

**A CRITICAL EVALUATION OF THE APPROPRIATENESS OF DURESS AND UNDUE INFLUENCE AS LEGAL SAFEGUARDS AGAINST UNCONSCIONABLE CONTRACTS\***

**Abstract**

*In the Law of Contract, duress and undue influence are equitable concepts that permit an innocent party to withdraw from a subsisting contractual relationship of influence on grounds that the innocent or aggrieved party was induced by reprehensible pressure on the part of the other party, to accede to such contractual relationship. Where the plea of duress or undue influence is made, what the innocent party is saying is that as a result of some unconscionable conduct of the other party to the contract, the agreement that gave rise to the contract could not be said to have proceeded from the voluntary choice of the aggrieved party and as such should be annulled. Thus, the major issue where duress or undue influence is relied on to seek to invalidate a contract is whether the party complaining has acted freely. However, duress must be distinguished from undue influence in that the former is usually pleaded as a causative factor to undue influence whereas the latter is relied upon to establish that as a result of duress or other causes, the aggrieved person was deprived of the requisite mental capacity to legitimately and freely make a choice.<sup>1</sup> It is therefore not in doubt that presence of such pressure should be a good-enough reason to overturn an otherwise good agreement. It is however important to scrutinize the belief(s) that inspire resolutions to permit a repudiation of contract on the basis of these concepts with a view to delimiting the exact range of each of them. This paper is an attempt to examine whether duress and undue influence as vitiating factors constitute sufficient legal safeguards against unconscionable contractual transactions.*

**Keywords:** Contract, Duress, Undue Influence, Law, Legal safeguards

**1. Introduction**

Citing Anson, Garner has defined duress to consist in the physical restriction of an individual or the imprisonment of the property of a party to an agreement or the real or threatened violence or confinement. According to him, the subject of duress must be the individual who is a party to the contract, or his relative or relatives and such duress must be actually imposed or threatened by the other party to the contract or by his someone else acting on behalf of or for the benefit of that other contracting party.<sup>2</sup> Accordingly, any unlawful threat or coercion employed by a contracting party to induce the other party to the contract to act or refrain from acting in a manner that other party could or would ordinarily not is duress. It could also be described as the act of subjecting a contracting party to improper pressures which overcome the party's free volition and coerce him or her to comply with a demand or to yield to an agreement to which he would not have yielded if he or she was acting of his voluntary resolve. It is the compulsion under which a person acts through personal suffering from injury to the body or from confinement, actual or threatened.<sup>3</sup> Duress is a variety of procedural unfairness which prevents a valid agreement from being reached due mainly to the overborne will theory.<sup>4</sup> To be forced to do an act is in the realm of duress. Duress involves coercion. It requires actual or threatened violence to the person.<sup>5</sup>

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<sup>1</sup> SA Smith, 'Contracting Under Pressure: A Theory of Duress' (1997) 56 *The Cambridge Law Journal* 343 (*Cambridge Core January 16, 2009*) <<https://www.cambridge.org/core/journals/cambridge-law-journal/article/contracting-under-pressure-a-theory-of-duress/F15887694E5C1ECE0948E8C671C09EF9>> accessed January 20, 201

<sup>2</sup> B Garner, *Black's Law Dictionary* (9th ed., Thomson Reuters, 2009) 578

<sup>3</sup> O Yerogun, *Modern Law of Contract* (rev edn., Nigerian Revenue Projects Publications 2004) 152

<sup>4</sup> D Oughton, M Davis, *Sourcebook on Contract Law* (2<sup>nd</sup> ed., Routledge Cavendish 2000) 308

<sup>5</sup> *Oilserv Ltd v. L. A. Ibeanu & Company (Nig) Ltd* (2007) LPELR-5149(CA) Per Rhodes-Vivour, J.S.C (p. 18, para. D)

