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When the law says it is fine to be a fool

The Supreme Court reins in the doctrine of lawful act economic duress

By Markus Esly

Where a party is induced to enter into a contract by illegitimate threats or pressure, and had no alternative but to do so, English law will set aside the contract on the grounds of duress. The threats or pressure can be financial in nature: for around forty years, English law has recognised the concept of 'economic duress'. However, should English law go further and recognise the doctrine of economic duress where the threats or pressure amount to lawful conduct? In the recent decision of *Pakistan International Airline Corporation* v *Times Travel (UK) Ltd* [2021] UKSC 40, the Supreme Court answered that question in the affirmative, although it severely limited the application of this doctrine in the commercial sphere. The majority in the Supreme Court disagreed with the Court of Appeal, and found that threats of lawful conduct made in bad faith (such as asserting a contractual right that one does not in fact believe in) would not constitute economic duress. More reprehensible or unconscionable conduct was needed – but the question of precisely what that conduct will look like has not, we suggest, been conclusively answered.

***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 to members of the local Pakistani community. At the relevant time, Pakistan International Airlines ("**PIA**") had a monopoly on such tickets, being the only carrier operating direct 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. PIA had the right to do so: 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

Times Travel then took 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. He cited a statement in *Chitty on Contracts*, 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 found that PIA's actions, although lawful, had crossed that line. He concluded 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 found 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 in the Court of Appeal

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 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 had proposed. Any objective test of reasonableness, as Warren J had applied at first instance, would introduce undesirable uncertainty into commercial relationships. While the reasonableness of PIA's conduct in resisting Times Travels' 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. David Richards LJ placed reliance on an earlier decision of the Court of Appeal in *CTN Cash and Carry Ltd* [1994] 4 All ER 714 (discussed further below), and restated the law as follows:

> "*… where A uses lawful pressure to induce B to concede a demand to which A does not bona fide believe itself to be entitled, B's agreement is voidable on grounds of economic duress.*"

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 and may have amounted to sharp commercial practice, that was not sufficient to engage the doctrine of economic duress. Times Travel appealed to the Supreme Court.

Does lawful act economic duress exist?

The Supreme Court rejected the appeal. Lord Hope gave the leading judgment. Lord Burrows gave a concurring judgment, but disagreed with the majority on one point. The Supreme Court (Lord Burrows, with the agreement of the majority) started from first principles, asking whether *lawful* act economic duress actually existed, and should exist, under English law. Putting this in context, the recognition of *unlawful* act economic duress is itself a relatively recent development in English law, its existence having been authoritatively established by the House of Lords in 1983 (*The Universe Sentinel* [1983] 1 AC 366). Prior to that, duress had been confined to acts against the person, and in some cases against goods property. Perhaps the most common example of unlawful act economic duress is where a party to a contract suddenly asks to be paid more to deliver what it has already contracted to provide at a lower price. The other party may find itself compelled to agree because it has no practical alternative. The threat of an unlawful act – breaching the contract – coupled with the demand for additional benefits over and above the contract provides the grounds on which the contract can be set aside for duress.

Lawful act duress goes further of course, and it has been a controversial proposition for some time. A number of leading academic commentators have argued against it. As long ago as 1989, Peter Birks identified the crucial problem that he thought such a doctrine would inevitably give rise to. If one accepts that some lawful conduct can

amount to duress, one must then distinguish between acceptable lawful conduct and unacceptable lawful conduct without having the benefit of falling back on the law as providing a clear dividing line (Birks, *An introduction to the Law of Restitution* (1989), at 117):

> "*… the only viable basis for discriminating between acceptable and unacceptable pressures is not positive law but social morality. In other words, the judges must say what pressures … are improper as contrary to prevailing standards. That makes the judges, not the law or the legislature, the arbiters of social evaluation.*"

