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Whither economic duress? Reflections on two recent cases

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Introduction

From its rather tentative and extremely recent beginnings,[1] the law relating to economic duress has developed at a relatively rapid pace during the last decade or so. We have had a series of decisions from various courts and jurisdictions[2] which, collectively at least, affirm the existence of the doctrine in English law. The pronouncements at the highest levels, however,[3] have not purported to be definitive, and, as we shall see, have certainly not aided in a clarification and systematization of the doctrine of economic duress.[4] The two recent decisions, which are the subject of the present comment, have merely underscored the very urgent need for a bolder and more definitive approach toward this dynamic area of the common law Since the factual nature of the doctrine is of special importance, it is appropriate to begin with the essential facts of each case.

The first, *Vantage Navigation Corporation* v *Suhail and Saud Bahwan Building Materials LLC, (The 'Alev')*,[5] a decision by Hobhouse, J., concerned plaintiff shipowners who had brought an action against the defendant endorsees of the bill of lading under the following circumstances. The plaintiffs had time chartered their vessel to third parties who, as it turned out, were financially unsound, ultimately declaring themselves bankrupt; only part of the hire had in fact been paid. The plaintiffs then attempted to recoup their losses by renegotiating with the various bill of lading holders, of which the defendants, of course, were one. The plaintiffs adopted this course of action even though they were nevertheless legally bound to carry the cargo to destination as freight had been prepaid with regard to the bills of lading. The plaintiffs' basic approach was to 'seek' financial assistance, failing which they intimated that the voyage to the various destinations could not be completed. It is of significance to note that, although the other bill of lading holders paid the plaintiffs various sums of money, the defendants initially stood their ground[6] — all this despite the fact (and an important one at that) that the delay in delivering the cargo was 'seriously dislocating' the defendants' business.[7] The plaintiffs, however, persisted in their stand, clearly threatening the defendants (as Hobhouse J. equally clearly found),[8]

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1 See, especially, *Occidental Worldwide Investment Corp.* v *Skibs A/S Avanti, Skibs A/S Glarona, Skibs A/S Navalis, (The 'Siboen' and the 'Sibotre')* [1976] 1 Lloyd's Rep. 292. Academic opinion (and exhortations for development) came (as usual) much earlier: see, *e.g.*, W.R. Cornish, (1966) 29 M.L.R. 428; and Beatson, [1974] C.L.J. 97.

2 The leading ones of which include *The 'Siboen' and the 'Sibotre', supra,* note 1; *Alexander Barton* v *Alexander Ewan Armstrong*, [1976] A.C. 104, P.C.; *North Ocean Shipping Co Ltd* v *Hyundai Construction Co Ltd, The Atlantic Baron*, [1979] Q.B. 705; *Pao On* v *Lau Yin Long*, [1980] A.C. 614, P.C.; *Universe Tankships Inc of Monrovia* v *International Transport Workers' Federation*, [1983] 1 A.C. 366, H.L.; and *B. & S. Contracts and Design Ltd.* v *Victor Green Publications Ltd.*, [1984] I.C.R. 419, C.A.

3 *i.e.*, from the House of Lords (see the *Universe Tankships* case, *supra*, note 2) and the Judicial Committee of the Privy Council (see *Barton* v *Armstrong, supra,* note 2; and *Pao On* v *Lau Yiu Long, supra*, note 2).

4 See also Carty and Evans [1983] J.B.L. 218.

5 [1989] 1 Lloyd's Rep. 138.

6 See [1989] 1 Lloyd's Rep. 138, 141.

7 *Ibid.* An important part of the defendants' business included the supply of steel to building and civil engineering contractors. The cargo involved in the instant case comprised some 14,500 tonnes of high tensile and mild steel bars.

8 [1989] 1 Lloyd's Rep. 138, 142.

and ultimately obtained an agreement *under protest* (yet another important fact)[9] that secured, in turn, for the plaintiffs, amongst other things, the payment of port expenses and discharge costs, waiver and abandonment of any claims against them, and an undertaking not to either arrest or detain the vessel concerned.[10] The plaintiffs, however, also agreed that the defendants would be appointed the ship's agents at the port concerned (Mina Qaboos in Muscat) — a point that figured prominently with regard to the doctrine of consideration, and which we shall be considering later in this comment. The defendants, however, brought an action in the courts at Muscat, and obtained judgment against the plaintiffs. In the meantime, the plaintiffs brought the present action in London against the defendant, alleging breach of the agreement just mentioned, and claiming as damages the sum they had been ordered to pay by the courts at Muscat in order to obtain the release of the vessel. The issue now before Hobhouse J. was whether this agreement was voidable for duress and/or unenforcable because of the absence of valid consideration — twin arguments prayed in aid by the defendants' counsel. On the other hand, it was common ground that if the agreement were indeed valid, then the defendants would be liable under it. Hobhouse J. held that although there was 'technically'[11] consideration, there was nevertheless economic duress, and therefore delivered judgment in favour of the defendants.

