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**LAWFUL ACT DURESS IN CONTRACT LAW: DOES IT
EXIST?**

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Abstract

The common law first recognised economic duress as a ground for rescinding a contract in the 1970s. In line with other areas of duress in contract law, the focus of economic duress is on providing a remedy to parties who have entered into contracts under illegitimate pressure. Over time, the courts have developed clear principles in order to ascertain when such a claim can be made out. However, the scope of economic duress remains uncertain in one particular area; lawful act duress. The question is whether, and in what circumstances, a threat to do a lawful act might amount to economic duress. This paper will analyse the development of lawful act duress in order to determine whether it exists as a basis for relief at common law. In particular, the paper examines the recent case of *Times Travel (UK) Limited v Pakistan International Airlines Corporation* and finds the Court of Appeal of England and Wales to be supportive of the possibility of lawful act duress claims in limited circumstances. This paper will also explore the scholarly debate around lawful act duress and argue that the approach of the court in *Times Travel* was appropriate, in that it supported the possibility of lawful act duress but did so in a way that was sufficiently cautious.

Key terms: ‘Economic Duress’, ‘Lawful Act Duress’, ‘Contract Law’,

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In contract law, the doctrine of duress focuses on illegitimate pressure inducing a party to enter into a contract. A successful duress claim will give the threatened party the option to rescind the contract. The focus of this essay will be on economic duress; the most recent form of duress to develop in the common law courts. Economic duress was first recognised by the common law in the 1970s in the first instance decisions of *Occidental Worldwide Investment Corporation v Skibs A/S Avanti (The Siboen and The Sibotre)*¹ and *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd (The Atlantic Baron)*². Shortly thereafter, the House of Lords in *Universe Tankships Inc of Monrovia v International Transport Workers Federation (The Universe Sentinel)*³ authoritatively accepted this extension of the law. Before these cases, contractual duress claims were confined to duress of the person⁴, which included threats of violence or unlawful imprisonment, and duress of goods⁵. The law developed to allow claims for economic duress in recognition that modern commerce required relief to be granted in situations where a party's will was coerced through threats to cause harm of an economic type. A typical example of such a threat would be where one contracting party threatens to breach a contract unless the other contracting party submits to a demand (for example to allow an alteration of the contractual terms or to pay additional remuneration for the execution of the promised performance).

Lord Scarman in *Universe Tankships* articulated the two fundamental elements of a successful economic duress claim;⁶ First, there must be illegitimate pressure placed on the claimant. Secondly, this illegitimate pressure must have compelled the claimant to enter the contract.⁷ These elements have been frequently cited and endorsed by the common law courts, including the Privy Council in *Attorney General for England and Wales v R*⁸ and by the New Zealand Court of Appeal in *Haines v Carter*⁹ and *McIntyre v Nemesis DBK*¹⁰. In claims for economic duress, a third element

¹ *Occidental Worldwide Investment Corporation v Skibs A/S Avanti (The Siboen and The Sibotre)* [1976] 1 Lloyd's Rep 293.

² *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd (The Atlantic Baron)* [1979] QB 705.

³ *Universe Tankships Inc of Monrovia v International Transport Workers Federation (The Universe Sentinel)* [1983] 1 AC 366 at 400.

⁴ *Barton v Armstrong* [1976] AC 104.

⁵ *Skeate v. Beale* [1840] 11 Ad. & El. 983.

⁶ *Universe Tankships*, above n 3, at 400.

⁷ At 400.

⁸ *Attorney General for England and Wales v R* [2003] UKPC 22, [2004] NZLR 577 at [15].

⁹ *Haines v Carter* [2001] 2 NZLR 167 at [108] and [112].

¹⁰ *McIntyre v Nemesis DBK* [[2010] 1 NZLR 463 at [20].

must also be established¹¹; the claimant must have no reasonable alternative but to succumb to the pressure.¹²

However, the scope of economic duress is uncertain in one particular area; lawful act duress. The question is whether, and in what circumstances, a threat to do a lawful act might amount to economic duress. The first economic duress cases focused on illegitimate behaviour that was inherently unlawful. But more recently, the courts have begun to question whether threats to take lawful action could also amount to illegitimate pressure. Lawful act duress, in theory, would arise in circumstances where the threatened conduct of one of the parties is lawful, yet still illegitimate. The aim of allowing this as a grounds for redress would be to recognise that despite a threat not being unlawful, in some circumstances, the pressure put on a plaintiff is so egregious that the law should intervene.

This essay will focus on lawful act duress and aim to answer the question: does lawful act duress exist, and if so, what is its scope? The answer to this question is practical in nature and will concentrate on the discussion of lawful act duress in the common law courts.

Additionally, I will focus on an equally fundamental question to this area of law: *should* lawful act duress exist? This is an issue widely debated by legal scholars who disagree on whether illegitimate pressure should include lawful threats at all. There is a tension between two ideals; the need to protect certainty and predictability and the need to protect those who enter into contracts under improper pressure.

II *Times Travel (UK) Limited v Pakistan International Airlines Corporation*

¹¹ Note that the position appears to be different for other forms of duress: see *Astley v Reynolds* [1731] 2 Strange 916.

¹² See, for example, Dyson J in *DSND Subsea Ltd (formerly DSND Oceantech Ltd) v Petroleum Geo-Services ASA* [2000] BLR 530 at 131; *Borrelli v Ting* [2010] UKPC 21; [2010] Bus LR 1718, at [35].

Until the recent case of *Times Travel (UK) Limited v Pakistan International Airlines Corporation*¹³, the concept of lawful act duress had only been addressed briefly in a few cases. The discussion of this type of economic duress was limited and mostly confined to obiter.

