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"You Can't Always Get What You Want" - When Lawful Actions Amount to Economic Duress

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What are the limits of commercial pressure that can be applied in a contractual relationship to get what you want?

This question has been considered by the English Courts in a number of recent decisions. They have looked at the limits of the doctrine of economic duress, a developing area of the law that has given rise to some uncertainty. Let us give you an overview of where things are at present.

In *Times Travel (UK) Ltd v Pakistan International Airlines Corporation* [2019] EWCA Civ 828, the Court of Appeal has sought to place the law in this area on a more stable footing. It disagreed with two recent first instances decisions which had applied, or advocated the application of, a wider notion of economic duress.

The Importance of the Enforceability of Contracts

English law places a great deal of importance on the enforceability of contracts. It goes without saying that for a contract to be enforceable, it must first have been validly made. The basic ingredients for a valid contract are of course 'offer and acceptance' leading to an agreement on all the essential terms, consideration, an intention to create legal relations - something that is generally found to exist in the commercial arena - and capacity or authority to bind the contracting party.

Setting Aside an Enforceable Contract

A party may have the right to set aside an enforceable contract. English law recognises few grounds on which an otherwise binding contract can be set aside or rescinded. A number of these grounds are fault-based. One example of a fault-based vitiating factor is fraudulent misrepresentation, where one party induces the other to enter into the contract in reliance on statements that it either knew to be false, or in respect of which it was reckless as to whether they were true. The law governing fraudulent misrepresentation is well-settled. Most businessmen would agree that a party who has been deceived as to the contract should have recourse against the fraudster. Parliament has enacted the Misrepresentation Act 1967, under which a contract can be rescinded if it was induced by negligent or even innocent misrepresentation, though the right to rescission can of course be lost (for example if the contract is affirmed, through delay in claiming the remedy, or where it is impossible to restore the parties to the position prior to the contract). A second example of a ground for rescission is unilateral mistake, where one party to the contract is mistaken about a fundamental matter affecting the bargain, and the other party is aware of this, but says nothing. These vitiating factors are not concerned with commercial pressure or the unfairness of the transaction.

Equity views some transactions as unconscionable and will set them aside because impermissible pressure has been brought to bear on a contracting party. The operation of this equitable doctrine, sometimes referred to as 'undue influence' depends on the abuse of a relationship of trust and confidence between the parties (such as doctor and patient, solicitor and client, or husband and wife), or the exploitation of a particular vulnerability affecting a party. Equity assists because a vulnerable party has been taken advantage of, but it will not lend assistance where a party has merely made a bad, or even terrible, bargain.

In *Boustany v Pigott* [1993] UKPC 17, the Privy Council confirmed that equity will not intervene because a bargain is "*hard, unreasonable or foolish*", or where there was "*unequal bargaining power*" or the terms of the contract were "*objectively unreasonable*".

The Development of 'Economic Duress'

The position at common law is generally the same: inequality of bargain power, or the exploitation of a monopoly are not grounds for setting aside contracts. However, uncertainty has been introduced by the way in which the common law doctrine of economic duress has developed over the last two or three decades. In *Times Travel*, the Court of Appeal noted that:

> *"It is now well-established that a contract may be avoided on the grounds of economic duress, although its scope remains uncertain. This appeal concerns the area of perhaps the greatest uncertainty, that of lawful act duress, where a contract results from a threat of a lawful act or omission. Does lawful act duress exist at all and, if so, in what circumstances may it be invoked?"*

Historically, contracts could be set aside for duress only if they were made under threats of physical violence. As the law developed, this was extended to unlawful threats made against property. In the late 1970s, the English courts at first instance began to accept that a contract might be voidable if made under compulsion which did not take the form of physical threats, or threats to property. In *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705, the defendant had threatened to terminate a shipbuilding contract unlawfully unless the claimant agreed to pay a higher price for the vessel, which it eventually agreed to pay. The claimant would have succeeded in establishing economic duress, setting the agreement aside on that basis, had it not subsequently affirmed the contract after the effects of the economic pressure had ceased, thus losing the right to rescind. In these early decisions, the threats that amounted to duress were unlawful in nature – such as threatening to simply break the contract (in the *Hyundai* case) or, to give another example, making fraudulent statements as to a party's financial inability to continue performing the contract unless it were given a better deal.