The facts of the second case, *Atlas Express Ltd* v *Kafco (Importers and Distributors) Ltd*,[12] were as follows. The plaintiffs were 'well-known carriers of goods by road in the United Kingdom',[13] whilst the defendants were 'a small company and their three directors were personally committed to its success'.[14] The defendants had entered into an agreement to supply their product (basketware) to Woolworth shops in the United Kingdom. To this end, they entered into an agreement with the plaintiffs 'whereby the plaintiffs agreed to deliver cartons of the defendants' basketware at a rate per carton depending on the number of cartons in the load'.[15] Leaving aside the precise figures and other details, problems arose simply because the plaintiffs' depot manager had made an apparent 'business mistake' in estimating the total number of cartons in each load,[16] thus resulting in the plaintiffs charging a much lower rate per load than they otherwise would have (the reality was that the cartons were very much larger than originally estimated, and therefore fewer were included per load). The plaintiffs' depot manager thus attempted to renegotiate the rate, and intimated to the defendants' representative that they (*i.e.*, the plaintiffs) would not carry any more goods under the 'Woolworth agreement' unless the defendant agreed to pay a certain minimum rate per trailer load. The defendants' representative resisted these overtures but only managed to obtain a minor concession. He ultimately signed an agreement that contained these revised terms because he was desperate for the plaintiffs' services, writing in the concession obtained. It appears that the plantiffs' manager had deliberately made himself available in order that the defendants' representative would be prevented from making any further protests. Other salient facts include the following: that '[i]t was essential to the defendants' success and to their commercial survival that they should be in a position to make deliveries';[17] that the defendants' representative 'had no bargaining power',[18] and that there was clear evidence from the Woolworth manager 'that if the defendants had told them that they could not supply the goods Woolworth would have sued them for loss of profit and would have ceased trading with them'.[19] The

9 See *ibid.*, 142 and 143.
10 For the full terms of this agreement, see *ibid.*, 143–144.
11 [1989] 1 Lloyd's Rep. 138 147.
12 [1989] 1 All E.R. 641.
13 *Ibid.*, 642.
14 *Ibid.*, 644.
15 *Ibid.*, 642.
16 See *ibid.*, 643.
17 *Ibid.*, 644.
18 *Ibid.*
19 *Ibid.*

defendants refused to settle outstanding payments under the terms of the revised agreement and, in reply to the plaintiffs' present action, adopted exactly the same approach that was utilized by the defendants in *The 'Alev', i.e.*, that the agreement was voidable for duress and/or that there was no consideration for the agreement. Tucker J. delivered judgment in favour of the defendants, holding that there was both economic duress as well as an absence of valid consideration in any event.

What is the collective significance (if any) of these two cases? It is submitted that the judgments reveal, first, that the doctrine of economic duress is here to stay. In *The 'Alev'* for example, Hobhouse J. stated that the doctrine is 'now well established'.[20] Likewise, Tucker J. in the *Atlas Express Ltd* case observed that the doctrine is 'a concept recognised by English law'.[21] What is further revealed, however, is not very encouraging. We are still left wondering which of the various factors (particularly those referred to in the *Pao On* case)[22] ought to be considered as relatively more important. The problem is exacerbated by the fact that the *actual application* of the various factors in both these cases is rather vague. In the light of these as well as other points that will be discussed below, we are, it is submitted, left in the dark as to the scope, limits, and future of the doctrine itself. Finally, the relationship (both from descriptive and, especially, normative points of view) between the doctrine and the related doctrine of consideration remains rather unsatisfactory. It is proposed that we examine each of these issues in turn.

