

## PART IV – DURESS

### I INTRODUCTION

#### A *Freewill and Efficiency*

A party is said to be acting under duress when their entry into a contract is not voluntary, but instead coerced by some act of the other party. When a contract is entered into under duress, any resulting obligations are unenforceable. The primary issue arising when considering whether duress is effective to void a contract is how voluntary an agreement must be before the Courts are willing to enforce its terms.

Economists like Richard Posner argue that entry into contracts is often not, and, further, need not be voluntary. Posner claims that the imposition of universally enforceable obligations upon relevant parties is necessary for business transactions to be conducted with certainty and economic efficiency. In this way, duress should not be used as a synonym for fraud, and should not be sufficient to void a contract in most circumstances. Similarly, unconscionability is seen as too vague and ambiguous a basis for rescission.

On the other hand, it is always possible to argue that – regardless of the apparent extent of duress – an element of choice always remains to the promisee. Short of being physically compelled to sign a contract, the choice to not sign and suffer the ill consequences threatened by the other party remains open to them.

The lack of direction provided by these two views of freewill and contract law seems indicative of a need to shift the rationale of duress from the basis of a lack of voluntariness on the part of the victim (since it must be accepted that some extent of pressure is always present, and not all pressures should void a contract) to a question of the pressure's illegitimacy.

The question to be asked is thus: 'was the pressure applied by the perpetrator legitimate?'

#### B *Legal Remedies for Duress*

Duress is a doctrine embodied by both the common law and the *Trade Practices Act 1974* (Cth) ('TPA'). It is primarily enforced by the common law and equity.

In a case of concurrent jurisdiction between the common law and equity, equitable doctrine will prevail. It is not necessary to distinguish further between them.

#### C *Consequences of Duress*

If a party called upon to perform is successful in asserting a claim of duress, they will be granted a right to rescind the contract for duress. This causes the contract to be invalidated retrospectively, restoring all effects of the contract to their *ab initio* states.

Duress has no offensive component (ie, no right to damages). Unlike misrepresentation, there is also no overlapping tort (cf deceit). However, it has been suggested that duress may constitute a tort in some circumstances. Other torts may also provide a source of damages to a victim of

duress, depending upon the circumstances: intimidation and inducing breach of contract are the two main possibilities.

There is also a right to restitution for duress (cf 'restitutio'). Restitution means that all monies paid under the influence of the duress, whether obliged by the contract or not, are to be returned to the victim of duress. Arguably, this also means that provision of services or benefits to the perpetrator (and potentially third parties) is returnable to the victim.

The right to rescind for duress is thus analogous to the right to rescind for misrepresentation. The principle difference is that no right to damages is inherent in the successful assertion of the right.

In summary, duress may:

- Render a contract voidable (*Barton v Armstrong*);
- Allow restitution of monies paid under the contract;
- Give rise to damages in tort;
- Provide a cause of action under the TPA (eg, ss 45, 45A-C, 51AA, 53A, 60)

## II CREATION OF THE RIGHT TO RESCIND

### A *Restitutio*

A similar structure to that adopted in the case of rescission for misrepresentation may here be utilised.

In order for a right to rescind for duress to exist, we must assume that the (implicit) requirement of restitutio exists, though this has not explicitly been stated by a court. The possibility of restoring the parties to their pre-contractual status ought to be a requirement, but – because it has not yet been in issue in a decided case – no authority exists on the matter.

### B *Illegitimate Pressure*

According to McHugh J, illegitimate pressure consists in the making of an unlawful threat or unconscionable conduct. This definition is now widely accepted.

A prototypical case of illegitimate pressure is provided by the facts in *Barton v Armstrong*.

#### ***Barton v Armstrong* (19xx) HCA:**

##### Facts

- A threatens B with death
- B replaces A as director of Landmark Corporation after a 'boardroom struggle'
- A is owed \$400 000 by LC
- LC makes promises to A about payment, but becomes insolvent
- B brings an action seeking to resolve the debts owed to A in his favour
- A threatens to kill B if he does not receive payment, hiring a hit man and making other illegitimate (unlawful) threats upon his person

Issue

- Did A's threats constitute illegitimate pressure such as to void LC's promises to pay A?

Reasoning

- The pressure was clearly unlawful (threats to kill and cause harm, apparently in the process of being carried out) and the duress was actionable

Decision

- [???

*Hawker Pacific* reflects another type of duress: that applied to the property of the promisee.

***Hawker Pacific v Helicopter Charters Pty Ltd (1901) HCA:***Facts

- Helicopter Charters Pty Ltd engage Hawker to paint their helicopter
- The paint job is unsatisfactory and the craft is returned *twice* by HC for a respray by H
- HC's manager and pilot return a third time to H so as to collect the helicopter; they need it urgently for a charter that afternoon
- Hawker's manager presents a letter negating payment before the helicopter is provided
- HC signs the form, releasing H from liability
- However, HC argues that the letter was not effective to void liability because it was signed under duress

Issue

- Was Helicopter Charters' manager acting under duress when he signed Hawker's letter?