The House of Lords Reviews the Doctrine (*Universe Tankships*)

The House of Lords considered the still emergent doctrine of economic duress in *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] AC 366. This was an industrial relations case. Members of a trade union demanded payment from shipowners, threatening that they would otherwise see to it that tug services were withheld, leaving the vessel stranded in the port. Some of these threats fell outside of the statutory immunity afforded to trade unions by industrial relations legislation at the time. The House of Lords held that the agreement to pay for the release of the vessel made following such unprotected threats had been procured by economic duress. Again, the conduct in question was unlawful: it was a threat to commit the somewhat arcane tort of 'inducing port workers to break their contracts of employment'.

In *Universe Tankships*, their Lordships explained the rationale underlying economic duress as follows: where a party's consent to enter into a contract was the result of illegitimate pressure being brought to bear by the counterparty, the law ought to provide redress. The House of Lords proceeded on the basis that economic or commercial pressure could, in principle, be illegitimate if it left a party without any practical choice or alternative. On the facts, the defendant had conceded that its actions amounted to economic duress and had relied on statutory immunity as its only defence. Even though the House of Lords did not, therefore, need to decide the precise ambit of economic duress, Lord Diplock seems to have taken the view that commercial pressure which

amounted to a coercion of the will of the other party had to be justified in order to be legitimate, thus seemingly putting the burden of proof on the 'stronger' party. He said:

> *"Commercial pressure, in some degree, exists wherever one party to a commercial transaction is in a stronger bargaining position than the other party. It is not, however, in my view, necessary, nor would it be appropriate in the instant appeal, to enter into the general question of the kinds of circumstances, if any, in which commercial pressure, even though it amounts to a coercion of the will of a party in the weaker bargaining position, may be treated as legitimate and, accordingly, as not giving rise to any legal right of redress."*

Lord Scarman, in a speech that has been influential in subsequent decisions, noted that whether there was illegitimate pressure had to be determined by considering two elements. The first element was the nature of the pressure, or the threat, and the second was the demand being made. If the threat is unlawful, a court might find illegitimate conduct without more. His Lordship recognised, however, that threats may well relate to actions that are perfectly lawful. As Lord Atkin said in *Thorne v Motor Trade Association* [1937] AC 797, 806:

> *"The ordinary blackmailer normally threatens to do what he has a perfect right to do – namely, communicate some compromising conduct to a person whose knowledge is likely to affect the person threatened. Often indeed he has not only the right but also the duty to make the disclosure, as of a felony, to the competent authorities. What he has to justify is not the threat, but the demand of money."*

That also applies to the 'ordinary' party engaging in economic duress. If lawful actions are being threatened, Lord Scarman's enquiry moves on to the second element - the demands. This immediately raises the question of what benchmark should be applied when judging the legitimacy of the demands. Do they have to be extravagant, extortionate or perhaps merely objectively unreasonable? Does it matter that the person making the demands believes that it was in the right?

The Court of Appeal Considers 'Lawful Act' Economic Duress (*Gallagher*)

Further guidance at the appellate level was not given until some eleven years later, when the Court of Appeal decided *CTN Cash and Carry Ltd v Gallagher Ltd* [1994] 4 All ER 714. Gallagher sold its well-known brands of cigarettes to the claimant and provided a credit facility for all such purchases. A consignment of cigarettes was stolen before it reached the claimant's store. Gallagher considered that risk had already passed to the claimant when the goods were stolen and pressed for payment. The claimant declined to pay. Gallagher withdrew its credit facility and demanded payment before reinstating it. This was not a breach of contract, as there was no ongoing obligation on Gallagher to provide credit for future purchases. The claimant reluctantly paid the invoice for the stolen goods but then commenced proceedings to recover that payment on the grounds of economic duress.