General Rationale of Economic Duress

Before considering the factors applicable (and in fact applied) by the judges in the two cases, it ought to be noted that the general definition and orientation of economic duress remains ambiguous. The 'overborne will' doctrine, first clearly propounded by Kerr J. in *The 'Siboen' and the 'Sibotre'*,[23] has come under considerable criticism from Professor Atiyah[24] whose views were apparently vindicated by at least two of the Law Lords in the *Universe Tankships* case.[25] We find, in these judgments, an acknowledgement that the 'overborne will' theory is, as argued by Atiyah, simplistic and misleading insofar as it suggests a kind of 'automatism' on the part of the party coerced. The focus is now on the *illegitimacy* of the pressure exerted by the allegedly guilty party. Such an approach certainly seems more persuasive from a theoretical point of view, though problems, already alluded to above, remain. The first is that it is still unclear what would constitute 'illegitimate pressure' in this redefinition.[26] In the *Universe Tankships* case, for example, Lord Scarman appears to suggest that 'illegitimacy' could encompass pressure that is not 'unlawful' but he does not really elaborate on this,[27] whilst Lord Diplock, on the other hand, leaves this point open.[28] Secondly, the present two cases not only do not clarify the issue just considered but, on the contrary, utilize both the 'overborne will' rationale and the 'illegitimate pressure' rationale interchangeably![29] One might argue that the precise terminology is immaterial, and that what does matter are the factors by which the court tests either the presence or absence of economic duress. As already explained above, however, there is a fundamental difference between the two rationales. In any event

20 [1989] 1 Lloyd's Rep. 138, 145.
21 [1989] 1 All E.R. 641 646. See also 645 where he observes in like vein that '[i]t is clear to me that in a number of English cases judges have acknowledged the existence of this concept'.
22 [1980] A.C. 614 635–636.
23 [1976] 1 Lloyd's Rep. 293, 336.
24 (1982) 98 L.Q.R. 197.
25 *Per* Lords Diplock and Scarman, [1983] 1 A.C. 366, 384 and 400 respectively.
26 See Carty and Evans, *op. cit.*, note 4, 222–223.
27 [1983] 1 A.C. 366, 401.
28 *Ibid.*, 384.
29 See [1989] 1 Lloyd's Rep. 138, 145; and [1989] 1 All E.R. 641, 645 and 646.

— and this is a point that will be presently considered — there do not appear to be any definitive guidelines or factors (either theoretical or practical) that can be gleaned from either of these two decisions.

The Factors Utilized to Ascertain the Presence or Absence of Economic Duress

Insofar as the various factors are concerned, the following four guidelines (as set out in the *Pao On* case)[30] appear, at present at least, to cover the field, *viz.*, (1) whether the party coerced had an alternative course open to him (such as an adequate legal remedy);[31] (2) whether the party coerced protested; (3) whether the coerced party had independent advice; (4) and whether after entering the contract the coerced party took steps to avoid it. This last factor is, in fact, directly relevant to the bar of approbation which is vividly illustrated by Mocatta J.'s decision in *The Atlantic Baron*.[32] The important question is the relative importance of these guidelines. One view, of course, is that they should be allocated equal importance, although this appears unlikely from a survey of the precedents themselves. Virtually all the prior decisions as well as the present two cases stress the first, whether there was really any alternative course of action open to the party coerced. In fact, there is direct emphasis by Lord Scarman in the *Universe Tankships* case upon whether there is 'no other practical choice open'[33] to the party alleging coercion. He then proceeds to observe that '[t]he absense of choice can be *proved* in various ways, e.g. by protest, by the absence of independent advice, or by a declaration of intention to go to law to recover the money paid or the property transferred . . . But none of these *evidential* matters goes to the essence of duress. The victim's silence will not assist the bully, if the lack of any practicable choice but to submit is proved.'[34] The upshot of Lord Scarman's observations appears to be this: that the absence of a practical choice is the 'umbrella' factor, with the other factors playing, as it were, an evidentiary role. It should be noted that the judgment of the Board in *Pao On* was delivered by none other than Lord Scarman himself who, after setting out the guidelines noted above, appeared to suggest, towards the end of the judgment,[35] that these factors were merely evidentiary. Furthermore, as already mentioned, the actual cases themselves support this conclusion. In *The 'Alev'*, for example, Hobhouse J. expressly cited and applied the principles enunciated by Lord Scarman in the *Universe Tankships* case,[36] and concluded that, on the facts, '[n]o other choice was left open'[37] by the plaintiffs to the defendants. And in the *Atlas Express Ltd* case, Tucker J. quoted extensively from the judgment of Lord Scarman in the *Pao On* case.[38] If, however, the majority of the guidelines are merely evidentiary in nature, we are back to 'square one', so to speak. By stating that the absence of a practical choice of alternative is an 'umbrella' factor, we are, in effect, no better off than before insofar as concrete and practical guidelines are concerned; the problem would, in other words, merely have been redefined at the (rather unhelpful) same level of abstraction. One might also wonder whether this factor is not itself separate and distinct from the other factors. Furthermore, as already mentioned, the actual *application* of the factors by the judges in the two cases considered in this comment merely buttresses the view that the factors are rather unhelpful.