At first instance, the High Court of England and Wales in *Times Travel* allowed the claim for lawful act duress. This finding has since been reversed by the Court of Appeal who declined to find for the claimant. Nevertheless, the judgement of the court still affirmed the existence of lawful act duress and asserted that, despite having a limited scope, lawful duress could provide a basis for rescinding a contract in certain circumstances.

A *The Facts in Times Travel:*

The claimant, Times Travel (TT), is a small travel agent operating in an area of Birmingham where the majority of residents are of Pakistani origin. The business is family owned and largely relies on the income generated by selling flights on behalf of the defendant, Pakistan International Airlines Corporation (PIAC). PIAC is Pakistan's national flag carrier and as such is the only airline that flies directly between Pakistan and the UK. Accordingly, the trading relationship with PIAC is key to the success of TT's business; the evidence established that "Times Travel would be forced out of business if it could not sell PIAC tickets."¹⁴

TT became certified by the International Air Transport Association in 2008 and subsequently signed an agreement with PIAC ("The Original Agreement") that entitled them to a nine percent commission on all ticket sales sold on behalf of the airline. Additionally, TT was entitled to overriding commission, which was an incentive payment based on total sales.

During the first year of this agreement, disputes arose between TT and PIAC as well as between PIAC and other sales agents. The Association of Pakistan Travel Agents (APTA) was formed in 2008 to represent the collective group of agents selling on behalf of PIAC. APTA began negotiations with PIAC concerning amendments to the commission rate but TT was later notified

¹³*Times Travel (UK) Ltd v Pakistan International Airlines Corpn* [2020] 1 WLR 2523 at [43].

¹⁴At [6].

that these negotiations had broken down. PIAC also advised TT to not get involved with these APTA disputes and asserted that “an amicable solution would be reached.”¹⁵

In 2010, TT’s basic and overriding commissions for 2009 had not been paid out and they regularly chased PIAC up about this. TT were later assured by PIAC that their commission would be paid out, despite the fact that a new remuneration scheme was due to be introduced.

By 2012, a significant number of APTA members were threatening or had issued proceedings against PIAC. It was at this time that PIAC sent a notice of termination to all UK agents, including TT, ending their original agreements.

PIAC’s termination of the agreement complied with all contractual obligations; notice was given on 14 September 2012 that the agreements would come to an end on 31 October 2012, which satisfied the required notice period in the contract.

On 17 September 2012, PIAC reduced TT’s ticket allocation from 300 to 60 tickets. This reduction was not a breach in the contractual terms and was within the lawful rights of PIAC. However, David Richards LJ (henceforth Richards LJ) in the Court of Appeal affirmed this “had a major impact on Time’s Travel’s business and, if continued for much longer, would have put it out of business.”¹⁶

The new agreement offered TT a different remuneration package under which they were entitled to purchase tickets at a 7 percent discount, as well as an additional commission if sales targets were met. The most important addition to this agreement was that TT waived all claims to accrued commission or remuneration earned under their previous contract; this included the overriding commission from 2009 and subsequent years which had still not been paid, as well as accrued 9 per cent sales commissions.

¹⁵*Times Travel*, above n 13, at [11].

¹⁶At [13].

TT signed the agreement but later issued proceedings against PIAC and “sought to recover sums owing to it by way of commission under the arrangements in force prior to the making of the new agreement”, claiming that they had entered the new agreement under economic duress.¹⁷

At first instance, Warren J of the High Court of England and Wales declared that “lawful conduct can in some circumstances amount to economic duress” and “although acting lawfully, the defendant, PIAC, [had] placed illegitimate pressure on TT.”¹⁸ The judge considered the other two elements of economic duress to also be made out: he found that the reduction in ticket allocation meant that TT was under pressure to sign the new agreement in order to prevent their business from failing. Furthermore, the judge rejected PIAC’s claim that TT had alternatives; the defendant argued that TT could have refused to sign the contract and found new business to replace that derived from PIAC. However, Warren J found that this could not have been done within a reasonable time-frame. Accordingly, all three elements of economic duress were made out and it was held that TT was entitled to avoid the contract.

B Discussion of the Law

Richards LJ¹⁹ delivered the Court of Appeal’s decision in *Times Travel*. In his opening remarks, his Lordship said that “it is now well established that a contract may be avoided on the grounds of economic duress, although its scope remains uncertain.”²⁰ He acknowledged that perhaps the greatest area of uncertainty involves “lawful act duress, where a contract results from a threat of a lawful act or omission.”²¹

His Lordship accepted the High Court’s findings on the second two ingredients of economic duress; pressure being a significant cause inducing the claimant to enter the contract, and the effect of the pressure being that there is a lack of practical choice for the claimant. It was agreed by both PIAC and TT that Warren J’s ruling on these elements would not be challenged.

¹⁷ *Times Travel*, above n 13, at [13].

¹⁸ At [33].

¹⁹ With whom Moylan and Asplin LJJ agreed.

²⁰ *Times Travel*, above n 13, at [1].

²¹ At [1].

