

The Soldier, the Order, and the Contract

Charles Rickett and Paul Myburgh, The University of Auckland, analyse two aspects of Salmon J’s judgment in the SAS case.

The recent action brought by the British Government in the High Court, seeking to prevent publication of a manuscript describing certain events during the Gulf War, and written by a New Zealander (referred to as “R”) who was a member of the British SAS and who took part in the events, captured the attention of the media in both Britain and New Zealand. The judgment of Salmon J, in *A-G for England and Wales v R*, unreported, HC Auckland, CP641/98, 6 December 2000, has in its turn captured our attention.

The British Government relied principally on a confidentiality contract signed by R, but Salmon J found that the contract could not be relied upon for a number of reasons. Confidentiality contracts were introduced in 1996, and were required by virtue of a Defence Council Instruction to be signed by all members of the SAS who wished to continue to serve in the UK Special Forces. Salmon J characterised the contract thus (para 30): “It creates a life long prohibition on the disclosure without express prior written authority of any information, no matter how innocuous or lacking in sensitivity or confidentiality, relating to the work of or in support of the United Kingdom Special Forces ...”

This article examines two aspects of Salmon J’s lengthy judgment, wherein he upheld several defences argued by R that went to the effectiveness of the confidentiality contract which the British Government had entered into with him. First, Salmon J held that the Ministry of Defence’s order to R to sign the confidentiality contract was unlawful. On this point, his Honour’s analysis is problematic in terms of private international law doctrine, and it is important to assess why this is so. Second, R presented a group of arguments, centred on duress, undue influence and unconscionable bargain, which his Honour regarded as raising the essential issue, “whether or not the consensual element required of a valid contract has been vitiated by the circumstances surrounding the execution of the document”

(para 43). Unfortunately, the manner in which his Honour dealt with R's arguments reveals somewhat muddled thinking. It is worth suggesting what the confusion is, with a view to avoiding its being compounded in future decisions.

The Ministry of Defence's Order

Salmon J held (at paras 58-81) that Defence Council Instruction 107/96 and consequent regimental orders requiring SAS soldiers to enter into confidentiality contracts exceeded the limits of the Ministry of Defence's prerogative powers to command and administer the United Kingdom's armed forces. After canvassing English authorities on whether prerogative powers were susceptible to judicial review, his Honour held that the Court could review the lawfulness of the Ministry's order to sign the confidentiality contract. On Salmon J's analysis, the Ministry acted unconstitutionally because the contract affected R's civil rights after leaving the armed forces. Having held that the Ministry's order to sign the contract was unlawful, his Honour considered whether it might be justified by considerations of national security, but concluded that national security could not be invoked as a justification in the case of an unlawful (as opposed to a procedurally improper) exercise of prerogative powers.

With respect, Salmon J's inquiry into the validity of the Ministry's order, and his finding that it was unlawful, seems at odds with the fundamental principle of private international law that courts have no jurisdiction to entertain a claim founded upon an act of state (on which, see generally L Collins (ed), *Dicey & Morris on the Conflict of Laws*, 13 ed, 2000, London, Sweet & Maxwell, 100-103).

The term "act of state" has historically been applied to different categories of cases, and the exact ambit of the act of state doctrine has been controversial. In *Buttes Gas & Oil Co v Hammer* [1982] AC 888, at 931-938, however, the House of Lords placed its imprimatur on a broad, classical formulation of the doctrine. Echoing Fuller CJ's famous dictum in *Underhill v Hernandez* (1897) 168 US 250, the House of Lords held that the recognised categories of act of state represented instances of a broader principle that local courts "will not adjudicate upon the transactions of foreign sovereign states". Lord Wilberforce noted that this principle is not merely a matter of

judicial discretion. Rather, it is inherent in the very nature of the judicial process that such issues should be non-justiciable. If the validity of foreign acts of state were to be challenged, controlled or condemned by local courts, this could embarrass the local executive, “imperil the amicable relations between governments and vex the peace of nations”: *Oetjen v Central Leather Co* (1918) 246 US 297 at 304. Moreover, there are generally “no judicial or manageable standards” by which local courts can measure issues relating to foreign acts of state. Courts which attempt to do so are likely to find themselves “in a judicial no man's land”.

