DOING "PRACTICAL JUSTICE" FOR DURESS IN CONTRACT LAW

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Cases of duress in contract law are few and far between. Most are concerned with improper threats or taking advantage of a weaker party to procure a contract rather than with actual physical threats of the "[y]our money or your life"[1] variety, which are more likely to be controlled by the criminal law.[2] A recent decision on a preliminary issue of law in relation to duress in the English Court of Appeal answered an interesting question that appears never to have been raised in earlier cases[3] about duress, that is, whether rescission of a contract can be granted where restitution is impossible because one of the parties has destroyed documents relating to the contract as required by the contract so that they could not be restored. The trial judge found that rescission could not be granted and that no other remedy was available in the common law for duress,[4] but the Court of Appeal reversed that finding by assimilating the fact situation with those in which equity has done "practical justice," thereby further fusing the common law and equity relating to duress and undue influence, and possibly also fraud as well.[5] The facts of this highly complex case, which also involved conflict of laws, mistake, frustration, and uncertainty have yet to be resolved at trial, but the Court of Appeal entertained two preliminary questions of law, duress, and conflict of laws before sending the case to trial. This comment is focused on the duress point.

Halpern[6] was concerned with an inheritance dispute within an Orthodox Jewish family in which the claimants and defendants were, respectively, one son and grandson and four other sons and a daughter of the deceased parents. In accordance with Jewish law and custom, the dispute was referred to a Beth Din that sat in Switzerland and England. Prior to a decision, the parties entered into a compromise that included cl. 4, requiring all documents relating to the agreement to be destroyed or handed over to the defendants.[7] The documents were allegedly destroyed and the complainants argued that the reason for this provision was to hide a fraud from the British tax authorities. A different Beth Din sitting in New York had previously awarded the sister the whole of the estate valued at £4 million and the compromise provided that the complainants should receive £2.4 million, however, the value of the estates of the deceased mother and father were said to be £210,000 and £309,945, respectively, in the Beth Din dispute in Switzerland. The defendant brother, who signed the compromise on behalf of the other defendants, alleged he had done so under duress consisting of an insistence by one of the rabbis of the Zurich Beth Din that each defendant would have to swear a ritual oath, with the knowledge that this oath could not be sworn by an observant Jew, or pay a £250,000 penalty as required by Jewish law. To avoid this, he signed the compromise that the complainants sought to enforce. The complainants said they

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1 John Swan, *Canadian Contract Law* (Markham: LexisNexis, 2006) at 76.

2 This distinction is drawn in the *Restatement (Second) of the Law of Contracts* § 176 (1979).

3 An early Canadian case is somewhat similar in relation to farm equipment allowed to deteriorate: *Sager v. Manitoba Windmill* (1914), 6 W.W.R. 265 (Sask. Sup. Ct.), aff'd (1914) 7 W.W.R. 1213 (S.C.C.).

4 *Halpern v. Halpern (No. 2)*, [2006] EWHC 1728 (Comm), [2007] Q.B. 88 [*Halpern* No. 2].

5 *Erlanger v. New Sombrero Phosphate*, [1878] 3 App. Cas. 1218 at 1278-79, Blackburn L.J. [*Erlanger*].

6 *Halpern v. Halpern (Nos. 1 and 2)*, [2007] EWCA Civ 291, [2008] 1 Q.B. 195 [*Halpern* Nos. 1 and 2].

7 See *ibid.* at para. 41.

had destroyed the documents as required by cl. 4, so that restitution was impossible. Thus, the complainants argued that since restitution was impossible, the defence of duress failed and the compromise remained valid and enforceable, with the effect of transferring £2.4 million to the complainants.

