

“Lawful Act” Duress

“Economic duress” has now been recognised as part of English law for around forty years: see, for instance, *Occidental Worldwide Investment Corp v Skibs A/S Avanti (The Siboen and The Sibotre)* [1976] 1 Lloyd’s Rep. 293, 334-336 (Kerr J.); *North Ocean Shipping Co v Hyundai Construction Co (The Atlantic Baron)* [1979] Q.B. 705; [1978] All E.R. 1170, 719 (Mocatta J). Yet its constituent elements remain controversial. One particularly difficult issue concerns the scope of “illegitimate pressure”, and whether that encompasses threats by a party to do something that he is lawfully entitled to do. So-called “lawful act duress” has been recognised in principle as a possibility in a number of cases, most notably by the Court of Appeal in *CTN Cash and Carry Ltd v Gallaber Ltd* [1994] 4 All E.R. 714. But there is no decision where lawful act duress forms part of the *ratio decidendi*.

Nevertheless, in *Times Travel (UK) Ltd v Pakistan International Airlines Corporation* [2017] EWHC 1367 (Ch), Warren J. confidently held that “the proposition is established” (at [253]) and that “[t]his is one of those cases where, although acting lawfully, the defendant ... has placed illegitimate pressure on [the claimant]” (at [262]). *Times Travel* might therefore be viewed as important confirmation of the existence of lawful act duress in English law. However, given the threats in *Times Travel* closely followed unlawful conduct by the defendant, it is suggested that caution is necessary. Whilst threats of unlawful acts such as contractual breach can fulfil the requirement that pressure be “illegitimate”, it remains unclear why lawful threats might also suffice.

Pakistan International Airlines Corporation (“PIAC”) was the national flag carrier airline of Pakistan and operated the only direct flights between Pakistan and the UK. A number of UK travel agents brought claims against PIAC for commission that was due but, in breach of contract, had not been paid. In September 2012, PIAC gave notice to all its UK agents that it would exercise its contractual right to terminate their agency agreements. Enclosed with the notice was a proposed new agency agreement. That not only set out a new (and less generous) basis for calculating commission, but also required the travel agents to give up any accrued claims for commission and not participate in the proceedings being brought against PIAC.

The claimants – Times Travel (“TT”) and Nottingham Travel (“NT”) – ran small travel agencies focused on serving their local Pakistani communities. Their revenues were almost entirely dependent on selling PIAC’s tickets. Without access to those tickets, both claimants would quickly go out of business. That prospect loomed large not only because of the termination notice; at the

same time, PIAC had substantially cut the claimants' allocation of tickets for the duration of the notice period in order to increase the pressure on the claimants to sign the new agreement. Significantly, reducing the ticket allocation was not itself a breach of contract.

Each of the claimants met with PIAC after receiving notice of termination. They protested the unfairness of the new agreement. But they were told that once the new agreement was signed, ticket allocations would be restored. PIAC also promised each claimant that, while the new agreement only ran until the end of 2012, the incentives under it would be paid "well into the future". Further, in its meeting with NT, PIAC promised that the travel agency would receive the same benefits which the other travel agencies might achieve in their litigation against the airline. Faced with the prospect of being put out of business in a matter of weeks, the claimants had little practical choice but to sign the new agreements.

The facts of *Times Travel* raised a number of issues at trial, including whether PIAC's assurances to the claimants amounted to collateral contracts (yes), whether a claim in misrepresentation could lie (no), and whether the new agreements might be subject to the Unfair Contract Terms Act 1977 (no). This note focuses on the most significant part of Warren J.'s judgment, namely whether TT and NT could rescind the subsisting contractual arrangements on the basis of duress. The judge began by identifying (at [248]) the three "necessary ingredients" for a successful economic duress claim: (1) illegitimate pressure which (2) causes the claimant to enter into the contract; and (3) the practical effect of the pressure is that there is compulsion on, or a lack of practical choice for, the claimant. It is doubtful that (2) and (3) are distinct; the claimant's lack of practical choice but to enter into the contract answers the question of whether the illegitimate pressure caused the contract to arise.

In any event, Warren J. then cited (at [250]) the well-known passage of Dyson J. in *DSND Subsea Ltd v Petroleum Geo Services ASA* [2000] B.L.R. 530 at [131] as an accurate statement of the law:

"In determining whether there has been illegitimate pressure, the courts take 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."

This passage mixes up the distinct elements of a duress claim, and is inconsistent with the earlier identification by Warren J. of three necessary ingredients for economic duress. Dyson J. was wrong to treat issues of causation and affirmation merely as “factors” in determining when pressure is illegitimate, and it is unfortunate that it has been cited in subsequent cases, such as *Times Travel*, without further analysis or criticism.

