Privy Council Appeal No. 15 of 1972

Alexander Barton – – – – – – – *Appellant*

v.

Alexander Ewan Armstrong and Others – – – *Respondents*

FROM

THE COURT OF APPEAL OF THE SUPREME COURT OF NEW SOUTH WALES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH DECEMBER, 1973

Present at the Hearing:

LORD WILBERFORCE
LORD SIMON OF GLAISDALE
LORD CROSS OF CHELSEA
LORD KILBRANDON
SIR GARFIELD BARWICK

[*Majority Judgment delivered by* LORD CROSS OF CHELSEA]

This is an appeal by leave of the Supreme Court of New South Wales from a decree of that Court (Mason J. A. and Taylor A-J. A., Jacobs J. A. dissenting) made on 30th June 1971. That decree dismissed the appeal of the appellant Alexander Barton against a decree of Street J. made on 19th December 1968 which dismissed a suit brought by the appellant against the respondents in which he sought a declaration that a deed dated 17th January 1967 made between the appellant and the first fourteen respondents and certain deeds ancillary thereto had been executed by him under duress exerted by the first respondent Alexander Ewan Armstrong and were void so far as concerned him.

The case is the outcome of a struggle between Armstrong and Barton for control of the 14th respondent Landmark Corporation Ltd.—a public company with an issued capital of 1,753,000 dollars divided into shares of 1 dollar each which is now in liquidation. In the middle of 1966—when the story begins—Armstrong was the chairman of Landmark and either himself or through the medium of one or other of the second to the sixth respondents (which are family companies controlled by him) held 300,000 shares in the Company—the largest single shareholding in its capital. Barton was the managing director of Landmark and was a substantial shareholder in it—though his holding was less than that controlled by Armstrong. The other directors were John Osborne Bovill, the 18th respondent, and a Mr. Cotter. The 7th to 13th respondents are subsidiaries of Landmark.

In 1966 the principal activity of Landmark was the development through the medium of the 8th respondent Paradise Waters (Sales) Pty. Ltd. (hereinafter called " Sales ") and the 9th respondent Paradise Waters Ltd. of a building estate near Surfers' Paradise in Queensland which was to be known as " Paradise Waters ". The land in question had been owned

by the 10th respondent Goondoo Pty. Ltd. which was then controlled by Armstrong. Goondoo sold the land, which was " swamp ", to Paradise Waters Ltd. and Goondoo's shares were bought by Landmark. All the shares in Paradise Waters Ltd. were held by Sales but only 60% of the shares in Sales were owned by Landmark, the remaining 40% being held by one of the Armstrong Companies, the 3rd respondent Finlayside Pty. Ltd. Of the purchase price payable in respect of the sale of the Paradise Waters land, 400,000 dollars remained unpaid. This sum was secured by mortgages given by Paradise Waters Ltd. to the respondent George Armstrong and Son Pty. Ltd. which provided, *inter alia*, that the sum secured with interest should become payable forthwith if Armstrong should be removed from the chairmanship of Landmark. It will be seen therefore that Armstrong through his Companies was interested in the Paradise Waters project in three different ways. First as a secured creditor for 400,000 dollars; secondly as holder of 40% of the share capital of Sales, and thirdly as the largest shareholder in Landmark which held 60% of the capital of Sales.

The " Paradise Waters " project involved the expenditure of large sums in dredging and forming canals to provide water frontages for the lots into which the land was to be subdivided for sale. This expenditure was being financed by advances made by United Dominions Corporation (Australia) Ltd. (hereinafter called " U.D.C.") which were secured by mortgages on the land which had priority over the mortgage for 400,000 dollars to George Armstrong and Son Pty. Ltd. By November 1966 a sum of over 400,000 dollars had been advanced by U.D.C. in respect of development costs which were running at the rate of over 20,000 dollars a month and were likely to continue to be incurred for some time. Landmark itself was an unsecured creditor of the Paradise Waters Companies for between 600,000 and 700,000 dollars which it had advanced towards the development.

In the middle of 1966 relations between Armstrong and Barton which hitherto had been not unfriendly began to deteriorate. In particular Barton resented what he considered to be the undue interference of Armstrong in the day to day business of the Company and the use by Armstrong of office facilities for purposes of his own unconnected with the Company's affairs. Eventually he came to the conclusion—and Bovill and Cotter agreed with him—that the interests of Landmark required that Armstrong should be so far as possible excluded from any say in the management of its affairs. In the middle of October Barton asked Armstrong to resign —which he refused to do. At a directors' meeting held on 24th October 1966 a series of resolutions aimed at Armstrong were passed, including one which denied to the directors other than Barton any executive authority in connection with the Company's affairs. On 8th November at Board meetings of Paradise Waters Ltd. and of Sales, Armstrong was removed from the chairmanship of those Companies and Barton appointed Chairman in his place; and at a Board meeting of Landmark held on 17th November Armstrong was removed from the chairmanship in favour of Bovill. On 21st November Armstrong's Solicitors gave notice to Landmark that the 400,000 dollars must be repaid. In anticipation of that demand Barton had approached U.D.C. for an advance of 450,000 dollars to be used to discharge the 400,000 dollar debt and certain other indebtedness to the Armstrong Companies and on 23rd November U.D.C. wrote a formal letter to Landmark stating that its Board had resolved that the necessary advance should be made. At the Annual General Meeting of Landmark which was to be held on 2nd December Cotter was due to retire and offered himself for re-election. Armstrong nominated candidates of his own and each side circularised the shareholders to obtain proxies for the impending trial of strength. The contest resulted in a victory for Barton for at the meeting Cotter was re-elected and Armstrong's candidates rejected. As

arrangements had been made for discharging the debt due to him it looked as though Barton's wish to exclude Armstrong from any effective say in the Company's affairs had been fulfilled.