However, the judge did not regard the existence of lawful act duress to be as certain as Warren J suggested. As such, the focus of the appeal was on the first ingredient of economic duress; illegitimate pressure. In particular, his Lordship concentrated on whether a threat to commit a lawful act could ever satisfy this element of the doctrine. The judge set out to answer the question: “Does lawful act duress exist at all and, if so, in what circumstances can it be invoked?”²²

Richards LJ acknowledged that in English law, economic duress was first recognised in *Occidental Worldwide Investment Corporation v Skibs A/S Avanti* and *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd*. Neither of these cases found economic duress to be established on the facts, but both judgments acknowledged the possibility of economic duress as a potential basis for relief. In *Occidental*, Kerr J emphasised that the pressure put on the claimants was merely commercial pressure and therefore could not sustain a claim of economic duress;²³ there had to be a coercion of the will so as to vitiate consent.²⁴ Richards LJ found *North Ocean Shipping* to establish that “a contract made under the coercion of economic duress was voidable and a threat to break a contract could amount to economic duress.”²⁵ On the facts, Mocatta J in *North Ocean* found that if the claimants had not subsequently affirmed the revised contract, they could have succeeded in a claim for economic duress.

In *Times Travel*, Richards LJ noted that in both *Occidental* and *North Ocean Shipping*, the pressure allegedly amounting to economic duress came from threats that were unlawful; in *Occidental* the threat was combined with fraudulent statements and in *North Ocean Shipping* there was a threat to breach a contract.²⁶

The two House of Lords’ decisions that subsequently provided clear authority for claims of economic duress also involved unlawful threats: The facts in *Universe Tankships Inc of Monrovia*

²² *Times Travel*, above n 13, at [13].

²³ *Occidental Worldwide Investment Corporation*, above n 1.

²⁴ More recent cases require the threshold of absence of choice, rather than coercion of the will vitiating consent. See *Universe Tankships*, above n 3.

²⁵ *Times Travel*, above n 13, at [44].

²⁶ *Times Travel*, above n 13, at [45].

*v International Transport Workers Federation (The Universe Sentinel)*²⁷ and *Dimskal Shipping Co SA v International Transport Workers Federation (The Evia Luck) (No 2)*²⁸ were quite similar. Both involved a tortious wrong called “blacking”, where the defendants prevented the claimants’ ships from leaving port until specific demands were met. In *Universe Tankships* the defendants instructed staff not to provide tug services to certain ships until one-off payments were made. Similarly, in *Dimskal Shipping*, the defendants wouldn’t allow a ship to leave port unless the workers entered into employment agreements with their crew. These threats ultimately constituted a tort and therefore were deemed unlawful. This allowed both shipowners to be successful in a claim for economic duress.

Richards LJ noted that the “central point at issue in [*Times Travel*]”, namely lawful act duress, was not a focus in these early cases.²⁹ However, the judge believed that examination of these authorities was important to establish the underlying principles of economic duress. In *Universe Tankships* Lord Diplock stated:³⁰

It is, however, in my view crucial to the decision of the instant appeal to identify the rationale of this development of the common law. It is not that the party seeking to avoid the contract which he has entered into with another party, or to recover money that he has paid to another party in response to a demand, did not know the nature or the precise terms of the contract at the time when he entered into it or did not understand the purpose for which the payment was demanded. The rationale is that his apparent consent was induced by pressure exercised upon him by that other party which the law does not regard as legitimate...

Therefore, according to Lord Diplock, the doctrine of economic duress has developed in the common law in order to liberate a party from contracts made under pressure which the law does not regard as legitimate. Lord Scarman dissented on the live issue in *Universe Tankships* but provided insight into the discussion on what “illegitimate pressure” means in this context:³¹

²⁷ *Universe Tankships*, above n 3.

²⁸ *Dimskal Shipping Co SA v International Transport Workers Federation (The Evia Luck) (No 2)* [1992] 2 AC 152.

²⁹ *Times Travel*, above n 13, at [47].

³⁰ *Universe Tankships*, above n 3, at 384.

³¹ At 400.

...in life, including the life of commerce and finance, many acts are done ‘under pressure, sometimes overwhelming pressure’; but they are not necessarily done under duress. That depends on whether the circumstances are such that the law regards the pressure as legitimate. In determining what is legitimate two matters may have to be considered. The first is as to the nature of the pressure. In many cases this will be decisive, though not in every case. And so the second question may have to be considered, namely, the nature of the demand which the pressure is applied to support. The origin of the doctrine of duress in threats to life or limb, or to property, suggests strongly that the law regards the threat of unlawful action as illegitimate, whatever the demand. Duress can, of course, exist even if the threat is one of lawful action: whether it does so depends upon the nature of the demand.

Richards LJ viewed this statement as one “of particular importance” to the case of *Times Travel*, due to its recognition that threat of lawful action could amount to illegitimate pressure under certain circumstances.³² According to Lord Scarman, the legitimacy of such threats can be determined by focusing not just on the nature of the threat, but also the nature of the demand. The example given by Lord Scarman was the case of blackmail:³³

Blackmail is often a demand supported by a threat to do what is lawful, e.g. to report criminal conduct to the police. In many cases, therefore, what [one] has to justify is not a threat, but the demand...

In *Times Travel* Richards LJ said that using blackmail as an example of lawful act duress is flawed. Ultimately, this is because blackmail should not be seen as a lawful threat at all. The threatened *conduct* (communicating the information) may be lawful, 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.”³⁴ Blackmail is an example that has been used to justify the possibility of lawful act duress in several other cases, including the House of Lords case of *Thorne v Motor Trade Association* which has been frequently cited for its test for economic duress.

³² *Times Travel*, above n 13, at [51].

³³ *Universe Tankships*, above n 3, at 400.

³⁴ *Times Travel*, above n 13, at [53].

