"LAWFUL ACT" DURESS (AGAIN)

"Does lawful act duress exist at all and, if so, in what circumstances may it be invoked?" This question was asked by David Richards L.J. at the start of his judgment in *Times Travel (UK) Limited v Pakistan International Airlines Corp* [2019] EWCA Civ 828. The Court of Appeal sensibly overturned the decision of Warren J. at first instance ([2017] EWHC 1367 (Ch), noted by Davies and Day (2018) 134 L.Q.R. 5.) and held that lawful act duress could not be established where the defendant's threats were both lawful and made in good faith. However, David Richards L.J. (with whom Moylan L.J. and Asplin L.J. agreed) thought that lawful act duress could be established in situations where a defendant uses lawful pressure to compel a claimant to accede to a demand that is made in bad faith.

Pakistan International Airlines Corp was the national flag carrier airline of Pakistan and, at the relevant time, operated the only direct flights between Pakistan and the UK. A number of UK travel agents brought claims against the airline for commission that was due but, in breach of contract, had not been paid. The airline genuinely believed that the commission was not due and disputed the claims. In September 2012, it gave a fortnight's notice to all its UK travel agents that it would exercise its contractual right to terminate their old agency agreements. Enclosed with the notice was a proposed new agency agreement. That not only set a new and less generous basis for calculating commission in the future, but also required the travel agents to give up any accrued rights for commission under the old agreement. Three days later, the airline applied further pressure by exercising its contractual rights to reduce ticket allocations to the travel agents. Importantly, save for not paying commission due under the old agreement, all these acts by the airline were lawful.

Times Travel ran a small travel agency focused on serving its local Pakistani community. Its future viability turned on selling the airline's tickets. Facing imminent insolvency by the airline's actions, it signed the new agreement. However, by February 2013, the airline had begun to make settlement payments to the travel agents which had stuck with the original litigation. In 2014, Times Travel wanted to sue for the outstanding commission due to it under the old agreement, so needed to rescind the new agency agreement. Rescission for misrepresentation failed at first instance, but it had success in its lawful act duress claim. Allowing the appeal, the Court of Appeal held that the agreement was not voidable on the basis of lawful act duress because the airline had acted in good faith.

Duress recognises that agreements procured by some threats can be unwound. The question is: what threats count? The doctrine first dealt with unlawful threats to persons and, from at least 1668, to property (see 1 Rolls Abr 687). Around 40 years ago, "[t]he scope of duress was significantly broadened with the acknowledgement that a contract might be avoided on grounds of economic duress": *Times Travel* at [44]. A claim in duress can be based upon a threat to break an existing contractual promise: *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] Q.B. 705; [1978] 3 All E.R. 1170. But since a breach of contract is an unlawful act, this extension maintained the key requirement of unlawfulness.

It is suggested that any threat to break a contractual promise should be sufficient for the purposes of a duress claim. In *Times Travel*, David Richards L.J. noted (at [51]) the contrary suggestion that a court can make a value judgment that a particular breach of contract is *not* sufficiently illegitimate to count for duress. Yet there is only one reported decision in which a threatened breach of contract was in fact held to be legitimate, *DSND Subsea Ltd v Petroleum Geo Services ASA* [2000] B.L.R. 530, and the reasoning adopted in that case is not entirely sound: *Times Travel* at [65]. Of course, sometimes a judge will need to make a difficult assessment about whether there was in fact a threat: for instance, in the context of contractual renegotiations, a party may explain that they simply will not be able meet their promises, unless the terms of the contract are varied, without that necessarily being a threat. Adding a value judgment as to "legitimacy" on top of that factual assessment is unnecessary and creates uncertainty.

More recently, courts have flirted with a broader doctrine of duress. Yet until the first instance decision in *Times Travel* there had never been a clear occasion where that doctrine had been recognised and applied. Nevertheless, Warren J. boldly held lawful act duress to be well-established ([2017] EWHC 1367 (Ch) at [253]). Happily, the Court of Appeal adopted a much more restrictive approach. David Richards L.J. rightly emphasised that the common law attaches "great significance to the enforceability of contracts validly made" (at [39]) and recognised the "need for clarity and certainty in the law of contract, particularly in commercial dealings" (at [42]). Moreover, "[t]he common law and equity have not countenanced as grounds for setting aside contracts factors such as inequality of bargaining power or the exploitation of a monopoly position" (at [41]). No claim in duress will arise "where a party uses lawful pressure to achieve a result to which it considers itself in good faith to be entitled" (at [103]), even if the belief is objectively unreasonable.