But within a few days the picture had changed completely, for on the 10th December the Managing Director of U.D.C. told Barton that his Company had decided not, after all, to advance the money necessary to discharge Landmark's indebtedness to the Armstrong Companies and further not to make any more loans in connection with the Paradise Waters project. At this point negotiations started between Barton and Mr. B. H. Smith, a well-known accountant who was Armstrong's financial adviser, which eventually resulted in the agreement of 17th January 1967 which Barton claims to have executed under duress. The main steps in these negotiations can be summarised as follows. (1) On the 14th December Smith, acting on instructions from Armstrong, asked Barton to make a firm offer in writing, to be subject to acceptance within 48 hours, covering the following matters: (*a*) the repayment of the debt of 400,000 dollars with interest; (*b*) the purchase of Finlayside's 40% interest in Sales for 175,000 dollars; (*c*) the purchase by Barton of Armstrong's 300,000 shares in Landmark for 180,000 dollars—*i.e.* at 60 cents a share the market price being then about 40 cents. Upon completion Armstrong and his nominees would resign from the Boards of the various Companies. Barton accepted in principle the idea of entering into such an agreement with the variation that the consideration for the 40% interest in Sales should be 100,000 dollars in cash and an option to Armstrong to buy 30 blocks in the Paradise Waters estate when developed, for the list price less 40% discount. (2) On the 16th December Barton and Smith met again and discussed the terms on which and the period within which the 500,000 dollars payable in respect of the debt of 400,000 dollars and the 100,000 dollars cash consideration for the 40% interest in Sales should be paid. (3) About 20th December U.D.C. threatened to appoint a Receiver under its first mortgage unless the sum owing to it was reduced by 60,000 dollars and Armstrong agreed to make an advance of 300,000 dollars to finance the project. In view of this threat Barton suggested to Smith on 21st December that Landmark should " get out " of the Paradise Waters project by selling its 60% interest to Armstrong for 150,000 dollars. This offer was not accepted by Armstrong and on 23rd December Barton induced U.D.C. to hold its hand for the time being in return for the giving of some further security by Landmark. (4) On the 3rd and 4th January 1967 Barton and Smith had further interviews at which the terms of the payments to be made by Landmark and Barton were further discussed. Eventually agreement was reached on the following basis:

(*a*) Landmark should transfer to Armstrong for 60,000 dollars a penthouse listed at 80,000 dollars;

(*b*) Landmark should pay Armstrong 140,000 dollars in cash within 7 days;

(*c*) The balance of 300,000 dollars owing in respect of the 400,000 dollars debt and the 100,000 dollars cash consideration for the 40% interest in Sales with interest at 12% should be paid within a year and secured by a second mortgage on the Paradise Waters property;

(*d*) Armstrong to have an option until 15th March 1967 to buy 35 blocks of the estate at 50% of the list price;

(*e*) Armstrong's 300,000 shares to be purchased for 180,000 dollars—the purchase price being payable over 3 years without interest; the purchasers to be Barton and nine others acceptable to Smith each of whom would guarantee payment of his part of the purchase price while Barton guaranteed the whole.

Smith obtained Armstrong's signature to a document embodying those terms which he read over to Barton and which formed the basis on which the solicitors for the parties drew up the deed executed on 17th January which is the subject of the suit. This was a very lengthy document containing recitals of the relationship between the various Companies and the connection of Barton and Armstrong with them but it is common ground that subject only to slight modifications introduced by the solicitors, it implements the agreement made between Smith and Barton on January 4th. It was eventually agreed that only seven other people as well as Barton should join in purchasing Armstrong's shares in Landmark. These are the last seven respondents who on 18th January executed mortgages of the shares purchased by them respectively to secure payment of the purchase price. On the execution of the various documents Armstrong and his nominees resigned from the Boards of the Landmark Companies.

The cash payment made by Landmark under the deed denuded it of most of its liquid assets; U.D.C. refused to change its mind with regard to the financing of the Paradise Waters project; and Barton failed to obtain finance from any other source. Consequently Landmark was soon in serious financial difficulties. A scheme of arrangement between the Company and its subsidiaries on the one hand and their creditors on the other was formulated but the Petition seeking the approval of the Court to it was dismissed on 11th January 1968 and an Order made that Landmark be wound up on account of its insolvency. On the 10th January without having previously served any letter of demand Barton commenced the present suit alleging that Armstrong on behalf of himself and the Armstrong Companies had coerced him into agreeing to the matters dealt with by the deed of 17th January 1967 by threatening to have him murdered and by otherwise exerting unlawful pressure on him. In answers to interrogatories Barton gave particulars of numerous occasions on which and the means by which, as he alleged, Armstrong and persons acting on his behalf had threatened or brought pressure to bear on him in connection with the making of this deed. By his defence Armstrong denied all the allegations of threats or unlawful pressure made in the Statement of Claim. During the hearing his Counsel stated that his client did not seek to rely on Barton's inaction in the period from 17th January 1967 to 10th January 1968 as constituting " laches acquiescence or delay " but only as casting doubt on the truth of the allegations of threats or unlawful pressure.

