THE F S Dethridge Memorial Address 1996

Between a Rock and a Hard Place:

illegitimate pressure in commercial negotiations.

Justice Richard Cooper
Federal Court of Australia

Frank Dethridge was the driving force behind the establishment of this Association in 1974. He was its first president. He was also the Senior Partner of Mallesons Solicitors when he died in June 1976.

Frank Dethridge hoped that the Association would become a forum in which aspects of maritime law would be revealed and discussed and that thereby not only admiralty and maritime law, but the law in general would be better understood and developed.

The series of Dethridge Memorial Addresses has over the years done credit to the memory of the man and his foresight and vision: they have also been part of the fulfilment of that hope.

I thank the Association for the honour given me in being invited to deliver this year's address.

The title to this paper had its genesis in the loss of the steamship 'Medina" on 30 September 1875. The vessel was en route from Sumatra to Jedda carrying five hundred and fifty pilgrims when it struck the Parkin Rock in the Red Sea. The pilgrims and crew were transferred to the rock where there was scarcely standing room for them. The rock stood only six feet above the water.

I acknowledge the research assistance of my Associate, B Cohen in the preparation of this address.

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On 1 October 1875 the steamship "Timor" observed distress signals from the rock. The "Timor" changed course and proceeded to it. Captain Black, the Master of the "Medina", went on board the "Timor" and told Captain Brown, the Master of that vessel, the situation as concerned the pilgrims and sought assistance to take the pilgrims off the rock. In the negotiations Captain Black offered first £1,500 and subsequently £2,000 to the Master of the "Timor" to relieve the pilgrims, himself and his crew from their adversity and carry the pilgrims to Jedda. Captain Brown refused to take the pilgrims from the rock for less than £4,000, being the original passage money for the voyage from Sumatra to Jedda. He also refused to have the amount fixed by arbitration. Although the weather was fine at the time, Captain Black was faced with the real prospect that if the weather changed and the seas came up, those on the rock would perish. In those circumstances he agreed to pay the sum of £4,000 and the pilgrims, without any undue difficulty, were removed from the rock and carried to Jedda.

The owners of the "Medina" refused to pay the sum of £4,000 when it was demanded and the owners of the "Timor" sued them for it. The owners of the "Medina" defended on the basis that the agreement "was extorted and improperly obtained from the Master of the "Medina" and is wholly unjust and inequitable and is not binding upon the defendants."

For Captain Black, the Parkin Rock was the rock of the title; Captain Brown was the hard place. Was the pressure applied by Captain Brown legitimate in the prevailing circumstances where the two mariners negotiated the terms upon which those in distress would be relieved of their adversity?

Sir Robert Phillimore at first instance refused to give effect to the agreement.

He said[1]:-

> ... It is the practice of this court, partly for the protection of absent owners and partly on the grounds of general policy, to control agreements made by masters when an examination of those agreements shews that they are clearly inequitable.

The judgment was affirmed on appeal.[2] The language used in the reasons of the English Court of Appeal is of interest. James LJ said[3]:-

> I agree that the conclusion of the judge of the Admiralty Court was right, that the sum exacted was exorbitant, and, having regard to the peculiar circumstances, that pressure was exercised and that the agreement ought not to stand.

Baggallay JA said[4]:-

> I am of opinion that the principle of the cases was expressed correctly by Dr Lushington in the case of 'The Theodore' (Swa Adm 351, 352) that an agreement for salvage should be upheld unless obtained by compulsion or fraud. But the very fact that we find an amount agreed to be paid which is very large in comparison with the services rendered, we are led to the conclusion that there may have been some unfair dealing in the transaction. And that applies with particular force where persons who are in an extremity, in order to obtain assistance in their extremity, have been required to pay a large price for the assistance.

Brett JA said[5]:-

> I think the old rule of the Admiralty Court ought not to be lightly encroached upon, viz, that where there is an agreement made by competent persons and there is no misrepresentation of facts, the agreement ought to be upheld, unless there is something very strong to shew that it is inequitable; but I think that this agreement cannot be

(1876) 1 PD 272 at 275.
(1876) 2 PD 5. At 6. At 7.
At 7.

> upheld. The amount claimed by the Timor' was exorbitant - not merely too large, but, for the services to be rendered, grossly exorbitant - and it was forced upon the Captain of the 'Medina' by practical compulsion. ... If the Captain refused to accept the terms he took upon himself the responsibility of allowing five hundred and fifty human beings under his care to be left to the danger of being drowned. That is compulsion to the mind of any honest man. Therefore I think there was a grossly exorbitant sum obtained on practical compulsion. Under all these circumstances I think that by the rules of the Admiralty Court the agreement cannot stand.