Nevertheless, Richards LJ went on to ultimately agree with Warren J that lawful act duress could exist as a grounds for rescinding a contract. He reached this conclusion after analysing the more recent discussion of lawful act duress in *CTN Cash and Carry Ltd v Gallagher Ltd*.³⁵

Although the claimants in *CTN* were unsuccessful in establishing a claim of economic duress, Lord Steyn, who delivered the judgement of the court, affirmed the possibility of the courts allowing future lawful act claims:³⁶

...it might be a relatively rare case in which 'lawful act duress' can be established. And it might be particularly difficult to establish duress if the defendant bona fide considered his claim was valid. In this complex and changing branch of the law I deliberately refrain from saying 'never'.

The court in *CTN* was the first to consider the issue of lawful act duress directly. The case involved a dispute between the claimant, a cash and carry company, and the defendant, a sole distributor of popular English cigarette brands. The defendants sold cigarettes to the claimant on a regular basis and, at their own discretion, granted credit facilities for these transactions. Each sale was a separate contract and therefore the defendant was not obliged to continue either granting credit or supplying the claimant. On one occasion, the defendant mistakenly delivered a consignment to the wrong warehouse and the goods were subsequently stolen. They then invoiced the claimant for the stolen order, believing that at the time they were stolen the claimant was responsible for the risk. The defendant genuinely believed they were entitled to this sum and therefore were acting in good faith. At first, the claimant refused to pay the invoice but later acquiesced when the defendant terminated all credit facilities and refused to reinstate them until payment was made. The claimant then sought to recover the sum paid by bringing proceedings for economic duress.

Richards LJ highlighted the three reasons why Steyn LJ rejected the plaintiff's claim: (1) the parties did not have a protected relationship so the doctrine of undue influence could not apply, nor could consumer legislation since it was a commercial transaction, (2) the defendant was not

³⁵ *CTN Cash and Carry Ltd v Gallagher Ltd* [1994] 4 All ER 714.

³⁶ At 719.

acting unlawfully, and most importantly, (3) the defendant's actions were taken in good faith; they bona fide believed that they were entitled to the sum demanded from the claimant. Therefore, the defendant's motive was pure; they sought to apply commercial pressure in order to obtain a sum they believed they were genuinely entitled to. It was these factors that Steyn LJ cited as barriers for any claim for economic duress.

Nevertheless, Steyn LJ cited Birks, *An Introduction to the Law of Restitution* (1989) and the House of Lords in *Thorne, Universe Tankships*, and *North Ocean Shipping* to support his affirmation that some lawful threats could fit within the scope of economic duress:³⁷

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.

Nicholls LJ in *CTN* also stated:³⁸

...the feature underlying and dictating this attitude was a genuine belief on its part that it was owed the sum in question. It was entitled to be paid for the price for the goods. So it took the line: the plaintiff must pay in law what it owed, otherwise its credit would be suspended.

In *CTN*, the defendant's belief that the money was already owed to them was actually unfounded. Nevertheless, the belief was still *genuine* and therefore the defendant was not acting in bad faith when they demanded payment. In *Times Travel* Richards LJ recognised that it was "critical for the decision [in *CTN*] that the defendant acted in good faith."³⁹ He noted that according to the court in *CTN*, the distinction between good and bad faith would not always be determinative: The judge found *CTN* to hold that "in a purely commercial context, it would be relatively rare for lawful act

³⁷ *CTN Cash and Carry Ltd*, above n 36, at 719.

³⁸ At 719.

³⁹ *Times Travel*, above n 13, at [61].

duress to be established and, while refraining from saying “never” it might be particularly difficult to do so if the defendant acted bona fide.”⁴⁰ Richards LJ found *CTN* to clearly establish that:⁴¹

... 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 cannot be taken to establish that if A genuinely but unreasonably believes that demand to be well founded, the same result follows.

Therefore, the existence of lawful act duress was generally affirmed in *CTN* and subsequently accepted by Richards LJ. However, a clear distinction was drawn between threats of good and bad faith. This was a distinction not emphasised by Warren J at first instance but was seen as of critical importance to Richards LJ.

The judge found it to be clearly established that lawful threats made in bad faith could constitute illegitimate pressure. However, the threats by PIAC were ultimately made in good faith. Accordingly, Richards LJ sought to ascertain whether lawful act duress should be extended beyond the bounds discussed in *CTN*; the question was whether a claim for lawful act duress could be made out in situations where the threats were made in good faith. His Lordship stated that in relation to lawful threats:⁴²

If a belief is reasonably, as well as genuinely, held, I can see no basis on which a plea of economic duress could succeed and it would, in any event, be contrary to the decision in *CTN Cash and Carry*.

Therefore, the critical inquiry was whether a claim for lawful act duress could succeed if the defendant’s threat was made in good faith, but their belief was unreasonably held. In situations where the belief was both genuine and reasonable, there is no basis for a claim.

⁴⁰ At [61].

⁴¹ *Times Travel*, above n 13, at [62].

⁴² At [70].

His Lordship also noted how Steyn LJ was well aware of the implications of extending economic duress to include lawful threats: allowing claims for economic duress where the actions of the defendant are both lawful and bona fide would be “a radical extension with far-reaching implications, introducing a substantial and undesirable element of uncertainty in the bargaining process.”⁴³ Therefore, it was seen as important by Steyn LJ to limit the scope of lawful act duress.

When examining the subsequent authorities on economic duress, Richards LJ found the judgments to provide little assistance to answering the question before him. In particular, this was because the cases referred to the court, namely *DSND Subsea Ltd v Petroleum Geo-Services ASA*⁴⁴, *Borrelli v Ting*⁴⁵ and *Progress Bulk Carriers Ltd v Tube City IMS LLC (The Cenk Kaptanoglu)*⁴⁶, all involved threats that were unlawful. The discussion of lawful duress in these cases was limited, and did not closely consider the distinction between good and bad faith threats.