Regrettably, the Court of Appeal did not take the further step and abandon lawful act duress entirely. Their Lordships appear to have been influenced by difficult *obiter dicta* admitting the *possibility* of lawful act duress in *CTN Cash and Carry Ltd v Gallagher Ltd* [1994] 4 All E.R. 714. In that case, the defendant sold cigarettes to the claimant and provided a credit facility. The defendant mistakenly believed that the claimant owed money for a consignment of cigarettes and threatened to withdraw the credit facility. This was a lawful threat: the defendant was under no obligation to extend credit to the claimant. The claimant paid the sum in question, and later sued to recover it on the basis of duress. The Court of Appeal rejected the claim: no claim in duress could lie between commercial parties where the defendant threatened to do something lawful and bona fide thought that it was entitled to the money in question. But the Court refused to say that lawful act duress could *never* be established, recognising that "in a purely commercial context, it might be a relatively rare case in which "lawful-act duress" can be established" (Steyn L.J. at 719).

David Richards L.J. considered himself bound by *CTN Cash and Carry* and said it should:

> "be taken to establish 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."

It is not clear whether David Richards L.J. was using "entitlement" in a moral or legal sense. The former was foreshadowed in *CTN Cash and Carry* when Steyn L.J. said (at 719) that "it is a mistake for the law to set its sights too highly when the critical enquiry is not whether the conduct is lawful but whether it is morally or socially unacceptable". But this is a very vague test, and it is suggested that courts should not embark upon questions of moral entitlement. Judges should focus squarely upon whether the defendant's threats were unlawful or not; they are not well-equipped to "be the arbiters of what is socially unacceptable and attach legal consequences to such conduct": J. Beatson, *The Use and Abuse of Unjust Enrichment* (Oxford, OUP, 1991) 129, cited in *Times Travel* at [97]; cf. *Al Nehayan v Kent* [2018] EWHC 333 (Comm); [2018] 1 C.L.C. 216 at [181] (Leggatt L.J.) cited at [85].

However, if entitlement is used in a legal sense, then the language of this test does not quite work in the contractual context. The demand will be to receive a contractual promise. Unless issues of public policy are engaged, a party is always legally entitled to receive a contractual promise, even if that is a waiver of a prior claim. This is illustrated by *Times Travel* itself: the point was not whether the defendant bona fide believed itself to be entitled to the thing demanded (the obligations under the new agency agreement) but rather whether the defendant actually believed there was a prior claim against it for past unlawfulness (for not paying commissions due under the old agency agreement). Since the airline had genuinely believed itself not to be liable to pay the commission under the old agreement, the waiver of that claim in the new agreement could not be rescinded for duress.

In any event, *CTN Cash and Carry* does not in fact establish the above proposition set out by David Richards L.J. It is important to remember that the Court of Appeal in *CTN Cash and Carry* actually rejected a claim in lawful act duress. It simply left the door open in *obiter dicta* for future development. The Court of Appeal in *Times Travel* was not, therefore, bound to follow the approach in *CTN Cash and Carry*. Nor could *CTN Cash and Carry* have stood for the proposition that the defendant must act in bad faith for a claim of lawful act duress to succeed: the defendant in that case did not act in bad faith, and Steyn L.J. did not even say that it would be impossible to bring a claim in lawful act duress where the defendant had acted in good faith; he merely suggested that it would be "particularly difficult" to succeed in those circumstances.

In *Times Travel*, the Court of Appeal relied upon a "sharp distinction" (at [106]) between demands made in good faith and those made in bad faith. There may be difficulties with this. Good faith is not a stable concept: it means different things to different people in different contexts. It ultimately seems to be something of a value judgment about the legitimacy of a party's conduct. Indeed, the trial judge recognised that whether the defendant's conduct in the negotiations "demonstrates bad faith is a matter on which different minds might take different views" ([2017] EWHC 1367 (Ch) at [262];

criticised by the Court of Appeal at [110]-[111]). Insisting upon a test of good faith is likely to lead to uncertainty and undermine Lord Ackner's (admittedly controversial) warning that a "concept of a duty to carry on negotiations in good faith is inherently repugnant" to English law: *Walford v Miles* [1992] 2 A.C. 128 (HL) at 138; [1992] 1 All E.R. 453 at 460.

Attempts to justify the existence of lawful act duress have sometimes relied upon instances of blackmail. That had been the basis on which Warren J. had recognised lawful act duress at first instance in *Times Travel*. Similarly, Leggatt L.J. in *Al Nehayan v Kent* [2018] EWHC 333 (Comm) at [188] proposed, albeit *obiter*, that lawful act duress could be extended by analogy with blackmail to circumstances in which:

> "(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."

Given the fuzzy idea of "morally or socially unacceptable conduct" formulated in *CTN Cash and Carry*, it is understandable why courts have been attracted to the clearer concept of blackmail. But its invocation is also problematic. To the extent it consciously refers to the criminal offence, it becomes a red herring. As David Richards L.J. correctly recognised in *Times Travel* (at [53]):

> "A threat may be lawful if viewed on its own but, when combined with a demand and other circumstances that turn it into blackmail, the making of the threat is a criminal offence and thus unlawful for all purposes, including the law of duress."

