Held: On 13 October 1886 the Rouen Tribunal de commerce (Commercial Court) accepted that argument and ordered Mr Fleischer to pay to the tug owner, Mr Lebret, the sum of 4,190 francs by way of recompense for the towage services provided. On appeal by Mr Lebret, the Cour de Rouen on 10 December 1886 upheld that judgment. Mr Lebret appealed to the Cour de cassation, but again his appeal was rejected.

Judgments: [In the Cour de Rouen (appellate court)]—Whereas at the time when the agreement in issue was concluded, Fleischer, the master of the *Rolf*, could have been in no doubt that, unless he received prompt assistance, his vessel, which was aground on the sand, would, upon the arrival of the next high tide, become fatally submerged and would be lost, and further that his only chance of salvation lay in being refloated by Delamer, the master of the tug *Abeille No 9*,who had been the only person to answer his distress signals and to offer his services.

—Whereas in requiring in advance, as the price of the salvage and towage, one twentieth of the value of the vessel and its cargo, namely a sum of approximately 18,000 francs, Delamer had abused the desperate situation in which the master of the *Rolf* found himself; as having tried in vain to get him to accept less harsh terms, Fleischer was constrained and forced to submit as a matter of necessity to the agreement imposed on him; since his consent was not freely given, the agreement, which is vitiated as a matter of principle, is not merely rescindable but voidable in its entirety; as it must be declared null and void.

—Whereas leaving the contract to one side, however, the owner of the *Abeille No 9* is entitled to be rewarded for the service rendered by his tug to the *Rolf*. In order to determine the level of remuneration to which he is entitled, it is appropriate to some extent to take into account the value of the vessel and her cargo, which were saved, but regard must also be had, primarily and above all, to the efforts deployed and the risks faced or run by the salvor; as the value of the *Rolf* and her cargo was not less than 363,000 francs; however, the *Abeille No 9*, sailing on 22 September between the hours of half past five and seven o'clock in the evening, was drawing little water in a sufficient depth of sea and was exposed to no serious danger.

—Whereas although she remained stationary until about half past three in the morning, at anchor in the Seine estuary and within range of the *Rolf*, waiting for the tide to enable her to bring assistance to the *Rolf*, that wait involved merely a waste of time without any risk; as the refloating, which was commenced at twenty past three in the morning of 23 September and completed less than three quarters of an hour later in normal conditions, caused the *Abeille* to suffer no accident or damage apart from the insignificant breakage of a towing cable, for which Captain Fleischer offered to pay.

—Whereas although the tug's engine had to be run on full power, it did not exceed its capacity; and it has not been alleged that it suffered any deterioration as a result.

—Whereas it is necessary to encourage salvage operations as a beneficial activity, and, having regard to the circumstances, generously to reward those undertaking them, they must nevertheless not be allowed to become a means of exploiting the perils or misfortunes faced by others.

—Whereas the sum awarded to Lebret by the court at first instance is adequate, even taking into account the contingent stipulation whereby nothing was to be payable in the event of an unsuccessful outcome, etc.

[In the Cour de Cassation] Judgment: On the sole appeal ground alleging misuse of

powers, infringement of Article 1134 of the Civil Code and misapplication of Articles 1109, 1111 et seq of that Code:—Under Article 1108 of the Civil Code, the consent of the person assuming the obligation is an essential condition governing the validity of an agreement.

—Whereas such consent is not freely given, and is given only out of fear instilled by some substantial and present ill to which the person or chattel concerned is exposed, a contract entered into in those circumstances is vitiated by a defect rendering it voidable.

—Whereas the contested judgment found that the master of the Rolf assumed the obligation at issue only in order to save his ship, which would otherwise have swiftly become fatally submerged and lost.

—Whereas that obligation was assumed as a result of constraint and by force of circumstance. Having sought in vain to secure less onerous terms, the master of the Rolf was forced as a matter of necessity to enter into the agreement which the master of the *Abeille No 9*, exploiting the desperate situation in which the former found himself, imposed on him.—Whereas in consequently declaring that agreement void, the appellate court neither misused its powers nor infringed or misapplied any of the abovementioned articles.

