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A fall between two stools: the Supreme Court confines lawful act duress

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INTRODUCTION

In *Pakistan International Airline Corporation v Times Travel (UK) Limited*[1] the Supreme Court considered lawful act duress. The Court confirmed the existence of the doctrine after many years of uncertainty. This is welcome. But the Court significantly narrowed the scope of its application to two specific circumstances: where pressure exerted by a defendant comprises a demand supported by a threat to report criminal activity, and where pressure derives coercive force from the defendant's use of 'illegitimate means' to manoeuvre the claimant into a position of weakness. As we outline below, this may prevent the law from developing in a clear and principled manner.

The case concerned two companies: Times Travel, a family-owned travel agent based in Birmingham, and Pakistan International Airline Corporation (PIAC) which is the national airline of Pakistan. In 2008, the parties contracted for Times Travel to provide tickets for PIAC flights, with Times Travel receiving commission on each ticket sale. While PIAC had similar arrangements with many travel agents, Times Travel's business relied 'almost entirely' on sales of PIAC tickets. This was sustainable because PIAC was the only airline operating direct flights between the UK and Pakistan at the time.

PIAC fell into financial trouble and failed to pay the commission on ticket sales it owed to many travel agents, including Times Travel. By 2012, Times Travel estimated it was owed £1.5m in unpaid commission fees. Rather than repaying or challenging the debt, PIAC asked Times Travel to enter a new contract for ticket sales, under which Times Travel would also agree to waive any claim against PIAC arising from the unpaid commissions. In order to induce Times Travel into signing the new agreement, PIAC significantly reduced the number of tickets it allocated to Times Travel, and threatened to terminate its commercial relationship with Times Travel entirely unless the new contract was

1 [2021] UKSC 40.

agreed. Crucially, both reducing Times Travel's ticket allocation and terminating the existing agreement were lawful acts.

Times Travel signed the new contract, thereby forfeiting any right to claim the £1.5m in unpaid commission. Sometime later Times Travel brought a claim seeking to rescind the second agreement, arguing that it was vitiated by lawful act duress. In the High Court, Warren J found that Times Travel was under duress when it signed the new contract, and that Times Travel could rescind the contract on that basis. That decision was overturned by the Court of Appeal. The matter was appealed to the Supreme Court, which found that Times Travel had not been subject to duress. The Court noted that the existence of the doctrine of lawful act duress was opaque, and its operation complex. The Court took the opportunity to clarify.

LAWFUL ACT DURESS

In *The Universe Sentinel* Lord Scarman said that for duress to be made out, two elements must be established: first, 'pressure amounting to compulsion of the will' and second, 'the illegitimacy of the pressure exerted'.[2] Where the threatened act is unlawful, the court has a clear marker of illegitimacy: traditional instances of unlawful act duress involve threats of 'loss of life or limb', battery, destruction of goods, or the wrongful detention of property.[3]

The issue in cases where the threatened act is *not* unlawful is finding a principled standard by which to draw the line between legitimate pressure and pressure which goes 'beyond what the law is willing to countenance as legitimate'.[4] This has proven complex, to the extent that Dawson has described the question as one 'which has chiefly arrested the modern development of the law of duress'.[5] Faced with this issue, some Australian courts have suggested that the concept of lawful act duress should be abandoned entirely.[6]

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2 *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366 (HL) 400 (*The Universe Sentinel*). The 'overborne will' theory of duress has since been rejected: see, in particular, *Crescendo Management Property Limited v Westpac Banking Corporation* (1988) 19 NSWLR 40 (CA); Patrick Atiyah, 'Duress and the overborne will again' (1983) 99 Law Quarterly Review 353.

3 *Sumner v Ferryman* (1708) 11 Mod 201 [88 ER 989]; *Skeate v Beale* (1841) 11 Ad & E 983 [113 ER 688].

4 *Equiticorp Finance Ltd (in liq) v Bank of New Zealand* (1993) 32 NSWLR 50 (CA), 106 (Kirby P).

5 John P Dawson, 'Economic duress – an essay in perspective' (1947) 45 Michigan Law Review 253, 287.

6 *New Zealand Banking Group Limited v Karam* (2005) 64 NSWLR 149: cf *Thorne v Kennedy* (2017) 263 CLR 85, 114–115 ([71]–[72]) (Nettle J); Henry Cooney and Harry Sanderson, 'Illegitimate pressure in the law of duress' (2022) Lloyd's Maritime and Commercial Law Quarterly 496, 497 and the cases cited therein.