Warren J. focussed on PIAC’s threats not to provide the claimants with their expected allocation of tickets and to terminate their agency agreements. Because those threats were, in themselves, lawful, the proposition that lawful conduct can in some circumstances amount to duress needed to be established. Somewhat surprisingly, counsel for the claimants relied on *Cantor Index Ltd v Shortall* [2002] All E.R. (D) 161 (Nov), which involved a threatened breach of contract and was therefore a clear example of unlawful act duress, as Warren J. rightly pointed out (at [251]). No other cases appear to have been cited to the judge in support of lawful act duress.

But beyond *obiter dicta* of prominent judges, no decision clearly turns upon the existence of lawful act duress. Two cases often cited both actually involved unlawful conduct. The first case is *Progress Bulk Carriers Ltd v Tube City IMS LLC* [2012] EWHC 273 (Comm); [2012] 2 All E.R. (Comm) 855. Ship owners withdrew their ship from a charterparty in breach of contract. The owners offered a substitute vessel and to pay full compensation but, soon after, demanded that the charterers waive their rights to damages for the breach of contract in return for the substitute vessel. The charterers, facing serious losses, accepted these terms under protest. Cooke J. held that the later threat to refuse to agree to a variation of the charterparty was lawful but could not be divorced from the owners’ prior breach of contract; the lawful threat “has to be seen both in the light of that prior repudiatory breach which was unlawful and the [o]wners’ subsequent attempts to take advantage of the position created by that unlawfulness” (at [42]). *Progress Bulk Carriers* is therefore better viewed as a case of unlawful act duress because the owners’ threats to refuse to vary the charterparty were part of the same chain of events as their prior breach of contract.

In the second case, *Borrelli v Ting* [2010] UKPC 21; [2010] Bus L.R. 1718, the claimants were the liquidators of a Bermudan company, “Akai”, of which Mr Ting had been the corrupt and incompetent chairman and CEO. Ting, through other companies, also held a minority shareholding in Akai. The claimants proposed a scheme of arrangement to raise money to fund the liquidation. Under Bermudan company law, that scheme had to be approved by Akai’s shareholders. Ting threatened to use his indirect stake in Akai to prevent the scheme of

arrangement, unless the liquidators entered into a settlement agreement under which they agreed not to pursue any claim against him. This they did. When the extent of Ting's wrongdoing whilst at the helm of Akai was discovered, the liquidators brought claims against him arguing that the settlement agreement was voidable for duress. This was upheld by the Privy Council. The case could be understood as involving lawful act duress because shareholders were entitled to vote against the scheme. But there are two alternative approaches which allow the case to be seen as involving unlawful act duress. The first turns on the fact that all Ting's actions in opposing the scheme in order to force the liquidators to give up their claims against him were in breach of his duties under local insolvency law to co-operate in the liquidation (see [32]). The second approach is similar to that in *Progress Bulk Carriers*. Ting had engaged in forgery and perjury in support of his opposition to the scheme of arrangement (see e.g. [7]); his threat to vote against the scheme could not be separated from those illegal acts.

Despite a lack of case law in support, Warren J. nevertheless felt able to conclude (at [252]) that lawful act duress exists on the basis of a passage from *Chitty on Contracts* (32nd ed., 2015, at [8-046]). *Chitty* states 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", but again without citing cases in support. The example provided to justify this assertion concerns blackmail. But blackmail is an example of unlawful act duress, albeit that the threat itself is the unlawful element rather than the threatened conduct. Blackmail should not be elided with lawful act duress or used to justify the existence of lawful act duress. In any event, there was no question of blackmail in *Times Travel*. Rather, the threat was simply that the airline would exercise its rights not to allocate tickets to the claimants in the future.

The judge held that TT had made out its case for lawful act duress (at [262]). It is hard to shake the impression that this conclusion followed from a value judgment as to PIAC's conduct and the fairness of the new terms. TT had been a "successful, honest and reliable agent with a substantial period of loyal service" (*idem.*). It was unfair to present it with the stark choice of signing the new agreement, thereby giving up its accrued rights to commission, or going out of business. This impression is further fuelled by Warren J.'s conclusion with respect to NT, whose position differed from TT in one respect only. As noted above, NT had received an additional assurance from PIAC which amounted to a term in its collateral contract to the effect that it would receive any additional benefits reaped by the other travel agents who were taking PIAC to court. Warren J. held that this

term “eliminate[d] the objectionable element of the New Agreement, namely the giving up of all past claims” (at [268]). In other words, NT did not deserve the option of setting aside the new agreement and its collateral contract, for it had not been forced into an unfair bargain. It is hard to see why this should bar duress: the fact that the airline was more generous in its new terms to NT does not mean that NT freely consented to those terms. Like TT, NT also had no practical choice but to sign the new agreement or go out of business.