Reasoning

- H was not going to deliver the helicopter until he had been paid
  - However, there was no explicit threat to keep the helicopter
- Can a threat to property be unlawful?
  - Here, H – as an unpaid repairer – held a lien over the property for unpaid work or repairs
  - However, because H was actually only fixing *defects* in the original workmanship, no such right to payment for fixing defects exists
  - Therefore, H held no lien over the property and it was unlawful for them to keep the helicopter
  - It is not criminally 'unlawful' but, according to civil obligations (ie, the law of property), it is; this is sufficient 'unlawfulness'
- H argued that duress could not arise from threats to property
  - Court: no, threats to retain property can constitute duress
  - This could be explained by reference to unlawfulness or unconscionability
  - Here, H was taking advantage of HC's urgent need of the helicopter that day in order to extract a sum they would otherwise not have been obliged to pay

Decision

- Where unlawful, threats to property can form the basis for an assertion of duress
- Here, HC was threatened with unlawful and therefore illegitimate pressure in respect of

their helicopter such as to void for duress any agreement entered into in an attempt to regain its control

It is also possible for illegitimate pressure to constitute a kind of economic duress (*TA Sundell*).

### ***TA Sundell v B (1901) HCA:***

#### Facts

- L contracted to sell galvanised iron at £109/tonne to TAS
- This was to be paid for under a letter of credit
- Several months later, L writes to TAS saying that, due to circumstances in the global iron market, the price would now be £140/tonne
- If TAS doesn't pay more, they won't obtain the iron
- TAS needs the iron, because they have a contract with another party to provide iron for a construction project in Queensland
- Consequently, TAS agrees to pay the extra 'only so as to get the iron'
- TAS forwards a new order with a cover letter saying he reserves the right to content for the original £109/tonne price
- L replies, not conceding any such right
- TAS now sues for the restitution (not breach of contract) of monies paid under duress
- L argues, in response, that this was not duress because a new contract was freely negotiated for the £140 price

#### Issue

- Was TAS' subsequent agreement to pay £140/tonne motivated by duress?

#### Reasoning

- This is a case of economic duress
- Was there a new contract?
  - No – insufficient consideration was provided because the promise to pay L was already made prior to fixing the new price
  - TAS' promise to pay was always conditioned on L's original price
  - It might be argued that a practical benefit was conferred upon TAS by not having to source their iron for the project elsewhere
    - Such a benefit probably existed here
    - However, the practical benefit exception to the requirement that fresh consideration be provided *only* applies in the absence of duress
  - L thus has no contractual entitlement to the additional payment of £31/tonne
- Is restitution available because of L's illegitimate pressure?
  - Here, the duress created by L is his threat not to perform the contract
  - A threat not to perform a contract *can* be duress
    - Traditionally, this was not the case
    - Now, threats to interfere with any right might constitute duress
  - This was economic duress: a threat to withhold performance unless an extra benefit is conferred upon the seller
    - This is civilly unlawful (because L had no contractual right to the money)
    - It is also unconscionable (because L is taking advantage of TSA's urgent need of the iron for their work in the Queensland development project)
- Is L acting with an intent to extort an extra benefit?

- No, as an importer, L is just a conduit for overseas goods, passing on costs and overheads
- However, although the global price rise was not intended nor anticipated by L (ie, the additional price was imposed innocently), this can *still* amount to duress
- Innocently-imposed duress can exist – illegitimate influence need not be intended
  - Cf *Barton v Armstrong*: the question arose whether Armstrong was acting with the intention to obtain a benefit from Barton, or just blind malevolence for him
  - But: B would have signed anyway, because the deal made good business sense
  - The privy council goes to some lengths to dispel the claim that A was simply a reluctant vendor who did not want to leave B: A did want the deal and intended to exert pressure to obtain it
  - This is *contra TA Sundell* (no intent required) – *Barton v Armstrong* (intent seems to be established as relevant)
- In light of this inconsistency with *Barton*, an intention to create duress is perhaps not required, but can be conducive to an inference of illegitimacy
  - This issue is unresolved

#### Decision

- Because L had no contractual right to the additional £31/tonne, the pressure he applied to TAS by threatening not to perform the original contract was unlawful and therefore illegitimate
- A duress thus operated in favour of TAS such as to entitle to him restitution of the additional monies paid under duress

### C      Causation

The party asserting duress needs to show that it was induced by pressure created by the other to create the obligations they seek to rescind.