30 [1980] A.C. 614, 635 to 636.
31 *Cf.*, ibid., 636, where reference is made to the effectiveness of the alternative remedy available.
32 [1979] Q.B. 705. There was, of course, no approbation found in either of the two instant cases.
33 [1983] 1 A.C. 366, 400.
34 *Ibid.*, (emphasis added).
35 [1980] A.C. 614, 636.
36 [1989] 1 Lloyd's Rep. 138, 145.
37 *Ibid.*, 146.
38 [1989] 1 All E.R. 641, 645 to 646.

Turning, first, to *The 'Alev'*, we find that although Hobhouse J. was clear in his mind that there had been economic duress, the only real factor considered was whether an adequate legal remedy (via an injunction) was a practical alternative remedy for the defendants. In fact, a number of other factors could have been *expressly* referred to by Hobhouse J.: for example, the fact that the defendants did protest right from the outset;[39] the fact that by taking the first 'offensive' in the courts at Muscat, they not only protested but also, in an at least indirect fashion, took steps to avoid the contract;[40] and that (and this has, again, to do with the absence of a practical (here, presumably, commercial) alternative) they could not easily procure alternative supplies of steel bars.[41] To be sure, the very mention as well as emphasis given to these facts in Hobhouse J.'s judgment demonstrates that there was an at least *implicit* acknowledgement that these factors were legally relevant to the case at hand. The fact, however, remains that, as already argued, they were *not expressly* referred to in the passages where the learned judge applied the law to the facts of the case.[42]

The *Atlas Express Ltd* case fares no better insofar as the issue of application is concerned. Tucker J.'s *express* application of the law to the facts encompasses an even smaller part of the actual judgment.[43] Once again, however, there are indications that the '*Pao On* factors' were considered at least implicitly. There is, for example, the reference to the fact that the defendants would probably not be able, given the particular time in the year, to find alternative carriers for their goods.[44] Then there was also the fact that they would have lost an apparently lucrative contract[45] — a point that was of vital importance in yet another case, *The Atlantic Baron*.[46] And the resistance (amounting, it is submitted, to tangible evidence of protest) was forthcoming from the defendants' representative right from the outset, and continued right through till the signing of the agreement concerned.[47]

The pattern, however, seems clear: setting out, *in extenso*, the salient facts that appear either to support or detract from the various '*Pao On* factors', a reference to the major *general* principles, and a decision thereon which does not appear to grapple, in any specific fashion, with an application of the law to the facts of the case. All this suggests that the courts are perhaps uncomfortable with the rather vague guidance that has been given in the precedents up to this point. There is no doubt that there has been a remarkable impetus in this sphere of the law in recent years. This, however, has not, it is respectfully submitted, been accompanied by a trend toward a concretizing of both the relative importance of the various general principles as well as the manner in which the specific factors might be applied. To recapitulate, the two decisions considered here demonstrate this by, first, conflating the 'overborne will' theory with the 'illegitimate pressure' rationale and, secondly, by demonstrating, in the actual application of the law to the facts of the respective cases, that there is no clear approach that ought to be followed.

It might, of course, be argued that some uncertainty is *inherent* within the doctrine of economic duress itself. Whilst this is undoubtedly true, it is submitted that so long as the courts perceive the doctrine as being so *excessively* open-ended, the way would be clear for the opening of Pandora's Box and a consequent full-scale application of the doctrine in a manner that would alarm the commercial common law world. It is submitted that vagueness tends to lead to liberal results, *i.e.*, a high success rate in the pleading of the doctrine, a point the force of which would be immeasurably augmented if lawful conduct

39 See notes 6 and 9 above. Though *cf.* Beatson's caveat on this particular factor: see (1976) 92 L.Q.R. 496, 498.
40 See the summary of the facts, above.
41 See [1989] 1 Lloyd's Rep. 138, 141.
42 *Ibid.*, 245 to 147.
43 [1989] 1 All E.R. 641, 656.
44 *Ibid.*, 644.
45 See note 19 above.
46 [1979] Q.B. 705.
47 See the discussion of the facts, above.