In addition to judges and arbitrators having to apply social norms, the existence of a doctrine of lawful act duress in the commercial context might also undermine the highly prised certainty and predictability of the English law of contract (as Professor Graham Virgo (*The Principles of the Law of Restitution*, 3rd ed (2015), p 218) and Paul Davies and William Day "*Lawful Act' Duress (Again)*", (2020) 136 LQR 7, 12) have pointed out). It is a fact of commercial life that contracts are made with one or the other party being under some pressure to strike a deal. The English law of contract takes the view that, subject to limited exceptions, a party will be held to their bargain, even if it subsequently turns out to have been a bad one. Lawful act duress might be seen as enabling a party to escape from a bad bargain by arguing, perhaps with the benefit of hindsight, that they were forced to enter into it.

The Supreme Court nevertheless concluded that there were three reasons why, on a close review of the authorities, lawful act duress already existed, and why it should continue to exist under English law. The first reason was that in prior decisions, notably that of the House of Lords in *The Universe Sentinel* [1983] AC 366, it had already been established that applying 'illegitimate' economic pressure on a party to secure a contract might amount to duress, although the exact limits of this emerging principle had not been explored by their Lordships. Lord Diplock had identified the underlying rationale for the concept of (economic) duress. It was not that the party seeking to avoid the contract could not properly understand the terms they had agreed to, but that their:

> "… *apparent consent was induced by pressure exercised upon him by that other party which the law does not regard as legitimate, with the consequence that the consent is treated in law as revocable unless approbated either expressly or by implication after the illegitimate pressure has ceased to operate on his mind*."

It would follow that as a matter of principle, there is no reason why (sufficiently serious) illegitimate pressure that falls short of *unlawful* conduct could not have the same effect on the mind of the 'innocent' party, vitiating their consent.

The second reason was that threats of taking lawful action may constitute the crime of blackmail. Section 21(1) of the Theft Act 1968 defines blackmail as the making of an unwarranted demand with menaces, with a view to the perpetrator making a gain or the victim suffering a loss. The statutory definition goes on to say that a demand with menaces is 'unwarranted' unless it can be shown that the person making the demand believed he had reasonable grounds for doing so, and further believed that it was proper to reinforce the demand with menaces. Lord Burrows (with the agreement of the majority) felt that it would be odd if the civil law took a different approach, effectively allowing parties to demand whatever they saw fit against the threat of taking lawful action (subject to the majority limiting the scope of the doctrine, as we shall see). To illustrate this, a person may commit blackmail if they threatened to report a crime to the police, something which is lawful, and for which there may even be a positive duty to do so, unless the victim paid them a sum of money. It is also lawful to inform on someone's conduct, be it to a national newspaper or their family – but it would be blackmail to ask for money in order to refrain from doing so. What has to be justified in the eyes of the law is the demand, not the actions that are threatened if the demand is not met.

The third reason was that a careful review of the authorities going back to mid-19th century showed that the equitable doctrine of undue influence already provided a remedy where there had been threats to commit *lawful* acts. The threats in question were to reputation, or were emotional in nature: two cases highlighted by the Supreme Court, *Williams* v *Bayley* (1866) LR 1 HL 200 and *Mutual Finance Ltd* v *John Wetton and Sons Ltd* [1937] 2 KB 389 concerned threats of a private prosecution of close relatives of the claimant for forgery, unless a debt was paid or a guarantee provided. The common law has since developed, recognising economic duress. Lord Burrows noted the close relationship between the equitable doctrine of relational undue influence and duress. In the leading modern case on undue influence, *Royal Bank of Scotland Plc* v *Etridge* (No 2) [2001] UKHL 44, Lord Nicholls had said:

> "*Equity identified broadly two forms of unacceptable conduct. The first comprises overt acts of improper pressure or coercion such as unlawful threats. Today there is much overlap with the principle of duress as this principle has subsequently developed. The second form arises out of a relationship between two persons where one has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage.*"