Those passages raise a number of questions in the maritime context: On what basis and in what circumstances will the Court in Admiralty refuse to enforce a maritime contract, particularly one of salvage? When is the benefit procured "exorbitant"? When is the benefit categorised as having been "obtained by practical compulsion"?

Outside the maritime context, the broader question is whether these admiralty decisions, reflecting as they do the approach of the Court to commercial agreements made under the pressure of necessitative circumstances, have any role in developing or explaining the modern common law doctrine of economic duress. The thesis of this address is that they do have such a role.

A study of the decisions of Dr Lushington indicates that the Admiralty Court would enforce a maritime contract, in particular a salvage contract, upon proof of its being made and provided that its terms were "just"[6] and "provided there be a clear understanding of the nature of the agreement; that it is made with fairness and impartiality to all concerned and that the parties to it are competent to form a judgment as to the obligations to which they bind themselves."[7] Where, however, he concluded that the agreement was an "extortionate agreement", the Court would move to set it aside. In order to determine whether or not the agreement bore the necessary extortionate character, the Court

The British Empire (1842) 6 Jur 608.
The True Blue (1843) 2 WRob 176 at 179; 166 ER 721 at 722.

would look at the consideration agreed to see whether it was too small or too large and the circumstances in which it was agreed.[8] The agreement to be enforced had to be "so far consistent with equity that the court will uphold it."[9] However, the Court would not set aside an agreement simply because it was a hard bargain or because the provision of the services agreed turned out to be more onerous than originally contemplated.[10]

In ***The Helen and George***[11] Dr Lushington again emphasised that *prima facie* upon proof of an agreement being made for the provision of salvage services, that agreement was binding and would be given effect to by the Court "unless totally contrary to justice and the equity of the case." The burden of proving the invalidity of the agreement was upon the party disputing it and in this regard "the owner may contend that under the circumstances the sum of money was grossly exorbitant; and *a fortiori,* if he can shew that the agreement was obtained by fraud or compulsion, no court would hold it to be binding."[1]

Three categories of case attracted the attention of the Admiralty Court during the time of Dr Lushington.[13]

The first involved circumstances where the benefit obtained for the service rendered was extortionate to the extent that it was inconsistent with "any just or fair dealing."[14] The focus of the inquiry was upon the demand made for the service in the circumstances that existed. Inherent in this approach is the operation of two underlying principles. One is that the Court will not enforce or allow the retention of a benefit which constitutes an unjust enrichment. The other is that the Court will not

The Henry (1851) 15 Jur 183.

The Firefly (1857) Swab 241; 166 ER 116 at 117.

[10] (1857) Swab at 241; 166 ER at 117.

(1858) Swab 368; 166 ER 1170. *1*

(1858) Swab at 369; 166 ER at 1171.

1838-1867. [14] ***The Theodore*** (1858) Swab 351 at 352; 166 ER 1163 at 1164; ***The Phantom***

(1866) LR1 A&E58at61.

allow the retention of a benefit unconscientiously obtained. Although these two principles form part of the common law and the rules of equity respectively, they both formed part of the substantive civil law which operated in the Admiralty Court at the time.[15] What ought not to be lost sight of is that the parallel development of principles applicable in like situations did not occur in the common law courts, the chancery, or the Admiralty Court in isolation; there existed a cross-fertilisation of ideas between the three.[16]

The second category of case where the Court would refuse to enforce a salvage agreement was where there was actual fraud or misrepresentation[17] or innocent misrepresentation amounting to equitable fraud.[18]

The third situation where the Court would refuse to enforce an agreement was where it had been procured by compulsion. The compulsion referred to is the pressure put upon one party by the other, either by actual duress to the person or by use of the surrounding circumstances, to obtain a contract on the terms demanded by the party applying the pressure. It is immediately apparent that in a situation requiring the provision of salvage services there exists a potential to exert considerable pressure to obtain a desired outcome. Sir Robert Phillimore in ***Cargo Ex Woosung*** said[19]:-

> It is said ... that this contract is void by reason of duress and compulsion. Now in one sense the services of every salvor are unwillingly and under duress accepted; the lesser evil of losing a portion of the profit and property being submitted to rather than the greater evil of losing all so that in that sense all salvage services are

' As to the history of the Court and its role as one applying the civil law, see Wiswall, F L, ***The Development of Admiralty Jurisdiction and Practice since 1800,*** Cambridge University Press (1970). [16] ***The Tojo Mam*** [1972] AC 242 at 291 per Lord Diplock.