The Court of Appeal rejected the claim. Gallagher had applied commercial pressure to recover a payment which it had believed, in good faith, to be due to it. There was no breach of contract. The Court declined to extend the doctrine of economic duress to pressure applied through lawful acts, where the party making the demand honestly believed that it had an entitlement. The Court of Appeal noted that Gallagher's counsel had advised it that there was a good chance of the invoice being payable despite the theft, such that the demand had been reasonable in the circumstances. Steyn LJ (as he then was) commented that:

> *"We are being asked to extend the categories of duress of which the law will take cognisance. That is not necessarily objectionable, but it seems to me that an extension capable of covering the present*

> *case, involving 'lawful act duress' in a commercial context in pursuit of a bona fide claim, would be a radical one with far-reaching implications. It would introduce a substantial and undesirable element of uncertainty in the commercial bargaining process. Moreover, it will often enable bona fide settled accounts to be reopened when parties to commercial dealings fall out."*

The Court of Appeal considered it inappropriate for the law of contract to set too high a standard when considering whether conduct was morally or socially unacceptable, as opposed to unlawful, but it did not quite say that the law of contract had no business asking that question in the first place. The Court of Appeal concluded by noting that in a purely commercial context, it might be rare to establish 'lawful act' economic duress, and perhaps rarer still to succeed if the party making the demand believed in good faith that it was entitled to what it is asking for. However, Steyn LJ added that "… *In this complex and changing branch of the law I deliberately refrain from saying 'never'*", thus leaving the door open.

Two Further Illustrations of What Is, and Is Not, Economic Duress

In *DSND Subsea v Petroleum Geo Services* [2000] EWHC 185, Dyson J (as he then was) considered a case where the allegedly illegitimate pressure consisted of a refusal to perform under an existing contract. The case concerned the operation of a floating production, storage and offloading vessel ("FPSO") that would be deployed to serve a North Sea oil and gas field. The claimants had taken on operational responsibility for the FPSO under a contract with a major oil company. They entered into a subcontract with the defendants for subsea works, as regards the connection of the FPSO to the wellhead by means of flexible cables, or 'risers'. The project was beset by technical difficulties and delays, including delays to the arrival of the FPSO at the wellhead location and problems with the final design of the risers. The defendants had no responsibility for either of those things. Faced with the delays, the parties agreed that the risers would be connected only to the wellhead and be left on the sea bed pending arrival of the FPSO. Once the FPSO had arrived, the other ends of the cables would then be taken up by the defendant's vessel and be connected to the FPSO's turret.

The defendant considered that this method of working entitled it to additional compensation. It was also concerned about the final design of the riser-turret interface, which would form the connection with the FPSO. There was no certification for the design, which had been changed during the project, and the defendant felt that it might not be installable at all. The defendant wanted assurances from the claimant that, if something went wrong during installation, the defendant would be given the benefit of the claimant's indemnity insurance and was not warranting that installation was in fact possible. Against that background, both parties engaged in negotiations. An amendment to their existing contract was tabled. That amendment would deal both with the insurance or liability concern, and with the additional payment that the defendant was asking for, over and above the subcontract price. Matters came to a head when the defendant declined to proceed with some of the work unless the amendment was agreed, purportedly suspending the contract in part even though it had no such right under the existing agreement. The commercial terms that were agreed following suspension favoured the defendants. With the amendment in place, the defendant went offshore and commenced the work. Further difficulties and disagreements then arose. The claimants terminated the contract and the matter went to court.