The hearing before Street J. lasted for 56 days and its result was somewhat surprising. On the one hand the judge found that Armstrong was a totally unreliable witness whose evidence could not be accepted unless corroborated; that on many occasions he had threatened Barton with death; and that Barton was justified in taking and did take these threats seriously. On the other hand, he held that though Barton was during the relevant period in consequence of Armstrong's threats in real fear for the safety of himself and his family, these threats and the fear engendered by them did not in fact coerce him into entering into the agreement. Barton—the judge said—" did not in his own mind relate Armstrong's threats to a desire by Armstrong to force through the agreement; nor was it forced through, so far as Barton was concerned, by reason of his fear of Armstrong's power to harm him. The agreement went through for the primary and predominant reason that Mr. Barton along with Mr. Bovill was firmly convinced that it was indispensable for the future of Landmark to enter into some such arrangement as this with Armstrong. Their belief was that they had to get rid of Armstrong if Landmark was to survive ". " It was "—to quote another passage—" what they "—(*i.e.* Barton and Bovill)—" regarded as sheer commercial necessity that was the real and quite possibly the sole motivating factor " underlying the agreement recorded in the deed of 17th January 1968. At this stage therefore it is necessary first to set out in some detail the

threats alleged by Barton with the judge's findings with regard to each and secondly to refer to the judge's reasons for reaching the conclusions which he did as to their effect.

The threats alleged were as follows:

(1) Barton said that when, in the middle of October 1966, he told Armstrong that he could not continue to work with him and suggested that he should resign Armstrong, after declining to do so, said, " The city is not as safe as you may think between office and home. You will see what I can do against you and you will regret the day when you decided not to work with me ". Despite Armstrong's denial the judge held that he did in fact utter this threat.

(2) Barton said that after Armstrong had been removed from the chairmanship—on November 17th—he began to receive telephone calls in the middle of the night. They would usually be made between 4 and 5 a.m. and would continue for four or five nights at a time. Then there would be a break for a few days; after which they would start again. This went on until early in January 1967. Generally no one spoke and he only heard heavy breathing into the telephone but on some occasions a voice would say " You will be killed ". Generally the voice was distorted but on one occasion in January 1967 he recognised this voice as Armstrong's. The judge found that Armstrong was in fact responsible for these calls.

(3) Barton said that over the period during which he was receiving these telephone calls he noticed that his house was being watched by a man named Hume. There was some evidence to show that he was Armstrong's " strong arm " man. The judge accepted that Barton was in fact being watched by Hume but said that there was not enough evidence to enable him to find that Armstrong was responsible for his activities.

(4) Barton said that one day late in November Armstrong said to him, " I am of German origin and Germans fight to the death. I will show you what I can do against you and you had better watch out. You can get killed ". In the light of some evidence to the effect that Armstrong was not of German origin the judge doubted whether Barton was right as to the first sentence but he accepted that he was right as to the second and third.

(5) Bovill whose evidence was accepted said that on 30th November Armstrong came into the Board room and shouted at Barton: " You stink; you stink. I will fix you. " Later he had a conversation with Armstrong alone in the course of which the latter made a number of extravagant statements such as that by virtue of his wealth and his position as a member of the Legislative Council he could procure police officers to do his bidding; that organised crime was moving into Sydney and that for 2,000 dollars you could have someone killed. The judge found not only that Armstrong was uttering threats of this character at this time but that Barton was justifiably seriously perturbed by them. Indeed on 24th November he hired a bodyguard to watch over his safety until after the Annual General Meeting. At this meeting three bodyguards were present—two of them concealed behind a curtain near where Barton was sitting.

(6) Barton said that on 7th December after a Board meeting of Sales Armstrong said to him in the presence of a number of other people, " You can employ as many bodyguards as you want. I will still

fix you ". In the absence of corroborative evidence from any of the other persons said to have been present the judge was not prepared to hold that this threat was made.

(7) Barton said that on December 14th Armstrong said to him, " Unless Landmark buys my interest in Paradise Waters (Sales) Pty. Ltd. for 100,000 dollars and the company repays 400,000 dollars owing to me and you buy my shares for 60 cents each I will have you fixed ". The judge said that though Armstrong might well have threatened Barton on 14th December he was not satisfied that such threats, if made, were coupled with any requirement that he enter into an agreement with him.

(8) On January 7th a Jugoslav named Vojinovic—a man with a bad criminal record—telephoned to Barton saying that he wished to see him urgently. When they met he told Barton that Hume had hired him to kill him promising him £2,000 for doing so and that Hume was acting on instructions from Armstrong. He said that he would prefer not to commit the murder provided that Barton paid him the money and Barton professed his willingness to do this if the matter could be put in the hands of the police so that Hume and Armstrong could be brought to justice. Next day Barton went with Landmark's Solicitor and Counsel to the Criminal Investigation Branch and reported the matter to the officer-in-charge. Vojinovic was promptly arrested and made a statement asserting that he had indeed been hired on Armstrong's behalf to kill Barton. The police however never interviewed Armstrong to find out what he had to say with regard to Vojinovic's story. Barton, of course, considered that this was due to Armstrong's intervention and was simply an example of his ability to influence their conduct of which he had boasted to Bovill. The judge was very puzzled by and critical of their inaction; but he did not consider that the evidence justified him in finding that Vojinovic was in fact employed directly or indirectly by Armstrong. He had, however, no doubt that Barton believed that Armstrong had hired a criminal to kill him and was seriously and justifiably alarmed for his safety. His actions indeed bore this out for he bought a rifle, moved with his wife and son from his house in the suburbs into a city hotel and did not return home until after the documents were executed on 17th and 18th January.

(9) Barton said that on Thursday January 12th Armstrong rang him up at the Company's office and said " You had better sign this agreement—or else " to which he replied that he did not let himself be blackmailed into any agreement. The judge inclined to the view that this conversation—which was, of course, denied by Armstrong—did in fact take place.