In *Progress Bulk Carriers*, Cooke J stated that “however unusual the situation may be, the courts are willing to apply a standard of impropriety rather than technical unlawfulness.”⁴⁷ Richards LJ noted that the decision in *Progress Bulk Carriers* did not strongly support an extension of economic duress to situations of lawful threats made in good faith: “Impropriety has to date involved, in the context of lawful acts, deliberate wrongdoing in the sense of pursuing claims known to be invalid.”⁴⁸ This statement from *Progress Bulk Carriers* did not show support for lawful act duress claims where the threat was made in good faith.

Richards LJ also acknowledged that some Australian cases have taken a much stricter approach to lawful act duress: The Court of Appeal of New South Wales in *Australia and New Zealand Banking Group Ltd v Karam* rejected the possibility of lawful act duress and instead suggested that these claims should be pursuant to the equitable doctrine of unconscionable transactions.⁴⁹

⁴³ *Times Travel*, above n 13, at [71].

⁴⁴ *DSND Subsea Ltd (formerly DSND Oceantech Ltd) v Petroleum Geo-Services ASA* [2000] BLR 530.

⁴⁵ *Borrelli v Ting* [2010] UKPC 21; [2010] Bus LR 1718.

⁴⁶ *Progress Bulk Carriers Ltd v Tube City IMS LLC (The Cenk Kaptanoglu)* [2012] 1 Lloyd’s Rep 50.

⁴⁷ At [35].

⁴⁸ *Times Travel*, above n 13, at [73].

⁴⁹ *Australia and New Zealand Banking Group Ltd v Karam* [2005] 64 NSWLR.

The court reasoned that limiting the scope of economic duress to only include unlawful threats would reduce uncertainty and vagueness.

As noted by Richards LJ, the development of the common law does show support for the accommodation of lawful act duress generally; *Progress Bulk Carriers*, *CTN Cash*, *Thorne* and *Universal Tankships* all discussed the possibility of such claims favourably. However, the collective approach has been one of caution; the judgments emphasise that the courts wish to refrain from introducing uncertainty into the law by allowing this extension of economic duress to have too wide a scope of application. The prevailing opinion has been that lawful act duress should apply in circumstances where the pressure is so exploitative that the courts feel compelled to intervene. Such circumstances are exceptional, and accordingly, the threshold for these claims is set high. The distinction between the good or bad faith of the defendant becomes important in determining whether such pressure is illegitimate. This is because good faith shows that the defendant was acting to further their business interests, an endeavour the courts do not want to prevent, rather than to improperly exploit the plaintiff's circumstances for financial gain.

C The Decision in Times Travel

Despite agreeing with Warren J that lawful act duress does exist as a basis for relief, Richards LJ ultimately allowed the appeal. Regardless of the reasonableness of the defendant's belief, the judge found that lawful act duress should not apply when the defendant was acting in good faith:⁵⁰

My conclusion on the central legal issue is 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 that it is entitled, and that is so whether or not, objectively speaking, it has the reasonable grounds for that belief. The common law and equity set tight limits to setting aside otherwise valid contracts. In this way, undesirable uncertainty in a commercial context is reduced.

⁵⁰ *Times Travel*, above n 13, at 105.

This finding is consistent with the majority of preceding case law which affirmed the existence of lawful act duress but emphasised the importance of its scope remaining limited in order to reduce uncertainty.

1 Reasoning of the Court

Richards LJ acknowledged that “in the context of the present case, which concerns the reasonableness of grounds for resisting a claim, it can be said that a test of unreasonableness is not uncertain, because it can be tested and decided according to conventional legal standards.”⁵¹ However, his Lordship emphasised that this will not be true for all cases and it would be hard to measure unreasonableness in a principled way without the intervention of legislation. Therefore, it was important to refrain from developing the law in a way that would require future courts to engage in such analysis.

It is clear that preserving certainty of the law was one key consideration for Richards LJ in reaching his decision. Beyond this, the judge also argued that this conclusion was important on principle:⁵²

In judging the use of lawful acts or threats of lawful acts as commercial pressure, there is a sharp distinction between such use to pursue demands made in good faith and those made in bad faith. As I earlier mentioned, a lack of good faith on the part of a contracting party is a feature in a number of the grounds on which contracts may be avoided. Rescission on grounds of fraudulent misrepresentation or unconscionable transaction are examples. 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 content, but it is also very unclear why or on what basis the common law should hold that a party with a private law right, whose exercise is not subject to any overriding duty, cannot use it to achieve a purpose which is both lawful and advanced in good faith.

⁵¹ *Times Travel*, above n 13, at [105].

⁵² At [106].

Economic pressure is something to be expected in a commercial context and to a large extent, the common law courts have shown a commitment to protecting this right. By limiting lawful act duress to threats made in bad faith, Richards LJ endeavoured to set a high threshold for illegitimate pressure that would only be reached in exceptional circumstances. This is consistent with the judgment in *CTN*, which emphasised that lawful act duress should be limited in scope. The distinction between good faith and bad faith also reflects a moral value judgment in society; when a party lacks good faith, it becomes easier for all to agree that the conduct is unacceptable.

The judge also wanted to ensure that lawful act duress did not become a ‘back door’ used by parties to control the behaviour of monopolies. PIAC was able to exert pressure on TT largely because of their position as a monopoly supplier. Richards LJ acknowledged that “the common law has always rejected the use, or abuse, of a monopoly position as a ground for setting aside a contract, leaving it to be regulated by statute.”⁵³ The judge did not want to inadvertently allow parties to use the doctrine to regulate an area of the law which the courts have maintained should be governed by statute.

