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Ewan McKendrick

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18. Duress

Ewan McKendrick

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Abstract

A contract can be set aside on the ground that it has been entered into under duress. This chapter presents cases illustrating the different forms of duress, namely duress of the person, duress of goods, and economic duress. The case-law establishes that there are two principal elements to a duress claim: (i) lack of consent/coercion of the will and (ii) the illegitimacy of the pressure exerted. There is a third element necessary in cases of economic duress, namely the lack of a reasonable alternative to giving in to the pressure or the threat. The chapter examines the idea of 'illegitimacy', in particular whether a threat to breach a contract is always illegitimate and the controversial question of the scope of 'lawful act' duress.

Keywords: English contract law, duress of the person, duress of goods, economic duress, lack of consent, coercion, illegitimacy, lawful act duress

Central Issues

1. A contract can be set aside on the ground that it has been entered into under duress. Duress can take different forms. The principal forms are duress of the person, duress of goods, and economic duress.
2. Outside the category of duress to the person, the law has been slow to develop. It was not until 1976 that the courts first recognized the existence of economic duress. A consequence of the late development of economic duress is that a number of questions remain unanswered in

relation to the scope of the doctrine. However, it is now clear that there are three central elements, namely (i) illegitimate pressure applied by one party which (ii) constitutes a (significant) cause inducing the other party to enter into the contract and (iii) leaves the claimant with no reasonable alternative but to give in to the pressure.

3. It is generally agreed that 'illegitimate pressure' includes a threat to commit a crime and a threat to commit a tort. It is also agreed that a threatened breach of contract can constitute illegitimate pressure but it is not yet clear whether all threatened breaches of contract are illegitimate for this purpose. Particularly difficult is the case where the threat is made in the bona fide belief that what has been threatened is not a breach of contract but it subsequently transpires that that belief is mistaken and that what has been threatened is, in fact, a breach of contract. A further difficulty arises where the pressure applied by the defendant is lawful. The Supreme Court has confirmed that a doctrine of lawful act duress does exist in English law, albeit if operates within very narrow (and contested) limits. The definition of 'illegitimacy' is one of the major issues in this chapter.

4. The test to be applied to determine whether there is a sufficient causal link between the illegitimate pressure and the entry by the claimant into the contract may depend upon the form that the duress assumes. Where it takes the form of duress of the person it would appear sufficient that the illegitimate pressure was 'a' cause of the claimant's decision to enter into the contract, whereas in the case of economic duress it would appear that the illegitimate pressure
p. 629 must have been a 'significant' cause of the decision to enter into the contract. If this is so, why should the law distinguish between duress of the person and economic duress in this way?

5. Other factors taken into account by the courts when deciding whether or not economic duress has been established on the facts of a case include whether the victim had any realistic practical alternative but to submit to the pressure, whether the victim protested at the time, and whether he affirmed the contract at a time when the victim was free of the pressure that had been applied by the defendant. These factors would seem to be relevant to the question of whether or not there is a sufficient causal link between the illegitimate pressure and the decision of the claimant to enter into the contract but the courts appear to regard them as distinct, free-standing elements which must be taken into account. While the existence of duress must ultimately depend upon a careful evaluation of the facts and circumstances of the case, the danger with a multi-factor approach is a lack of consistency as different courts place different emphasis on the different factors.

18.1 Introduction

Duress of the person is well established in the authorities. By contrast, duress of goods and economic duress have had a more uncertain career. Duress of goods was stunted for many years by the decision in *Skeate* v. *Beale* (1841) 11 Ad & E 983, in which it was held that the unlawful detention of goods belonging to another did not constitute duress. Economic duress (that is to say a case in which one party uses his superior economic

power in an illegitimate manner in order to compel the other party to agree to enter into a contract or to enter the contract on particular terms) was not formally recognized until the decision of Kerr J in *Occidental Worldwide Investment Corporation* v. *Skibs A/S Avanti (The Siboen and The Sibotre)* [1976] 1 Lloyd's Rep 293.

The late recognition of economic duress and the problems posed for the development of a coherent doctrine of duress of goods by *Skeate* v. *Beale* meant that judges who wished to avoid giving effect to an agreement that had been procured by the application of illegitimate pressure had to find other doctrinal pegs on which to hang their decision. A classic example of this phenomenon is said to be the decision of Lord Ellenborough in *Stilk* v. *Myrick* (1809) 2 Camp 317, 6 Esp 129 (discussed in more detail at 5.2.2.3.1). The argument which is advanced by some authors and judges is that, in the absence of a developed doctrine of duress, Lord Ellenborough had to make use of the doctrine of consideration in order to find that the plaintiff was not entitled to recover the promised extra pay. The obvious difficulty with this argument is that there was little evidence of duress on the facts of *Stilk*, given that the vessel was in port at the time at which the master promised to share the wages of the deserters with the remainder of the crew provided that they worked the ship back to London. However, leaving these factual difficulties to one side, it is clear that the modern trend is to regard duress as the more appropriate regulator of contract modifications (see *United States* v. *Stump Homes Specialties Manufacturing Inc* 905 F 2d 1117 (1990), 5.2.2.3.2.3 and *The Alev* [1989] 1 Lloyd's Rep 138, 147, 5.2.2.3.2.3). The desirability of this development is open to question (5.2.2.3.2.3) but there can be little doubt
p. 630 that it is taking place. As a result ↵ duress is likely to play a greater role in the modern case-law, yet judges will find that it does not provide ready-made answers to the questions that are asked of them. The consequence will be a degree of uncertainty in the case-law until the doctrine settles down and its limits are established.