This overlap between the equitable remedy of undue influence and duress was crucial to the reasoning of the majority in the Supreme Court. Lord Hodge noted that in cases where the common law had found that contracts could be set aside on the grounds of duress, the relevant conduct was morally reprehensible in the eyes of equity:

> "*… morally reprehensible behaviour which in equity was judged to render the enforcement of a contract unconscionable in the context of undue influence has been treated by English common law as illegitimate pressure in the context of duress.*"

In the commercial context, however, it was important to recall that English law did not impose a duty of good faith in contracting (or in negotiating for that matter), and did not recognise any doctrine of the inequality of bargaining power. Lord Burrows (with the agreement of the majority) stated that:

> "*Within the realm of commercial contracts, with which we are here concerned, English law has a long-standing reputation for certainty and clarity and there is a significant danger that that reputation will be lost if the law on lawful act economic duress is stated too widely or with insufficient precision.*"

Lawful act duress yet lives, but is it on life-support?

Having determined that lawful act duress does exist, Lord Hodge and the majority reviewed the authorities closely and identified only two types of cases where English law had, in truth, recognised lawful act duress.

The first category of cases concerns the exploitation of knowledge of criminal activity. As an example, Lord Hodge cited the *Mutual Finance Ltd* case. The defendant, Percy Wetton, successfully resisted enforcement of a personal guarantee he had given to the claimant financiers in respect of the performance of the Wetton family company's obligations. He had only provided the guarantee to avert the threat of his brother, Joseph Wetton, being prosecuted by Mutual Finance Limited for the forgery of a hire purchase agreement. Percy Wetton feared that if such a prosecution were brought, this would kill his father, who was already very ill. The judge found that while this was not duress at common law (at the time limited to physical threats against a person), the guarantee was voidable for undue influence.

The second category of cases concerns the use of illegitimate means to manoeuvre the claimant into a position of weakness, and then to force him to give up a legitimate claim. Lord Hodge gave two examples. The first case

was *Borrelli* v *Ting* [2010] UKPC 21, which concerned the downfall of James Ting's business empire, built around the consumer electronics brand Akai. At the height of his success in the late 1990s, Mr Ting's companies had more than 100,000 employees in 120 countries, and were valued at more than US$ 5 billion. 'Akai' means 'red' in Japanese. By 2000, Akai's accounts had certainly lived up to the company's name: all that remained were US$ 1.8 billion in debt. The Privy Council's decision arose out of Mr Ting's opposition to a scheme of arrangement that Akai's liquidators were keen to enter into with the creditors. Mr Ting used certain minority shareholdings, and forged documents as well as false evidence, to block this. To explain what happened, as part of the scheme of arrangement, the liquidators wanted to transfer Mr Ting's holding company, which was listed on the Hong Kong Stock Exchange and thus had some residual value, to a third party, for the (comparatively) modest sum of HK$ 46.6 million. With the holding company in the hands of a third party, the liquidators would have been able to investigate Mr Ting's conduct in relation to the affairs and dealings of that company much more freely – in addition to raising some much-needed cash to fund the liquidation. However, any such transfer of the holding company would have required the approval of two corporate minority shareholders, which were both controlled by Mr Ting.

The liquidators convened a scheme meeting in Hong Kong. Mr Ting was in Shanghai at the time of the meeting, but he sent two proxies who had his authority to vote, and object to the scheme. The trouble was that Mr Ting had not filled in the proxy forms correctly: he had simply signed them personally, whereas they should have been executed under seal by an authorised officer of the two companies. The liquidators objected to these votes during the scheme meeting and were hopeful to secure the majority vote. When Mr Ting learnt of this turn of events, he gave instructions by telephone to an associate in Hong Kong to quickly type up new proxy forms, affix the corporate seals and then forge Mr Ting's own signature. Armed with these forgeries, Mr Ting's proxies then went back to the meeting just in time and voted against the scheme.