The Repulse (1845) 2 WRob 396 at 397; 166 ER 804 at 805. [1] ***The Kingalock*** (1854) 1 Sp Ecc & Ad 263 at 265; 164 ER 153 at 154. [19] (1876) !PD260at265.

> accepted under compulsion. But there is no compulsion or duress of a criminal character, unless, indeed, all reasonable limits are transgressed by the salvors, or there has been a use of false representations or the excitement of ungrounded fears in order to procure the acceptance of their services.

The question then becomes - what pressure is reasonable and by what criteria are the limits of reasonableness to be established or measured?

In ***The Medina*** the pressure applied was the refusal to render assistance on other than the terms demanded by the Master of the "Timor" in circumstances where the person responsible for the safety of those shipwrecked had no practical alternative but to consent to the agreement on those terms. The pressure applied was illegitimate. No reasonable person could expect that the Master of the "Medina" would put at risk five hundred and fifty lives for the sake of avoiding payment of the sum of £4,000.[20] The real difficulty lies in distinguishing between legitimate and illegitimate pressure in the less extreme cases.

In *Akerblom v Price, Potter, Walker & Co* [21] the English Court of Appeal recognised the difficulty in formulating which particular circumstances fall within or without the limits of reasonable pressure. Brett LJ in delivering the judgment of the Court said[22]:-

> The rule of administration of maritime law in all courts of maritime jurisdiction is that, whenever the court is called upon to decide between contending parties, upon claims arising with regard to the infinite number of marine casualties, which are generally of so urgent a character that the parties cannot be truly said to be on equal terms as to make any agreement they may make with regard to them, the court will try to discover what in the widest sense of the terms is under the particular circumstances of the particular case fair and just between the parties. If the parties have made no agreement, the court will decide

[20] For further examples of clearly extortionate demands, see ***The Port Caledonia and the Anna*** [1903] P 184; ***The Rialto*** [1891] P 175.

[21] (1881)7QBD129.

[22] At 132-133.

> primarily what is fair and just. The rule cannot be laid down in less large terms because of the endless variety of circumstances which constitute maritime casualties. They do not, as it were, arrange themselves into classes, of which **a priori** rules can be predicated. If the parties have made an agreement the court will enforce it unless it be manifestly unfair and unjust: but if it be manifestly unfair and unjust the court will disregard it and decree what is fair and just. This is the great fundamental rule. In order to apply it to particular instances, the court will consider what fair and reasonable persons in the position of the parties respectively would do or ought to have done under the circumstances.

The test is therefore an objective standard of reasonableness in the particular circumstances of any case. The consequence is, as was recognised by the Court itself,[23] that to invalidate an agreement for duress under maritime law involves the application of a lesser degree of pressure than would have been required by the common law at that time.[24]

Subsequent to the decision in ***Akerblom v Price,*** it became common to state the test simply in terms of whether the agreement was manifestly unfair or unjust having regard to the respective positions of the parties at the time the agreement was entered into.[25]

What then was the position in maritime jurisdictions other than the English Admiralty jurisdiction?

The position in the United States of America was confirmed as being the same as in England by the United States Supreme Court in ***The Elfrida***[26] The Court, after reviewing the American decisions commencing in 1799, the relevant English decisions and the applicable civil law codes under various continental systems, determined that the

[23] ***The Mark Lane*** (1890) 15 PD 135 at 137; ***The Rlalto*** [1891] P 175 at 178-179.

[24] Seep 11 ff, post.

[25] ***The Strathgarry*** [1895] P 264 at 270-271; ***TheAltair*** [1897] P 105 at 108.

[26] 172 US 186; 19 SCt 146 (1898).

position in the United States, as in England, required a greater degree of pressure than the continental systems required before the Court would intervene to annul an agreement. Nevertheless, Justice Brown, in delivering the judgment of the Court, expressed the opinion that to impugn a salvage contract on the ground of duress did not require proof of such duress as was necessary in a court of law to set aside an ordinary contract. What must be proved was "moral compulsion."[27] The Court rejected any notion that salvage contracts were within the discretion of the Court.[28]

Whether or not the civil codes of continental Europe as opposed to the jurisprudence of the civil law systems required a lesser degree of pressure is open to argument. In 1877 the French *Cour de cassation* held in a salvage case that when the consent of the person obliged "is not free, but is given under the influence of fear inspired by a real, considerable and present evil to which his person or fortune is exposed, the contract is tainted by a vice which makes it annullable."[2]

The statement by Brett LJ in ***Akerblom v Price*** of the operative rule for the determination of whether or not a salvage contract will be enforced has been accepted as the relevant rule in Australia.[30]

That the maritime law grants a substantive remedy to set aside maritime contracts in accordance with the principles to be deduced from the cases referred to has not been doubted.[31] The remedy remains

' At 150; 197. ! At 149; 196. ' CassReq 27.4.1887, S 1887.1.372, D 1888.1.263, Source-book p 378; cited in

and see generally Nicholas, B, ***French Law of Contract.*** Butterworths (1982) at 103.