## 2. Various Types of Duress

### Duress to the Person

Duress to person was initially narrowly interpreted to cover only actual or threatened physical violence or unlawful threat of a party to a contract or to his family or friends.<sup>6</sup> Hence, it was held that a housemaid who was ordered by her mistress to submit to a medical examination on a suspicion that she was pregnant, which suspicion later turned out to be baseless, was not entitled to her claim of damages for assault because her mistress in getting her to submit to the examination, did not threaten her with any physical violence.<sup>7</sup> Later decisions have however deviated from the position in *Cumming v Ince*.<sup>8</sup> The current position is illustrated by the case of *Barton v Armstrong*<sup>9</sup> which decided that for a plea of duress to succeed, there must be evidence that the duress was the sole reason for entering a contract.<sup>10</sup> This, it is respectfully suggested, leads to some confusion as to determining the degree of coercion that would be held sufficient to amount to duress

### Duress to the Goods

This consists on improper taking, confinement, destruction or hurting of one's properties or possessions that leaves the party no alternative but to accede to a contract.<sup>11</sup>

### Economic Duress

This, simply explained, comprises threats to the fiscal, commercial or business welfare of a party to a contract. This is actionable, but must be distinguished from *hard bargaining* which has been described to include use of threats, intense demands, and even unscrupulous conduct, to try to get an advantage in contract negotiation.<sup>12</sup> Mere presence of pressure arising from hard bargaining is therefore not conclusive evidence of duress, sufficient to invalidate a contract. The effect of the pressure on the receiving party, the element of illegality, and the fact that the receiving party was induced into entering the contract exclusively as a result of the pressure must be established.<sup>13</sup> Accordingly, economic duress would be held to exist only where the coercion constituting economic duress is illegal as opposed to lawful business impact occasioned by fiercer bargaining power or tactics. It is therefore submitted that such threats as could be described as intimidation or blackmail could amount to duress. The problem that is easily noticeable is as to where to draw the line between legitimate, even if immoral, commercial pressure and unlawful economic threats that could ground a plea of duress. In *D and C Builders v. Rees*,<sup>14</sup> the court held that a creditor's promise to accept part payment in full settlement was obtained under duress, and in *B & S Contracts & Designs Limited v. Victor Green Publications Limited*<sup>15</sup> where a contractor who had, less than one week to the implementation of the contract, extracted additional payment from its client by threatening that if the client did not pay the additional sum, the contract would be cancelled, the court held that such additional payment was made under duress because not paying the additional sum would have left the client's reputation badly damaged and exposed them to lawsuits. It must however be pointed out that it is not all increment in the originally agreed price obtained by pressure would amount to duress, as the defendant may well have secured such increment by legitimate means, even if unfavourable to the plaintiff, such as variations in exchange rate,

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<sup>6</sup>*Cumming v Ince* (1847) 11 QB 112;

<sup>7</sup>*Latter v Bradell* [1880] 50 LJCP 166

<sup>8</sup>*All Answers Ltd*, 'Concept of Duress in contract law' (Lawteacher.net, January 2019) <<https://www.lawteacher.net/free-law-essays/contract-law/discuss-the-concept-of-duress-in-contract-law-contract-law-essay.php?vref=1>> accessed 20 January 2019

<sup>9</sup> 1976 UKPC 27, AC 104

<sup>10</sup>*Ibid*

<sup>11</sup>*Legal Definition of Duress of Goods* (Merriam-Webster Dictionaries 2018) <<https://www.merriam-webster.com/legal/duress%20of%20goods> accessed January 20, 2019

<sup>12</sup> '10 Hard-Bargaining Tactics & Negotiation Skills' (PON - Program on Negotiation at Harvard Law School November 30, 2018) <<https://www.pon.harvard.edu/daily/batna/10-hardball-tactics-in-negotiation/>> accessed January 20, 2019

<sup>13</sup>TT Arvind, *Contract Law* (Oxford University Press 2017)

<<http://www.oxfordlawtrove.com/view/10.1093/he/9780198703471.001.0001/he-9780198703471-chapter-12> accessed January 20, 2019

<sup>14</sup>Yerogun (n 3) 153

<sup>15</sup>(1948) 1 c R 4

fluctuation in cost of raw materials, human error as illustrated in the case of *Atlas Express Limited v. Kafco*.<sup>16</sup>