Unlike the position in Australia, English courts have generally recognised the existence of lawful act duress. But the doctrine is bathed in controversy. One note written before the final decision in *Times Travel* argued that 'the Supreme Court should jettison the concept of lawful act duress', since there would be 'no gap in the law if the doctrine were abolished'.[7] Another warned that this would cause 'despair' for those 'who believe that contract law can and should be used as a tool to set a minimum standard of acceptable behavior'.[8] The Supreme Court in some sense sought to satisfy both camps, by ensuring that the doctrine survived to protect this minimum standard, but limiting it to a more predictable set of grounds. In our view, the decision fell between two stools: it has both limited the doctrine in an unprincipled manner and failed to articulate a predictable standard within those new confines.

THE NEW TEST

The Supreme Court gave a leading judgment by Lord Hodge, with whom Lord Reed, Lord Lloyd-Jones and Lord Kitchin agreed. Lord Burrows dissented, though there was much common ground between the two groups.

Most importantly, the Court held that lawful act duress exists. They further agreed that it is comprised of three core elements. First, there must be a threat by the defendant which is illegitimate; second, the threat must have caused the claimant to enter into the contract; and, third, the claimant must have had no reasonable alternative to complying with the demand.[9] The difficult question remained how to define 'illegitimate' in the first element, which was the focus of both judgments.

Lord Hodge identified two circumstances that would constitute illegitimate threats or pressure: where a defendant used knowledge of criminal activity by the claimant to exert pressure upon them, and where the defendant used 'illegitimate means' to manoeuvre the claimant into a position of weakness to force them to waive a pre-existing claim. Lord Burrows, in dissent, considered that a demand for a waiver of a claim would amount to lawful act duress where the defendant did not genuinely believe that it had a defence to the claim (ie the demand was made in bad faith) and the defendant had created or increased the claimant's vulnerability to the demand.

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7 Paul Davies and William Day, '"Lawful act" duress (again)' (2020) 136 Law Quarterly Review 7, 12.

8 Jodi Gardner, 'Does lawful act duress still exist?' (2019) 78(3) Cambridge Law Journal 496, 499.

9 This third element is implicit in Lord Hodge's reliance on authority, and stated explicitly by Lord Burrows without disagreement from the majority. See *Times Travel* (n 1 above) [13], [15] (Lord Hodge); [79] (Lord Burrows).

MANOEUVRING AND UNCONSCIONABILITY

Lord Hodge's reference to the exploitation of knowledge of criminal activity is a relatively stable test and was not relevant to the dispute in *Times Travel*. Accordingly, His Lordship focused on the scenario where a defendant uses 'illegitimate or unconscionable acts'[10] to manoeuvre a claimant into a position of weakness, thus forcing them to waive a pre-existing claim.

Lord Hodge did not elaborate extensively on the requirements of the 'unconscionable manoeuvring' test, instead illustrating the point with two examples from case law. The first was *Borrelli v Ting*.[11] In that case a company had collapsed, and the liquidators wanted to enter into a scheme of arrangement. This needed shareholder approval from Ting, who blocked the arrangement through forgery, false evidence and by withholding information. At the last minute, Ting agreed to support the scheme of arrangement, but only if the liquidators agreed to waive any pre-existing claims against him. The Privy Council held that the settlement agreement was invalid, on the basis of what Lord Hodge now characterised as lawful act duress: Ting was legally entitled to withhold consent to the scheme, but 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'.[12]

The second case was the *The Cenk K*,[13] in which the defendant shipowners contracted with the claimants for the charter of a ship for the carriage of shredded scrap metal to China. The owners subsequently agreed to charter the ship to someone else in breach of the initial agreement. The owners assured the charterers that they would provide a substitute vessel and compensate the charterers for all damages resulting from the owner's failure to provide the vessel as originally agreed. The charterers relied on this promise and did not seek an alternate ship. At the last minute, the owners gave the charterers a 'take it or leave it' offer, requiring them to drop all claims against the owners for costs they would face because of the delay. The waiver agreement was held to be voidable because the owners had manoeuvred the charterers into a position where 'they had no choice but to accept' the owners' offer.[14]

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10 Ibid [13].
11 [2010] UKPC 21.
12 *Times Travel* (n 1 above) [13].
13 *Progress Bulk Carriers Ltd v Tube City IMS LLC (The Cenk Kaptanoglu)* [2012] EWHC 273 (Comm).
14 *Times Travel* (n 1 above) [15].