30 ***The Cartela v The Invernesshire*** (1916) 21 CLR 387 at 395.

3 See ***Lloyds Bank Limited v Bundy*** [1975] QB 326 at 338-339 per Lord Denning MR; ***The Unique Mariner*** [1978] 1 Lloyd's Rep 438 at 454-455 per Brandon J; see also Kennedy's *Law of Salvage,* 5th ed. (1995) paragraphs 753, 754, 789-803; Goff & Jones' ***The Law of Restitution,*** 4th ed. (1993) at

available at this time for use in an appropriate case. That decisions of a court exercising such a power do not appear in the Anglo-Australian reports much, if at all, in the last fifty years is explicable by the use of the Lloyd's Standard Form of Salvage Agreement and the reference to private arbitration under it to fix the amount of the salvage award. The use of such a form of salvage contract as the Lloyd's Standard Form makes recourse to this body of case law unnecessary. Nonetheless, the case law remains applicable to all salvage and towage contracts and is available to source a remedy in an appropriate case.[32]

As has been noted earlier, the pressure necessary to sustain the remedy in Admiralty was acknowledged in the eighteenth and nineteenth century cases to be less than, and as not constituting, duress under the common law. However, in this century there has emerged and continues to develop a modern doctrine of duress at common law. It is therefore appropriate to examine the present relationship between the remedial jurisdiction with respect to salvage and other maritime contracts and the modern common law principles applicable to the avoidance of agreements for duress, particularly economic duress.

The concept of duress in the common law had its genesis as a by-product of legal controls over crime and tort.[33] The concept provided redress to those persons induced to enter into contracts by actual or threatened physical violence to the person. In the eighteenth century the courts recognised duress in cases of wrongful seizure or detention of goods - "duress of goods."[3] The development of the doctrine in England was hindered due to a distinction which was drawn between

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297, 387; Parkes and Cattell's ***The Law of Tug, Tow and Pilotage,*** 3rd ed. (1994) at paragraphs 11, 1101-1104. ***The Unique Mariner*** at 455.

' Dawson, J P, ***Economic Duress - An Essay In Perspective*** (1947) 45 Mich L Rev 253 at 254 and see generally: Ogilvie, M H, ***Economic Duress Inequality of Bargaining Power and Threatened Breach of Contract*** (1981) 26 McGill LJ289. [34] ***Astley v Reynolds*** (1731) 2 Str 915; 93 ER 939.

payments made at the time of the duress, which were recoverable, and promises to pay in the future, which could not be avoided on the ground of duress of goods, and by the further requirement that the duress should be such as would overcome a "constant man."[3]

In the maritime context the modern doctrine of economic duress first appears in the judgment of Kerr J in ***Occidental Worldwide Investment Corporation v Skibs*** *A/S* ***Avanti (the Siboen and the Sibotre)****[6] The owners of the "Siboen" and the "Sibotre" agreed by an addenda to existing charter parties to reduce the applicable charter rates because of the threat or representation by the charterers that they would go bankrupt if the rates were not so reduced. There had been a slump in the market rates and charterers knew that the owners would have difficulty finding new charterers. Later, when market rates had begun to rise steeply, the owners withdrew the vessels and made large profits from the vessels during the remainder of the charter periods. In an action by the charterers for damages based on wrongful withdrawal of the vessels, the owners claimed, *inter alia,* that they were entitled to rescission of the addenda varying the charter rates on the ground that the addenda had been obtained by the charterers' fraudulent and innocent misrepresentations or under duress. Kerr J found in favour of the owners on the misrepresentation ground. However, his Honour did consider the owners' defence of duress.

His Honour accepted that there may be coercion or compulsion not amounting to actual or threatened physical harm to a party to an agreement or amounting to actual or threatened physical detention of its goods which constituted duress at common law, provided that the pressure was such as to overbear the will of the party and thus to vitiate

[3] For a full discussion, see Dawson in (1947) 45 Mich L Rev at 255; Hilson, R, ***Opportunism Economic Duress and Contractual Modifications*** (1991) 107 LQ Rev 649 at 657. [36] [1976] 1 Lloyd's Rep 293.

the consent of that party to the agreement.[37] In the circumstances of the case before him, Kerr J found that although the pressure being applied to the shipowners was great, it was only commercial pressure and was not sufficient to constitute coercion of the will.