could also constitute 'illegitimate' pressure.[48] To those who argue for substantive (as opposed to mere procedural) justice, such a consequence cannot obviously be a bad thing. Applied, however, in such liberal doses in a *commercial* context, the implications are wide-ranging and ominous insofar, at least, as businessmen are concerned. And if the courts attempt to restrain the liberality of the doctrine from time to time, this is likely to engender even more confusion simply because such restraint would, in the absence of the availability of more settled guidelines, simply be effected on a necessarily *ad hoc* basis. Yet, the courts continue to draw an extremely clear distinction between commercial pressure on the one hand and duress on the other. Given the situation just described, whether or not one situation falls on one side of the line or the other would, it is submitted, be rather difficult for lawyers to ascertain when advising their clients, save in extreme situations.[49] If, of course, every situation became an at least potentially 'extreme' one in a *liberal* sense, the problem just outlined would not exist. Given the current attitude toward commercial transactions, however, there is likely to be more anxiety than approbation, as argued above.

It is also submitted that, given the especially heavy reliance upon facts, the opportunitiy for rationalization by the appellate courts is further reduced. This is in accordance with the well-established principle of civil procedure that the appellate court will not lightly interfere with the trial judge's finding of fact, and has, in fact, been explicitly endorsed in the context of economic duress itself.[50]

There remains, however, one possibility that might provide sone concrete guidance for the courts — the statement in both *The 'Alev'* and the *Atlas Express Ltd* case to the effect that, in order for the doctrine of economic duress to be successfully pleaded, the party alleging that he had been coerced must prove that he was acting *reasonably* in taking the other party's threats seriously.[51] The introduction of this *objective* test might, arguably, aid the rationalization of the doctrine. Such a view is, however, dependent upon the particular jurisprudential approach[52] one adopts toward the law in general and the concept of objectivity in particular. It might be added that there is presently a controversy as to what precisely constitutes objectivity in the law of contract.[53]

Summary and Suggestions for the Future

It is appropriate at this juncture to draw the various strands of arguments canvassed above together in order to ascertain the (at least possible) future of the doctrine of economic duress. All these arguments were either initiated, or rather strikingly illustrated, by the two cases that form the focus of this comment.

48 See text to notes 26 to 28 above. The problem would be worsened if a mere 'serious and immediate consequences' test were adopted, although consideration of consequences as a *factor* is probably acceptable: see Kerr L.J. in *B. & S. Contracts and Design Ltd.* v *Victor Green Publications Ltd.*, [1984] I.C.R. 419, 428, although it is submitted that a closer reading of the relevant passage will reveal that the learned judge was really focusing upon the factor as to whether there was a reasonable alternative open, as to which, see the discussion above *cf.* Coote, [1980] C.L.J. 40, 45.

49 These would be akin to Hart's 'core meaning', although this concept is, of course itself debatable; of this, more later. See (for the moment at least), generally, Hart, (1958) 71 Harv. L. Rev. 593; Fuller, (1958) 71 Harv. L. Rev. 630; Hart, *The Concept of Law* (1961), Chapter 7; Dworkin, *Taking Rights Seriously* (1978); Dworkin, *A Matter of Principle* (1985); Dworkin, *Law's Empire* (1986); Hart, (1976) 51 N.Y.U.L. Rev. 538; and Hart, (1977) 11 Ga. L. Rev. 969.

50 Notably in the *Pao On* case [1980] A.C. 614, 635.

51 *The 'Alev'*, [1989] 1 Lloyd's Rep. 138, 142 and 146; and the *Atlas Express Ltd* case [1989] 1 All E.R. 641, 644. Though *cf.* Beatson's interpretation of Kerr J.'s approach in *The 'Siboen' and the 'Sibotre'*: (1976) 92 L.Q.R. 496, 498.

52 See the discussion below.

53 See Howarth, (1984) 100 L.Q.R. 265; Vorster, (1987) 103 L.Q.R. 274; and Howarth, (1987) 103 L.Q.R. 527.

It was argued, first, that the basic rationale underlying the doctrine was still unclear. Secondly, it was argued that, on a more practical level, there was very little guidance to be gleaned from the existing precedents with regard to the relative importance of the various factors and how they were to be applied. These points, coupled with the possibly wide-ranging scope of 'illegitimate' pressure, the necessarily *ad hoc* element inherent within the factual nature of the doctrine intself, the related difficulty of drawing a clear distinction between commercial pressure and economic duress, and the general non-interference by appellate courts with trial judges' findings of fact, suggest an *excessive* flexibility and liberality that might result in creating a correspondingly excessive degree of commercial uncertainty.[54]

Balanced against this was a measure of objectivity embodied within the requirement that the party coerced must prove that his belief was reasonable, although here again it was pointed out that there was some doubt as to what exactly constituted objectivity in the law of contract.