The general principle of non-justiciability enunciated by the House of Lords in *Buttes* is not absolute. There are circumstances in which foreign acts of state may be disregarded by local courts. For example, as will be discussed below, local courts may refuse to enforce foreign acts of state on public policy grounds. They may similarly refuse to give effect to foreign acts of state committed in violation of public international law: *Kuwait Airways Corp v Iraq Airways Co* [2001] 1 Lloyd's Rep 161 (CA). Moreover, there is some authority which suggests that courts may consider the constitutionality of foreign legislative acts of state where the question arises incidentally in the course of a commercial dispute between private parties: see eg *A/S Tallinna Laevauhisus v Estonian State SS Line* (1947) 80 Ll L Rep 99 (CA). However, it is not permissible for a court to impugn the constitutionality of a foreign act of state directly: *Buck v Attorney-General* [1965] Ch 745 (CA).

An act of state may be defined as an act performed by a state by virtue of its sovereign authority in the course of its relationship with other states or with its own subjects: *Halsbury's Laws of England*, 4 ed, vol 8, para 1413; *Peters v Davison* [1999] 3 NZLR 744). As Salmon J recognised (at paras 60 and 68 of the judgment), members of the armed forces like R are appointed under the royal prerogative. The relationship between the Crown and members of its armed forces is founded in status rather than in contract. The Defence Council Instruction, regimental orders to sign the confidentiality contract, and the Ministry of Defence's sanctions in the case of a refusal to sign all involve an “exercise of the prerogative powers relating to army personnel”, and fall squarely within the above definition. Indeed, it is difficult to think of more self-evident examples of acts of state.

From a reading of the judgment alone, it appears that the plaintiff did not protest the Court's lack of jurisdiction to determine the lawfulness of the Ministry's order on this ground. However, it cannot be argued that the Court therefore enjoyed jurisdiction by virtue of the plaintiff's implied submission. Whilst submission can cure a lack of *personal* jurisdiction (for example, where a foreign sovereign waives its immunity), litigants cannot, by their submission, confer *subject-matter* jurisdiction on a court in respect of foreign acts of state which would otherwise be non-justiciable: see eg *Duke of Brunswick v King of Hanover* (1844) 6 Beav 1, (1848) 2 HL Cas 1; *Buttes* at 932; *Controller and Auditor-General v Sir Ronald Davison* [1996] 2 NZLR 278, 314 (CA). Regardless of how the case was argued, the Court of its own accord should have exercised appropriate "judicial restraint or abstention" and declined to challenge the lawfulness of the Ministry's order.

Salmon J's key finding (at paras 71-74, citing *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL); *R v Ministry of Defence, ex parte Smith* [1995] All ER 427) that he was entitled to review the Ministry of Defence's exercise of its prerogative powers, is misconceived. The authorities cited by his Honour address the issue of whether an exercise of prerogative powers may be reviewed *by courts of competent jurisdiction* (ie, in respect of acts of the Crown in right of England and Wales, *English* courts). They cannot be read as authority for the proposition that such matters are subject to judicial review by foreign courts which lack subject-matter jurisdiction.

Although a proper application of the act of state doctrine should have precluded the Court from ruling on the lawfulness of the Ministry's order, it does not follow that the Court was therefore obliged to enforce or otherwise give effect to that order in New Zealand. It might have declined to do so on two grounds, neither of which was canvassed in Salmon J's judgment.

First, the Court might have refused to enforce the plaintiff's claim on public policy grounds. Whilst the Court was not competent to challenge the Ministry's order, it was entitled to decline to give effect to it in New Zealand if this would violate some aspect of fundamental New Zealand public policy or international law: see eg *Re Helbert Wagg & Co Ltd* [1956] Ch 323; *Oppenheimer v Cattermole* [1976] AC 249;

Kuwait Airways Corp, above. The public policy exclusionary rule is interpreted narrowly. Courts hearing conflict of laws cases “are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors, unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.” (*Loucks v Standard Oil Co*, 120 NE 198, 202 (NYCA 1918)).

It could perhaps be argued that the high-handed procurement of R’s signature, the overly broad terms of the confidentiality contract, and the threat that he would be “returned to unit” if he did not sign the agreement, viewed as a whole, constituted an unconscionable violation of R’s rights of speech and freedom of expression. If the Court accepted this argument, it might have been entitled to refuse to enforce the plaintiff’s claim in New Zealand on the ground that it contravened fundamental New Zealand public policy (see eg *Cheshire and North’s Private International Law*, 13 ed, 1999, Butterworths, London, at 126 (coercion), 128 (freedom of speech)).