(10) Barton said that by Friday January 13th he had made up his mind not to sign the deeds—which were then being finalised by the solicitors—and not to advise his co-directors to execute them on behalf of Landmark and that he so informed Smith on that day; but that on January 16th Armstrong rang him up in the morning saying, " Unless you sign this document I will get you killed ", and that yielding to this threat he changed his mind and executed the deeds. The judge rejected this part of Barton's evidence. He held that although before Christmas Barton may well have felt—and expressed to Bovill—doubts as to the wisdom of entering into an agreement on the lines being suggested by Smith on behalf of Armstrong he had ceased to feel any such doubts by the beginning

of January, that thereafter he never changed his mind and that Armstrong did not threaten him with death on 16th January unless he signed.

Their Lordships must now refer to the reasons given by the judge for holding that Barton was not coerced into signing the agreement by any threat of physical violence made by Armstrong. When U.D.C. went back on its promise to advance the money needed to pay off the debt to Armstrong and further said that it was not prepared to go on advancing money to enable the development to be completed it must have been obvious to Barton that unless U.D.C. could be induced to change their minds again or the necessary money could be obtained from some other source the Paradise Waters project was " finished " so far as Landmark was concerned even if Landmark itself could survive. The judge accepted that when he heard of U.D.C.'s decision Barton was at first despondent. Bovill gave evidence—which the judge accepted—that on December 13th Barton said to him, " The money has not come through. I don't think that it will come through. I would like to resign. I don't think that we can get this money any other way. I think that it is finished ". But the judge held that Barton soon came to share the view—which appears always to have been held by Bovill—that if only Armstrong could be got out of the way U.D.C. would change its mind and provide the necessary finance to enable the project to be completed and that to enter into an agreement on the lines suggested by Smith on behalf of Armstrong was " good business " from Landmark's point of view. In his judgment the judge lists a number of acts done and statements made by Barton both before and shortly after the documents in question were executed which indicate that he was optimistic as to the future once Armstrong was out of the way. Thus on 3rd January 1967 he told Smith that once Armstrong was out of the way he was sure that U.D.C. would give the Company finance and after the deed was executed he said to Armstrong's Solicitor (Mr. Grant) " Now we have got rid of Armstrong nothing will stop us " and told Smith that he thought that the deal was " a miracle ". Again during the negotiations and in the period immediately after the execution of the deeds Barton was either himself or through his family Companies lending money to Landmark or its subsidiaries and buying Landmark shares on the Stock Exchange. The judge refused to accept that these manifestations of optimism and confidence were a mere " facade ". Further he was much impressed by the evidence given by Detective Inspector Lendrum as to what he was told by Barton's Solicitor (Mr. Millar) in Barton's presence with regard to the negotiations for an agreement between Barton and Armstrong when they reported the Vojinovic incident to him. According to Lendrum's notes which the judge accepted as accurate Millar said that shortly before Christmas it appeared that Landmark would fall but that since then Barton had managed to save the Company; that there had been some conferences between representatives of Armstrong and Barton in connection with a compromise; that on Wednesday the 4th January Armstrong's representative B. H. Smith and Barton had reached what appeared to be an agreement subject to documentation to be prepared by Armstrong's lawyers and submitted to Millar's firm; and the drafts had in fact been submitted on Friday the 6th. The judge pointed out that if the agreement which Barton had apparently reached with Smith had been induced by Armstrong's threats it was very surprising that Barton should have allowed Millar to give such a misleading picture of the position to Lendrum. Barton had come to the police in order to get Armstrong brought to justice for hiring criminals to murder him and if his agreement with Smith had itself been induced by threats on Armstrong's part he would surely have brought that fact to Lendrum's attention at the same time. The judge indeed went so far as to hold that Armstrong was, as he put it, a " reluctant vendor " and that his threats were not intended and were not

thought by Barton to be intended to induce him to enter into the agreement but were simply manifestations of blind malevolence. He thought that Barton—though by comparison with Armstrong an honest witness—had after the failure of Landmark come to believe that Armstrong's threats played a part in inducing him to enter into an agreement which had proved disastrous which they did not in fact play.

Barton appealed from the judgment of Street J. to the Court of Appeal Division of the Supreme Court and there contended that many of the findings of fact adverse to him made by the judge should be reversed. For the most part this attack failed but it succeeded on a few points to which their Lordships must now refer. In the first place Mason J. A. and Taylor A.-J. A. held that the judge was wrong in refusing to draw the inference that Armstrong had employed Hume to " keep a tag " on Barton. Secondly all three judges held that Armstrong was not a " reluctant vendor " and that such threats as he uttered after December 13th were intended by him to induce and were understood by Barton to be intended to induce him to enter into the agreement. Their Lordships have no hesitation in agreeing with the judges of the Appeal Division on these points. On the facts proved the inference that Armstrong was responsible for Hume's " watching " of Barton is irresistible. Again as their Lordships read it the evidence points strongly to the conclusion that so far from being a " reluctant vendor " Armstrong was eager to " get out " of Landmark on the best terms that he could so soon as he heard, as he did about December 10th, that U.D.C. had decided not to advance it any more money. Smith was in touch with the directors of U.D.C. during the negotiations and he never thought for a moment that U.D.C. was likely to change its mind whether or not Armstrong was " out of " Landmark. He declined to become Chairman of the Company—though Barton and Armstrong would both have liked him to take on the chairmanship—because he realised that it was doomed and it must have seemed to him—and consequently to Armstrong—that an agreement under which Armstrong acquired all or nearly all of Landmark's liquid assets and sold his shares at nearly twice their market value was very favourable to him. Armstrong—being the sort of man he was—had every reason to threaten Barton in order to induce him to go through with the agreement and their Lordships have no doubt that such threats as he made during the negotiations were made for this purpose and that Barton was well aware of the fact. The judge has found that on January 12th Armstrong told Barton in terms " Sign the agreement—or else ". Moreover Sergeant Wild who was in charge of the investigation into the Vojinovic incident said that on January 11th Barton told him how nervous he was for his safety and that of his family but added, " Well, the agreement will be signed on the 18th and it will all be over ". This remark—which is not mentioned in the judgment of Street J.—appears to their Lordships to show clearly that Barton was well aware that Armstrong's threats were in fact directed to inducing him to sign the agreement.