Applying the test as illustrated through both of these cases to the facts in Times Travel, Lord Hodge found there had been no lawful act duress. While PIAC had exerted strong commercial pressure on *Times Travel*, PIAC had not 'used any reprehensible means' to manoeuvre Times Travel into a position of vulnerability.[15]

BAD FAITH

Lord Burrows focused on a different test of illegitimacy within the law of lawful act duress. Lord Burrows thought that a demand for a waiver of a pre-existing claim would amount to lawful act duress where: the defendant made the demand in bad faith; and the defendant had created or increased the claimant's vulnerability to the demand. This second limb was similar to Lord Hodge's unconscionable manoeuvring test. It is Lord Burrows' focus upon the role of bad faith, a concept also relied upon by David Richards LJ in the Court of Appeal, that distinguishes the dissent.

Lord Burrows stressed that the concept of bad faith can be used in different senses and specified that bad faith in lawful act duress would arise where a defendant 'does not genuinely believe that it is owed what it is claiming to be owed or does not genuinely believe that it has a defence to the claim being waived by the threatened party'.[16] To illustrate this point Lord Burrows focused on *CTN Cash and Carry Limited v Gallaher Limited*.[17] In that case, the defendants mistakenly delivered cigarettes to the wrong warehouse, from which they were subsequently stolen. Believing (incorrectly) that the risk had passed to the claimants, the defendants demanded the £17,000 contract price and threatened to stop doing business with the claimants if they failed to pay. The claimants paid the £17,000, but later argued that they had done so under duress. The claim failed in the Court of Appeal. Lord Burrows explained that this was because the defendant's demand was made in good faith, given that they were genuinely mistaken about their liability for the cigarettes.

Applying his own test to the facts, Lord Burrows too rejected a finding of lawful act duress. His Lordship relied upon Warren J's finding at first instance that PIAC had not acted in bad faith given PIAC had genuinely believed that it did not owe the commission demanded, and that therefore there was no reason to set the contract aside.[18]

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15 Ibid [58].
16 Ibid [102].
17 [1994] 4 All ER 714.
18 *Times Travel* (n 1 above) [115].

A CONFUSED STANDARD

The test set out by the majority now governs the law of lawful act duress in England. With respect, it is jumbled.

The most glaring issue is whether the new test is limited to instances involving waiver of contractual rights. This is a straightforward issue of scope, yet it goes unaddressed in either judgment. According to Lord Hodge, pressure is illegitimate when the defendant's manoeuvring 'forces the claimant to waive his claim'.[19] Lord Burrows too framed his bad faith requirement in the context of 'a demand for a waiver of claims'.[20] Yet given a vast range of duress cases involve claimants seeking to set aside agreements without any element of waiver, there is an open question as to whether the new test limits lawful act duress to cases involving waiver.

One interpretation of the majority judgment is that Lord Hodge simply adapted the test to the dispute between Times Travel and PIAC, which involved a waiver, and therefore used cases with analogous fact patterns to illustrate his reasoning. But this is conjecture. A more likely interpretation is that Lord Hodge's test is specifically tied to waiver, and that the reference to cases involving waiver intentionally carved out instances of duress being used to procure a waiver of rights. Read in this light, Lord Hodge frames the test for manoeuvring as linked *in substance* with the inducement of waiver, albeit in a manner that is only ever latent within the judgment.

We see no reason for such a limitation, given there is nothing inherent to the law of waiver which might give it special classification within the law of duress. In any event, such a decision significantly narrows the operation of the doctrine. Suppose that, in *The Cenk K*, the shipowners had simply pressured the charterers into entering a new, more exorbitantly profitable arrangement for the shipowners, without procuring any waiver of rights. On Lord Hodge's test, while the defendant had deliberately manoeuvred the claimant into a position of vulnerability by means which the law would otherwise regard as illegitimate, the lack of waiver would render the pressure legitimate. This is a strange outcome. In fact, the *only* scope for lawful act duress outside of waiver cases would be where the case involved an exploitation of knowledge of the claimant's criminal activity, since that limb of Lord Hodge's test was not tied to the procurement of waiver. In our view, this muddles the enquiry: the focus should be on the nature of the pressure applied, rather than the type of rights procured by the pressure.

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19 Ibid [4].