One issue before Dyson J was whether the claimants had entered into the amendment under duress. At the time, the claimants had faced considerable liability in liquidated damages to the oil company. They needed the risers installed as soon as possible. They argued that they depended entirely on the defendants to achieve that. The claimants also relied on the fact that the defendants had breached the contract by 'suspending' performance – an unlawful act, and therefore perhaps enough to amount to illegitimate pressure. Dyson J summarised the law of economic duress as follows:

> *"The ingredients of actionable duress are that there must be pressure, (a) whose practical effect is that there is compulsion on, or a lack of practical choice for, the victim, (b) which is illegitimate, and (c) which is a significant cause inducing the claimant to enter into the contract: …*
>
> *In determining whether there has been illegitimate pressure, the court takes into account a range of factors. These include whether there has been an actual or threatened breach of contract; whether the person allegedly exerting the pressure has acted in good or bad faith; whether the victim had any realistic practical alternative but to submit to the pressure; whether the victim protested at the time; and whether he affirmed and sought to rely on the contract. These are all relevant factors. Illegitimate pressure must be distinguished from the rough and tumble of the pressures of normal commercial bargaining."*

On the facts, Dyson J found that there was no duress. The defendants had committed a breach of contract as they had no right to suspend any part of the work, and they had made demands. However, Dyson J felt that the breach of contract was excusable. The suspension had related only to work in respect of which the defendants had well-founded and reasonable (as Dyson J found) insurance concerns. He found that a breach of contract could not have been illegitimate pressure on the facts because it was "… *reasonable behaviour by a contractor acting bona fide in a very difficult situation*." If, on the other hand, the defendants had simply told the claimants that they would cease performing any part of their scope of work until additional payment had been agreed, then Dyson J might have reached a different conclusion: such a refusal would have been a "*flagrant*" breach and could have amounted to illegitimate pressure.

Another factor that influenced Dyson J in finding that there was no duress was the absence of any complaints by the claimants that they were being forced to enter into the amendment. The claimant's lead negotiator had not looked for alternative vessels or other contractors who could do the job. Instead, he had continued to negotiate with the defendants and agreed terms which, admittedly, were more beneficial for the defendants. Having done that, he went to a celebratory dinner with the defendants. This was simply not consistent with the claimant's suggestion that there had been economic duress.

In contrast, Dyson J did find that a settlement agreement had been entered into under economic duress in *Carillion Construction Ltd v Felix (UK) Ltd* [2001] BLR 1. Carillion's cladding subcontractor Felix was in delay and had made claims for additional payment under the subcontract. Felix then threatened to withhold deliveries of bespoke cladding which Carillion needed to finish the work, unless Felix's final account was agreed with an additional £3.2 million to be paid by Carillion. Carillion entered into a settlement agreement and paid the sums demanded, but then applied to the court to have that settlement agreement set aside on the grounds of economic duress. Dyson J found that the threat to withhold deliveries was a clear breach of contract, and that Felix had not mistakenly, but genuinely, believed that it a had right to insist of agreeing the final account before completing the works. Carillion stood no chance of procuring the bespoke cladding it needed from someone else in time for Carillion to meet the completion date under the main contract with the employer.

The high-water mark (*Al Nehayan* and *Times Travel* at first instance)

In both *DSND Subsea and Carillion*, the defendant's own state of mind, looked at subjectively, settled the question. That should be contrasted with *Al Nehayan v Kent* [2018] EWHC 333, where Leggatt LJ (handing down a first instance judgment after having been made a Lord Justice of Appeal) proposed considering the legitimacy, or propriety, of the defendant's demands objectively. He felt that the defendant's own view, even if honestly held, of whether its actions were justified should not be determinative. He considered that in principle, conduct that was both lawful and based on a genuine belief that it was justified could amount to economic

duress, if it was sufficiently egregious and fell short of standards that were to be independently applied by the courts:

> *"… it is appropriate to take account of the legitimacy of the demand and to judge the propriety of the defendant's conduct by reference not simply to what is lawful but to basic minimum standards of acceptable behaviour. To the complaint that this makes the law uncertain, I would give two replies. First, as the authorities have emphasised, the standard of unconscionability is a high one and it is only in cases where the demand made and means used to reinforce it are completely indefensible that the courts will intervene. Second, no apology is needed for intervening in such cases, as the enforcement of basic norms of commerce and of fair and honest dealing is an essential function of a system of commercial law."*

The judge also noted that a finding of duress was not precluded where the affected party had independently and rationally considered whether to enter into the contract, or had taken legal advice. What mattered was whether the illegitimate pressure had caused the party to enter into the contract: independent and rational thought, or legal advice, cannot relieve that pressure or offer the affected party a practical alternative.