Secondly, and more compellingly, the Court might have refused to entertain the plaintiff’s claim on the ground that it involved the indirect enforcement of a foreign public law. New Zealand courts do not have jurisdiction to enforce directly or indirectly the revenue, penal or other public laws of a foreign country: see *Attorney-General for the UK v Wellington Newspapers Ltd* [1988] 1 NZLR 129 (CA) (“*Spycatcher*”); L Barnard, “Enforcement of Foreign Judgments” [1996] NZLJ 227, 228-229.

In *Spycatcher*, the Court of Appeal acknowledged the existence and effect of the foreign public law exclusionary rule. The Court, however, preferred to characterise the Crown’s cause of action in that case as being founded on an independent private law relationship of confidence rather than the relevant foreign public law, as this would allow the New Zealand courts to assist friendly foreign sovereigns to safeguard their security. The Court in *Spycatcher* therefore held that the plaintiff’s claim was not barred by the foreign public law exclusionary rule.

The present case, however, is distinguishable from *Spycatcher*. Although the plaintiff's claim is framed in breach of contract and might therefore seem susceptible to characterisation as a private law obligation, this characterisation cannot be sustained when the context of the confidentiality contracts is taken into account. The Defence Council Instruction and regimental orders, as discussed above, clearly amount to public acts of state. They prescribe in detail who is required to sign the confidentiality contracts, the standard terms of the contracts, and the sanction for non-compliance (paras 28-29 of the judgment). The confidentiality contracts themselves add nothing substantive to the Ministry's order, and amount to nothing more than an enforcement mechanism, the private law form of which may well have been strategically crafted with the foreign public law exclusionary rule and the *Spycatcher* litigation in mind.

Taking into account the nature of the legal relationship between the Crown and R, and more importantly the Ministry of Defence's powers to terminate summarily and unilaterally R's service in the Special Forces, the better view is that the plaintiff's claim necessarily involves an assertion of sovereign rights, rather than merely "acts that may be done not only by the King but also by anyone else" (*Spycatcher* at 174). As such, the plaintiff's claim should have been barred by the foreign public law exclusionary rule.

R's Consent to the Contract

The second aspect of the decision which we discuss is that of R's consent to the contract. Salmon J applied English law in holding that the confidentiality contract was defective, having been obtained both by duress and by actual undue influence. There was, however, no presumed undue influence, nor was the contract an unconscionable bargain.

Salmon J's broad-brush application of English law as the proper law of the contract to "all matters to do with the contract and its validity" (para 98), including undue influence and unconscionable bargain, is interesting. The Anglo-Common Law conflicts authorities on point suggest that, express trusts aside, equitable issues are governed by the *lex fori*. Although the *lex fori* approach has been criticised by

academic commentators, it has been reaffirmed quite recently by the Federal Court of Australia in *Paramasivam v Flynn* (1998) 160 ALR 203. With respect, Salmon J's approach of determining all issues directly connected to the contractual claim by reference to the proper law of the contract is to be preferred in terms of logic, simplicity and consistency of result. Given that this issue is controversial, however, it is surprising that it was not discussed in any detail.

We are mindful of the fact that Salmon J's application of English law to decide these issues was constrained by the general rules regarding proof of foreign law. As the Court of Appeal has recently reiterated in *Bilgola Enterprises Ltd v Dymocks Franchise Systems (NSW) Pty Ltd* [2000] 3 NZLR 169, 176, proof of foreign law is a question of fact to be determined by reliance on expert evidence, rather than on authorities proffered by counsel. Section 40 of the Evidence Act 1908, which allows reference to foreign statutory material, law reports and textbooks, "does not appear to permit a Judge to decide a question of foreign law from his or her own studies or research, nor to engage in the development of existing and established law of another state". These rules do not, however, preclude the court from exercising its inherent skills of logical analysis and construction in matters relating to foreign law, or from forming an independent assessment of the written material on which the expert evidence is based. The comments which follow are based on a reading of Salmon J's judgment alone, as the expert evidence and counsels' submissions were not available to us. We nonetheless believe that it is important to analyse the consideration of English law in this judgment because of its potential influence on future developments.

Duress

R alleged duress to the person, and/or economic duress, founded upon the (unlawful) order to sign the contract, the threat (if he did not sign) of exclusion from the SAS and return to his regular army unit, and the circumstances of the signing (a "tight framework"; "emotive circumstances"; refusal to allow R to read the contract in advance, or to obtain legal advice, or to retain a copy after signing – paras 99-100 of the judgment).