The three judges in the Court of Appeal Division were in substantial agreement on the facts of the case but they reached different conclusions because they differed as to the law applicable to them. Mason J. A. and Taylor A.-J. A. thought that Barton could not succeed unless he could establish that but for the threats he would not have signed the agreement and that he had failed to establish that fact. Jacobs J. A. agreed that if Barton had indeed to show that but for the threats he would not have signed the agreement he had failed to do so. He thought, however, that if the evidence showed that one party to the transaction had put the other in fear of his life during the negotiations leading up to the execution of the deed in question the common law would assume that he was not " a free agent " and that he could consequently avoid the transaction. Furthermore he thought that in any case equity would allow him to avoid the transaction if the evidence showed that the threats had any appreciable

effect in inducing him to execute the agreement even if he would in fact have executed it if there had been no threats and that the evidence did at least establish that.

Their Lordships turn now to consider the question of law which provoked a difference of opinion in the Court of Appeal Division. It is hardly surprising that there is no direct authority on the point, for if A threatens B with death if he does not execute some document and B, who takes A's threats seriously, executes the document it can be only in the most unusual circumstances that there can be any doubt whether the threats operated to induce him to execute the document. But this is a most unusual case and the findings of fact made below do undoubtedly raise the question whether it was necessary for Barton in order to obtain relief to establish that he would not have executed the deed in question but for the threats. In answering this question in favour of Barton Jacobs J. A. relied both on a number of old common law authorities on the subject of " duress " and also —by way of analogy—on later decisions in equity with regard to the avoidance of deeds on the ground of fraud. Their Lordships do not think that the common law authorities are of any real assistance for it seems most unlikely that the authors of the statements relied on had the sort of problem which has arisen here in mind at all. On the other hand they think that the conclusion to which Jacobs J. A. came was right and that it is supported by the equity decisions. The scope of common law duress was very limited and at a comparatively early date equity began to grant relief in cases where the disposition in question had been procured by the exercise of pressure which the Chancellor considered to be illegitimate—although it did not amount to common law duress. There was a parallel development in the field of dispositions induced by fraud. At common law the only remedy available to the man defrauded was an action for deceit but equity in the same period in which it was building up the doctrine of " undue influence " came to entertain proceedings to set aside dispositions which had been obtained by fraud. (See Holdsworth's History of English Law, Vol. 8, pp. 328/9.) There is an obvious analogy between setting aside a disposition for duress or undue influence and setting it aside for fraud. In each case—to quote the words of Holmes J. in *Fairbanks v. Snow* 13 Northeastern Reporter 596 at 598—" the party has been subjected to an improper motive for action ". Again the similarity of the effect in law of *metus* and *dolus* in connection with dispositions of property is noted by Stair in his Institutions of the Law of Scotland, Book IV, Title 40.25. Had Armstrong made a fraudulent misrepresentation to Barton for the purpose of inducing him to excute the deed of 17th January 1967 the answer to the problem which has arisen would have been clear. If it were established that Barton did not allow the representation to affect his judgment then he could not make it a ground for relief even though the representation was designed and known by Barton to be designed to affect his judgment. If on the other hand Barton relied on the misrepresentation Armstrong could not have defeated his claim to relief by showing that there were other more weighty causes which contributed to his decision to execute the deed, for in this field the Court does not allow an examination into the relative importance of contributory causes.

> " Once make out that there has been anything like deception and no contract resting in any degree on that foundation can stand ". (*Per* Lord Cranworth L. J. in *Reynell v. Sprye* 1 De G. M. & G. 660 at 708)—see also the other cases referred to in Cheshire and Fifoot's Law of Contract 8th ed., pp. 250/251.

Their Lordships think that the same rule should apply in cases of duress and that if Armstrong's threats were " a " reason for Barton's executing the deed he is entitled to relief even though he might well have entered into the contract if Armstrong had uttered no threats to induce him to do so.