By that stage, the liquidators were under considerable time pressure. The sale of the listed holding company had to complete by 31 December 2002. Thereafter, the Hong Kong Stock Exchange would not allow any transfer. The liquidation was overseen by the Bermuda Courts, as the relevant companies were incorporated there. The liquidators applied for a court order to declare the objecting votes invalid. This application was due to be heard just in time for the 31 December 2002 deadline. Mr Ting was contesting it: he filed an affidavit wrongly stating that his signatures on the proxy forms were indeed genuine. Unfortunately, the Bermuda judge then broke her arm. The replacement judge recused himself because of certain dealings with Mr Ting's companies. As of 30 December 2002, the liquidators had no firm hearing date in the Bermuda Courts, and only one more day to secure approval of the sale of the listed entity – which meant overcoming Mr Ting's fraudulent votes. If they failed to do that, the liquidation would run out of money and come to an end.

On the eve of 30 December 2020, and fresh out of options, the liquidators entered into a settlement agreement with Mr Ting. Under that agreement, they gave up all claims against Mr Ting personally and his remaining companies. Mr Ting in return signed a consent order disallowing the votes against the scheme, having made it clear that he would continue to contest the application otherwise. The Supreme Court of Bermuda sanctioned the scheme the next day, and the sale went through. The liquidators then challenged the settlement agreement and asked for it to be set aside on the ground of economic duress. The Privy Council (on a final appeal from the Bermuda Courts) upheld their claim, and found that Mr Ting had acted in bad faith. In *Times Travel* Lord Hodge noted that the Privy Council:

> "*… treated as important the conclusion that it was the unconscionable or illegitimate conduct of Mr Ting which placed the liquidators in the position that they had no reasonable or practicable alternative but to enter into the settlement agreement. By so acting, Lord Saville stated, at para 31, Mr Ting "had the liquidators over a barrel". In other words, it was Mr Ting's illegitimate or*

> *unconscionable acts which placed the liquidators in the position of vulnerability with the result that they had no reasonable alternative but to agree to his demands.*"

While the threats that finally induced the liquidators to enter into the settlement agreement could be seen as lawful (continuing to oppose an application civil litigation), Mr Ting's threats had been preceded by unlawful conduct, and he had plainly acted for an improper purpose – namely to frustrate the liquidation and prevent his own conduct from being scrutinised. Lord Hodge noted that the Privy Council had described Mr Ting's conduct as unconscionable, and had also made specific reference to his position as an officer of an insolvent company (he appears to have been in breach of his fiduciary duties).

Lord Hodge's second example of a case where lawful act duress was established after the claimant had been deliberately placed in a position of weakness was *Progress Bulk Carriers Ltd* v *Tube City IMS LLC* [2012] EWHC 273 (Comm). The claimant charterers were badly let down by their owners when the owners repudiated the contract and chartered the vessel to someone else willing to pay more. The charterers faced huge losses if they could not ship the cargo as they had contracted with their buyers. The owners then found a substitute vessel and offered this to the charterers at a reduced rate. This would have helped considerably to mitigate the losses that the charterers faced, so they were understandably keen to accept the owners' offer. However, the owners then insisted that the charterers waive any claim for damages arising from the charterers original repudiatory breach. The charterers reluctantly agreed, but later brought a claim to recover such losses as they were, in the end, unable to avoid. Cooke J in the Commercial Court set aside the settlement agreement on the grounds of economic duress. While it was correct for the owners to say that they had never committed themselves to provide the substitute vessel before they insisted on the waiver, such that their refusal to do so unless the charterers gave up their claims for breach of contract was not an unlawful act or a breach of contract, that was no answer:

> "*What however the Owners' submissions overlook is the fact that their repudiatory breach was the root cause of the problem and that their continuing conduct thereafter was … designed to put the Charterers in a position where they had no option but to accept the settlement agreement in order to ship the cargo to China and avoid further huge losses on the sale contract to the Chinese receivers. As the Charterers submitted, it would be very odd if pressure could be brought about by a threatened breach of contract, which did amount to an unlawful act but not by a past breach, coupled with conduct since that breach, which drove the victim of the breach into a position where it had no realistic alternative but to waive its rights in respect of that breach, in order to avoid further catastrophic loss.*"

Cooke J described the illegitimate pressure as follows:

> "*… the pressure created by the owners in their demand for a waiver of rights by the charterers has to be seen both in the light of their repudiatory breach and in the light of their subsequent conduct, including their deliberate refusal to comply with the assurances they had previously given about providing a substitute vessel and paying full compensation in respect of that breach. Their refusal to supply the substitute vessel to meet the charterers' needs, in circumstances which they had created by their breach and their subsequent misleading activity, unless the charterers waived their rights, could readily be found by the arbitrators to amount to 'illegitimate pressure'*".

When reviewing this case, Lord Hodge in *Times Travel* placed emphasis on the fact that the owners had been guilty of deliberately misleading conduct, by having made assurances about the availability of the replacement vessel (albeit not contractually binding ones) that the charterers had relied on to their detriment, before then suddenly demanding a release of the charterers' claims.

Equity may already lend a hand where there is unconscionable conduct

Looking beyond those two specific categories of cases, Lord Hodge stated that any role that lawful act duress would have to play in the law of contract had to be looked at against the background of the existing equitable remedies. Unconscionable conduct, even in equity, was not something for which a remedy was available across the board – otherwise judges would become arbiters of what is morally acceptable. Instead, equity has identified specific factual and legal situations that call for judicial intervention so as to protect the weaker party. To give some examples, a contract may be set aside for undue influence where the stronger party in a relationship (often one of trust and confidence) takes unfair advantage of the weaker party. Other, perhaps more archaic, examples of transactions that can be set aside in equity where one party is guilty of unconscionable conduct include contracts with intoxicated, elderly, unwell, poor, and/or ignorant counterparties who enter into transactions at an undervalue without having had the benefit of advice. However, beyond those specific situations, English law does not recognise a doctrine of unequal bargaining power, nor is there a general principle of good faith in contracting.

It is okay to be selfish

Lord Hodge and the majority and Lord Burrows all rejected the suggestion that lawful act economic duress should be based on a general principle of good faith or fair dealing. It was not for the law to decide what was commercially unreasonable or unacceptable conduct, and any attempt to police this would introduce so much uncertainty that it would not be a price worth paying. Lord Burrows made it clear that if a demand was motivated by commercial self-interest, then it would be justified and not illegitimate. It would by no means be objectionable if, during the course of commercial negotiations, one party threatened to carry out a lawful act unless the other signed up to the contract:

> "*Illegitimate pressure must be distinguished from the rough and tumble of normal commercial bargaining.*"

To illustrate how threats of lawful acts motivated purely by commercial self-interest would not cross the line and amount to duress, Lord Burrows referred to the recent New Zealand decision in *Dold* v *Murphy* [2020] NZCA 313. In that case, Mr Murphy was the minority partner in a tourism business, holding 6.2% of the shares. The other two partners held 46.9% each. A third party offered to buy the business for AUD 112 million. Mr Murphy's share of that was AUD 6.9 million. That was not enough for Mr Murphy. He demanded that the other two partners pay him an additional AUD 2 million each, and threatened to block the deal by not selling his shares unless they paid him. Mr Murphy was paid, but one of the partners subsequently sued him to recover his AUD 2 million on the grounds of economic duress. The claim failed. The Court of Appeal of New Zealand found that Mr Murphy was entitled to be 'opportunistic' and 'ungenerous'. Against that background, Lord Burrows explained that:

> "*… the doctrine of lawful act economic duress is essentially concerned with identifying rare exceptional cases where a demand motivated by commercial self-interest is nevertheless unjustified …*"

Range of factors test not appropriate

Something more than sheer selfishness was thus required to make lawful conduct illegitimate. Counsel for one of the parties had suggested that illegitimate conduct for the purposes of lawful act duress could be identified using the same test that the Supreme Court had restated in *Patel* v *Mirza* [2016] UKSC 42 for the defence of illegality. It has long been a principle of English law that "*No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act*", as Lord Mansfield put it in *Holman* v *Johnson* [1775] 1 Cowp 341.