The pleadings confused the issue of duress. Duress is a coherent and single doctrine, as recent developments have shown. It is limited neither to historical categories (eg duress to the person), nor to the protection of certain interests (eg a person's economic interests). Its coherence is found, as will be demonstrated herein, in the fact that it is concerned with the effect of pressure on the legitimacy of a person's consent to a transaction. Here, the issue was thus simply whether R's apparent consent to the confidentiality contract (because he signed it) was given voluntarily.

The pleadings caused Salmon J to make a separate finding that there was no duress to the person (because R did not sign the confidentiality contract on account of threats of violence or imprisonment – para 108). The pleading of economic duress appears to have suggested to Salmon J that economic duress was a separate doctrine of duress (see para 111), requiring threats to “economic interests”. At paragraph 113, his Honour concluded that the pressure allegedly applied to R was economic pressure “because it is directed at [R's] income and his professional status as an elite as opposed to ordinary soldier”. A separate finding of this type is unnecessary, because the matter is one only of the existence of pressure, which is properly taken up by the notion of “illegitimate pressure”.

At paragraphs 109 and 112, Salmon J set out the basis upon which he later proceeded to find in favour of R that he had been economically pressured: “It is now accepted that duress rests not upon an absence of consent, but on the application of pressure so as to bring about an absence of practical choice. ...The test for duress, of whatever type, involves two questions: [a] Did the pressure bring about an absence of practical choice? [b] Is the pressure illegitimate?” The authority which his Honour cited to support his formulation of the “test” was *Universe Tankships [sic] of Monrovia v International Transport Workers Federation* [1983] 1 AC 366, 400. However, what Lord Scarman actually said at p 400 was that there needed to be “pressure amounting to compulsion of the will of the victim”. His Lordship continued: “There must be pressure, the practical effect of which is compulsion or the absence of choice. Compulsion is variously described in the authorities as coercion or the vitiation of consent. The classic case of duress is, however, not the lack of will to submit but the victim's intentional submission arising from the realisation that there is

no other practical choice open to him.” As is clear, Salmon J re-interpreted the test set down by Lord Scarman. This is problematic, as we will demonstrate.

In *Universe Tankships* Lord Diplock said (at p 384) that the rationale of duress was that a person’s “apparent consent was induced by pressure exercised upon him by that other party which the law does not regard as legitimate”. Accordingly, while it might be correct to suggest that duress is not about an absence of consent if by that it is meant that it is not based upon an overbearing of a party’s will, the statement is fundamentally misleading if it is understood to exclude reference to consent altogether. The core of the coherent and single doctrine of duress is the *effect* which the pressure exerted brings to bear on the quality of the consent of the party pressured. It is therefore a doctrine about a defect in a party’s *actual* consent; therefore, it is about the absence of (legitimate) consent! It is essential to keep to the forefront this fundamental justification for providing relief, in assessing whether in any case relief will actually be granted.

The first matter therefore is to identify the extent to which a party’s consent must be affected by the pressure before the pressure constitutes duress. Some pressure is to be expected, as part and parcel of daily life. A person’s consent is often affected by pressure. But pressure becomes unacceptable when it is “illegitimate”. What does this mean? Early cases toyed with simply equating legitimacy with lawfulness, but as Salmon J correctly recognised (para 115), lawfulness cannot be a definitive criteria, merely a helpful one.

In fact, an examination of the recent cases indicates that the factor most often relied upon to identify illegitimate pressure is the effect of the pressure in depriving one party of any reasonable alternative but to submit to the other’s demands. Salmon J articulated this not as a potential factor for determining illegitimacy, but as a separate stand alone requirement, which he did not however directly address thereafter (although there was some reference to R’s lack of choice at para 106). It is, with respect, both dangerous and unprecedented, to promote “absence of practical choice” as a separate requirement. It is not clear what it means, or how it relates to the more established expression “no reasonable alternative” (see, eg, *B & S Contracts and Design Ltd v Victor Green Publications Ltd* [1984] 1CR 419, and discussion in

Grantham and Rickett, *Enrichment and Restitution in New Zealand*, 2000, Hart, Oxford, 193-196). Further, it may work to constrain the reach of duress. A party may well still have a practical choice available, but be pressured in such a way that the quality of his or her consent can be said to have been affected by duress. This is exactly the point Lord Scarman was making in *Universe Tankships*.