It remains to apply the law to the facts. What was the state of Barton's mind when he excuted the deed is, of course, a question of fact and a question the answer to which depended largely on Barton's own evidence. The judge who heard him give evidence was in a better position than anyone else to decide whether fear engendered by Armstrong's threats was " a " reason for his excuting the deed. It was submitted that the decision of Street J. in favour of Armstrong amounted to a finding that fear engendered by the threats was not such a reason and that as that decision had been affirmed by a majority of the Appeal Division the Board should not disturb it. But this case, as their Lordships see it, is not one to which the rule as to " concurrent findings " is applicable. In the first place some of the findings of fact made by the judge were varied by the Appeal Division. In particular they held that he was wrong in finding that Barton did not think that Armstrong's threats were being made with a view to inducing him to execute the agreement. Again there appears to have been little discussion of the law before Street J. and it is by no means clear that he directed his mind to the precise question which was debated in the Appeal Division and before the Board. Consequently one cannot be sure that if he had applied to the facts found by him as modified by the Appeal Division what their Lordships think to be the correct principle of law he would have reached the conclusion which he did reach. He might have done so but equally he might not have done so. The judges in the Appeal Division approached the case no doubt in the light of what their Lordships assume to be the right findings of fact but the majority applied to them what in their Lordships' judgment was a wrong principle of law. In these circumstances their Lordships think that they can properly, and indeed should, reach their own conclusion by applying the law as they understand it to the facts found by the judge as modified by the Appeal Division. They proceed then on the footing that although when he learnt that U.D.C. had decided no longer to finance the Paradise Waters project Barton was at first despondent as to its future he soon came to share Bovill's view that U.D.C. would change its mind when once Armstrong was out of the way; that the confidence as to the eventual success of the project to which he gave expression to Smith and others during the negotiations and shortly after the execution of the documents was genuine; that he thought that the agreement with Armstrong was a satisfactory business arrangement both from the point of view of Landmark and also from his own point of view; and that the evidence which he gave at the trial, though possibly honest, was a largely erroneous reconstruction of his state of mind at the time. But even so Barton must have realised that in parting with all Landmark's liquid assets to Armstrong and in agreeing himself to buy Armstrong's shares for almost twice their market value in the hope that when Armstrong was out of the way U.D.C. would once more provide finance he was taking a very great risk. It is only reasonable to suppose that from time to time during the negotiations he asked himself whether it would not be better either to insist that any settlement with Armstrong should be conditional on an agreement with U.D.C. or to cut his own and Landmark's losses on the Paradise Waters project altogether rather than to increase the stakes so drastically. If Barton had to establish that he would not have made the agreement but for Armstrong's threats then their Lordships would not dissent from the view that he had not made out his case. But no such onus lay on him. On the contrary it was for Armstrong to establish, if he could, that the threats which he was making and the unlawful pressure which he was exerting for the purpose of inducing Barton to sign the agreement and which Barton knew were being made and exerted for this purpose in fact contributed nothing to Barton's decision to sign. The judge has found that during the ten days or so before the documents were executed Barton was in genuine fear that Armstrong was planning to have him killed if the agreement was not signed. His state of mind was described by the judge as one of " very real mental torment " and he believed that his fears

would be at an end when once the documents were executed. It is true that the judge was not satisfied that Vojinovic had been employed by Armstrong but if one man threatens another with unpleasant consequences if he does not act in a particular way, he must take the risk that the impact of his threats may be accentuated by extraneous circumstances for which he is not in fact responsible. It is true that on the facts as their Lordships assume them to have been Armstrong's threats may have been unnecessary; but it would be unrealistic to hold that they played no part in making Barton decide to execute the documents. The proper inference to be drawn from the facts found is, their Lordships think, that though it may be that Barton would have executed the documents even if Armstrong had made no threats and exerted no unlawful pressure to induce him to do so the threats and unlawful pressure in fact contributed to his decision to sign the documents and to recommend their execution by Landmark and the other parties to them. It may be, of course, that Barton's fear of Armstrong had evaporated before he issued his writ in this action but Armstrong—understandably enough—expressly disclaimed reliance on the defence of delay on Barton's part in repudiating the deed.

In the result therefore the appeal should be allowed and a declaration made that the deeds in question were executed by Barton under duress and are void so far as concerns him. Their Lordships express no view as to what (if any) effect this may have on the rights or obligations *inter se* of the other parties to the deeds—and the Order should include liberty to any of them to apply to the Court of first instance for the determination of any questions which may arise between them in that regard. Their Lordships think that the costs below should be dealt with as suggested by Jacobs J. A.—that is to say, that Armstrong and his companies (the first to sixth respondents) should pay Barton's costs of the hearing before Street J. but that there should be no costs of the appeal to the Appeal Division because so much of the time there was taken up by submissions which all three judges were agreed in rejecting. The first respondent (Armstrong) must pay to the appellant (Barton) his costs of the appeal to the Board. Their Lordships will humbly advise Her Majesty accordingly.

[*Dissenting Judgment by* LORD WILBERFORCE *and* LORD SIMON OF GLAISDALE]

The reason why we do not agree with the majority decision is, briefly, that we regard the issues in this case as essentially issues of fact, issues moreover of a character particularly within the sphere of the trial judge bearing, as they do, upon motivation and credibility. On all important issues, clear findings have been made by Street J. and concurred in by the Court of Appeal—either unanimously or by majority. Accepted rules of practice and, such rules apart, sound principle should, in our opinion, prevent a second court of appeal from reviewing them in the absence of some miscarriage of justice, or some manifest and important error of law or misdirection. In our view no such circumstance exists in this case.

Before stating those findings of fact, which are to our mind conclusive, we think it desirable to define in our own way the legal basis on which they rest.

The action is one to set aside an apparently complete and valid agreement on the ground of duress. The basis of the plaintiff's claim is, thus, that though there was apparent consent there was no true consent to the agreement: that the agreement was not voluntary.

This involves consideration of what the law regards as voluntary, or its opposite; for in life, including the life of commerce and finance, many acts are done under pressure, sometimes overwhelming 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 legitimate. 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. In this the law, under the influence of equity, has developed from the old common law conception of duress—threat to life and limb—and it has arrived at the modern generalisation expressed by Holmes J.—" subjected to an improper motive for action " (*Fairbanks v. Snow* 13 Northeastern Reporter 596, 598).

In an action such as the present, then, the first step required of the plaintiff is to show that some illegitimate means of persuasion was used. That there were threats to Barton's life was found by the judge, though he did not accept Barton's evidence in important respects. We shall return to this point in detail later.