Times Travel could be disruptive to many commercial agreements. The underlying story – a small business entirely dependent for its survival on its dealings with a large company – is not an uncommon one. Previously that story left the common law unmoved. For example, Lord Denning M.R.’s attempts to introduce a general principle of inequality of bargaining power into the common law (e.g. *Lloyds Bank Ltd v Bundy* [1975] 1 Q.B. 326; [1974] 3 All E.R. 757) were firmly rejected by the House of Lords. In *National Westminster Bank v Morgan* [1985] A.C. 686; [1985] 1 All E.R. 821, Lord Scarman said that any mischief arising from inequality of bargaining power was for Parliament to redress, not the common law. Yet Parliament has not even acted on the Law Commission’s recommendations (Law Com No. 292, 2005, Part 5) to extend to small businesses statutory protection from unfair terms currently enjoyed by consumers. Nevertheless, *Times Travel* perhaps suggests that lawful exploitation of inequality of bargaining power may now, in rare instances, be policed at common law by the doctrine of duress. If correct, its application should not turn on the court’s value judgments as to the fairness of the bargain struck. Further principles are needed to give certainty to contracting parties.

In *Progress Bulk Carriers*, Cooke J. thought that whether the defendant acted in good or bad faith was a “critically important characteristic” (at [27]; see too *CTN Cash & Carry* at 719 and *DSND* at [131], quoted above). This emphasis sits uncomfortably with contract law’s refusal to impose a general duty of good faith on contracting parties, and should be jettisoned. In *Times Travel*, PIAC’s course of action in serving notice under the old agreement and proposing the new agreement was intended to ensure that the claimants gave up any accrued rights to commission. But Warren J. pulled back from finding that PIAC’s conduct was in bad faith: that was a moot point “on which different minds might take different views” (at [262]). The judge’s caution on this point is appropriate. On the one hand, Warren J. found that at least some of the claims to commission under the old agreement were clearly valid at the time that they were first asserted. PIAC’s bad faith in demanding the claimants waive any claims might be inferred on the basis of this finding. On the other hand, it is understandable that PIAC took a commercial decision to work only with

travel agents who were not pursuing claims against it. The difficulty in reaching a conclusion on this issue highlights the amorphous nature of good faith.

What might separate *Times Travel* from the usual rough and tumble of commercial negotiations is that PIAC was in breach of contract in respect of commission due but not paid under the old agency agreement. While PIAC's threat to end contractual relations with the travel agents was something it was entitled to do, it nonetheless was part of a "single chain of events" which started with PIAC's breach of contract (at [261]); indeed, its objective in making that threat was that it be excused that unlawful conduct. It would be artificial to look at the lawfulness of the threat or threatened conduct narrowly, in isolation from the wider circumstances that involved unlawful conduct. Viewed from this perspective, caution should be exercised in treating *Times Travel* as confirmation of the existence of lawful act duress in English law. It should be read as going no further than *Progress Bulk Carriers* in recognising that a lawful threat may render a contract voidable because it is inextricably linked to previous unlawful conduct.

Understood in this limited fashion, *Times Travel* should not further aggravate current uncertainties as to the scope of economic duress. But nor does it bring much clarity. In particular, where – as in *Progress Bulk Carriers* and *Times Travel* – one party has compromised potential claims but now wishes to start litigation, the other party cannot be sure that the settlement agreement will hold up on the basis that no unlawful threat was made to induce the contract. In some circumstances, it seems that the claimant can now avoid such an agreement because, notwithstanding its lawfulness, the defendant's threat was part of the same chain of events as the unlawful conduct which is the subject of the settlement. This could undermine the finality of settlement agreements.

Despite *obiter dicta* to the contrary, it seems that English law still only recognises duress in three circumstances: (1) where the threat itself is unlawful; (2) where the threat is to do something unlawful; and (3) where the threat is part of the same chain of events as unlawful conduct. Since even the third category involves an element of unlawfulness, it may be better to do away with the language of "lawful act" duress. The question of lawful act duress beyond these three categories has arisen because of a predisposition by some judges to "never say never" to that possibility (see especially *CTN Cash & Carry* at 719 (Steyn L.J.)), but the courts should now place the law on a more certain and stable footing by explicitly rejecting such an open-ended doctrine (see further R. Ahdar, "Contract doctrine, predictability and the nebulous exception" [2014] C.L.J. 39). Indeed, it would be open to the Court of Appeal further to restrict economic duress by abolishing the third

category: there is a clear difference between lawful and unlawful behaviour and no good reason has yet been given why lawfully applied pressure, even if closely connected to unlawful conduct, can be “illegitimate”.

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