2 *Application of the Law to the Facts*

After outlining his view of the law, Richards LJ applied this to the facts of the case. The judge noted that “Warren J did not find PIAC to lack a genuine belief in its right to reject Times Travel’s various claims.”⁵⁴ In fact, for some of the claims, namely the 9 per cent basic commission, Warren J found that PIAC was able to establish they held a genuine belief that the money from October 2010 was no longer owed. Nevertheless, Warren J went on to hold that:⁵⁵

Whether PIAC has acted in good faith or bad faith is moot. The claimants have not established that there was bad faith but nor has PIAC established good faith. It is clear to me that the whole basis on which the Notice was served and the terms of the New Agreement were formulated was to ensure that agents would lose their claims to accrued rights in a situation where some of those rights

⁵³ *Times Travel*, above n 13, at [107].

⁵⁴ At [109].

⁵⁵ *Times Travel (UK) Ltd v Pakistan International Airlines Corp* [2017] EWHC 1367 (Ch), at [262].

(in particular, 9 per cent commission on YQ) were clear... Whether this demonstrates bad faith is a matter on which different minds might take different views.

Richards LJ criticised Warren J's analysis in this passage and held that the burden of proof remains with the claimant: "The judge accepted that Times Travel had not established bad faith. That should have been the end of the discussion of good faith or bad faith. It was not for PIAC to establish its good faith."⁵⁶ His Lordship also criticised the judge for considering "that good or bad faith is a matter for objective evaluation, rather than a finding of fact."⁵⁷ This reinforces the argument that good faith or bad faith is not concerned with views of "morally or socially acceptable conduct" but should instead be a matter of evidence.⁵⁸

According to Warren J's findings, one of PIAC's genuine claims clearly lacked reasonable grounds. Richards LJ acknowledged that this made up a small percentage of the total claims, around 3.75 percent, and questioned whether this would "be enough to avoid the entire release of the claims of Times Travel, if a lack of reasonable grounds were a basis for finding of illegitimacy?"⁵⁹ Ultimately, this was not a question that needed to be answered, as the judge ultimately ruled: "In my judgment, a lack of reasonable grounds is insufficient to engage the doctrine of duress where the pressure involves the commission or threat of lawful acts."⁶⁰ Presumably, the judge simply posed this question in order to highlight the issues that would arise in allowing a lawful act duress claim in these circumstances.

Fundamentally, the judgement of Richards LJ in *Times Travel* stands to limit the application of lawful act duress to circumstances where the defendant has acted in bad faith. The judge undertook a comprehensive analysis of the doctrine's development and agreed with many of the preceding cases. These cases insisted that lawful act duress was a possible grounds for rescission, but should only apply in exceptional circumstances. In reaching this conclusion, his Lordship considered how the law could strike a balance between avoiding uncertainty whilst also retaining the ability to

⁵⁶ *Times Travel*, above n 13, at [111].

⁵⁷ At [111].

⁵⁸ At [111].

⁵⁹ At [112].

⁶⁰ At [113].

intervene when economic pressure goes too far beyond what is acceptable in commercial dealings. Ultimately, this balance was found by refusing to extend the scope of lawful act duress to circumstances where the defendant has acted in good faith, even if its belief is unreasonable.

III Scholarly Debate: Should Lawful Act Duress Exist?

The decision of David Richards LJ in *Times Travel* has since been appealed to the Supreme Court and we now await judgement. Notably, this will be the first time that the Supreme Court has heard a case on economic duress. This remains a unique opportunity for the common law to have clear confirmation on whether economic duress can apply to lawful threats, and if so, what the scope of its application will be.

The Court of Appeal in *Times Travel* was confident in holding that whilst the scope may be limited, lawful act duress does exist as a basis for relief. However, it is not certain that the Supreme Court's judgement will be consistent on this matter. There is currently no express authority for this area of law and it remains possible that the Supreme Court will reject even a limited application of lawful act duress.

Certainly, many scholars share the view of Richards LJ that lawful act duress should exist as a basis for relief in some capacity. However, there are many academics who disagree with this and would prefer the Supreme Court to limit economic duress to threats that are unlawful.

Nevertheless, I would argue the ruling of Richards LJ in *Times Travel* marks a desirable development in the common law. Economic duress exists as a basis for relief to protect those who have entered into contracts under improper pressure. It is certainly common practice for commercial parties to apply pressure when bargaining. However, the law should intervene when such pressure becomes grossly exploitative.

In *Contract Doctrine, Predictability and the Nebulous Exception*, Rex Adhar argued that allowing economic duress to include lawful threats undermines both the predictability and clarity of the law

in a way that frustrates the interests of commerce.⁶¹ Predictability is an important endeavour in such a context because it allows those in business to make informed decisions. According to Adhar, for commercial parties:⁶²

The actual content of the rules is not so critical as the fact that the rules are fixed and certain... Even if the law impinges in an unwelcome way, at least [business people] know where they stand. Not knowing is extremely uncomfortable.

He argues that extending the doctrine to include lawful threats goes beyond affirming parties' positive legal rights and begins to "render the law too uncertain... in an area of law where certainty is highly desirable."⁶³ Certainty is a consideration that the common law courts have consistently taken into account when discussing the scope of lawful act duress. However, Adhar argues that restricting the application of lawful act duress to instances of bad faith does not do enough to protect the interests of commercial parties. Instead, he would argue that it is in the best interests of commercial parties to have a doctrine that relies on the clear distinction between lawful and unlawful action to determine which circumstances will have a basis for relief.