In ***North Ocean Shipping Co Limited v Hyundai Construction Co Ltd (the Atlantic Barorif****** shipowners and a ship building company entered into a contract whereby the company agreed to build a tanker for the owners for a fixed price in United States dollars payable in five instalments. After the owners paid the first instalment, the US dollar was devalued by ten percent. The ship builder put forward a claim to an increase often percent on the remaining instalments. The owners, who at the time were negotiating a lucrative contract for the charter of the tanker, initially refused the claim and suggested the ship builder should subject its claim to arbitration. The ship builder declined to do so and requested that the owners give a final and decisive reply to the ship builder's claim failing which it would terminate the contract. The owners agreed to the additional payments without prejudice to their rights and remitted the remaining instalments, including the ten percent increase, without protest. The tanker was delivered to the owners in November 1974. It was not until July 1975 that the ship builder knew that the owners were claiming the return of the extra ten percent paid on the four instalments. Mocatta J held that the ship builder's threat to break the contract without legal justification unless the owners agreed to its claim for a ten percent increase amounted to duress in the form of economic pressure and accordingly the agreement whereby the owners agreed to pay the additional sum was voidable at the option of the owners. However, his Honour found that the owners had by their inaction affirmed the variation of the original contract and could not therefore avoid the variation on the ground of duress.

' At 335-336.

[1979] 1 QB

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These two decisions were considered by the Privy Council in ***Poo On vLou Yiu Ong***[39] Although finding that it was unnecessary to determine whether or not English law recognised a category of duress known as "economic duress", their Lordships nonetheless expressed a view in the following terms[40]:-

> Recently two English judges have recognised that commercial pressure may constitute duress the pressure of which can render a contract voidable: Kerr J in Occidental Worldwide Investment Corporation v Skibs A/S Avanti [1976] 1 Lloyds Rep 293 and Mocatta J in North Ocean Shipping Co v Hyundai Construction Co [1979] QB 705. Both stressed that the pressure must be such that the victim's consent to the contract was not a voluntary act on his part. In their Lordships' 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 will, which vitiates consent. It must be shown that the payment made or the contract entered into was not a voluntary act.

The issue of economic duress in the maritime context was next considered by the House of Lords in ***Universe Tankships Inc. of Monrovia v International Transport Workers Federation****[1] In that case the appellant owned a Liberian registered ship which had docked in the United Kingdom and discharged its cargo. The respondent federation considered the ship to be sailing under a flag of convenience and in consequence the vessel was "blacked". Waterside workers refused to service the vessel with tugs and it could not sail. The respondent federation demanded that the ship owners pay to it $US80,000 by way of, *inter alia,* backpay for the crew of the ship and a contribution of $US6,480 to the respondent's welfare fund. The appellant acceded to the respondent's demand and the ship was able to sail twelve days later. Subsequently, the appellant demanded the return of the $US80,000

' [1980] AC 614.
40 At 636.
4 [1983] 1 AC 366.

claiming that the agreements entered into between it and the respondent were void because of duress.

In the House of Lords it was conceded that the pressure exerted upon the appellant by the respondent amounted to economic duress. In the opinions of Lord Diplock (with whom Lord Cross of Chelsea and Lord Russell of Killowen agreed on this point) and Lord Scarman, two elements were identified as being the rational basis for the development of economic duress as one of the categories of duress in respect of which the common law will grant a remedy. The first element was the coercion of the will of the victim. The second was that such coercion was as a result of pressure exerted by the other party which the law did not regard as legitimate.[42] The requirement that the pressure must be of the kind which the law does not regard as legitimate comes from the minority advice of Lord Wilberforce and Lord Simon of Glaisdale in ***Barton v Armstrong*** As to the question of determining the legitimacy of the pressure, Lord Scarman made the following observation[44] :-

> 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.
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> The origin of the doctrine of duress in threats to life or limb, or to property, suggest 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. Blackmail is often a demand supported by a threat to do what is lawful, eg to report criminal conduct to the police. In many cases therefore, 'what [one] has to justify is not the threat but the demand ... ,: see per Lord Atkin in ***Thome v Motor Trade Association*** [1937] AC 797, 806.

[1] At 384, 400. [43] [1976] AC 104 at 121.

[44] [1983] 1 AC at 401.