However, there is plainly a wide range of 'illegal' conduct, some of it so serious that it should preclude any claim (take for instance an agreement to rob a bank which ought to be unenforceable) and some of it less serious, and perhaps only of peripheral relevance to the claim in issue. Prior to *Patel* v *Mirza*, English law had come to apply the 'reliance' test: a claim was generally barred if the claimant had to rely on the illegality in advancing (pleading) the claim. That was a formalistic test, and it could be circumvented by clever drafting or recasting of a claim. A number of judges had come to adopt a less rule-based and more flexible approach that took into consideration a range of relevant factors, creating uncertainty as to when the defence of illegality might succeed. In *Patel* v *Mirza*, the Supreme Court identified what Lord Burrows described as the 'covert reasoning' of the courts, by which undesirable outcomes that would otherwise have followed from the strict application of the rules had been avoided. Following that decision, English law now openly recognises that one cannot in reality decide whether to deny a claim that is somehow affected or tainted by illegality without considering three main factors: (i) the underlying purpose of the prohibition which has been transgressed, and whether that purpose will be enhanced by denial of the claim, (ii) any other relevant public policy on which the denial of the claim may have an impact and (iii) whether denial of the claim would be a proportionate response to the illegality. It is by weighing up these factors that English law now decides whether it would be against the public interest, or harmful to the integrity of the legal system, to uphold a claim that is affected by illegality. The Supreme Court in *Times Travel* did not, however, feel that it would be appropriate to apply a range of factors (whatever they might be) to determine whether lawful conduct is illegitimate for the purpose of economic duress. This was a new and emerging area of law, unburdened by formulaic and inflexible rules. The common law should therefore be free to develop as it ordinarily does, on an incremental basis.

What makes conduct illegitimate?

Lord Hodge (for the majority) and Lord Burrows ultimately disagreed on the crucial point, of what makes lawful conduct illegitimate for the purposes of economic duress. Lord Hodge held that any expansion of the doctrine that would allow it to intrude into commercial life was anathema to the common law. He cited a passage from *Anson's Law of Contract*, which stated the position bluntly:

> "*It is not ordinarily duress to threaten to do that which one has a right to do, for instance to refuse to enter into a contract or to terminate a contract lawfully. In the cut-and-thrust of business relationships various types of pressure may be brought to bear in differing situations. … [A] contracting party will not be permitted to escape from its contractual obligations merely because it was coerced into making a contract by fear of the financial consequences of refusing to do so. Although this approach leaves many forms of socially objectionable conduct unchecked, as a general rule the determination of when socially objectionable conduct which is not in itself unlawful should be penalized is for the legislature rather than the judiciary.*"

It followed that pressure applied in the course of commercial negotiations, even where there is unequal bargaining power, would only very rarely be illegitimate. Lord Hodge noted that this was consistent with the position in other leading common law jurisdictions, including Australia, New Zealand and Singapore, where the Court of Appeal of Singapore had expressly rejected any 'umbrella doctrine' that would allow contracts to be vitiated on the grounds of unconscionable conduct or illegitimate pressure (*BOM* v *BOK* (2018) SGCA 83). Other jurisdictions which had adopted a general principle of good faith in contracting, such as the United States and Canada, had been more open to adopting such a general principle.