The issues of the applicable law and duress were dealt with by different trial judges who found, respectively, that either English or Swiss law, but not Jewish law, was applicable,[8] and that there could be no rescission for duress.[9] The English Court of Appeal confirmed the law of the compromise, but suggested that if duress was to be found at the trial there could be a remedy although the destruction of the documents made restitution, including substantial restitution, impossible.[10]

Speaking for the Court on the duress issue, Carnwath L.J. noted that determining the abstract legal question may be of uncertain value until the relevant facts are found, particularly which documents have been destroyed, but regarded its resolution as important from a purely doctrinal perspective because the decision of the trial judge was required to be corrected if wrong.[11] He further noted at the outset that, in the view of the trial judge, although the documents were destroyed by the claimants, the defendants benefited from their destruction.[12] Superficially this may be so, but by arguing successfully that the compromise was avoided for duress, the defendants would retain the entire estate as awarded by the New York Beth Din, while a successful argument by the complainants that there was no duress or that a finding of duress would not result in a remedy because restitution was not available would result in the enforcement of the compromise to the claimants' benefit. The important fact was the destruction, not which party complied with its contractual duty to destroy. The narrow, novel issue was whether rescission for duress could be refused because restitution could not be made.

Throughout the discussion of the requirements of rescission for duress at common law, the Court contrasted the common law availability of rescission for fraud, in which restitution is a requisite,[13] and equitable rescission for undue influence, which is subject to the more flexible criterion of "practical justice" as set out by Blackburn L.J. in *Erlanger*:

> [A] Court of Equity could not give damages, and, unless it can rescind the contract, can give no relief. And, on the other hand, it can give accounts of profits, and make allowance for deterioration. And I think the practice has always been for a Court of Equity to give this relief whenever, by the exercise of its powers, it can do what is practically just, though it cannot restore the parties precisely to the state they were in before the contract.[14]

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8 *Halpern v. Halpern*, [2006] EWHC 603 (Comm), [2006] 2 All E.R. (Comm.) 251.
9 *Halpern* No. 2, *supra* note 4.
10 On appeal, Waller L.J. dealt with the conflict issue and Carnwath L.J. dealt with the duress issue. All three justices were unanimous on both issues.
11 *Halpern* Nos. 1 and 2, *supra* note 6 at paras. 59-60.
12 *Ibid.* at para. 57.
13 *Western Bank of Scotland v. Addie*, [1867] L.R. 1 Sc. & Div. 145 (H.L.).
14 *Erlanger*, *supra* note 5 at 1278-79. See also *O'Sullivan v. Management Agency and Music Ltd.*, [1985] 1 Q.B. 428 at 458, Dunn L.J.; *Kupchak v. Dayson Holdings Ltd.* (1965), 53 D.L.R. (2d) 482 (B.C.C.A.).

The defendants argued that no distinction should be made between common law duress and undue influence at equity insofar as practical justice should be the criterion for awarding rescission in both. There are no cases imposing a requirement of making restitution in order to rescind for duress and to require restitution might amount to rewarding a claimant for illegitimate conduct. Practical justice as a remedy is never impossible.[15] The claimants argued that the extension of this approach from undue influence to duress was wrong.[16]

In response, Carnwath L.J. acknowledged that there is much overlap of duress or undue influence when the duress does not involve physical threats but rather improper pressures brought to bear to induce a contract.[17] He further opined that there may be little difference either where the pressure brought to bear on the complainant is a fraudulent misrepresentation. Using the example of someone persuaded to pay an excessive amount for having his roof re-tiled, Carnwath L.J. suggested that the remedy ought to be the same whether the improper pressure is characterized as duress, undue influence, or fraudulent misrepresentation. If the purpose is to do practical justice when improper pressure is brought to bear, the common law restriction that restoration of both parties to their previous positions ought not to be the primary objective,[18] rather, the essential goal is to ensure that the party bringing the improper pressure should not be unjustly enriched at the other's expense.[19]

Although the appellate Court declined to give a definitive response until the facts in the case had been found, it was of the view on the preliminary question of law that duress should be treated no differently from other vitiating factors in contract law for the purposes of rescission, that is, restitution to the status quo ante is only one possible expression of the practical justice principle equally applicable for duress, undue influence, or fraud. Should the defendants succeed in proving that consent to the compromise was procured by duress or undue influence,[20] the law should be able to find a remedy appropriate to the facts.[21] Thus, the decision of the trial judge on the preliminary point of law was overturned.