In deciding whether the pressure applied to R – which Salmon J said consisted of “a military order accompanied by threats” (para 114) – was illegitimate, his Honour adopted the approach advocated by Steyn LJ, as he then was, in *CTN Cash and Carry [sic] Ltd v Gallaher Ltd* [1994] 4 All ER 714, 717, which was “to focus on the distinctive features of [the] case” (para 116). Somewhat surprisingly, however, Salmon J then simply applied the distinctive features identified in the *CTN* case as if they comprised a check list, without any assessment whether they were appropriate to the case of *R* itself, or whether there were other distinctive features of *R*.

First, Salmon J held that the relationship between R and his superiors pointed “toward the pressure being illegitimate” (para 117), because a soldier was subject to the coercive nature of the orders of a superior. This is, with respect, an extraordinary statement. By its very nature, the soldier-superior relationship is one where a high degree of pressure is to be expected. In that respect, the assumption should be that the pressure identified (an order backed by threats of consequences for failure to obey) is *prima facie* legitimate!

Second, Salmon J held that “the illegality of the order is another factor which points towards the illegitimacy of the pressure” (para 118). As discussed above, the finding that the Ministry’s order was unlawful is problematic in terms of the foreign act of state doctrine and this must throw this later finding into question too.

Third, Salmon J held that the British Government was not exercising pressure in good faith, in that it “used a combination of lawful and unlawful pressure to get that which it should have known it had no legal entitlement to” (para 119). Again, this finding seems to be based on the incorrect assumption that the Court was entitled to challenge the lawfulness of the Ministry’s order.

As to causation, Salmon J determined that the order given to R to sign the confidentiality contract “was an effective cause of the signing of the contract” (para 124), in that R “would not have signed had he not been ordered to do so” (para 122). At face value, this appears to be a factual causation requirement. However, given Salmon J’s earlier emphasis on “absence of practical choice”, it is worth noting that there is a potential link between that requirement, if such it be, and causation. If there is a practical choice, it may be thought that the party ought to have taken the other path, and that his or her failure to do so means that causation will not be established (being a normative rather than factual criterion). This is deeply problematic (see Grantham and Rickett, above, p 202), which is another reason for avoiding Salmon J’s promotion of “absence of practical choice” to the status of a separate requirement.

Undue Influence

In analysing R’s undue influence claim, Salmon J adopted the classical distinction between actual and presumed undue influence. That is understandable, but it should be recognised that that distinction may not be the best way to expose the various dimensions of the cases which have built up the law of undue influence. The core notion of the concept of undue influence is the impact which the existence of certain types of relationship have, or a particular relationship has, upon the legitimacy of a transaction between the parties to that relationship. It is thus a “relational” concept. And within that relational concept there are the vast majority of cases where a presumption is supplied by the law that the transaction between parties to the relationship is caused by the influence which that relationship gives rise to. In some cases the law says that once a relationship of this or that type exists (eg, solicitor and client, or medical adviser and patient), the presumption is applied immediately. This class of relationships is probably closed off today. In other cases, the law provides the presumption once the relationship in existence is shown to be one in which one party places trust and confidence in the other. So a wife must prove such a relationship with her husband, before she can avail herself of the presumption. She cannot say simply “I am a wife”, as a solicitor’s client can say “I am a client”. She must say, “I am a wife in a relationship of trust and confidence”, and establish the truth of that on the evidence, and only then she can avail herself of the presumption. That is the manner in which presumptive relational undue influence works. All

presumptive undue influence must be relational. But not all relational undue influence is necessarily presumptive. There can be relational actual undue influence. This is shown by the legitimate claim made in *Bank of Commerce and Credit International SA v Aboody* [1990] 1 QB 923, 967-969, that the wife was subject to *actual* undue influence by her husband (even though the husband's activities did not amount to improper pressure). Cases of relational actual undue influence will likely be very rare (although, interestingly as will be seen below, R's case seems to have been interpreted thus by Salmon J). But it is important to note that in such a case, the plaintiff must prove not only that the relationship in question is one of trust and confidence but also that the transaction was caused by the exercise of the influence in the relationship. There is no recourse to a presumption of causation.

Immediately, it can be seen that the division between actual and presumed undue influence is problematic. This becomes even more so when it is appreciated that most cases decided under the rubric "actual undue influence" have nothing to do with a relationship. Their focus is the transaction in question, and the charge is that that transaction was procured by the exercise of pressure by one party on the other. They are cases of transactional pressure. The application of pressure by one party to the other, which pressure was a cause of entering into of the transaction, must be established. Presumptions are irrelevant, precisely because the "relationship" between the parties is not relevant.