In the United Kingdom, the requirement that the remedy be based upon a theory of overborne will has been criticised on the basis that it ignores an earlier decision of the House of Lords in ***Director of Public Prosecutions for Northern Ireland v Lynch,***[45] which unanimously rejected the notion that duress operates by "overbearing the will" of the party subject to it.[46] In more recent times, some of the Law Lords have doubted whether it is or was helpful in the context of economic duress to speak of the will of the victim as having been coerced.[47]

In Australia the overbearing of the will theory of duress was rejected by McHugh JA in ***Crescendo Management Pty Ltd v Westpac Banking Corp.***[48] His Honour was of the opinion that the proper approach was to ask whether any applied pressure induced the victim to enter into the contract and then ask whether the pressure went beyond what the law is prepared to countenance as legitimate. McHugh JA continued[49] :-

> Pressure will be illegitimate if it consists of unlawful threats or amounts to unconscionable conduct. But the categories are not closed. Even overwhelming pressure, not amounting to unconscionable or unlawful conduct, however, will not necessarily constitute economic duress.
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> In their dissenting advice in ***Barton v Armstrong*** [1973] 2 NSWLR 598; [1976] AC 104, Lord Wilberforce and Lord Simon of Glaisdale pointed out (at 634; 121):
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> > '... in life, including the life of commerce and finance, many acts are done under pressure, sometimes overwhelming

' [1975] AC 653. [46] See Atiyah, P S. ***Economic Duress and the "Overborne Will"*** (1982) 98 LQ Rev 197; Atiyah, P S, ***Duress and the Overborne Will Again*** (1983) 99 LQ Rev 353; cf Tiplady, D, ***Concepts of Duress*** (1983) 99 LQ Rev 188. [7] ***Dimskal Shipping Co SA v International Transport Workers' Federation*** [1992] 2 AC 152 at 166 per Lord Goff of Chieveley, with whom Lord Keith of Kinkel and Lords Ackner and Lowry agreed.

48 (1988) 19 NSWLR 40 at 45.

49 At 46.

> pressure, so that one can say that the actor had no choice but to act. Absence of choice in this sense does not negate consent in law: for this the pressure must be one of a kind which the law does not regard as illegitimate. Thus, out of the various means by which consent may be obtained - advice, persuasion, influence, inducement, representation, commercial pressure - the law has come to select some which it will not accept as a reason for voluntary action: fraud, abuse of relation of confidence, undue influence, duress or coercion.'
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> In ***Poo On v Lou Yiu Long*** [1980] AC 614, the Judicial Committee accepted (at 635) that the observations of Lord Wilberforce and Lord Simon in ***Barton v Armstrong*** were consistent with the majority judgment hi that case and represented the law relating to duress.
>
> It is unnecessary however for the victim to prove that the illegitimate pressure was the sole reason for him entering into the contract. It is sufficient that the illegitimate pressure was one of the reasons for the person entering into the agreement. Once the evidence establishes that the pressure exerted on the victim was illegitimate, the onus lies on the person applying the pressure to show that it made no contribution to the victim entering into the agreement: ***Crescendo Management Ply Ltd v Westpac Banking Corp*** (at 633; 120) per Lord Cross.

That passage from the judgment of McHugh JA in ***Crescendo*** has been accepted and applied in a number of Australian jurisdictions.[50]

The principles stated by McHugh JA in ***Crescendo Management Pty Ltd v Westpac Banking Corp*** admit of ready application in circumstances where the conduct complained of by the party alleging economic duress amounts to unlawful conduct or threats. There can be

} *Equiticorp* ***Finance Limited (In Liquidation) v Bank of New Zealand*** (1993) 32 NSWLR 50 at 149 per Clarke and Cripps JJA; ***Scolio Pty Ltd v Cote*** (1991) 6 WAR 475 at 481 (FC); ***Deemcope Pty Ltd v Cantown Pty Ltd*** [1995] 2 VR 44; see generally Sindone, M P, ***The Doctrine of Economic Duress - Part 1*** (1996) 14 Aust Bar Rev 34; ***The Doctrine of Economic Duress - Part 2*** (1996) Aust Bar Rev 114.

little doubt that pressure consisting of such conduct or threats, if it induces the victim to enter into a contract, will, all other things being equal, amount to relievable or actionable duress. The difficulty arises in cases where what is complained of is in fact lawful conduct.

The authorities so far seem to accept that lawful conduct or threats to take lawful action can amount to illegitimate pressure in certain circumstances.[51] If that is so, the question becomes one of the appropriate delineation of the boundary between commercial or financial pressure of the kind which operates in a market economy as a feature or function of economic liberty[52] and commercial or financial pressure which is impermissible and which calls out for the intervention of the courts.