It could be concluded that a pressure that may give rise to an action for duress ought to be such that is unlawful. The mere fact that the pressure was unfavourable or operated against the plaintiff may not be sufficient evidence of duress if reasonable justification is shown for the pressure which must however not be illegal. The decision in each particular case would depend on its peculiar circumstances. Whether a claim for rescission founded on duress would succeed would depend on the effect and degree of the pressure, the element of illegality, and on whether the aggrieved party would have entered into the contract even without such pressure.<sup>17</sup> One thing that is undeniably clear is that, as a general rule, a contract may be rescinded at the instance of a victim of threat which is sufficient to constitute duress. Besides, to establish duress, the victim must prove presence of coercion or unjustifiable or illegitimate pressure, which is shown to have scared the victim into acceding to the defendant's demands. Thus, as stated in *The Universe Sentinel*,<sup>18</sup> where such illegitimate pressure is proved, the effect is to render the contract voidable, and also actionable in tort if it has led to damage or loss. One is said to be under coercion if one is constrained to obedience or submission in a vigorous or forcible manner, reasonably leaving one with no choice.<sup>19</sup>

There is however no doubt that considerable progress has been recorded in the law of duress, because in the olden days, prior to the twentieth and twenty-first centuries, one could succeed in an action founded on duress only if one established presence of real, not threatened, confinement or panic over loss of life or suffering of other bodily injury or harm.<sup>20</sup> Thus, threat or fear of battery or of having one's house set ablaze or of being deprived of one's property or of one's property being damaged were not seen to amount to duress because in each of these cases, one may adequately be compensated in damages whereas in the former case, loss of life cannot be adequately recompensed in monetary or other compensation.<sup>21</sup> All that has now changed; any illegal act or omission which deprives a person of his freedom of choice could be held to constitute duress and entitling the innocent party to the remedy of rescission. Once unlawful pressure by a contracting party results to lack of autonomy by the victim, duress is presumed. Finally, one must not forget the impact of necessity on application and scope of the law relating to duress. This was explained by Garner,<sup>22</sup> quoting Perkins and Morawetz: ... the doing of prohibited act is not a crime if reasonably believed to be necessary to save from death or great bodily injury... together with the equally ancient exception in the form of the 'inexcusable choice,' are as firm today as ever, except for the realization that they cover only part of the field.

Among defences, necessity needs to be distinguished from duress... the person who acts under necessity chooses to act in a way that the law ultimately approves. The person who acts under duress acts in a way that the law disapproves and seeks to discourage, but he acts under circumstances which make conviction and punishment inappropriate and unfair. This is so because to act under duress is to act under pressures that a person of reasonable firmness would not be able to resist. Both the theory of necessity and the theory of duress refer to the pressure of exigent and extraordinary situations, but they do so in different ways.

At this point it is pertinent to look and examine the term Undue Influence. Undue influence is understood to refer to the state of mind of a person who has been subdued by an improper persuasion or machination in such a manner that he is overpowered and consequently induced to do or refrain

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<sup>16</sup>(1989) QB 833

<sup>17</sup>Arvind *supra*

<sup>18</sup>(1982) 2 WLR 803, 803

<sup>19</sup>Renaissance Publishers Nigeria Limited, 'Case *U.B.N. v. Nwachukwu*' (*U.B.N. v. Nwachukwu* | All Federation Weekly Law Reports July 10, 2000) <<http://www.allfwlr.com/index.php/cases/detail?tokz=245847fca436140948482379>> accessed January 20, 2019

<sup>20</sup>Garner *supra*

<sup>21</sup>*ibid*

<sup>22</sup>*Op Cit*, 579

from doing an act which he would otherwise do or not do only of his free will. Bamgbose<sup>23</sup> describes undue influence as the product of the abuse or misuse of the confidence reposed in someone who is able to put some pressure on or take unfair advantage of another or who takes an oppressive and unfair advantage of another's necessities or distress. According to him, the doctrine of undue influence extends not only to cases of coercion or tricks or fraud but to all cases where influence is acquired and abused, where confidence is reposed and betrayed. In *Bua v. Dauda*,<sup>24</sup> the Supreme Court of Nigeria defined 'undue influence' as follows:

