

CONTRACT – promissory estoppel and duress (lectures 6 & 7)

PE: All promises must be supported by consideration. At common law the payment of a lesser sum does not discharge the obligation pay the full amount – *Foakes v Beer*; *Re Selectmove*. The general rule is that part payment of a debt is not good consideration. NB *Williams v Roffey* rule of factual consideration to a promise to pay more, not to a promise to pay less. Also see *Stilk v Myrick*; *Hartley v Ponsonby*.

EXCEPTIONS TO PART PAYMENT RULE

1. PINNELL'S CASE – if you offer something different in kind then that is good consideration. This applies if it is a different thing, different place or earlier debt received by the creditor. *Where the contract is partially executed it may be discharged by deed or accord and satisfaction

2. PAYMENT BY THIRD PARTY – where a lesser amount is paid in satisfaction of a debt by a third party to that debt, the creditor cannot sue for the balance – *Welby v Drake*.

3. PROMISSORY ESTOPPEL. It is an equitable doctrine ie to achieve justice when common law doesn't do so. 'A natural result of the fusion of law and equity' – Lord Denning. PE – must honor your promise. Origins – *Hughes v Metropolitan Railway*; Lord Denning applied PE in *CLP trust v High Trees case* (lease contract – half rent through war). There is no need to show consideration. However, the courts do not favour PE, so they have narrowed the principle and for someone to claim PE they must show the following criteria.

Elements:

a) clear and unequivocal promise to suspend existing contractual rights – *Woodhouse v Nigerian Pound*. The promise is to waive existing contractual rights – either by express statement or by conduct which implies that promise – *Hughes v Metropolitan Railway*.

b) change of position by promisee in reliance on the promise – *Ajayi v Briscoe*

c) reliance need not be detrimental ie do not that you suffered but that you went ahead and did something as a result of the reliance on the promise – *The Post Chaser*

d) must be inequitable for promisor to go back on the promise – *D & C Builders v Rees* (£300 or nothing was said by Rees. Builders quote Foakes. Rees quotes Pinnells under different thing ie cheque. Not a different thing. Rees claims PE. Ct said unfair – see duress)

e) shield not a sword – act as a defence to a claim. It is not a cause of action – *Combe v Combe*. It doesn't stand alone as a cause of action itself.

Advancement of PE? HC of Australia has been flexible *Waltons Stores Ltd v Maher*. The English CA has not been followed – *Baird Textile Holdings Ltd v Marks and Spencer*.

Effect of PE?

It is generally suspensory – rights resumed on 'reasonable notice' – *Tool Metal v Tungsten Electric*.

Past periodic payments like rent, PE may be applied, not only as to suspend strict legal rights, but also to preclude the enforcement of them. – *D&C builders v Rees*

DURESS: "some form of coercion or threat to the person, property, or to a person's financial interests". It is a vitiating (weaken or destroy) factor. Contract entered into under duress is voidable (but not void) and can be set aside by the court. There is an interrelation between consideration, PE and duress. Can either use duress as a defence or use it to get your money back.

Duress of the person – where contract entered into unwillingly by one party because of threats to their person. The duress need not be 'the reason' (for entering into the contract), just 'a' reason. – *Barton v Armstrong*

Duress of goods – the unlawful detention of or threat to another's goods – *The Siboen and the Sibotre*. Test for causation is: 'but for'.

Economic duress – effect. NB it is a valid contract unless and until the victim takes the perpetrator to court, proves duress and court orders the variation contract set aside. The original contract is unchanged/still valid, it is the extra that is void. Contractual variations made under duress will fail.

Development

1. consideration used to restrain unfair practice – *Stilk v Myrick*

2. Duress recognised in *The Siboen & The Sibotre*. Although it was found there was no duress in this case, as it was merely hard bargaining. This case shows that the courts don't like duress. C would have to prove there has to be coercion of the will so as to vitiate consent.

3. *Pao On v Lau Yiu long* stated, did the victim: protest; have an alternative course open to him; receive independent advice; and take steps to avoid contract (ie as soon as the duress as lifted).

4. 'lack of consent' then went to 'illegitimate pressure' – *Universal Sentinel*. Test for causation: must be the significant cause 'but for' the duress they would not have entered into the contract – *huyton sa v peter cremer*.

ECONOMIC DURESS TODAY

"There must be pressure, resulting in lack of practical choice for the victim, which is illegitimate, and which is a significant cause inducing the C to enter into the contract" – *DSND subsea v petroleum geo ltd*. Affirmed: *Carillion construction ltd v felix ltd/ Kolmar group ag v traxpo enterprises ltd*.

LACK OF PRACTICAL CHOICE

"whether the victim had any realistic practical alternative but to submit" – *DSND subsea v petroleum geo*. Also see *b & s contracts & designs ltd v victor green publications ltd* (C said they couldn't do the job unless D gave them extra money as a gift); *atlas express v kafco ltd*; *carillion construction ltd v felix (uk) ltd*.

ILLEGITIMATE PRESSURE

Factors to consider in assessing legitimacy of pressure: threatened breach of contract? Good or bad faith? Protest? Affirmation?

a) threatened breach of contract?

Atlas express ltd v kafco ltd; *carillion construction ltd v felix (uk) ltd*; *b&s contracts & design v victor green*.

b) good or bad faith?

Illegitimate threat, but for lawful end is good faith – *DSND subsea ltd v petroleum geo-services* – safety of the divers was a priority.

Legitimate threat for unlawful end – in good faith – *CTN v Gallagher*. Ct won't award duress easily.

Contrast with: legitimate threat? But for illegitimate purpose – *The Universal Sentinel*

c) legitimate pressure?

'A hard bargain' is not a legitimate pressure – *Alec lobb v total oil*

'overwhelming pressure' will be but it was held not to be in *r v AG of England v wales*

d) protest or affirm?

The remedy for ED will be lost unless the innocent party takes actions to protest and reopen the issue at the time, or shortly after, the contract performance is completed. In *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd, The Atlantic Baron*, therefore, it was held that the plaintiffs' inaction during the 8 month period following the delivery of the tanker under the construction contract amounted to constructive affirmation of the contract. However, ct has not specified duration that would be classed as 'affirming' / *dsnd subsea v petroleum geo ltd*

Contrast with immediate action to avoid – *atlas express ltd v kafco/b&s contracts & design v victor green*