Perhaps "blackmail" may be used in a wider sense than the criminal offence, especially where threats are non-commercial in nature (cf. Edelman and Bant, *Unjust Enrichment* 2nd edn (2013) at 217, cited in *Times Travel* at [99]). However, references to "moral blackmail" (e.g. *Royal Bank of Scotland v Bennett* [1999] 1 F.L.R. 1115 at 1127; (1999) 77 P. & C.R. 447 at 459) are prone to generate uncertainty since its boundaries are also unclear. Where the threat was lawful, other doctrines are better placed to provide relief where appropriate (as was the case in *Bennett* itself: the appeal was heard alongside *Royal Bank of Scotland v Etridge (No. 2)* [2001] UKHL 44; [2002] 2 A.C. 773). Lawful conduct may lead to a contract being set aside on the basis of the equitable doctrines of unconscionable bargains or undue influence (neither of which was relevant in *Times Travel* (at [40])) but the common law doctrine of duress should be limited to threatened or actual unlawful conduct": *Australia and New Zealand Banking Group Ltd v Karam* [2005] NSWCA 344, [2005] 64 NSWLR 149, cited in *Times Travel* at [80].

In *CTN Cash and Carry* Steyn LJ cited three cases in support of the existence of lawful act duress, but on analysis these do not actually provide that support. In *Thorne v Motor Trade Association* [1937] A.C. 797 at 806-807; [1937] 3 All E.R. 157 at 159-160, and in *Universe Tankships Inc of*

Monrovia v International Transport Workers' Federation [1983] 1 A.C. 366 at 401; [1982] 2 All E.R. 67 at 89, Lord Atkin and Lord Scarman did not go beyond the blackmail example, referring to the criminal offence. And in *Mutual Finance Ltd v John Wetton & Sons Ltd* [1937] 2 K.B. 389 at 394-395; [1937] 2 All E.R. 657 at 661, Porter J. in fact "unhesitatingly" upheld the proposition that:

> "[d]uress at common law could only be pleaded where the end arrived at was achieved by the use of something in the nature of unlawful force or the threat of unlawful force against the person of the other contracting party".

Steyn L.J. also cited Birks, *An Introduction to the Law of Restitution* rvsd ed (Clarendon Press, Oxford, 1989) at 177, where Birks relied upon blackmail and an analogy between duress and actual undue influence. Many actual undue influence cases in fact involved illegality. In *Williams v Bayley* (1866) LR 1 HL 200, for example, a contract procured by a threat to prosecute was held to be an illegal agreement to stifle a criminal prosecution. As Lord Westbury put it (at 220): "it is a law dictated by the soundest considerations of policy and morality, that you shall not make a trade of a felony". The same explanation applies to *Mutual Finance* where Porter J. rejected a claim to rescind a contract procured by threats of prosecution on the basis of duress but allowed it on undue influence. The few cases involving no illegality have arisen where the claimant has been a natural person in an unusually, inherently and inescapably vulnerable position. This may be better captured by a doctrine of unconscionable bargains (cf. *BOM v BOK* [2018] SGCA 83; 21 I.T.E.L.R. 607 at [145]-[153], noted Oi and Yong (2019) 135 L.Q.R. 400). But that is fundamentally different to a commercial party *choosing* to operate in a monopoly context facing an inequality of bargaining power. Inequality of bargaining power by itself has never been a good basis for unwinding contracts.

The pre-*CTN Cash and Carry* basis for lawful act duress is therefore shaky. As for the few cases which followed in the wake of *CTN Cash and Carry*, the Court of Appeal in *Times Travel* rightly considered these not to have "taken the issue much further" (at [63]; previously explained in Davies and Day, *supra*, at 7). However, the facts of *Progress Bulk Carriers Ltd v Tube City IMS LLC* [2012] EWHC 273 (Comm) are close to those of *Times Travel*. 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 had to be seen in the light of two factors: first, the prior repudiatory breach which was unlawful; and, second, the owner's subsequent attempts "to take advantage of the position created by that unlawfulness", which was in substance tantamount to acting in bad faith (at [40] and [42]). The first factor was also present in *Times*

Travel; but the second factor was not, and this demonstrates the central role that good faith may now play in this area of the law.

In our note on the first instance judgment in *Times Travel* (*supra*) we argued that lawful act duress could be limited to circumstances where the threat is part of the same "chain of events" as unlawful conduct, although the preferable solution would be for the Court of Appeal to abolish lawful act duress altogether. We understand that permission has now been sought to appeal to the Supreme Court. If permission is granted, we suggest that the Supreme Court should jettison the concept of lawful act duress. The non-existence of reported cases applying the doctrine demonstrates that there would be no gap in the law if lawful act duress were abolished, and the welcome effect would be to place the law of contract on a more certain and stable footing, avoiding protracted and expensive litigation about the existence and scope of lawful act duress. Whereas the Court of Appeal in *CTN Cash and Carry* took a "never say never" approach to the possibility of lawful act duress, it is to be hoped that the Supreme Court in *Times Travel* will be more definitive and explicitly reject such an open-ended doctrine.

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