intention by the

133. Section 5(1) and 6(2)

134. See discussion by Tipping J in *Attorney General for England v R* (2002) 2 NZLR 91, Paragraph 62

Court to depart from the law as applied in other common law jurisdictions. On the contrary, the Zambian Court focused on applying and clarifying pre-existing authorities in this area.

This author agrees with the finding of economic duress in the case under discussion. This is because as his Lordship stated all the ingredients of economic duress as provided for in the *Alec Lobb* case were present. Even though economic duress was not found in the *Alec Lobb* case, the judge laid down a number of important tests that need to be fulfilled before economic duress can be found.¹³⁵ If these ingredients are found, the victim of economic duress will be entitled to avoid the contract. The victim can then claim restitution of any monies paid under the contract. However, this entitlement will be lost if the victim either expressly or by its conduct affirm the contract.

The first ingredient was established in that as his Lordship pointed out, according to the Tobacco Act, tobacco growers and not buyers are mandated to pay the levy. This meant that the coercion that was exerted on the victim was unlawful. The other issue is that the plaintiff used the non-payment of levy to refuse issuance of a licence to the defendant even when they knew that the Tobacco Act¹³⁶ did not provide for such grounds as a basis for refusal. This action by the plaintiff was done in bad faith.

Secondly, the facts of this case as established shows that the coercion that was meted on the defendant was a significant cause which induced the victim to sign the acknowledgement of debt. The wording of the acknowledgement of debt was such that the licence would only be issued upon the defendant signing the document. The threat in this case had a causative effect. In *Pao On v Lau Yiu Long*,¹³⁷ the test was expressed to be "a coercion of the will so as

135. For tests see, *Alec Lobb v Total Oil GB Ltd* (1983) 1 ALL ER page 944.

136. Section 12 of Tobacco Act.

137. Cited above. See footnote 57.

to vitiate consent.” In order for this to be proven, there has to be proof as to whether the victim had protested. In the case at hand there is evidence to show that the defendant protested.

On the other hand, had Tobacco Board of Zambia (plaintiff) established that it had bona fide considered its demand from Tombwe Processing Limited (defendant) to be valid, then it would have been difficult to establish duress. However, this was unlikely as reference is made to section 12 of Tobacco Act.

Thirdly, the victim had no real alternative but to act as demanded by the plaintiff. The defendant may have been aware of his action but the choices that were available to him were not viable. The example given by many commentators in this area involve a victim who has a gun held to his head. The options available to him are to hand over his money, or be shot in the head. Being shot is always an option, but not a particularly viable one.¹³⁸ The defendant in this case desperately needed the licence because the existence and survival of their business was dependent on it. Without the licence, the company would have gone into liquidation and the many employees laid off.

The importance of the need to show that there was “no reasonable alternative” should not be underestimated. This is clear from the decision in *DSND Subsea v Petroleum Geo Services ASA*.¹³⁹ In this case, the claimant was carrying out construction work for the defendant on an oil rig, but suspended its work pending the signing of a contractual variation on more favourable terms. The defendant contended on the basis of economic duress that it should not be bound by the variation. This argument was rejected for three reasons:

138. <http://www.radcliffechambers.com>. [accessed June 10th, 2013].

139. (2000) BLR 530.

(i) the pressure from the claimant was not illegitimate because the claimant was acting in good faith in insisting on new terms.

(ii) the defendant had realistic practical alternatives to accepting the variation of the contract

(iii) the contract had been affirmed when the defendant was free from any duress.

However, some commentators such as Dyson J said that “compulsion on, or lack of practical choice for the victim” was “one of the ingredients of actionable duress.” This means that he considered that it was not an absolute requirement because these words meant it was one of a range of factors that the court takes. His Lordship, Nigel Mordaunt, however, took the other view, when he referred to the *Alec Lobb* case. He stated that the defendant had met all the requirements for proving economic duress including the lack of an alternative choice. According to him all the three tests had to be met.