What if the argument from vagueness were accepted? The consequences would, it is submitted, be rather wide-ranging. There might, for example, be an effective merger between the doctrine of economic duress and the broad doctrine of 'inequality of bargaining power' first enunciated by Lord Denning M.R. in *Lloyds Bank* v *Bundy*.[55] Yet, Lord Denning's broad doctrine has been expressly disapproved of by the House of Lords in the recent case of *National Westminster Bank* v *Morgan*,[56] and at least indirectly doubted by the Judicial Committee of the Privy Council in *Hart* v *O'Connor*.[57] And, even more importantly, the Privy Council in the *Pao On* case has rejected an argument premised upon public policy to the effect that a contract will be unenforceable where 'there has been a threat to repudiate a pre-existing contractual obligation or an unfair use of a dominating bargaining position'.[58] This rejected argument is, in substance, the same as the broad 'Denning argument', and is apt to be rather liberal in application. In the *Atlas Express Ltd* case, for example, Tucker J. clearly found inequality of bargaining power.[59] Yet, whilst the other factors in the doctrine of economic duress provide some *theoretical* checks against excessive liberality, if the arguments made in the preceding parts of this comment are accepted, the (liberal) result arrived at would, in effect, be the same. Returning for the moment to the reasons for the rejection of the public policy argument in *Pao On*, it is submitted that they are interesting as they have, as we shall see, a bearing upon the arguments canvassed in the instant comment.

The Board were, first, of the view that whilst fraud, mistake or duress could possibly render a contract unenforceable, businessmen dealing at arm's length ought, generally speaking, to be held to their bargains. This argument is persuasive, of course, only if a distinction can, in fact, be drawn between the doctrine of economic duress on the one hand and the broader public policy argument on the other. If the former merges into the latter, the argument must perforce fail.

The second reason was that '[s]uch a rule of public policy . . . would be unhelpful because it would render the law uncertain. It would become a *question of fact and degree* to determine in each case whether there had been, *short of duress*, an unfair use of a strong bargaining position.'[60] This argument is also premised upon the assumption that demarcation can be

54 *cf.* Adams, (1979) 42 M.L.R. 557, 561 to 562.

55 See [1975] 1 Q.B. 326, 339. There are other interesting issues such as the relationship between the doctrine of economic duress and the doctrines of undue influence and unconscionability, respectively. No discussion of these relationships will, however, be undertaken here, as an exploration of these issues would require a full-length study and is therefore outside the more modest scope of the instant comment.

56 [1985] A.C. 686.

57 [1985] A.C. 1000.

58 [1980] A.C. 614, 634.

59 See note 18 above.

60 [1980] A.C. 614, 634 (emphasis added).

effected between economic duress and broad public policy. If the argument that a liberal application of the doctrine of economic duress would render it no different from the application of broad public policy arguments is accepted, this reason must be discounted. Further, it is interesting to note that the Board does not, by implication at least, think that the application of the doctrine of economic duress involves 'a question of fact and degree'. This point is, however, disputable, given the rather factual nature of the inquiry as already alluded to in this comment. The Board's conclusion that uncertainty would result from a broad application of public policy considerations and arguments cannot, however, be disputed. In fact, this was precisely the danger (insofar as a liberal application of the doctrine of economic duress was concerned) that was identified in the instant comment.

The third reason is related to the first and second, *i.e.*, that an anomalous situation would result 'if conduct less than duress could render a contract void, whereas duress does no more than render a contract voidable'.[61] Again, the reasoning fails if merger occurs.