Having thus shown that there is no one coherent doctrine of undue influence, but rather two very different doctrines, one relational, the other transactional, it does not follow, however, that both doctrines are not fundamentally concerned with the matter of vitiation of consensual capacity of the unduly influenced party. Indeed, the better view is that they are (see Grantham and Rickett, above, Chaps 7 and 9).

This analysis throws into sharp relief the conceptual view articulated by Salmon J (para 128): "The doctrine of undue influence may be seen as the equitable counterpart of the common law of duress. The basis of the doctrine is that no person should be allowed to retain the benefit of his own fraud or wrongful act. Equity acts upon the conscience of the donee, rather than on the want of true consent on the part of the donor. For this reason cases of undue influence will not always correspond

with duress.” Several comments are called for. First, if pressure characterises duress, then *only* transactional actual undue influence exists as a counterpart of duress. Second, most cases of undue influence are relational, and depend upon a presumption of causation. It is quite misleading to regard them as cases of fraud or wrongdoing by the presumptively influencing party (see further Rickett and McLauchlan, “Undue Influence, Financiers and Third Parties: A Doctrine in Transition or the Emergence of a New Doctrine?” [1995] NZ Law Rev 328, 349-350). Third, equity’s concern in relational cases is with a loss of autonomy by the donor, brought about by an excessive or exceptional degree of dependence within the relevant relationship. Its concern is not with the conscience of the donee. Even in transactional actual undue influence, where pressure is of the essence, it is the affect of that pressure – the loss of autonomy by the exercise of pressure beyond that which is generally acceptable – which is the proper focus.

Having set out an incorrect basis for understanding undue influence, Salmon J then made several further misleading suggestions. To begin with, in examining whether there was a relationship in which undue influence would be presumed, his earlier reference to the donee as a wrongdoer caused him to suggest, first, that in order for a presumption of undue influence to arise there had to be both a relationship of “special character” and “victimisation of one party by the other” (para 130). The proffered “victimisation” requirement is simply a heresy. The authority his Honour relied on, a comment by Nourse LJ in *Goldsworthy v Brickell* [1987] Ch 378, 401, makes no reference whatever to the donee’s activity! Further, his Honour’s linking of the manifest disadvantage requirement with victimisation is illegitimate, given the role of the former, to which we return herein.

A second point of concern is Salmon J’s finding that the relationship between R and his military superiors, while (correctly) not an established category of relationship of undue influence, was nonetheless “a relationship of trust and confidence on the facts” (para 131). His Honour’s statement, in paragraph 132, of the basis for this finding reads as anything but a decision on the facts. It reads as if a new established category of relationship is being set up. “Counsel for the defendant points out correctly that the nature of the command structure within the armed forces makes it essential that orders fall within the ambit of the issuer’s authority. Soldiers are

trained to follow orders, not to question them. Therefore, a soldier will normally repose trust and confidence in his superior officers ...[T]he effective functioning of an army ... depends upon soldiers trusting their superiors to command them properly and lawfully. In my view, the relationship between enlisted soldier and superior officers is such that the latter necessarily occupies a position of ascendancy, power and domination over the former who in turn takes a position of dependence and subjection.” This is not about R and his superiors. This is about soldiers and their superiors in general. It is suspect reasoning.

R failed in his presumed undue influence argument because Salmon J held that he did not establish that the confidentiality contract was to his “manifest disadvantage”, which his Honour took as a separate and necessary requirement. Given that English law was being applied, his Honour unfortunately appears not to have had drawn to his attention recent English authorities on “manifest disadvantage” in presumed undue influence. These authorities appear to distance its status as a necessary requirement, or to minimise severely its content. In *Royal Bank of Scotland v Etridge (No 2)* [1998] 4 All ER 705, 713-714, the role of manifest disadvantage was interpreted as being “a powerful evidential factor”. Stuart-Smith LJ stated (emphasis added): “The fact that a transaction is manifestly disadvantageous to one of the parties ... it *assists* the complainant in establishing her claim against the wrongdoer [the influencer] in a case of presumed undue influence”. In *Barclays Bank plc v Coleman* [2001] QB 20 (decided and reported well before the hearing in *R*) the Court of Appeal seriously questioned the future existence of a requirement of manifest disadvantage even in cases of presumed undue influence. Nourse LJ re-examined Lord Scarman’s speech in *National Westminster Bank plc v Morgan* [1985] AC 686, and suggested that the requirement of manifest disadvantage was an original creation of the House, otherwise unsupported by English authority, and in large part caused by Lord Scarman’s reliance on Indian authority. Nourse LJ went on in any event to minimise the requirement (at 33): “So there must be a disadvantage and it must be clear and obvious. But that does not mean that it must be large or even medium-sized. Provided it is clear and obvious and more than *de minimis*, the disadvantage may be small.” Indeed, recent authority seems to be returning to the real purpose of arguing manifest disadvantage, which is to establish a link between the influence and the impugned transaction by ruling out other (innocent) explanations for the transaction.