The other issue worth commenting on with regard to the judgement was the fact that, his Lordship, was of the view that the issues of consideration raised by the plaintiff was irrelevant to the case at hand. His lordship was on firm ground to rule as such. This is so because it is trite law that the existence of an adequate consideration will not save a contract which would otherwise be avoided for economic duress. Economic duress, like duress generally, overrides the satisfaction of the formalities required for a promise which the law will enforce.¹⁴⁰

McKendrick also argues that historically, duress cases were decided under the doctrine of consideration. However, given the rule that consideration must be sufficient, but need not be adequate, he argues that consideration is ill equipped to deal with duress cases.¹⁴¹ Instead the

140. Frank Hopkins, “Review of Economic Duress in Common Law,” (LLB Thesis, University of Nottingham. (2002).

141. Ewan McKendrick, *contract law* (Palgrave Macmillan law Masters, 1997), <http://www.palgrave.com> [accessed June 15, 2013].

modern courts will be more willing to find the presence of consideration in the renegotiation of a contract and leave it to duress to regulate the fairness of the renegotiation.¹⁴²

If economic duress is found, it will override consideration and the validity of the contract is directly affected. This shows that the courts readily consider the presence of duress before looking at consideration. However, there seems to be no strict guideline in determining what would measure up to economic duress and hence more uncertainty may result.¹⁴³

It would have been unfortunate to see this case running contrary to the usual trend. This is because this would open the floodgates to more claims in the future, potentially with undesirable consequences. This, however, is not the situation in the case under discussion. Its impact upon normal, everyday commercial dealings or negotiations may actually be minimal.

Most importantly, in this judgement organisations such as the defendant may now be able to rely on the remedy of economic duress where a statutory body such as the plaintiff behaves in unethical or unlawful manner to the benefit of the plaintiff in a contract.

142. Ibid. See footnote 141. Page 362

143. [http:// www.lawteacher.net](http://www.lawteacher.net) [accessed on June 10th, 2013].

CHAPTER 5 Conclusions

Originally, the common law only recognised duress to persons and goods. However, in more recent times the Courts have recognised economic duress as giving rise to a valid claim. Economic duress is still referred to as young and still developing law in English contract law. The development of this doctrine has not been an easy one. It first appeared through the coercion of the will theory which however, lacked certainty. It later developed at a fast pace in the last two to three decades, trying to follow the evolutions in the business relationship.

Later on courts developed a number of factors that could link the coercion and the victim's consent. These factors include; the presence of an alternative choice for the victim, the fact that the pressures have been a significant cause for the entry of the victim into the agreement and the fact that the victim protested at the time. Courts have also focused on the legitimacy of the pressure. The problem here is that there is a thin line between illegitimate and legitimate pressure.

Like in *Tobacco Board of Zambia v Tombwe Processing Limited*, other common law Courts have not been able to define very precise guidelines to be used in each case. Probably, this is because the problems set in this area of law involve complex business relationships. Hence, Judges may need some freedom to develop criterions to fit in each case. However, this is for as long as they do not use the criterion developed in a purely factual context.

Economic duress has generally offered a good alternative for common law Courts which include Zambian Courts to deal with the problem set in cases of abuse of monopolies. However, the court still has to be cautious with the way they deal with economic duress cases. This is because this could be interpreted as interference of justice in contractual

commercial relationships. Thus the finding of economic duress has not been easy in the courts of law.

When compared to other contractual doctrines like unconscionability and undue influence, it can be concluded that all have vitiating effects on contracts. Each of these doctrines handled in this paper can not completely replace each other. This because even though they produce similar results they do not have exactly the same scope as clarified by the courts in the last decade. The existence of unconscionability, on the other hand is yet to be confirmed in English law.

All in all, the doctrine of economic duress has implanted well in English common law jurisdictions and it is expected that Judges or Courts will soon get rid of the uncertainties surrounding the notion. For instance, his Lordship found the doctrines of consideration, estoppels and the effect of a written contract viz-a-viz, the parole evidence rule to be irrelevant to the *Tobacco Board of Zambia v. Tombwe Processing Limited* case. In line with this, it is important that his Lordship's opinion is explored further to help the Zambian Courts to develop the doctrine of economic duress further.

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