It is submitted that for the sake of commercial certainly, the courts in future cases concerning economic duress must clearly explain and, more importantly, apply the law to the facts in such a manner that some concrete guidance is offered for the decision of future cases. If, perhaps, this is not possible, then the courts ought to state clearly, whether or not they ultimately choose to develop or even apply the doctrine in the future.[62] It is conceded that, given the apparent conservatism of English judges toward any substantial extension of public policy arguments, an acknowledgement of the vagueness of the doctrine might lead to such severe constraints that it becomes emasculated in practice.[63] If this be the case, then parties, lawyers and judges would at least be clear *vis-a-vis* the *true* nature of the doctrine itself. To continue in the present rather ambiguous approach would, however, not only stymie courts in the future resolution of the actual cases themselves but would also serve to gradually effect an imperceptible merger with broader public policy arguments that have already been rejected by the courts.[64] The net results of the latter consequence would be to perpetuate an excessive liberality that would, in the practical world of commerce and business, generate a degree of uncertainty which would be detrimental to business generally — a result already alluded to above.

I do not, at least within the more limited scope of this, wish to comment in any detail upon the more radical arguments to the effect that the law is plagued by indeterminacy, and that any suggestions for a more concrete anunciation and application of guidelines (as suggested above) are destined to meet an early legal grave.[65] There is much truth in the general argument, but it cannot, it is submitted, be accepted, without more, for at least two reasons. First, if the general thrust of critical legal studies were accepted and applied to the law of contract, the entire enterprise of legal scholarship would be an exercise in futility. Before we accede to such a startling proposition, more research and discussion have to be conducted. Most critical legal studies tend, however, at the moment at least, to be rather reductionist and even Marxist in approach.[66] Secondly, even the critical legal scholars cannot deny that notions of commercial certainty and predicability in the legal context are firmly ingrained in the *psyche* of lawyers, judges, and, most importantly perhaps, businessmen. To dismiss this belief lightly (via catchphrases such as 'false consciousness') is to throw out the baby together with the bathwater.

Finally, a brief look at the relationship between economic duress and consideration will be undertaken in the following (and concluding) section.

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61 *Ibid.*
62 But *cf.*, *e.g.*, the approach of the court in the *Pao On* case: see text to notes 60 and 61, above.
63 See text to notes 56 to 58, above.
64 *Ibid.*
65 For a good general overview of the critical legal studies movement, see Kelman, *A Guide to Critical Legal Studies* (1987).
66 See *e.g.*, Gabel and Feinman's 'Contract Law as Ideology' in Kairys (ed) *The Politics of Law* (1982).

The Relationship between Economic Duress and Consideration

It ought to come as no surprise that the doctrines of economic duress and consideration are frequently pleaded and considered together.[67] This is due to the fact that in situations where there is possible extortion, the party impugning the transaction in question may argue either that there is insufficient consideration or that there has been economic duress, the successful pleading of either of which will, of course, suffice to enable extrication from the improvident bargain.[68] And, as already seen in the recitation of the facts, *The 'Alev'* and the *Atlas Express Ltd* case were no exceptions. To briefly recapitulate, in *The 'Alev'*, Hobhouse J. held that the defendants ought to succeed on the point of economic duress although they failed on the point of consideration which 'technically' existed insofar as the plaintiffs had appointed them (the defendants) as the ship's agents at the port of discharge.[69] In the *Atlas Express Ltd* case, on the other hand, Tucker J. found in favour of the defendants not only on the ground of economic duress but also on the alternative ground pleaded that there had, in fact, been no valid consideration furnished by the plaintiffs for the renegotiated agreement.

There are, it is submitted, good reasons why the doctrine of economic duress ought to *displace*, and not be in addition to, the doctrine of consideration in 'extortion situations', provided, of course, that it can be rationalized.[70] The foremost reason is that the doctrine of consideration is at least as (if not more) amorphous than the doctrine of economic duress — in both definition as well as application. And this unfortunately allows courts to frequently strain to find the necessary consideration[71] — a point that we need not venture far to justify, for, as already mentioned, Hobhouse J. in *The 'Alev'* found that consideration was only 'technically' present,[72] whilst in *The Atlantic Baron*, Mocatta J. held that there was consideration furnished despite the fact that he arrived at this conclusion 'not without some doubt'.[73] Further, the very nature of the doctrine of economic duress suggests that it might be more suited in the light of modern commercial circumstances, whereas the doctrine of consideration, on the other hand, appears somewhat out of synch with present-day commercial needs.