If the pressure flowing from lawful conduct or a threat to take lawful action will only be illegitimate if it would, in a court of equity, amount to actionable unconscionability, one must question the need for, or benefit of, resort to the doctrine of economic duress in such circumstances. This is particularly so when one has regard to the merger of the jurisdictions of the courts of common law and equity and to the existence of the large body of case law which has developed around the settled equitable doctrines of unconscionable conduct and undue influence.[53]

However, the rationale for setting aside contracts entered into under duress is different from the rationale behind the relief granted in equity on the ground of unconscionable conduct. In the latter case, relief is granted where one party makes unconscientious use of his or her superior position to the detriment of a party who suffers from some special

See ***Universe Tankshlps*** [1983] 1 AC at 401 per Lord Scarman; ***CTN Cash & Carry v Gallagher*** [1994] 4 All ER 714 at 719 (CA); ***Shivas v Bank of New Zealand*** [1990] 2 NZLR 327 at 345; ***Caratti v Deputy Commissioner of Taxation*** (1993) 27 ATR 448 at 457.

[1] ***Equiticorp Finance*** (1993) 32 NSWLR at 106 per Kirby P. [53] ***Equiticorp Finance*** at 107; ***Magnacrete Ltd v Douglas-Hill*** (1988) 48 SASR 567 at 592-593 per Perry J.

disability or is placed in some special situation of disadvantage.[54] Equity denies to the party acting unconscionably the fruits of his or her unconscientiousness. In the case of economic duress, the rationale for granting relief is that the law will not give effect to an apparent consent which was induced by pressure exercised upon one party by another party when the law regards that pressure as illegitimate.[55] The "consent is treated in law as revocable unless approbated either expressly or be implication after the illegitimate pressure has ceased to operate" on the victim's mind.[56] Further, the common law doctrine does not require that the victim of the conduct be in a special position of disability in order to found relief, although that the victim is by dint of circumstance at a disadvantage will often be a relevant factor to be considered in the application of the common law doctrine..

The thesis which I put forward is this: the salvage cases with which I commenced this address, in marking out where the Admiralty Court would refuse to enforce a salvage agreement, identify the area in which the exercise of lawful conduct becomes illegitimate. It is where the pressure exerted by the exercise or the threat of exercise of lawful conduct is applied to support an extortionate demand. The operative underlying principle is the avoidance of unjust enrichment. As Lord Wright said in ***Fibrosa Spolka Akcyjna v Fairburn Lawson Combe BarbourLtd***[57]***:-***

> It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from another which is against conscience that he should keep. Such remedies in English law are generally different from remedies in

[1] ***Commercial Bank of Australia Ltd v Amadio*** (1983) 151 CLR 447 at 461 per Mason J; ***Louth v Diprose*** (1992) 175 CLR 621 at 626, 630, 637-638, 650.

[55] ***Universe Tankships*** [1983] 1 AC at 384 per Lord Diplock .

[56] ***ibid.***

[57] [1943] AC 32 at 61-62.

> contract or in tort and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution.

There is in substance no difference between this formulation and that of Justice Storey in 1832 in ***The Emulous™*** where he said[59]:-

> ...No system of jurisprudence, purporting to be founded upon moral, or religious, or even rational principles, could tolerate for a moment the doctrine, that a salvor might avail himself of the calamities of others to force upon them a contract unjust oppressive and exorbitant; that he might turn the price of safety into the price of ruin; that he might turn an act demanded by Christian and public duty, into a traffic of profit which would outrage human feelings, and disgrace human justice.

Where the pressure applied by lawful conduct has as its object compliance with a demand which is manifestly unfair or unjust in that it is not what a fair and reasonable person in the positions of the parties respectively would do or ought to have done under the circumstances, the pressure is illegitimate notwithstanding that the conduct is lawful. This is essentially to re-state the fundamental rule set out in ***Akerblom v Price.***

An example of the reasoning by Butt J in ***The Rialto***[60] is instructive. There his Honour said[61] :-

> It has been laid down that the sort of pressure requisite to invalidate an agreement of this nature and made in such circumstances is less than the duress required at common law to invalidate an agreement and the question is: what amount of duress will have that effect? Again, the effect of the decided cases is to shew that the agreement insisted upon by the salvors at the time must be inequitable; and then comes the question: what is an inequitable agreement in cases of this sort? On this point two ingredients are commonly referred to. First the parties contracting must be shewn not to have contracted on equal terms. I am

' 8 F Case 704; 1 Sumn 207 (1832).
' At 706; 208.
60 [1891] P 175.
61 At 178-179.