Undue influence is no doubt elusive of satisfactory definition but it may be regarded as a state of mind of a person who has been subdued to any improper persuasion or machination in such a way that he is overpowered and consequently induced to do or forbear an act which he would otherwise do or not do of his free will. It is a product of the abuse or misuse of the confidence reposed in someone who is able to put some pressure on or take unfair advantage of another; or who takes an oppressive and unfair advantage of another's necessities or distress: see Black's Law Dictionary, 6th edn. page 1528. Undue influence could arise from confidential or fiduciary relationship existing between the parties which raises a presumption of that influence such as solicitor and client: see *Willis v. Barron* (1902) AC 271; doctor and patient: see *Radcliffe v. Price* (1902) 18 T LR 466; Re C.M.G. (1970) 2 All ER 740; principal and agent: see *Nasr v. Rossek* (1973) ANLR 539 (green cover); religious adviser and disciple: see *Allcard v. Skinner* (1887) Ch D 145

However, Oshikoya<sup>25</sup> believes that undue influence does not have any acceptable characterisation. Yet, Yerokun is of the opinion that undue influence is a narrow concept of the duress.<sup>26</sup> Under the law of undue influence, equity offers relief on grounds that a person has misused the power possessed by him over another, by inducing that other to enter into a contract against his free will. Thus, undue influence could be described to consist in an improper pressure short of violence or threat of violence, unlike duress.<sup>27</sup>

Although, with the exception of fiduciary relationships and relationship of agent and principal, husband and wife, employer and employee, and some others,<sup>28</sup> presumption of undue influence was initially thought to be predicated upon only certain special relationships existing between the parties, such as that existing between a solicitor and his client, a medical doctor and his patient, a pastor or priest and a congregant, a teacher and his student, parent and his child, trustee and *cestui qui trust*, etc.,<sup>29</sup> yet, it is submitted that existence of such special relationship is not a mandatory condition precedent to raising the plea of undue influence, as seen in the definitions given above, provided that victimization of one party by the other is established.<sup>30</sup> It is sufficient to establish undue influence if the aggrieved party shows, as explained by Lindley, CJ in *Alcard v. Skinner*, that the other party has engaged in some inequitable and indecorous conduct or underhandedness or in some form of cheating and generally, though not always, has thereby gained some peculiar benefit.<sup>31</sup> This presumption ought to be rebuttable by the defendant proving that the alleged victim acted voluntarily notwithstanding the alleged undue influence; that he was not unduly influenced by the pressure from the other party. One easy way of rebutting the presumption is by showing that the aggrieved party had independent advice. However, for this to apply, it must be additionally shown that such advice was credible, predicated on

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<sup>23</sup>OJ Bamgbose, *Digest of Judgments of the Supreme Court of Nigeria (Volumes 3 & 4)* (Ibadan: Safari Books Limited 2014) 434. See also <<https://books.google.com.ng/books?id=cGAYDwAAQBAJ&pg=RA1-PA434&lpg=RA1-PA434>> accessed January 20, 2019.

<sup>24</sup>(2003) LPELR-810(SC), Per Uwaifo, J.S.C (pp. 15-16, paras. E-C). This decision was followed in *Agaba v. Frn* (2018) LPELR-44575(CA), Per Nimpar, J.C.A (p.18, paras. A-E).