- *Hawker*: owners of helicopter were induced by their urgent need to use it that afternoon
- *TA Sundell*: (assumed to have been) induced by their contract with the Queensland developers for iron in their construction project
- But *Barton*: by negotiating a settlement with A, B was doing the commercially sensible thing
  - B cannot show that, but for the existence of the duress, B would not have executed the deed anyway
  - Apply *Jacobs*: this equitable rule states that if a cause is relevant, this is sufficient to presume it to be *the* cause for the purposes of equity
    - The onus is then reversed, so that the other party must show that it was not a cause
  - Here, A's illegitimate pressure (threats to kill) no doubt contributed some influence to the deal
    - Because it was a cause of B's decision to execute the contract, the onus is reversed so that A must establish that his death threats were not a cause
  - Minority: on the facts the threat played no role
  - Majority: the threats were a cause of B's execution of the deed
  - The difference in opinion is largely attributable to divergence in respect of this factual conclusion

*Barton* suggests that it is necessary only to adduce evidence that suggests the duress was a cause of the entry into the contract.

### III RESTRICTIONS ON THE RIGHT TO RESCIND

#### A Contractual Provisions

To date, there do not appear to have arisen any cases out of which a right to rescind for duress has been contracted. It is thus a matter of speculation whether contractual provisions would be effective to exclude such a right.

It seems possible that a contractual provision may be able to exclude innocent or unintended duress. This would be consistent with the courts' approach to innocent misrepresentation. However, as for fraudulent misrepresentation, rights arising out of the intentional creation of duress may not be excludable.

#### B Unconscionability

Legal rights must not be exercised unconscionably. Though no specific pronouncement exists about the applicability of this equitable tenet to rescission for duress, it is likely to operate.

However, rescinding for duress is rarely likely to be unconscionable. It may be assumed that, where the right to rescind is based on the pressure applied being unconscionable, such a right is unlikely to be restricted by any considerations pertaining to the unconscionability of rescinding for that duress.

#### C Partial Rescission

Once again, it is assumed that the structure of the law of misrepresentation also applies to duress. This being the case, partial rescission for duress may also be possible.

- *Barton v Armstrong*: many obligations were undertaken by L
  - Can A legitimately claim any of them, or does the duress void every part of the agreement?
  - Yes, payment for land owing to Armstrong was part of the \$400 000 owing
  - This obligation might possibly survive rescission of the agreement for duress

### IV LOSS OF THE RIGHT TO RESCIND

#### A Affirmation

- *Hawker*: HC ‘fobbed off’ (was indecisive about payment) after agreement to pay for the second helicopter respray
  - HC made telephone calls citing reasons for the delay of payment to H
  - It was only *after* several weeks – during which HC seemed to suggest that H’s right to payment would be recognised – that duress was mentioned and an action brought
  - However, the Court held that HC had not affirmed the contract because the excuses and delays were not equivocal enough

## B Waiver

It might also be possible for a party entering into an agreement under duress to expressly waive their right to an action.

## C Estoppel

An estoppel might operate such as to prevent the pressured party from departing from the assumption they induced in the other party that they would not rescind the contract.

- *Hawker*: no statement was made that could be construed as a representation that the right would not be exercised
  - There needs to be an ‘unequivocal’ representation
  - Additionally, there was not really any detriment suffered by Hawker, who did not change their position in any way as a result of any alleged representation from which HC sought to depart
    - If H had a claim for payment, all they lost is the use of the money they were owed during the period preceding HC’s rescission (ie, interest)
    - Therefore, no detriment was suffered

# V STATUTORY REMEDIES

## A Trade Practices Act 1974 (*Cth*) (*TPA*)

The TPA is available to consumers where they enter into a contract with a corporation under the influence of duress. It operates to protect consumers *only* from enforcement of the consumer’s obligations by the corporation. The relevant sections are ss 53A and 60.

<extract s 53A>

The meaning of the terms ‘undue harassment’ is somewhat unclear, because there are no authorities on s 53A(2). ‘Physical force’ and ‘coercion’ are similarly lacking in judicial interpretations.

<extract s 60>

- Cases don't deal with entry into a contract but rather its enforcement
  - Eg, where a corporation being guilty of coercion, harassment, or force seeks to enforce a contract against a consumer (by, eg, employing debt collectors) s 60 may operate to prevent the instigation of proceedings
- The provisions of s 60 are mirrored in the *Fair Trading Act* (Vic)
  - 'repeated unwelcome approaches to a potential acquirer of goods could amount to harassment'
  - Seems to be significantly broader than the scope of the common law definition of harassment

## VI HYPOTHETICAL

- Unlawful?
  - Yes: tortious
    - Inducing breach
    - Breach of collateral obligations is unlawful
  - Yes: blackmail
  - Yes: stalking
- Economic duress and no consideration
- Harassment may fall short of duress at common law but may still be covered by the TPA definition under ss 53A and 60