> inclined to think that in general, in the case of salvage services contracted for and about to be performed, the parties are on unequal terms, and, therefore, the mere fact of their standing in such a position will not invalidate the agreement. If, however, contracting on unequal terms - that is to say the master of the salved ship being at a disadvantage - it further appears that the sum insisted upon is exorbitant, then the two ingredients exist which will induce the court not to uphold the agreement. Now I have no doubt that the parties stood as they usually do in such cases upon unequal terms. The question that follows is: Is 6,0001. a wholly unreasonable, or, in other words, an exorbitant sum? I think it is. and, therefore, it seems to me that the two things necessary to invalidate the agreement exist here.

That it is the relationship between the pressure exerted and the benefit procured thereby which is to be considered is supported by the statement of Lord Atkin in ***Thome v Motor Trade Association,***[62] cited with approval by Lord Scarman in ***Universe v Tankships***[63]

Lord Atkin said[64] :-

> **... In** ***Ware & de Freville v Motor Trade Association*** (1921) 3 KB 40 and again in *Hardie &* ***Lane v ChUton*** [1928] 2 KB 306, Scrutton LJ appeared to indicate that if a man merely threatened to do that which he had a right to do the threat could not be a menace within the Act. With great respect this seems to me to be plainly wrong; and I entirely agree with the criticism of this proposition made by the Lord Chief Justice in ***Rex*** *v* ***Denyer*** [1926] 2 KB 258. The ordinary blackmailer normally threatens to do what he has a perfect right to do - namely, communicate some compromising conduct to a person whose knowledge is likely to effect the person threatened. Often indeed he has not only the right but also the duty to make the disclosure, as of a felony, to the competent authorities. What he has to justify is not the threat, but the demand of money. The gravamen of the charge is a demand without reasonable or probable cause; and I cannot think that the mere fact that the threat is to do something a person is entitled to do either causes the threat not to be

[1937] AC 797. [1]
[1983] 1 AC at 401. [64]
At 806-807.

> a 'menace' within the Act or in itself provides a reasonable or probable cause of the demand.

To adopt such an approach does not render contracts either arbitrary in their operation or discretionary at the will of the Court. The cases make clear that the jurisdiction identified is not to relieve from hard bargains. Nor is it a jurisdiction to allow agreements to be set aside simply because there was a difference in the bargaining position of the parties to the agreement and that one of the parties used the imbalance to extract a commercial advantage from the other party. What is involved is the application of principled reasoning to prevent the retention of an unjust benefit acquired through the application of illegitimate pressure. That is, there must be some vitiating factor to make the receipt and retention of the benefit unjust.

The High Court of Australia has shown no reluctance to apply unjust enrichment as a definitive legal principle according to its own terms and not just as a concept in commercial transactions. In ***David Securities Pty Ltd v Commonwealth Bank of Australia***^ Mason CJ, Deane, Toohey, Gaudron and McHugh JJ in a joint judgment stated the Australian position[66]:-

> ...In *Pavey & Matthews,* Deane J stated (1987) 162 CLR, at pp 256 - 257:
>
> > To identity the basis of such actions as restitution and not genuine agreement is not to assert a judicial discretion to do whatever idiosyncratic notions of what is fair and just might dictate. ... That is not to deny the importance of the concept of unjust enrichment in the law of this country. It constitutes a unifying legal concept which explains why the law recognizes, in a variety of distinct categories of case, an obligation on the part of a defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff and which assists in the

(1992) 175 CLR 353.

[66] At 378-379.

> determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognize such an obligation in a new or developing category of case.'
>
> Accordingly, it is not legitimate to determine whether an enrichment is unjust by reference to some subjective evaluation of what is fair or unconscionable. Instead, recovery depends upon the existence of a qualifying or vitiating factor such as mistake, duress or illegality.

The salvage cases identify the relevant vitiating factors which under the modern law of duress will give rise to an entitlement to restitutionary relief. If necessary, the Court will exercise its auxiliary jurisdiction in equity to craft such relief as is necessary to achieve what is practically just as between the parties.[67] As it has developed, the modern common law doctrine of economic duress has moved closer to and now either parallels or substantially approximates the position reached in Admiralty. In this respect the common law may well be served by the time invested in the study of a doctrine of Admiralty which at first blush would appear to be no longer of practical relevance in the twentieth century.

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[67] ***Vadasz*** **v** ***Pioneer Concrete (SA) Pty Limited*** (1995) 184 CLR 102