Leggatt LJ decided *Al Nehayan* after the first instance judgment in *Times Travel*, in which Warren J (as will be seen) found that economic duress was established where the defendant's actions were lawful, and not in bad faith. Leggatt LJ approved of that decision. He also cited with approval a passage from Chitty on Contracts, suggesting that:

> *"… there can be no doubt that even a threat to commit what would otherwise be a perfectly lawful act may be improper if the threat is coupled with a demand which goes substantially beyond what is normal or legitimate in commercial arrangements."*

Leggatt felt that this statement could be improved upon. He proposed a new test for establishing economic duress, which was in effect an objective version of the offence of blackmail:

> *"… a demand coupled with a threat to commit a lawful act will be regarded as illegitimate if (a) the defendant has no reasonable grounds for making the demand and (b) the threat would not be considered by reasonable and honest people to be a proper means of reinforcing the demand."*

Al Nehayan and the first instance decision in *Times Travel* represented, it is suggested, the high water mark of the law of economic duress.

***Times Travel* – the Facts**

Times Travel was a family-owned travel agency based in Birmingham. Its business depended on the sale of airline tickets to Pakistan. Its customer base comprised of members of the Pakistani community. At the relevant time, Pakistan International Airlines ("**PIA**") had a monopoly on such tickets, being the only carrier operating directing flights from the United Kingdom to Pakistan. Put simply, without being able to sell PIA tickets, Times Travel would have gone out of business.

In 2008, Times Travel was appointed an IATA-authorised agent for the sale of tickets issued by PIA. It also entered into agency contracts with PIA. These contractual arrangements were identical to those between PIA and all its other authorised agents in the United Kingdom. The question of how much commission was payable by PIA to its authorised agents under these terms became contentious. A number of agents made claims

against PIA for unpaid commission. These claimants formed a trade association, the Association of Pakistan Travel Agents "(**APTA**"), to represent their interests. Times Travel considered that it, too, was owed commission. Throughout 2009 and 2010, Times Travel regularly chased PIA for payment. PIA reassured Times Travel that a solution would be found. PIA also recommended that Times Travel should not join APTA, a recommendation which Times Travel heeded.

In 2011, APTA members commenced legal proceedings against PIA. Times Travel did not join that action. In 2012, PIA gave notice of termination to all of its agents in the United Kingdom, including Times Travel. The agency contracts entitled PIA to terminate at any time, on one month's notice. Following termination, Times Travel's allocation of PIA tickets was reduced so significantly that the company faced financial ruin unless the agency relationship with PIA could be renewed. PIA did offer new terms to Times Travel, as it did to all other agents in the United Kingdom. It outlined those new terms at the same time as it gave notice of termination, on a 'take it or leave it' basis. Importantly, PIA's proposed new terms required the agents to waive any and all prior claims for commission. The new terms were also financially less attractive for agents than the previous arrangements. Times Travel signed the new agreement with PIA, giving up all of its accrued claims against PIA (as did all other agents who signed up). PIA had previously shown Times Travel a draft of the document at a meeting, but declined to let Times Travel have a copy to take away with it and obtain legal advice. With the new agreement in place, Times Travel's allocation of PIA tickets was restored to what it had been previously.

***Times Travel* – Judgment at First instance**

Ultimately, Times Travel felt compelled to take matters to court. It claimed unpaid commission and other amounts due to it under the old agency agreements, of about £1.5 million, arguing that the new agreement, and the release of prior claims it contained, were not binding on three grounds: misrepresentation, unfairness under the Unfair Contract Terms Act 1977 ("**UCTA**"), and because it was procured by economic duress. At trial, Times Travel gave evidence that it did not want to enter into the new agreement, but felt it had no choice but to do so anyway. Warren J found that the company had been entirely dependent on PIA for its continuing survival, and could not have found other business within the necessary timeframe. He rejected the misrepresentation claim and the challenge under UCTA.