20 Ibid [115].

A second uncertainty at the heart of Lord Hodge's reasoning surrounds the definition of unconscionability itself. Lord Hodge noted that '[u]nconscionability is not an overarching criterion to be applied across the board without regard to context. Were it so, judges would become arbiters of what is morally and socially acceptable.'[21] Despite this statement, the judgment does not provide a more certain definition of unconscionability, or outline which factual patterns will give rise to such a finding. Ambiguity surrounding the meaning of 'unconscionable' pressure has already led to incoherence within English law. In one case it was said that pressure would be unconscionable if used to procure a manifestly disadvantageous agreement.[22] Yet, in other cases, pressure has been found to be legitimate despite being used to procure entry to patently unfair contracts.[23] Confusingly, pressure has also been judged legitimate despite it being 'unconscionable' for the defendant to retain the benefit procured by the pressure.[24]

In light of the decision in *Times Travel*, it will be important for future decisions to clarify the relationship between unconscionable pressure and other notions of unconscionability throughout the law. Equitable notions of good conscience have clearly played an important role in the development of duress. But the term 'unconscionable' itself only signifies pressure prohibited in equity. Without further elaboration, the concept of unconscionability does not provide a 'test' of illegitimate pressure.[25] To develop such a test, it is necessary to examine the cases closely and identify the factual patterns and chains of reasoning that determine when pressure will be illegitimate.[26] This task was not undertaken in Times Travel.

While Lord Burrows' decision does not form the law of duress, his Lordship's approach brought no more certainty to the doctrine. One criticism of Lord Burrows' test, noted by Lord Hodge,[27] is the inherent subjectivity of the bad faith requirement. Lord Burrows addressed this last criticism on the grounds that a subjective approach within this

21 Ibid [23]. See generally Peter Birks, *An Introduction to the Law of Restitution* rev edn (Clarendon Press 1985) 177.

22 *Harrison v Halliwell Landau* [2004] EWHC 1316 (QB).

23 For a clear example, see *Alf Vaughan & Co Ltd v Royscot Trust plc* [1999] 1 All ER (Comm) 856.

24 *CTN* (n 17 above) 720 (Nicholls VC); see further Cooney and Sanderson (n 6 above).

25 One possibility is that the doctrine of duress can be subsumed within the doctrine of unconscionable dealing. See Andrew Phang, 'Undue influence – methodology, sources and linkages' (1995) (Nov) Journal of Business Law 552, 565–574. This idea has generally been rejected in Anglo-Australian law.

26 Determining when otherwise lawful pressure is illegitimate is our focus in Cooney and Sanderson (n 6 above).

27 *Times Travel* (n 1 above) [50].

area is consistent with the law on compromises generally.[28] Yet, with respect, the law of duress is a different animal. If the defendant's belief, reasonable or otherwise, was the linchpin of a successful claim for lawful act duress, it would be difficult for most claimants to succeed: the defendant could simply aver that they believed their actions to be in good faith. While courts will not accept this proposition where it is manifestly unreasonable,[29] defendants in more borderline cases will be encouraged to simply claim their belief was legitimate.

More broadly, as Lord Hodge noted, English law has never recognised a general principle of good faith in contracting.[30] To make a bad faith requirement the bedrock of the test of lawful act duress would be to rapidly expand the purview of the duty, at a time when courts remain in the process of developing it.[31]

OUTSTANDING ISSUES IN LAWFUL ACT DURESS

While we have focused on issues of contention in *Times Travel*, we have two further reservations regarding the new approach to lawful act duress which were not discussed by the Court. First, both judgments persistently referred to the doctrine as 'lawful act economic duress'. The modifier 'economic duress' is used to specify situations in which the threat is to a person's economic wellbeing. It is not synonymous with lawful act duress and merely serves to identify the type of harm a threat is directed toward.[32] Yet, beyond being of little value as a label, we argue it distracts from the proper point of focus in assessing a claim for duress. Some pressure applied to a person's economic wellbeing may consist of threatened acts that would be unlawful, and some threats of lawful acts will not be directed toward a person's economic wellbeing. In either case, the focus should be on whether the pressure was illegitimate.

Second, both judgments emphasised that to found a claim in duress it must be shown that the claimant had 'no reasonable alternative' but to submit to the defendant's demand.[33] This follows one line of English authority.[34] While this requirement was not at issue in Times Travel, it

28 Ibid [116]; H G Beale (ed), *Chitty on Contracts* 33rd edn (Sweet & Maxwell 2018) [4-051].

29 *Times Travel* (n 1 above) [18] (Lord Burrows).

30 Though see Leggatt J in *Al Nehayan v Kent* [2018] EWHC 333 (Comm)).

31 Gardner (n 8 above) 498.

32 Claudia Carr, 'Lawful act duress' (2020) 13 Journal of Equity 292, 297.

33 *Times Travel* (n 1 above) [12], [15] (Lord Hodge), [79] (Lord Burrows).