The next necessary step would be to establish the relationship between the illegitimate means used and the action taken. For the purposes of the present case (reserving our opinion as to cases which may arise in other contexts) we are prepared to accept, as the formula most favourable to the appellant, the test proposed by the majority, namely that the illegitimate means used was *a* reason (not *the* reason, nor the *predominant* reason nor the *clinching* reason) why the complainant acted as he did. We are also prepared to accept that a decisive answer is not obtainable by asking the question whether the contract would have been made even if there had been no threats because, even if the answer to this question is affirmative, that does not prove that the contract was not made because of the threats.

Assuming therefore that what has to be decided is whether the illegitimate means used was a reason why the complainant acted as he did, it follows that his reason for acting must (unless the case is one of automatism which this is not) be a conscious reason so that the complainant can give evidence of it: " I acted because I was forced ". If his evidence is honest and accepted, that will normally conclude the issue. If, moreover, he gives evidence, it is necessary for the court to evaluate his evidence by testing it against his credibility and his actions.

In this case Barton gave evidence—his was, for practical purposes, the only evidence supporting his case. The judge rejected it in important respects and accepted it in others. The issues as to Barton's motivations were issues purely of fact (that motivation is a question of fact hardly needs authority but see *Cox v. Smail* (1912) V.L.R. 274 *per* Cussen J.): the findings as to motivation were largely, if not entirely, findings as to credibility. It would be difficult to find matters more peculiarly than these within the field of the trial judge who saw both contestants in the box, and who dealt carefully and at length with the credibility, or lack of credibility, of each of them.

We think it important to notice how little of Barton's case was accepted: how much of it—indeed almost the whole of his essential contentions—failed. In general the judge found that his case was reconstructed after the event: it was not until nearly a year after signing the agreement in January 1967 that he brought forward his claim of duress. Barton's case, which he put forward at the trial, was that negotiations for the agreement (*sc.* to buy Armstrong out) started in January 1967: that no agreement

had been reached on 4th January 1967: that on 13th January 1967 he had made up his mind not to proceed; that there was a powerful threat by Armstrong on 16th January 1967 by which he was coerced into signing on 17th January. The facts as found were that negotiations started on 14th December 1966: that thereafter there was a good deal of bargaining of a normal character not with Armstrong directly but with Mr. Smith, his respectable accountant, in the course of which Barton gained some advantages: that agreement was essentially reached on 4th January 1967: that so much was stated to the police on 8th January 1967 by Barton's legal adviser in Barton's presence without any reference to or suggestion of coercion—the judge attached considerable importance to this interview notes of which were available at the trial: that Barton never decided not to proceed: that he thought it a matter of urgency to sign: that there was no threat on 16th January 1967. The judge also rejected Barton's evidence as to a number of threats alleged by Barton to have been made on various occasions.

Of course this is not the whole picture—or Barton could not hope that his case would stand up. There are also findings that Barton was in a general state of fear of Armstrong, nourished by the telephone conversations and evidenced by his removal of himself to a hotel and of his family to the country. The judge accepted that, on 12th January 1967, Armstrong had said on the telephone to Barton " you had better sign the agreement—or else ". Both Courts faced the problem thus created. Were these facts alone sufficient to conclude the case in Barton's favour, or was it open to the Court to enquire whether, given the existence of a state of fear, it was a reason for action? That a man in a state of fear may yet act voluntarily—*i.e.* totally for other reasons or motives—is undoubtedly exceptional and has to be clearly proved, but this is in so many ways an exceptional case that nothing can be ruled out.

This issue was squarely faced by Mason J. A. between whose judgment and that of Taylor A.-J. A. there is substantial agreement. We find it necessary to refer to some key passages.

(1) He accepted that Armstrong intended by threats and intimidation to coerce Barton into signing the agreement and that Barton, in his own mind, related Armstrong's threats to his desire to force it through. He accepted the judge's finding that Barton was in fear of Armstrong.

(2) He continued " . . . it goes without saying that a man who is in fear of another is prone to comply with the demands of that other, without bringing a free and independent mind to the matter in hand. The outcome of the issue therefore depends in part on the degree of the apprehension which affected the appellant's mind and his capacity, despite that apprehension, to bring a free mind to bear on the question whether he should assent to the proposed agreement ."

(3) He agreed with the learned judge in thinking that at all relevant times the appellant, although apprehensive as to the safety of himself and his family in the light of threats and intimidation to which he had been subjected, nevertheless viewed and considered the proposed agreement dispassionately with a free and independent mind. For " . . . reasons which his Honour shortly described as commercial necessity, he decided to enter into the agreement . . . ".

(4) " The strong point in the appellant's case is the finding that the appellant was fearful for his own safety and that of his family. In general the existence of a condition of fear associated with a particular event is incompatible with the possession of a free and dispassionate mind with reference to a course of action which involves as a possibility the occurrence

of that event. But it is not universally so for, as I have said, much depends on the degree of apprehension and the capacity of the mind to act independently of the apprehension ".

(5) " In my opinion in duress, as well as undue influence, the Court is concerned to ascertain whether entry into the transaction was free and voluntary; the area of that inquiry is not circumscribed by a rigid proposition of law that a condition of fear or apprehension is absolutely and in all circumstances incompatible with the possession of a free and voluntary mind ".

These passages show that the learned Judge of Appeal took the position that it was in his power, and was his judicial duty, to enquire whether, notwithstanding the existence of intimidation and a state of fear, the fear was a reason inducing Barton to sign the agreement, or whether he was shown to have signed it for other reasons. The same position was taken explicitly, or implicitly, by Street J. and by Taylor A.-J. A. All three judges fully recognised that a conclusion to the latter effect would be exceptional, and must be clearly proved. In our opinion the direction they thus gave themselves was correct.

On this direction the judges reached their ultimate and crucial findings of fact as to motivation.