Since neither the trial judges nor the Court of Appeal noted that the alleged improper conduct was done by a rabbi of the Zurich Beth Din rather than by the complainants, it might be thought that this was unimportant notwithstanding the underlying notion that doctrines such as duress and undue influence operate to deprive parties who benefit from contracts induced by their own wrongdoing. If the omission was deliberate, this too would constitute a change in the application of these doctrines to ensure that a party to the resulting contract does not benefit regardless of the source of the improper pressure that produced the contract. On its face, this seems unobjectionable as a restitution of a windfall, although it appears to leave the perpetrator free from civil sanction. By analogy with the surety spousal cases in

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15 *Halpern* Nos. 1 and 2, *supra* note 6 at paras. 62-69.

16 *Ibid.* at para. 69.

17 Relying on *Royal Bank of Scotland plc v. Etridge (No. 2)*, [2001] UKHL 44, [2002] 2 A.C. 773 at para. 8, Nicholls L.J.; Andrew Burrows, *The Law of Restitution*, 2d ed. (Oxford: Oxford University Press, 2005) at 211; Andrew Burrows, "We Do This At Common Law But That in Equity" (2002) 22 Oxford J. Legal Stud. 1 at 6; Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (London: Sweet and Maxwell, 2006) at para. 7-004.

18 *Halpern* Nos. 1 and 2, *supra* note 6 at paras. 74-75.

19 Relying on G.H. Treitel, *The Law of Contract*, 11th ed. (London: Sweet and Maxwell, 2003) at 380.

20 The Court was open to the possibility that the proper plea might be undue influence: see *Halpern* Nos. 1 and 2, *supra* note 6 at para. 76.

21 *Ibid.* at paras. 76-77.

undue influence, the innocent party could only be implicated with actual or constructive notice of the exercise of undue pressure.

A second observation is to speculate a little on the nature of the remedy that might be available where there is total destruction rather than deterioration of an important element of the contract by operation of the principle of doing practical justice. Although the documents had no market value by which to estimate the cost of their replacement, they were, apparently, of great value in relation to the estate dispute between the parties. Where restitution is no longer required to be made, a finding of duress would avoid the compromise with several possible results: (1) a return to the Beth Din to resolve the underlying dispute; (2) a return to the Beth Din for the approval of a new compromise, identical to or a variant of the original one; or (3) an award imposed by a civil court in favour of the complainants to compensate them in whole or in part for the loss of the £2.4 million on the basis of a civil court's judgment in the absence of the original documents. The Court of Appeal refrained from speculation about a remedy and possibly none of these outcomes would please the complainants if they received less than that provided for by the avoided compromise. On the other hand, if their allegations of tax fraud were found to have substance, then neither side would likely benefit from the estates as each had hoped, and one or more parties might be liable to further legal action.

Further speculation is pointless in the absence of findings of fact, but one point is clear: the difficulties of doing practical justice will be considerable even though *Halpern* is a case for which the flexibility in practical justice is particularly suitable.

While the ultimate outcome in *Halpern* will likely never be known, the preliminary question of law as to whether an inability to give restitution should remain a bar to a successful plea of duress at common law has been resolved. Duress is to be treated like undue influence, and possibly also fraudulent misrepresentation, in an equitable fashion with a view to doing practical justice between the parties. This may involve no restitution, whole or partial restitution, an award of damages, or such other award as might be necessary to restore the parties to their pre-contractual positions as best as can be done in the circumstances.

The significant implication of this remedial assimilation of duress with undue influence is to pose, again, the question of how these doctrines, together with fraudulent misrepresentation, unconscionable dealing, and abuse of superior bargaining power differ in law when the pressure is not that of actual physical force. All deal with pressures inducing contract, which the law finds so sufficiently improper as to result in avoidance of the contract and the award of a remedy. Whether each doctrine truly captures a particular type of pressure, or whether the principle of making restitution for improper pressure undermining voluntary consent to a contract can be so encapsulated, or whether some general principle of improper pressure can be successfully formulated, remains to be seen. Once the historical distinction between common law and equity has been dissolved in favour of the equitable remedy as has happened in *Halpern*, reconsideration of the reason for that remedy cannot be far behind in the law. Duress cases may be even fewer in the future than in the past.