That of course raises a question about its role in presumed undue influence cases at all, where the presumption is one of causation, whence the onus of proof shifts to the donee to show why the transaction in question was not caused by undue influence. The *lack* of manifest disadvantage may be a relevant factor in rebutting the presumption: see *Re Brocklehurst* [1978] Ch 14. Thus, were R legitimately, *on the facts*, to be held to be entitled to the presumption of undue influence as against the British Government, R's not having suffered manifest disadvantage in signing the confidentiality contract would aid the British Government in rebutting the presumption.

In fact, if the role of manifest disadvantage is to establish a link between the influence and the impugned transaction by ruling out other (innocent) explanations for the transaction, it may make more sense as a "requirement" in an *Aboody*-type case, where relational actual undue influence is pleaded, and there is no presumption of causation. Manifest disadvantage provides the causative link.

Salmon J found that actual undue influence was exerted on R. Here, his Honour's analysis appears to be founded in essence on relational actual undue influence. His Honour applied the "test" laid down in *Aboody*, which was a case of *relational actual undue influence*, where the requirement of one party's having the "capacity to influence" the other was understood as relationally focussed; hence, he suggested that capacity to influence was established by the same features, enlisted soldier and superior officers, as established a relationship of presumed undue influence. The influence was the issuing of an order, which influence was undue because the order was, in effect, beyond the realm of legitimate orders which could be issued in the context of the relationship. The order, Salmon J stated, caused the execution of the contract, and, further, manifest disadvantage was not required. Salmon J then stated that "the critical question ... is whether or not [R] was allowed to exercise an independent and informed judgment" (para 139), and his finding that R was not given the opportunity to exercise such a judgment is entirely coherent in the context of a claim that the contract was brought about by the influence arising out of the relationship between the parties.

Two comments can be made. First, his Honour's exclusion of manifest disadvantage was a consequence of the failure to distinguish two types of actual undue influence. As suggested above, a complete coverage of recent English authorities might have suggested to his Honour that manifest disadvantage has been rejected only in cases of direct pressure actual undue influence, where the focus on the effect of pressure (which can be said to be "fraud") means that the nature of the transaction is irrelevant to establishing a defect in the pressured party's consent. But in a case of influence, rather than pressure, manifest disadvantage helps to show that a particular transaction within a relationship where many transactions might occur was caused by "undue" influence. Salmon J's earlier finding that no manifest disadvantage existed for R ought to have been weighed here in the British Government's favour. Second, the issue of causation ought not to have been decided simply by appeal to the factors establishing causation for a claim in duress, which is a claim founded on pressure. The complaint in relational actual undue influence is not that the source of the influence is pressure. It is that the source of the influence is the relationship. This is very difficult to understand, and to sustain, but having started down a relational line it behoves the analyst to maintain a conceptual purity.

Salmon J did in fact have recourse to the concept of direct pressure actual undue influence as a fall back position. Indeed, it was difficult to see, having found duress, that he could have avoided such a conclusion. In direct pressure (or transactional) actual undue influence, the issue is simply whether threats of a physical, psychological or emotional nature, going beyond the degree of pressure which is acceptable (not gauged from the standpoint of a particular relationship of influence, but in general terms, as part and parcel of life in a modern society), caused R's execution of the contract. Salmon J concluded that R was "subjected to impermissible pressure to sign" (para 139). Once such pressure is found to have been applied, the next step is not "whether or not [R] was allowed to exercise an independent and informed judgment" (para 139), but whether or not R *did* exercise an independent and informed judgment even in the face of the illegitimate pressure. That issue was not expressly confronted.