On those grounds, the Court dismisses the appeal.

Note

Cases of salvage were later dealt with by statute; see L67–545 of 7 July 1967 (replacing a statute of 1916).

Cass soc, 5 July 1965[120] **11.19 (FR)**

A pressing need for money

A (labour) contract which is disadvantageous for one party may be avoided on the ground of threat if that party's consent to enter into the agreement is not freely given because of his urgent need for money.

Facts: Pursuant to a contract dated 22 January 1959, Mr Maly was engaged for six months on a probationary basis as a salesman by Frameco, a manufacturer of concrete products, on terms whereby he was to receive a 3% commission on the net price of direct and indirect sales. As he had to move from Paris to Grenoble, he resigned on 21 September 1959. At that time Mr Maly was in urgent need of money to provide medical treatment for his sick child. On 12 October 1959 he entered into a new agreement with IMAC, a firm, whereby he was, with the authorization of Frameco, to sell the same product as an independent operator and was to receive a commission of 1.5% on direct sales only; this arrangement was to have retroactive effect. On 17 February 1960 Mr Maly sued IMAC, seeking an order requiring that company to pay commission on the basis on the agreement of 22 January 1959.

Held: The Cour de Cassation upheld the decision of the appellate court that the contract of 12 October 1959 was to be declared void on the ground of threat as Mr Maly's consent, given, among other things, his pressing need of money, had been constrained.

Judgment:—Whereas the contested judgment is challenged in that (a) it declared the agreement of 12 October 1959 void on the ground that it was vitiated by 'violence',

[120] Bull civ IV.545.

(b) it held that the relationship between the parties continued to be governed by the agreement of 22 January 1959 and (c) it appointed an expert to calculate the commission due, on the grounds that Maly had had certain doubts as to the enforceability against IMAC of the agreement entered into with Frameco and that Maly had only agreed to accept the conditions laid down in the agreement of 12 October 1959 because of the constraint in which he found himself.

—Whereas according to the appellant, it is patently clear that Maly at all times worked on behalf of IMAC, that it was that company which paid him his commission and which he sued for payment of the commission provided for under the original agreement, and that he could not therefore have been unaware that that agreement could if necessary be enforced against IMAC; as furthermore, the legal status of a salesman is such that he is required to exercise his profession on an exclusive and steadfast basis, and the contested judgment, which did not examine the question whether, as is contended by IMAC, Maly had sold goods for a competitor, provided no legal basis for the decision delivered by the court below; as lastly, the appellant contends that the findings in the contested judgment do not adequately establish, first, that the rate of commission was not reduced in pursuance of an agreement between the parties and, second, that the contract of 12 October 1959 was entered into in circumstances of compelling constraint amounting to 'violence'.

—Whereas the contested judgment found, however, that, at the time of his resignation, Maly, who was required to leave Paris and take up residence in Grenoble with a sick child, was in pressing need of money, that his employer refused to perform the obligations imposed by the initial contract, that he was faced with the alternative of either bringing what might prove to be protracted proceedings or agreeing to the immediate receipt of a reduced sum by consenting to pursue his activities on draconian terms which involved a considerable reduction in the rate of commission and the renunciation of social benefits, etc., one of those terms being unlawful and their provisions as a whole being inequitable; As the complaint that Maly had effected sales for a competitor undertaking—which Maly contested, stating that the company had agreed to his carrying out such operations on an occasional basis—was not levelled against him by the company at the time of his departure, the company having, on the contrary, expressed its regret at seeing him go, and was only raised in the course of the proceedings; as moreover, he had not exerted any influence on the signature of the second agreement.

—Whereas in inferring from this that Maly's consent had been vitiated by intellectual 'violence' [*violence morale*] and that the contract of 12 October 1959 was void, the contested judgment provided a legal basis for the decision therein contained.