34 *B & S Contracts and Design Limited v Victor Green Publications Limited* [1984] ICR 419; *Huyton SA v Peter Cremer GmbH & Company* [1999] 1 Lloyd's Rep 620; *DSND Subsea Limited v Petroleum Geo-Services ASA* [2000] BLR 530; *Carillion Construction Limited v Felix* [2001] BLR; but see *Astley v Reynolds* (1731) 93 ER 939.

should be abandoned. This is chiefly because the requirement imposes an objective standard of moral fortitude in the face of pressure which the court has already identified as illegitimate.[35] A vulnerable person faced with illegitimate pressure may feel they have no reasonable alternative in circumstances where a hard-nosed person would stand their ground. As much has been accepted in Australia.[36] This is not to say the consideration is entirely irrelevant: the existence or absence of a reasonable alternative may have probative value in determining whether the pressure in a given case was a cause of the claimant's decision to enter the transaction.[37] As Christopher Clarke J held in *Kolmar Group AG v Traxpo Enterprises PVT Limited*: '[i]f there was no reasonable alternative, that may be very strong evidence in support of a conclusion that the victim of the duress was in fact influenced by the threat'.[38] Following this approach, the third 'requirement' of the new test should be downgraded to an evidentiary marker of causation.

THE FATE OF UKRAINE

Intervening in *Times Travel* were the State of Ukraine and The Law Debenture Trust Corporation plc (on behalf of the Russian Federation). Both are parties to an appeal in the Supreme Court regarding Ukraine's default on $3billion-worth of Eurobonds held by Russia. Ukraine alleges that Russia applied illegitimate pressure in 2013, including threats of use of force, to deter Ukraine from signing an association agreement with the European Union and to compel them to accept Russian financial support instead.

In June, the Supreme Court informed both parties it would hear *Times Travel* before giving judgment in the dispute, meaning the test of unconscionable manoeuvring will likely be used to determine the outcome in the case. Russia's trustee submitted that lawful act duress should be abolished entirely. Ukraine, conversely, argued that the doctrine existed, and that it should be determined according to a test of bad faith. Ukraine will likely be happy that the Court accepted that the doctrine exists, though discouraged that the good faith test was only accepted by Lord Burrows in dissent. It remains to be seen whether the geopolitical pressure Russia applied to Ukraine in 2013 will reach the standard of 'unconscionability' against which it will now be judged. If it does, parties will at least have a high-water mark for the amount of pressure the Court is willing to countenance as legitimate.

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35 James Edelman and Elise Bant, *Unjust Enrichment* 2nd edn (Hart Publishing 2016) 205–206.

36 *Lactos Fresh Property Limited v Finishing Services Property Limited (No 2)* [2006] FCA 748, [97] (Weinberg J).

37 *Huyton SA* (n 34 above) 638 (Mance J).

38 [2010] EWHC 113 (Comm) [92].

CONCLUSION

Times Travel will not please those wishing to do away with the doctrine of lawful act duress, nor will the decision comfort those who had hoped the doctrine could guarantee a minimum standard of commercial behaviour. First, as we have outlined, it remains unclear whether *Times Travel* only bears relevance to cases of alleged duress involving waiver. If it is so limited, one wonders whether the law might be more expansive in standard cases of contracts vitiated by lawful act duress, and why English law would unnecessarily partition concepts around the law of waiver.[39]

Even if not limited to waiver, the decision nonetheless narrows the operation of lawful act duress to two very specific instances. The Court's attempt to confine the doctrine may be encouraging to those who fear that lawful act duress has the potential to generate commercial uncertainty. These parties bear the vestiges of Lord Ratcliffe's warning that concepts in equity should not become 'a panacea for adjusting any contract between competent persons when it shows a rough edge to one side or the other'.[40] Yet the Court has doused the fires of uncertainty with petrol. Lord Hodge's test, resting as it does upon an imprecise conception of unconscionability, raises more questions than it answers. Claimants alleging lawful act duress must now scour tea leaves in order to divine the precise legal content of 'morally reprehensible conduct' and will need to take care to distinguish such behaviour from mere bad faith. Where possible, such claimants will be well-advised to look to the doctrines of unconscionable conduct and undue influence as alternatives to lawful act duress.

39 For discussion of potential differences between oral waivers and oral variations, see Harry Sanderson, 'Between a Rock and a Hard Place: "No Oral Waiver" Clauses in English Law' (2021) 37 Journal of Contract Law 122.

40 *Campbell Discount Company v Bridge* [1962] AC 600.