<sup>25</sup>LO Oshikoya, 'An Almanac of Contemporary Judicial Restatements (Civil Law) Vol. II' (Google Books 2016) <<https://books.google.com.ng/books?id=Br3OBAAAQBAJ&pg=PA33&lpg=PA33>> accessed January 20, 2019

<sup>26</sup> *Ibid* (n 4) 157

<sup>27</sup>*Tumbull & Co v. Divall* (1902) AC 429; *Chaplin & Co v. Brammal* (1908) 1 KB 233; *Aron Finance Co v. Bridge* (1985) 2 All ER 281

<sup>28</sup>*Coldunell v. Gallon* (1986) 1 All ER 429

<sup>29</sup>*Thompson v. Eastwood* (1877) App Cases 215

<sup>30</sup>*National Westminster Bank Plc v. Morgan* (1985) AC 686; *Petrou v. Woodstead Finance Ltd* (1986) FLR 158

<sup>31</sup>(1887) 36 Ch. D 145, 181

the knowledge of all material facts, and that the adviser had approved of the transaction and that the advice was actually relied upon by the aggrieved party.<sup>32</sup> In *Lloyds Bank Ltd v. Bundy*,<sup>33</sup> where a bank was found to have abused the relationship of trust that was found to exist between it and its customer by failing to render needed advice to the client who had relied heavily on the Bank, Lord Denning held the subsisting contract invalid on grounds of 'inequality of bargaining power'. His Lordship then proceeded to give what appears to be a clearer explanation of the meaning and scope of undue influence, explaining that 'inequality of bargaining power' would be held to be in existence to entitle the aggrieved party to an order nullifying the contract on grounds of undue influence where any one of the following is established:<sup>34</sup>

- (1) Duress of Goods, as in withholding the goods of an innocent party when the party urgently needed them;
- (2) Unconscionable transaction, as in a money-lender taking undue advantage of a hard-pressed heir;
- (3) Undue influence, as in abusing or misusing a position of trust for purposes of gaining unjust advantage over the other party;
- (4) Undue Pressure, obtaining undue advantage over a person in a weaker position by exerting improper pressure; and
- (5) Salvage cases, as in where one in a stronger position abuses that position to obtain undue benefit over a party in distress.

Giving further clarification on the subject, especially with respect to the appropriate redress in cases where inequality of bargaining power is established, Lord Denning further posited as follows:

The English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfer property for a consideration which is grossly inadequate when his bargaining power is grievously impaired by reason of his own needs or desires or but his own ignorance or infirmity coupled with undue influence or pressure brought to bear on him by force for the benefit of the other.<sup>35</sup>

Relief exists in some other situations, such as dealing with poor and ignorant persons,<sup>36</sup> catching bargains, etc.<sup>37</sup> Undue influence may manifest itself in different forms. In some cases, it depends on variety of circumstances in which trickery or coercion can be employed in human affairs. In other cases, it depends on special relationship in which presumption of undue influence may reasonably be inferred. In this respect, Cotton, L.J., classified cases of undue influence into two and said as follows: First, where the court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose; second, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor. In such a case the court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justifies the court in holding that the gift was the result of a free exercise of the donor's will. The first class of cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases the court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused.<sup>38</sup>

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<sup>32</sup> *Inche Noriah v. Shalk Allie Bin Omar* (929) AC 127

<sup>33</sup> (1975) QB 326

<sup>34</sup> *Yerokun op cit* 159

<sup>35</sup> Slayton P, 'The Unequal Bargain Doctrine: Lord Denning in *Lloyds Bank v. Bundy*' 105 <[https://scholar.google.com/scholar?cluster=1459298282448703353&hl=en&as\\_sdt=0,5&scioldt=0,5](https://scholar.google.com/scholar?cluster=1459298282448703353&hl=en&as_sdt=0,5&scioldt=0,5)> accessed January 20, 2019

<sup>36</sup> *Alex Lobb (Garages) Ltd v. Total Oil (GB) Ltd* (1985) 1 WLR 173

<sup>37</sup> *Chetserfied v. Janseen* (1750) 2 Ves Sen 125

<sup>38</sup> *Allcard v. Skimmer (supra)* at p.171,

### 3. Denial of Relief

As a generally rule, undoubtedly, a party who is a victim of undue influence can recover back money or property transferred under such circumstances.<sup>39</sup> A contract based on undue influence is a form of illegal contract. An assertion that a party to an illegal contract acted under pressure or undue influence is a further extension of the exception that if the parties to an illegal contract are not *in pari delicto* so that the party on whom superior power or influence was operated may well recover money or property exchanged in such circumstances. However, reliance on the exception of undue influence must be established by positive evidence or strong inference that can be drawn from the surrounding circumstance.<sup>40</sup> Besides, where undue influence is alleged, the onus is on the party seeking to be discharged from the contract to show that undue means had been used to obtain the contract.<sup>41</sup> Explaining this point further with particular reference to which party bears the burden of proof where a transaction raises a prima facie case of undue influence, Uwaifo, J.S.C stated:<sup>42</sup>