Notes

(1) French law has been struggling with the question whether or not a contract may be avoided on the ground of threat, in the sense of the Code civil, if the constraint of the will of the one party (the plaintiff) did not arise from a threat exercised by the other party but from the external circumstances in which the one party found himself, such as a state of necessity or economic dependence. The courts and authors are divided over this issue.[121] Relevant cases are few, but there are decisions in which a contract was held to be voidable because of *violence*—in

[121] For a discussion see Terré et al (above n 6) paras 239–40; Nicholas (above n 32) at 108–10.

this context often referred to as *violence morale*—arising from a state of necessity. The courts seem to require that the other party has gained an excessive advantage by abusing the state of necessity (when an advantage can be said to be excessive, the courts have not specified; it appears that all the relevant circumstances of the case, such as the market value, are to be taken into consideration).[122] The above cited case of *The Rolf* illustrates this position: the Cour de cassation upheld the decision of the appellate court that the agreement could be avoided because of *violence (morale)* as the captain of the *Rolf*, which was in danger of being lost unless it was pulled of the sandbank on which it had grounded, gave in to the captain of the tug and agreed to pay a price which, as the trial court had found, was four times the reasonable figure.[123] Another example is the case of the Cour de Cassation (soc.),[124] in which a contract of employment was declared void as the employee (the disadvantaged party) entered into the contract of 12 October 1959 under a pressing need for money occasioned by the illness of his child—although the Cour de cassation did not explicitly consider whether in this case there was an abuse of the father's state of necessity, it did speak of the 'draconian terms' of the contract from which it might have inferred an abuse. For a more restrictive approach, however, see Cass com, 20 May 1980,[125] which was a case of economic dependence. The Cour de cassation refuses to assimilate economic dependence and violence. As recalled in Civ 1ère 3 April 2002, the strong party must have unduly made use of an economic dependence situation, to take advantage of the fear of a party whose legitimate interests are directly jeopardised, insomuch as making illegitimate the economic pressure (about an employee of Larousse, who, after having been dismissed, was arguing that her intellectual property rights had been infringed while she was working there, as she allegedly had to agree with terms offered by her employer, out of fear of being dismissed, while it was not proved on the one hand that her job was indeed threatened and on the other hand that her employer had used this threat as an argument).

(2) It should be noted that in some cases of qualified *laesio enormis* the courts have held that a contract could be avoided on the ground of *dol* (fraud).[126]

(3) It should also be noted that, since the 2002 decision of the Cour de casastion, *violence économique* could be recognized under French law. Article 1114–3 of the Catala project, which is inspired by PECL, makes an important step towards the recognition of *economic violence*.

Avant–projet Catala Article 1114-3: There is also duress where one party contracts under the influence of a state of necessity or of dependence, if the other party exploits this situation of weakness by obtaining from the contract a manifestly excessive advantage.

A situation of weakness is assessed by reference to all the circumstances, taking particular account of the vulnerability of the party who submits, the pre-existing relations between the parties, and their economic inequality.

[122] See, eg Ghestin (above n 95) no 586.
[123] See the English salvage case of *The Port Caledonia and the Anna* [1903] P 184.
[124] Cass, soc 5 July 1965, Bull civ IV.545, see above p 579.
[125] Bull civ IV.212 (quashing cour d'appel de Paris, 27 September 1977, D 1978.690).
[126] See, eg Kötz (above n 98) 132, with references to case law.

The first project of the Ministry of Justice also refers to this concept in Article 63:

> There is also duress where one party abuses the weak situation of the other party, who, under the influence of a state of necessity or of dependence, enters into a contract which he would not have entered in the absence of that constraint.

(4) In the field of competition law, in 2001 and 2005, some statutes have introduced the concept of *dependence économique* (L442-6, 2° Code de Commerce). In 2008, the legislator went even further. Initially, under Article L442–6, 2° a party was liable who

> abuses the dependent relationship in which he holds his partner . . by imposing upon the other party unreasonable commercial conditions or obligations. In the Law adopted on 4 August 2008, the reference to *dependence économique* disappeared. A person is now liable simply if he submits or tries to submit 'a commercial partner to obligations which create a significant imbalance in the rights and obligations of the parties.[127]

Interestingly, the Belgian courts and legal authors have developed a doctrine of qualified *lésion* based on the doctrine of *cause licite* and/or the doctrine of *culpa in contrahendo*. On this Belgian doctrine of qualified *lésion*, Jacques Herbots writes:[128]