No general principle of bad faith demands in English law

Lord Hodge and the majority in the Supreme Court decided that there should be no general principle of 'bad faith demands' in English law, disagreeing with David Richards LJ in the Court of Appeal. Thus, even if PIA had made its demands in bad faith, fully appreciating that Times Travel had good claims against PIA, the Supreme Court would not have set aside the new agency agreement on the grounds of economic duress. Lord Burrows disagreed. He would have upheld the Court of Appeal's decision, but with one gloss (considered below).

Both Lord Hodge and Lord Burrows looked carefully at *CTN Cash and Carry Ltd* v *Gallagher Ltd* [1994] 4 All ER 714, a decision that the Court of Appeal in *Times Travel* felt lent considerable support to the existence of a principle of 'bad faith demands.' The facts of that case were as follows. 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:

> "*A … critically important, characteristic of the case is the fact that the defendants bona fide thought that the goods were at the risk of the plaintiffs and that the plaintiffs owed the defendants the sum in question. The defendants exerted commercial pressure on the plaintiffs in order to obtain payment of a sum which they bona fide considered due to them. The defendants' motive in threatening withdrawal of credit facilities was commercial self-interest in obtaining a sum that they considered due to them.*
>
> *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 in *CTN Cash and Carry Ltd* 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.

Lord Burrows in *Times Travel* saw an implication in the Court of Appeal's judgment that while a demand made in good faith was not illegitimate, a demand made in bad faith might well be. Lord Hodge, however, held that *CTN Cash and Carry Ltd* was only authority for what did not constitute lawful act duress - namely, demands made in good faith - but could not be relied on to establish that demands made in bad faith did amount to lawful act duress. Lord Hodge gave a number of reasons why bad faith demands should not, as matter of principle, be sufficient to support a claim for lawful act economic duress. He noted that bad faith demands based on pre-existing entitlements may not be a rare occurrence in commercial life, since "… *Discreditable behaviour can be a feature of commercial activity*." If the law allowed contracts to be set aside on such grounds, that would represent an

unjustifiable intrusion into commercial dealings, and would require the creation of a new general principle of law that would be difficult to express with certainty. Even if such a principle were created, Lord Hodge felt that it would be of limited use, because parties often make demands in situations where the legal position is not clear-cut:

> "*… A party may proceed to make a claim on the basis of legal advice of a percentage chance of success. What is envisaged in the "bad faith demand" requirement in this context is that there is little, if any, uncertainty as to A's lack of entitlement, and that A makes its demand in the knowledge that it does not have the legal entitlement which it claims. B would succeed in its claim for lawful act duress only if it established that A did not genuinely believe that it had that entitlement.*"

Speaking for the majority of the Supreme Court, Lord Hodge did not accept that the doctrine of lawful act duress should be extended to cover circumstances where a commercial entity exploits its bargaining strength (or even a monopoly position) so as to extract payment from a counterparty, even where it asserts a pre-existing legal entitlement in bad faith. Instead, for lawful act duress to apply in a commercial situation, it would be necessary to show that the party making the demand actively placed the other party in a position of weakness or vulnerability, and did so by means that involved bad faith or other reprehensible conduct that brought the equitable doctrine of unconscionable transactions into play. He felt that PIA's conduct was not sufficient, as it was a merely "*hard-nosed exercise of monopoly power*." It may be relevant in this context that PIA had done nothing itself to put Times Travel in a position of weakness: Times Travel's total reliance on airline tickets to Pakistan, and thus PIA, was a function of the business that Times Travel had itself set up.

Lord Burrows' alternative view

Lord Burrows (in the minority on this point) held that the Court of Appeal in *Times Travel* had been correct to find that lawful act economic duress required that a demand be made in bad faith, and that a subjective test should be applied. He was not persuaded by the argument that applying a subjective test would enable a defendant to avoid liability by simply asserting that it genuinely believed that the demand was justified, or that it had an entitlement. Bad faith had to be established by the threatened party who is claiming duress, who will have the burden of proof. The more unreasonable (objectively speaking) the alleged genuine belief was, the slower a judge or arbitrator would be to accept the evidence that the party in question (subjectively) acted in good faith. Lord Burrows added that he could even envisage a situation where the alleged genuine belief was so manifestly unreasonable or absurd that the burden of proof would shift to the defendant. On the evidence, PIA had not been found to have acted in bad faith, and that was enough to dismiss the appeal. However, Lord Burrows went on to find that the Court of Appeal had gone a little too far when restating the law.