The learned judge did, however, find that the new agreement was voidable by Times Travel because it had been entered into under economic duress. The crucial point was whether PIA had exerted illegitimate pressure. PIA had the right to terminate the old agency agreements with Times Travel, and had thus not acted in breach of contract or otherwise unlawfully. Nonetheless, Warren J found that this lawful action amounted to economic duress. Like Leggatt LJ, he cited the statement in Chitty, that lawful conduct can be illegitimate pressure in the eyes of the law if it involves "… *a demand which goes substantially beyond what is normal or legitimate in commercial arrangements*."

Warren J decided that PIA's actions, although lawful, had crossed that line. He found that some of Time Travel's claims to outstanding commission were very strong, such that summary judgment would have been given in its favour. PIA's refusal to pay the relevant amounts was, in the judge's view, a breach of contract. Warren J also considered that PIA's notice of termination, accompanied by the demand to sign the new agreement under which all prior claims would have been released was a threat. In fact, it was more than a threat, because if Times Travel and the other agents did not comply, then their agency would automatically terminate 30 days after service of that notice – spelling disaster for Times Travel. He concluded that PIA's whole purpose of terminating the existing arrangements was to procure a release of the claims against it. PIA had never really intended to sever its commercial relationship with the agents, including Times Travel, whom they wanted to continue selling tickets. By imposing a deadline of 30 days to sign up to the new arrangement, PIA also failed to

give the agents sufficient time to adjust their business, or acquire some of their remaining ticket allocations from PIA for cash (perhaps to tide them over until new and better terms could be worked out). Warren J considered that the benefits offered by the new agreement, which were limited to compensation for future services, were inadequate compensation for the accrued rights which Times Travel and the other agents had to give up. In so doing, he assessed the legitimacy or 'commercial reasonableness' or PIA's demand objectively.

***Times Travel* - Court of Appeal Reins in Economic Duress**

The Court of Appeal allowed PIA's appeal. David Richards LJ reviewed the development of the doctrine of economic duress. His conclusion was that the:

> *"… doctrine of lawful act duress does not extend to the use of lawful pressure to achieve a result to which the person exercising pressure believes in good faith it is entitled, and that is so whether or not, objectively speaking, it has reasonable grounds for that belief."*

He stressed that the common law did not impose any general duties on commercial parties as to how they should exercise their rights, and did not generally consider that inequality of bargaining power, or even a monopoly, should be grounds for setting aside a contract (monopolies are controlled by competition law, which is set out in legislation and does not form part of the law of contract). The concept of 'lawful act' economic duress was very much an exception to the general rule, and it was not to be extended in the manner that Warren J and Leggatt LJ had proposed. Any objective test of reasonableness would introduce undesirable uncertainty into commercial relationships. While the reasonableness of PIA's conduct in resisting Times Travel's claim for commission could be assessed by reference to ordinary legal principles (such that there was perhaps no uncertainty on the facts), such an established yardstick would not be available:

> *"… in the much more common situation of a party using lawful commercial pressure in support of a purely commercial demand. There is no yardstick by which to judge such demands, save those that can be set out in legislation such as that applying to consumer contracts. Such demands are a matter of negotiation against the background of the pressures operating on both parties."*

Avoiding uncertainty was not, however, the only consideration. A party should only be precluded from pursuing a lawful course of action, or exercising its contractual rights, if that was done in bad faith. Bad faith was a concept that was well-known to the law, in contrast to "… *basic minimum standards of acceptable behaviour* …" which Leggatt LJ had proposed to apply. On the facts, the Court of Appeal found that PIA had not acted in bad faith. Even though (as the judge thought) the conduct of PIA did not reflect well on it, that was not sufficient to engage the doctrine of economic duress.

A Step in the Right Direction, but not Without some Difficulties?

While limiting the scope of 'lawful act' economic duress, the Court of Appeal did not go as far as suggesting that the exercise of contractual rights, or doing anything else that is lawful, could never be legitimate. Following the appeal in *Times Travel*, a contract can still be set aside where:

> *"… A uses lawful pressure to induce B to concede a demand to which A does not bona fide believe itself to be entitled."*

The above is David Richards LJ authoritative statement of the effect of the Court of Appeal's decision in *Gallagher*, which now represents the limits of economic duress in English law.