Whilst certainty and predictability of law are important endeavours, I disagree with Adhar that allowing economic duress to extend to lawful acts would render the law too uncertain. Although inquiring into the legitimacy of lawful action does require judges to engage in conscience-based questioning, this can still be done in a principled way. In fact, Lord Scarman's well-known discussion of illegitimate pressure provides significant guidance on how such an approach can be developed.

To reiterate, in *Universe Tankships* Lord Scarman emphasised that two matters must be considered in determining whether pressure is legitimate; both the nature of the pressure and the nature of the demand the pressure is applied to support. It is clear that it would never be regarded as legitimate for a person to threaten unlawful action in order to support a demand, regardless of what that demand is. Thus, in situations where the pressure exerted is independently unlawful, the first part

⁶¹ Rex Adhar "Contract Doctrine, Predictability and the Nebulous Exception" (2014) 73 CLJ 39.

⁶²At 56.

⁶³At 56.

of Lord Scarman’s principle becomes largely determinative in deciding that there is illegitimate pressure. In situations where threats are lawful, Lord Scarman’s two-pronged framework for illegitimate pressure can still apply, albeit emphasis must be placed equally on both parts of the inquiry; the nature of the pressure *and* the nature of the demand. If a party is proposing to do something that is otherwise lawful, this will not constitute economic duress unless the threat was made to support a demand that is greatly disproportionate. Grant Lamond in *The Coerciveness of Law* explained this concept:⁶⁴

Statements of rights are normally shorthand approximations of more complex specifications, and rights themselves are normally defeasible by other considerations. Until we have examined the details of a particular case, ... it cannot be concluded from the judgment that someone has the right to do X or that it is permissible for them to threaten to do X unless someone complies with their demand, even where the demand is not in itself impermissible (i.e. it does not involve the other in doing something wrong). We need to know what X is, and what it is that is being demanded, before we can know whether the pressure is legitimate.

Extending the scope of economic duress to include threats that are lawful allows the courts to intervene in circumstances where the combination of the threat and the demand is unfairly exploitative. In *Throwing the Baby Out With the Bathwater*, Rick Bigwood explains that a successful lawful act case will have “a seriously disjunctive relationship between the end that was being sought (the demand) and the means that was being employed to achieve it (the application of ‘lawful’ pressure).”⁶⁵ The court must inquire whether the pressure applied is “a proper means in the circumstances for supporting the specific, self-serving demand”.⁶⁶ Such a case may be hard to define but will be easy to spot: Lord Steyn and Richards LJ both emphasised the fact that lawful act duress will only apply in extreme circumstances. If a party is threatening to do what is legally permissible, they can be certain that the courts will not intervene unless their conduct is grossly exploitative; behaviour that goes far beyond the practices expected in normal commercial interactions.

⁶⁴ Grant Lamond “The Coerciveness of Law” (2000) OJLS 39 50, at 1.

⁶⁵ Rick Bigwood “Throwing the Baby Out With the Bathwater” (2008) UQLJ 27 41, at 60.

⁶⁶ At 59.

Furthermore, it is important to note that in reaching his decision, Richards LJ specifically recognised the importance of maintaining certainty in this area of the law. In particular, his Lordship noted the importance the common law and equity have traditionally placed on upholding contracts that are otherwise valid. The courts should not intervene to usurp fair bargains or prevent the exercise of ordinary commercial pressure. However, certainty and predictability should not be the only consideration of the court; the pursuit of maintaining minimum standards of commercial conduct is also an important endeavour and can only be pursued by allowing the courts to have discretion. As Bigwood explained:⁶⁷

It is far too easy to exaggerate the problem of ‘general concepts’ (or ‘categories of indeterminate reference’) in the administration of law, when such concepts (or categories) are both unavoidable and necessary to the attainment of legal justice - legal justice of any complete and sophisticated kind, at least. Nuanced justice will inevitably come at the expense of certainty to some degree. The question then becomes, how much certainty can we reasonably expect, or even want, in an area where difficult, instance-specific, and all-things-considered judgments are inevitable...

As Bigwood suggests, not only is complete certainty difficult to achieve in this area of law, it is also not entirely desirable. Justice requires judges to have room to apply discretion and evaluate each case against principles that are general enough to accommodate for unpredictable situations. This is particularly important in an area of law that exists to provide remedies to parties precisely because the pressure placed on them was not commonplace in the commercial environment and therefore would be rather hard to closely define in advance.

In “*Lawful Act*” *Duress (Again)*, Paul S. Davies and William Day expressed a similar view to Adhar: The authors asserted that the courts should “abandon lawful act duress entirely.”⁶⁸ Davies and Day argued that the test set out by Richards LJ was vague and required the courts to “embark upon questions of moral entitlement” which should be avoided.⁶⁹ According to the authors:⁷⁰

⁶⁷ Bigwood, above n 66.

⁶⁸ Paul S. Davies and William Day. “‘Lawful Act’ Duress (again).” (2020) LQR, at 2.

⁶⁹ At 3.

⁷⁰ At 3.

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.