Unconscionable Bargain

R also argued that the confidentiality contract was an unconscionable bargain, but Salmon J did not agree. As his Honour had earlier decided that all contractual issues were governed by English law, he was careful to confine his discussion to English developments, noting that there are potential differences between English and New Zealand law in this area. The modern doctrine of unconscionable bargain stems from equity's readiness to relieve a person of obligations incurred where that person was under a particular disadvantage that meant that he or she could not fend for himself or herself in dealings with others. The first requirement is that a person must suffer from a special disadvantage, and various "lists" have been offered as to what that might require. Salmon J held that R did suffer from a "bargaining weakness", in that he was "refus[ed] ... an opportunity to read the contract at leisure or to obtain independent legal advice" (para 143). This seems to be a finding of special disadvantage which was particularly favourable to R, beyond the type of case which equity originally had in mind. For example, in *Borg Warner Acceptance Corporation (Australia) Ltd v Diprose* [1988] ANZ Conv Rep 59, Cohen J usefully identified three classes of disability: (a) where the party cannot exercise judgment at all; (b) where the party needs assistance to exercise judgment; and (c) where care is needed by the second party to ensure that the first party is able to exercise judgment. Applying Cohen J's categories, Salmon J's finding appears at most to place R's case within class (c), and even here it is by no means clear that that is an appropriate case for the doctrine of unconscionable bargain. Indeed, in the English Court of Appeal's most recent analysis of the doctrine of unconscionable bargain, *Portman Building Society v Dusangh*, unreported, 19 April 2000 (decided some months before the hearing in *R*), Ward LJ said that "[i]t may be that the absence of legal advice is not so much an essential freestanding requirement, but rather a powerful factor confirming the suspicion of nefarious dealing which the presence of advice would serve to dispel". Salmon J's notion of a "refusal" to allow R to obtain advice or read the contract at leisure may not properly go to the matter of special disadvantage, but rather to the behaviour of the British Government. It is also difficult to square Salmon J's reference to the refusal of an opportunity to read the contract at leisure with his earlier finding dismissing R's claim "that he was given little time to consider and read the document" (para 101).

In any event, Salmon J held that the confidentiality contract was not “oppressive”, which he equated with no manifest disadvantage (para 142). This implies a freestanding requirement of substantive disadvantage for the doctrine to operate. This may be putting the matter too strongly. Earlier English cases did suggest a requirement of “oppressiveness” (see *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1983] 1 WLR 87 (HC); [1985] 1 WLR 173 (CA)), but consistently with the trend in respect of manifest disadvantage discussed above, there may be a change developing in English law in this respect. This would be quite consistent with a growing awareness that an important dimension of unconscionable bargain is that it is a doctrine concerned as much with the impaired judgmental capacity of one party as with wrongdoing by the other. (See *Portman Building Society*, above.)

Furthermore, in Australia, where the modern doctrine of unconscionable bargain is at its most sophisticated, substantive disadvantage is recognised as evidentially important in establishing knowledge by one party of the special disadvantage of the other, but not as a separate requirement: see *The Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 475; *Louth v Diprose* (1992) 175 CLR 621, 637. We are, as indicated above, not in a position to know whether the Australian cases on unconscionable bargain were cited to Salmon J as of relevance in assessing the substance of current English law.

This may then cause a re-think of what is perhaps the essential feature of the English law of unconscionable bargain, which Salmon J characterised as: “It must be shown that the [British Government] engaged in unconscionable conduct or an unconscientious use of power” (para 145). “Unconscionable conduct” is understood as morally reprehensible or wrong behaviour, or impropriety, or exploitation, or nefarious dealing (see *Portman Building Society*, above). Salmon J was not satisfied that the British Government met this “high test” (para 147). This is perhaps a little surprising given his Honour’s earlier readiness to find duress and impermissible pressure exercised by R’s superiors, and his Honour’s characterisation of R’s “bargaining weakness” as related in effect to the conduct of R’s superiors.

By this heavy focus on proof of overreaching or active victimisation of one party by the other, English law seems to regard unconscionable bargain as

fundamentally a species of wrongdoing. In general terms, in our view, this behoves a counsel of caution, as a result of the analyses of the antipodean courts. The doctrine really embraces two distinct themes – response on the one hand to concerns about impaired judgmental capacity, and on the other to wrongful behaviour. That is why Brennan J’s formulation of the doctrine in *Louth v Diprose*, above, at 626, reads as it does: “a relationship between the parties which, to the knowledge of the donee, places the donor at a special disadvantage vis-à-vis the donee; the donee’s unconscientious exploitation of the donor’s disadvantage; and the consequent overbearing of the will of the donor whereby the donor is unable to make a worthwhile judgment as to what is in his or her best interest.” So, exploitation is of a disadvantage which results in lack of worthwhile judgment. Too one-sided a focus on exploitation would distort the doctrine, because it is not about exploitation in the round!