This merits some closer consideration. Consider the following scenario. Party A supplies goods to Party B under a contract which Party A can terminate for convenience. Party A knows that Party B's business depends heavily on the resale of Party A's goods. Party A would like to be paid more by Party B. It 'threatens' to terminate the contract (a lawful act and Party A's right under the agreement) unless Party B agrees to a 30 per cent increase in the price of the goods. Assume that the other elements of economic duress are made out – there is compulsion or a lack of practical choice for Party B to secure alternative goods, such that Party A's pressure would cause Party B to accept the increase in price. To set aside an agreement under which the higher price is paid, Party B would need to establish that Party A "… *did not bona fide believe itself to be entitled* …" to ask for a 30% increase. The use of 'entitlement' in this context is, it is suggested, problematic. Party A might well honestly believe that there is nothing wrong with asking for a 30% price increase because it sees this as perfectly acceptable commercial behaviour. But why would Party A believe that it had an 'entitlement'? Would Party A have to point to something like a corresponding increase in the cost of manufacturing its goods to make a persuasive argument that it really thought it had an 'entitlement'? Similar difficulties might arise where Party A has an option to extend the contract term, and tells Party B that it is not going to exercise that option unless Party B accepts the higher price – thus making a 'demand'. A 'demand' in the purely commercial context is always something that a party would like to have and never something to which it already has an entitlement.

Reference to entitlement only make sense where the demand is based on a perceived legal claim. That was the situation in *Gallagher*: Gallagher thought it was entitled to insist on the invoice being paid because counsel had advised that the stolen goods were already at the buyer's risk. David Richards LJ however repeated the reference to 'entitlement' in the passage of the judgment setting out his overall conclusion, where he expressly refers to purely commercial demands which are not based on any legal claim (at 105: "… *lawful act duress does not extend to the use of lawful pressure to achieve a result to which the person exercising pressure believes in good faith it is entitled.*").

In the example given above, the exercise of the right to terminate for convenience is now made subject to a requirement of good faith, albeit a limited one. Party A could still terminate in bad faith as long as it did not make demands of Party B. If Party A were particularly calculating, it could also terminate for convenience first and then, sometime later, propose to contract again at a higher price. The separation between termination and the offer of the new terms might preclude any argument that there was economic duress.

The Court of Appeal thought that the requirement of a lack of good faith was to be preferred over any objective test because:

> *"It is a clear criterion involving conduct which all can agree is unacceptable and which is a fact capable of proof, often as it happens by reference to the lack of any reasonable grounds for the belief. By contrast, not only is reasonableness in this context a standard of very uncertain …"*

In David Richards LJ's explanation of how a lack of good faith is usually proven, reasonableness makes an appearance only for it to be criticised as being 'very uncertain' in the next sentence. Further on in the judgment, the Court of Appeal also noted that a "*a lack of reasonable grounds is insufficient to engage the doctrine of duress where the pressure involves the commission or threat of lawful acts*." The conclusion one may draw from this is that a lack of reasonable grounds, objectively assessed, is not enough to establish bad faith, but it may be a factor in proving bad faith subjectively.

In practice, and as the Court of Appeal appears to have recognised, while lack of good faith is a subjective test as a matter of principle, someone asserting that they acted in good faith may not be believed if they cannot point to some reasonable basis for holding the relevant view. In contested proceedings where much can be at stake,

declarations by witnesses of their subjective state of mind are often taken with the proverbial pinch of salt. It is therefore to be expected that the basis for the belief would be reviewed to some extent, and witnesses would be cross-examined as to what they really thought at the time.

In conclusion, the decision of the Court of Appeal in *Times Travel* is to be welcomed as it seeks to reduce the uncertainty created by the concept of 'lawful act' economic duress. While it is a step in the right direction, it is not without its difficulties.