...the law is that the burden is on the donee or purchaser to show the righteousness of the transaction. He is entitled as of right, as said by Lord Browne-Wilkinson in *C.I.B.C. Mortgages Plc. v. Pitt (supra)* at page 209, to have it set aside as a matter of public policy; and also the case of *Allcard v. Skinner (supra)* at page 171 per Cotton, L.J., and page 183 per Lindley, L.J. In Ashburner on Equity, 2nd Edn., at page 299, the learned author gave this illustration: 'In a Court of equity, if A obtains any benefit from B, whether under a contract or as a gift, by exerting an influence over B which, in the opinion of the Court, prevents B from exercising an independent judgment in the matter in question, B can set aside the contract or recover the gift. Moreover, in certain cases the relation between A and B may be such that A has peculiar opportunities of exercising influence over B. If under such circumstances A enters into a contract with B, or receives a gift from B, a Court of equity imposes upon A the burden, if he wishes to maintain the contract or gift, of proving that in fact he exerted no influence for the purpose of obtaining it.

Further, the court of equity may refuse to award relief in deserving circumstances where restitution<sup>43</sup> has become impossible, or where the innocent party affirms the transaction after the undue influence has ceased as happened in *O'Sullivan v. management Agency & Music Ltd*,<sup>44</sup> or where the innocent party has become guilty of undue delay in seeking relevant relief, raising the presumption on the principle of *delay defeats equity* that the innocent party may have ratified the transaction, or on grounds of interference of valuable bona fide third party interest as happened in *Coldunell v. Gallon*.<sup>45</sup>

### 4. Conclusion and Recommendations

From the discussions, above, it could be seen that the law relating to duress and undue influence has recorded tremendous progress over the years. There could therefore be said to exist at present, quite considerable avenues for redress for an innocent victim of unconscionable contracts arising, out of established cases of duress or undue influence. The law is now wider in the scope of issues and injuries covered and the areas of relief established. Further, it is seen that a reasonable balance is struck by the law to ensure that undue protection is not given to the innocent party while establishing compensation mechanisms. This is seen in those areas of denial of relief on grounds of established equitable justifications – delay defeats equity, equity aids the vigilant, bona fide purchaser for value, ratification, *legit non cogit ad impossibilia* (the law will not compel the doing of what is impossible), etc. The huge progress notwithstanding, there is need for improvement as there still exist some clouds, cobwebs in some areas, which, it is hoped, would be improved upon as time goes on. What for example is the degree of coercion that would be held to graduate to duress? And where does one draw the line between legitimate pressure and unlawful threats in determining duress? The dynamic nature of legal development would take care of the situation through statutory amendments and more novel judicial decisions to take care of emerging issues in the law of duress and undue influence. The courts are expected to adopt a more pragmatic and realist approach in dealing with such developing. In this way, we would arrive the Eldorado.

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<sup>39</sup> *Smith v. Cuff* (1817) 105 ER 1203; *Atkinson v. Derby* 6 H & N 778 and *Hughes v. Liverpool Society* (1916) 2 K B 482

<sup>40</sup> *Pan Bisbilder (Nig) Ltd v. FBN Ltd* (2000) LPELR-2900(SC)

<sup>41</sup> *Ibid*

<sup>42</sup> *Bua v. Dauda, Op Cit.* (pp. 19-20, paras. F-D)

<sup>43</sup> *Fry v. Lane* (1888) 40 Ch D312, 321.

<sup>44</sup> (1985) QB 428

<sup>45</sup> (1986) QB 1184