> The doctrine requires two elements: first a serious disproportion between the terms of the contract. But this is not sufficient. Moreover there must be an exploitation of one of the parties, a taking advantage of the needs, weaknesses, emotions or ignorance of one of the parties, or an abuse of a dominant position.[129]

In Dutch law, in a case of qualified *laesio enormis*, the contract may be avoided under Article 3:44 IV BW as there has been an abuse of circumstances and the excessive disadvantage should have prevented the one party from prompting the other party to enter into the contract.[130]

11.4.B SPECIFIC DOCTRINES: UNDUE INFLUENCE IN ENGLISH LAW

It is in English law that it is least clear whether there is any equivalent to what is here called qualified *laesio enormis*. Certainly there are certain doctrines which lean in that direction, notably undue influence and the rules on unconscionable bargains. However, the former is distinctly limited in its application while the latter, though of ancient origin, is of uncertain scope in modern law. As we will see later, an attempt by Lord Denning MR to formulate a broad doctrine of inequality of bargaining power was firmly rejected by the House of Lords.[131]

[127] Terré et al (above n 6) para 248.

[128] J Herbots, *Contract Law in Belgium* (Deventer/Boston/Brussels, Kluwer Law and Taxation/Bruylant, 1995) 129.

[129] With references to Cass, 25 November 1977, Arr Cass, 1978.343 and Comm Brussels, 16 April 1974, BRH, 1974.229.

[130] See below pp 596ff.

[131] Below pp 591ff.

House of Lords **11.20 (E)**

Royal Bank of Scotland v Etridge (No 2)[132]

Undue influence may be proven by evidence that one party abused a relationship of trust and confidence. If the parties were in a relationship of trust and confidence and the claimant entered a transaction that requires explanation, it will be presumed that this resulted from undue influence unless the other party shows that this was not the case.

Facts: see the judgment.

Judgment:

LORD NICHOLLS OF BIRKENHEAD . . .

[5] My Lords, before your Lordships' House are appeals in eight cases. Each case arises out of a transaction in which a wife charged her interest in her home in favour of a bank as security for her husband's indebtedness or the indebtedness of a company through which he carried on business. The wife later asserted she signed the charge under the undue influence of her husband. . . . Seven of the present appeals are of this character. In each case the bank sought to enforce the charge signed by the wife. The bank claimed an order for possession of the matrimonial home. The wife raised a defence that the bank was on notice that her concurrence in the transaction had been procured by her husband's undue influence. The eighth appeal concerns a claim by a wife for damages from a solicitor who advised her before she entered into a guarantee obligation of this character.

UNDUE INFLUENCE

[6] The issues raised by these appeals make it necessary to go back to first principles. Undue influence is one of the grounds of relief developed by the courts of equity as a court of conscience. The objective is to ensure that the influence of one person over another is not abused. In everyday life people constantly seek to influence the decisions of others. They seek to persuade those with whom they are dealing to enter into transactions, whether great or small. The law has set limits to the means properly employable for this purpose. To this end the common law developed a principle of duress. Originally this was narrow in its scope, restricted to the more blatant forms of physical coercion, such as personal violence.

[7] Here, as elsewhere in the law, equity supplemented the common law. Equity extended the reach of the law to other unacceptable forms of persuasion. The law will investigate the manner in which the intention to enter into the transaction was secured: 'how the intention was produced', in the oft repeated words of Lord Eldon LC, from as long ago as 1807 (*Huguenin v Basely* (1807) 14 Ves Jun 273 at 300). If the intention was produced by an unacceptable means, the law will not permit the transaction to stand. The means used is regarded as an exercise of improper or 'undue' influence, and hence unacceptable, whenever the consent thus procured ought not fairly to be treated as the expression of a person's free will. It is impossible to be more precise or definitive. The circumstances in which one person acquires influence over another, and the manner in which influence may be exercised, vary too widely to permit of any more specific criterion.

[8] Equity identified broadly two forms of unacceptable conduct. The first comprises

[132] [2001] UKHL 44, [2001] 4 All ER 449.