Street J. had found that Barton was motivated to enter into the agreement by sheer commercial necessity. By this he meant that the Company would survive and be profitable without Armstrong, but not with him, and that the likelihood and extent of such profit justified the price to be paid to get rid of Armstrong. He meant also, as his judgment shows, that Barton was motivated by a desire for uncontested control over the business, rather than a sharing of it with Armstrong.

This finding and the evidence supporting it was carefully scrutinised by the Court of Appeal, and, in the end, endorsed. The Court was, in particular, concerned to see whether Street J. had applied an incorrect standard—*i.e.* one of " predominant cause "—but came to the conclusion that he had not done so. The finding of Mason J. A. as to motivation is conveyed in the following passage:

> " I agree with the learned judge in thinking that at all relevant times the appellant, although apprehensive as to the safety of himself and his family in the light of threats and intimidation to which he had been subjected, nevertheless viewed and considered the proposed agreement dispassionately with a free and independent mind. He entered into the agreement and committed Landmark to it, not because he was overborne by Mr. Armstrong, but because in the exercise of his free and independent judgment he considered the agreement to be advantageous. First, he thought that Paradise Waters held the promise of very considerable profits. Secondly, he appreciated that to enable completion to take place it was essential to secure finance which could be obtained only in the event that the controversy within the company was brought to an end by a settlement which terminated the Armstrong interest in the company. Thirdly, for the well-being of the company he thought it essential to sever the connexion with Mr. Armstrong and eliminate his capacity to create trouble. For these reasons, which his Honour shortly described as commercial necessity, he decided to enter into the agreement and commit Landmark to it ".

The judge's findings were also accepted, after careful examination by Taylor A.J. A.—" . . . the conclusion ", he finds, " that Barton entered into this agreement because he wanted to and from commercial motives only is, I think undoubtedly correst ".

The appeal cannot succeed unless these most explicit findings are overturned. We consider that no basis exists for doing so.

There are two contentions against the acceptance of them, with which we should deal.

1. An attempt was made to show that there was no such commercial necessity as the Judge found to have motivated Barton, and his colleagues, to buy out Armstrong on the terms agreed. A detailed examination was made—both in the appellant's printed case and in argument—to demonstrate that Landmark's position was, at any rate after United Dominions Corporation had refused to provide further finance, hopeless: that the agreement was, from the point of view of Barton and his associates, disastrous, and from Armstrong's point of view, extremely favourable. Traces of the influence of this argument and even of its acceptance are found in the majority judgment. With all respect we think it to be illegitimate and misconceived. The point is not whether the agreement was financially advantageous to one side or the other (we would not venture any pronouncement as to this) but whether it was thought to be advantageous by Barton and his associates. That it was so thought is both found by the judge as a matter of fact, and shown by overwhelming evidence. Before the agreement was signed, Barton and his friends thought that the arrangement would be the salvation of the Company, and that it was vital to get Armstrong to sign as soon as possible. When it was signed, and for months afterwards, Barton and his friends acted and expressed themselves in the same spirit. On January 18th 1967 Barton said " Now we have got rid of Armstrong nothing will stop us ". On January 19th, he said to Mr. Smith (Armstrong's adviser) " I think the deal is a miracle ". As to the subsequent period up to April 1967, Street J. lists 17 facts proved in evidence illustrating Barton's confidence and optimism. However little justified these turned out to be, they undoubtedly existed. We cannot see how a successful attack can be made against the finding that, to Barton, the deal appeared as a commercial necessity.

2. In view of the strong findings of fact summarised above, and of their concurrent adoption by the Court of Appeal, a situation which on well known practice prevents a further review, attention was directed to certain findings of Street J. which were reversed by the Court of Appeal. This, it was argued, took the case out of the concurrent findings rule and entitled the Board to make their own assessment of the facts. We find traces of acceptance of this argument in the majority judgment. But in our opinion this is but a fragile support for a total reversal of the essential findings of both courts.

The points (4 in number out of 16, the rest of which were specifically affirmed) were (stating the Court of Appeal's findings—those of Street J. being to the contrary):

1. That Armstrong was responsible for Hume's watching activities.
2. That Armstrong was not a reluctant vendor.
3. That Armstrong's threats and intimidation were intended to coerce the appellant into the making of the agreement.
4. That the appellant did in his own mind relate Armstrong's threats to a desire by Armstrong to force through the agreement.

Of these (1) is peripheral; (2) is not inconsistent with Barton being a willing buyer; (3) does not preclude the critical question whether the threats were a reason why Barton made the agreement. It is only (4) which appears to be of significance in relation to the ultimate issue whether intimidation played a part in securing Barton's assent to the agreement. But, as has already been shown, this point was given full consideration by the Court of Appeal.

Mason J. A. said: " It is implicit in what I have said that the variations which I am disposed to make in the findings made by Street J. do not cause me to differ from the ultimate finding of fact which His Honour made. These variations are of minor significance when compared with the other objective evidence throwing light on the appellant's attitude of mind ". We agree.

In our opinion the case is far from being one in which a second appellate court should reverse findings made below and endorsed by a Court of Appeal. Respect for such findings—particularly where the issues depend so much upon credibility and an estimate of rival personalities—appears to us to be a central pillar of the appellate process. It is perhaps otiose, but also fair to the learned judges below, to say that we have no ground for thinking that the factual conclusions which they reached after so prolonged a search did not represent the truth of the situation—or at least the nearest approximation to truth that was attainable.

We would dismiss the appeal.

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In the Privy Council

ALEXANDER BARTON

v.

ALEXANDER EWAN ARMSTRONG AND OTHERS

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