I disagree with the notion that judges are incapable of making inquiries into what is acceptable conduct in the commercial environment; this is an inquiry the courts are already familiar with making, in particular in dealing with situations of unconscionable contracts. The common law develops piecemeal in order to reflect society's moral and social expectations. This is true in all areas of law, including private law. Furthermore, the scope of lawful act duress has been justly limited by the court in *Times Travel* to only apply in situations where commercial parties are acting in bad faith and are therefore aware of the exploitative nature of their threats. The common law has taken a caustic approach to extending economic duress, with the intent of only allowing its application in circumstances that go far beyond what would be accepted as tolerable commercial behaviour. These are situations where any reasonable individual would view the circumstances and ask themselves: *surely the law cannot accept this behaviour?* Judges are surely capable of distinguishing such extreme instances from the "rough and tumble of pressures of normal commercial bargaining."⁷¹ Rick Bigwood explained this concept well:⁷²

It is hard to imagine, even on the current state of the jurisprudence on the subject, that intelligent minds (such as those attributed to judges) are incapable of understanding the above concepts⁷³ in a controllable way. Granted, concepts like economic duress and illegitimate pressure lack sharp boundaries, and this is brought home especially in those controversial or borderline cases that tend to be litigated, but the absence of bright-line borders in this area of the private law should be of little or no concern when the relevant determinations are themselves capable of being rendered within a framework of understanding and analysis that is conceptually tractable, which it is submitted, the two-pronged normative baseline approach to contractual duress⁷⁴ is.

It is true that the outcome of claims for lawful act duress will depend on the specific facts of each case. It will require judges to engage in questions that elucidate what kind of behaviour can be

⁷¹ *DSND Subsea Ltd*, above n 45, at [131]. Per Dyson J.

⁷² Bigwood, above n 66, at 79.

⁷³ Here referring to the concept of illegitimate pressure in relation to lawful act duress.

⁷⁴ Bigwood is referring to Lord Scarman's aforementioned two-factor approach to illegitimate pressure.

condoned in a commercial environment, looking at both the nature of the pressure and the nature of the demand in conjunction. There is nothing to say that this inquiry cannot be engaged in a principled manner by taking an approach that looks at the issue in both an analytical and intuitive way.⁷⁵ We should not be so conservative in developing the law that redress for clear exploitation becomes impossible. Rather, as Bigwood asserted: “Indeterminacy usually just calls for care in application rather than rejection.”⁷⁶

Davies and Day also criticised the distinction made by Richards LJ between good faith and bad faith demands. They argued that good faith is “not a stable concept” and “means different things to different people in different contexts.”⁷⁷ This very concept was discussed by Richards LJ in *Times Travel* who asserted that good or bad faith is actually a matter of fact and not a social or moral judgment of the party’s conduct. Davies and Day insisted that “a test of good faith is likely to lead to uncertainty.”⁷⁸ It is likely that they arrived at this conclusion as a result of their incorrect conceptualisation of the court’s inquiries on good or bad faith; in determining whether PIAC was acting in good or bad faith, the court was not judging whether their conduct was honorable, but instead whether they genuinely believed themselves to be entitled to make such a threat.

Nonetheless, Davies and Day argue the courts should denounce lawful act duress as a whole in order to ensure as much predictability in the law as possible. According to the authors:⁷⁹

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.

Davies and Day have adopted a conservative approach to the law that prioritises commercial certainty and predictability over all else. Their concern is that allowing claims for lawful act duress,

⁷⁵ See generally: Bigwood, above n 66.

⁷⁶ Bigwood, above n 66, at 79.

⁷⁷ Davies and Day, above n 69, at 4.

⁷⁸ At 4.

⁷⁹ At 6.

even only in situations where the defendant has acted in bad faith, will introduce uncertainty which will eventually result in unnecessary litigation costs as well as commercial doubt.

I would contend that whilst commercial certainty is an important endeavour, there should remain scope for the common law to intervene when exceptional circumstances arise. The use of pressure in a commercial environment is generally acceptable but when one party uses such pressure to grossly exploit another party, this should not remain completely unchecked. Furthermore, as I have already outlined, the courts can use Lord Scarman's two-prong approach to illegitimate pressure to guide the development of a principled approach to lawful act duress. In circumstances where a party has made a threat in bad faith, the court can inquire further about whether the nature of this threat, when paired with a particular demand, is unjustly exploitative.

Based on Richards LJ's conception of the law, if PIAC had known that there was no basis for their claim, namely, they were aware the agents were entitled to the unpaid commissions and yet still set out to exploit the claimant's vulnerable position, a claim for lawful act duress could succeed. Similarly, if the defendant in *CTN* did not genuinely believe the claimant to owe the sum related to the stolen goods, the same conclusion could be reached. This does not seem like a problematic result to arrive at; Commercial pressure of this type, whilst not unlawful, is clearly exploitative and should not be overlooked by the courts in favour of pursuing complete certainty.

In my view, the court in *Times Travel* successfully struck a balance between the facilitation of commercial bargaining and free enterprise, and the protection of parties from unjust exploitation and improper pressure. A restrictive approach was taken that considered the need for both certainty and predictability in the law: By making a distinction between threats made in good or bad faith, Richards LJ confined lawful act claims to circumstances where the defendant has an awareness of the exploitative nature of their threats.

IV Conclusion

In general, the common law seeks to develop in a way that meets the needs of society over time. Duress, which at first only applied to threats against a person, has developed significantly to address the changing circumstances of the commercial environment. Broadly, certainty and clarity of the law is an important consideration for the courts to take into account. Nevertheless, complete certainty is something that need not be prioritised over fairness. The Supreme Court, when considering the appeal for *Times Travel*, will need to limit the scope of lawful act duress in order to avoid introducing unnecessary doubt into the law. However, allowing its application in exceptional circumstances is crucial in order to acknowledge that the law should also aim to reflect the minimum standards expected of people within the commercial environment. Whilst the focus of commerce is justifiably selfish, we should not allow it to be unfairly exploitative.

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