As noted above, David Richards LJ's statement of principle in the Court of Appeal had been that

> "*… where A uses lawful pressure to induce B to concede a demand to which A does not bona fide believe itself to be entitled, B's agreement is voidable on grounds of economic duress.*"

In our previous article in *The Arbiter* (June 2019) reviewing the Court of Appeal's decision in *Times Travel*, we had suggested that this statement of the law was problematic, and considered how it might apply in 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's A 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.

Lord Burrows took the same view. He did not think that lawful act economic duress could ever be made out in circumstances where someone simply made a demand. Instead, David Richards LJ's reference to entitlement had to be read as being concerned with a pre-existing legal entitlement:

> "*Put another way, the "bad faith demand" requirement is dependent on there being an existing legal right and duty between the parties (whether contractual or otherwise) which provides a clear and certain standard against which alleged bad faith of the threatening party can be assessed. Without that tie to an existing legal right and duty, the "bad faith demand" requirement loses its force as being underpinned by a workable standard of dishonesty: the bad faith demand is concerned with either a dishonest assertion of an existing right or the dishonest removal (by waiver) of an existing right. It also loses its force as providing a clear and certain means of controlling the scope of lawful act economic duress and of distinguishing a demand that is unjustified from one that is made in ordinary commercial bargaining.*"

Discussion

At the end of his concurring judgment, Lord Burrows gave a concise summary of the law with which the majority agreed, save for the last point – what amounts to illegitimate conduct. Adapting that summary to take account of Lord Hodge's decision on that latter point, the present position under English law is now as follows:

(a) Lawful act duress (including economic duress) exists in English law.

(b) Three elements are needed to establish it: (i) an illegitimate threat, (ii) causation (the threat has to cause the other party to enter into the contract), and (iii) the threatened party must have no reasonable alternative to giving into the threat.

(c) Because the threat will be lawful, the focus has to be on the legitimacy of the demand.

(d) Demands motivated by commercial self-interest will generally be legitimate. Duress in this context is limited to rare and exceptional cases.

(e) There are presently two recognised categories of lawful act duress in English law: (i) where a party exploits the knowledge of criminal activity for its benefit, and (ii) where a party uses illegitimate means to manoeuvre the claimant into a position of weakness to force him to waive his claim.

(f) The categories of lawful act duress are not closed. However, in the commercial context, duress likely requires that the party making the threat or demand has actively placed the other party in a position of weakness or vulnerability, and did so by means that involved bad faith or other reprehensible conduct that brought the equitable doctrine of unconscionable transactions into play. Abusing a strong bargaining position, or even a monopoly, in bad faith is not illegitimate.

The last point, (f) above, was not expressly spelt out by Lord Hodge for the majority – no doubt because it was not necessary to do so in order to dispose of the appeal. While it is now clear that lawful act duress exists, claimants will need to consider whether the conduct they have suffered is really sufficiently reprehensible or unconscionable for a claim to have any realistic prospect of success. A key consideration will be whether the party making the threat has done anything objectionable that made the innocent party vulnerable to the threat. Lord Burrows would have had the law sanction demands that were made in bad faith and which contradicted or flouted a pre-existing legal right. That would, arguably, also have reduced the scope of the doctrine if one takes the widest interpretation of the Court of Appeal's judgment. However, Lord Hodge's majority judgment went further still, perhaps influenced by the view that commercial parties make demands in bad faith more frequently than one would like to believe, something that he felt did not need policing.