An observation by Hobhouse J. in *The 'Alev'*, however, implies that the doctrine of consideration should be retained in view of the doctrine of economic duress.[74] In so far as the alleged victim is concerned, however, given the general artificiality engendered by the doctrine (as alluded to in the preceding paragraph), it is submitted that it is not, on balance, worth retaining the doctrine, especially if it turns out to be merely a 'technical' consideration thus serving more as a *useless* string to the alleged victim's bow than anything else.[75] In any event, even if Hobhouse J.'s views are accepted, they presuppose (as he

67 See *e.g.*, *The Atlantic Baron*, [1979] Q.B. 705; and *Pao On* v *Lau Yiu Long*, [1980] A.C. 614.

68 Reference might also be made to the leading case on sufficiency of consideration (in the context of public duty) decided by the House of Lords, *Glasbrook Brothers, Ltd.* v *Glamorgan County Council*, [1927] A.C. 270, where both consideration as well as public policy arguments were canvassed. Unfortunately, however, most commentators focus upon the former to the exclusion of the latter.

69 See note 11 above.

70 See, on this point, the preceding discussion.

71 See *e.g.*, Treitel, *The Law of Contract* (7th Edn., 1987), 56; and Adams, (1979) 42 M.L.R. 557, 559.

72 See text to note 11 above. A more persuasive source of consideration would have existed had the learned judge found a compromise, which, however, he did not: see [1989] 1 Lloyd's Rep. 138, 147 (and *cf.* Beatson, note 1 above who argues that the then apparent underdevelopment of economic duress was due to a factual overlap with the rules governing, *inter alia*, compromises).

73 [1979] Q.B. 705, 714.

74 [1989] 1 Lloyd's Rep. 138, 147: 'Now that there is a properly developed doctrine of the avoidance of contracts on the grounds of economic duress, there is no warrant for the Court to fail to recognize the existence of some consideration even though it may be insignificant and even though there may have been no mutual bargain in any realistic use of that phrase.'

75 *Cf.* the observation by Hobhouse J. in *The 'Alev'* cited in note 74 above.

observes) a 'properly developed doctrine of ... economic duress'.[76] This brings us back full circle, as it were, to the main points raised in this comment. If the doctrine is to develop (notwithstanding the fact that there may well be good arguments for speculating why it might not),[77] then the courts must consider taking a bolder stand than they have hitherto adopted.

Social Security Adjudication, Judicial Review and the Technology of Poverty

Julian Webb*

Introduction — the Adjudicatory Context

'To err is human; to really mess things up takes a computer' is an aphorism which can currently attract widespread agreement. The problems confronting the Department of Social Security (DSS) and its clients during the drawn-out process of computerising benefit services add a rather Kafkaesque variation to that maxim, and provide an important context in which to discuss the Court of Appeal's decision in *R* v *Secretary of State for Social Services ex parte Child Poverty Action Group and others.*[1]

The case arose out of an attempt by the Child Poverty Action Group (CPAG) and others to challenge, by way of judicial review, the substantial delays in adjudication faced by many claimants under the Supplementary Benefits scheme. The problem of delay is one that has become embedded in the social security system during the 1980s, as a feature both of the level of claims being made, and the policy of staff reductions within the DSS and its predecessor. Judy McKnight, for example, has shown how staffing cuts within the then Department of Health and Social Security had increased the staff/claims ratio in supplementary benefit cases from 1:100 in 1979 to 1:132 in 1983.[2] Although there is some slight evidence that delays have been reduced since the introduction of Income Support,[3] this is likely, in part, to be explicable by the disappearance of time-consuming claims for single payments, while average figures still disguise wide variations in efficiency between, in particular, some inner city and other local offices.[4]

It was the extreme delays faced by claimants in inner London that prompted CPAG to bring this test case. CPAG built its arguments around sections 98 and 99 of the Social Security Act 1975. (These provisions survived the superseding of Supplementary Benefit

76 See note 74 above.
77 See text to note 63 above.

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1 [1989] 1 All E.R. 1047.
2 'The crisis in management' in S. Ward (ed.) *The DHSS in Crisis*, London (Child Poverty Action Group, 1985), p. 30.
3 Figures published in October 1988 showed claims for Income Support taking an average of five days to be processed — HC Deb, vol. 139, col. 334, 27 October 1988 (Written Answer).
4 Thus in 1987, the last full year for which Supplementary Benefit figures were available, the average time taken to dispose of a claim was six days; but this concealed a range of disposals taking from three to seventeen days. See the *Sixth Report of the Social Security Advisory Committee* (London: HMSO, 1988) para. 6.6, p. 35. On the level of delays in inner city offices, the best recent evidence (though still anecdotal) is provided from a survey of Greater London Citizens Advice Bureaux; see *Out of Service*, (London: Greater London Citizens Advice Bureaux Service, 1987).