That said, the essential elements of duress do now appear to be firmly established, albeit significant issues remain to be resolved in relation to some aspects of these elements. The most recent authoritative exposition of the elements of duress was provided by Lord Burrows in *Pakistan International Airline Corporation* v. *Times Travel (UK) Ltd* [2021] UKSC 40, [2023] AC 101 as follows:

> 78. Where it is alleged that one contracting party (the defendant) has induced the other contracting party (the claimant) to enter into the contract between them by duress, the case law has laid down that there are two essential elements that a claimant needs to establish in order to succeed in a claim for rescission of the contract. The first is a threat (or pressure exerted) by the defendant that is illegitimate. The second is that that illegitimate threat (or pressure) caused the claimant to enter into the contract. As Lord Goff said, in the context of economic duress, in *Dimskal Shipping Co SA* v. *International Transport Workers' Federation (The Evia Luck) (No 2)* [1992] 2 AC 152, 165:
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> > '[I]t is now accepted that economic pressure may be sufficient to amount to duress [which would entitle a party to avoid a contract] provided at least that the economic pressure may be characterised as illegitimate and has constituted a significant cause inducing the plaintiff to enter into the relevant contract. …'
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> 79. It is also important that, in the context of economic duress (but the position appears to be different in respect of other forms of duress: see *Astley* v. *Reynolds* (1731) 2 Strange 916), there is a third element. This is that the claimant must have had no reasonable alternative to giving in to the threat (or pressure): see, for example, Dyson J in *DSND Subsea Ltd (formerly DSND Oceantech Ltd)* v. *Petroleum Geo-Services ASA* [2000] BLR 530, para 131; *Borrelli* v. *Ting* [2010] UKPC 21; [2010] Bus LR 1718, para 35.

The principal issues in this definition that remain to be resolved relate to the exact meaning of 'illegitimate' and the precise nature of the causal link that must be established between the threat or pressure and the decision of the claimant to enter into the contract. Both of these issues will be examined during the course of this chapter. There is one further basis for duress which should be mentioned, only to be dismissed, and that is the unfairness of the terms of the contract (commonly referred to as 'substantive unfairness', on which see 20.1). While substantive unfairness is a common feature of duress cases, it does not constitute the foundation of the doctrine. The reason for this is that the presence of substantive unfairness is not, of itself, sufficient to constitute duress, nor is its absence sufficient to negative the existence of duress. For example, if I am compelled by circumstances to sell my house quickly and forced to lower the price, the unfairness of the price will not of itself suffice to demonstrate the existence of duress. On the other hand, if a robber forces me at gunpoint to sell my house for a fair price, the fairness of the price will not prevent me from setting aside the contract on the ground of duress (*The Law Debenture Trust Corporation plc* v. *Ukraine* [2023] UKSC 11, [2023] 2 WLR 699, [182]). What is wrong with the contract is not the fairness or the unfairness of the terms of the contract, but the nature of the threats that have been used in order to induce me to enter into it. In other words duress is an example of 'procedural unfairness' (on which see 20.1). It is therefore suggested that the basis of
p. 631 the doctrine ↵ is correctly located in the lack of consent on the part of the person seeking to set aside the contract and the wrongful or illegitimate nature of the threats made by the other party in order to induce entry into the contract. These twin elements are to be found in all cases of duress, namely duress of the person, duress of goods, and economic duress.

18.2 Duress of the Person

Duress of the person is a well-recognized form of duress and its operation is illustrated by the following case:

Barton v. Armstrong
[1976] AC 104, Privy Council

> Armstrong and Barton were the major shareholders in a company, Landmark Corporation Ltd, which was involved in the development of a building estate which was to be known as 'Paradise Waters'. Armstrong was the chairman and Barton was the managing director. They were locked in a power struggle for control of the company which, over the years, became increasingly bitter. Barton initially succeeded in obtaining the removal of Armstrong as chairman of the company, and then negotiations began as to the terms on which Armstrong's interest was to be bought out. Armstrong demanded that Landmark repay to him a loan of $400,000 which was stated to be payable forthwith in the event of Armstrong being removed from the chairmanship of Landmark. Barton hoped to be able to pay off Armstrong by negotiating a loan from United Dominions Corporation (Australia) Ltd ('UDC') but UDC, despite initial appearances to the contrary, refused to provide the loan. In these circumstances Barton entered into negotiations with a representative of Armstrong, and these negotiations resulted in a deed of 17 January 1967 under which Barton agreed, inter alia, to repay the loan of $400,000, to pay Armstrong $140,000, and to buy his shares for $180,000. An order for the winding up of Landmark was made on 11 January 1968 but on 10 January Barton commenced a suit in equity in which he alleged that he had been coerced by Armstrong into agreeing to the terms of the deed by threats that he would be murdered and by the exertion of other unlawful pressure over him. He therefore sought a declaration that the deed was 'void' so far as it concerned him. The trial judge, Street J, found that Armstrong had indeed threatened Barton and his family, but held that Barton's primary and predominant reason for entering into the transaction was a commercial one, namely to ensure the survival of the company by ridding it of Armstrong. The Court of Appeal of New South Wales dismissed Barton's appeal. Barton appealed to the Privy Council who, by a majority (Lord Wilberforce and Lord Simon of Glaisdale dissenting), allowed the appeal on the ground that Armstrong's threats were a reason for Barton entering into the agreement and that he was entitled to relief even though he might well have entered into the contract had Armstrong not threatened him in the way in which he had done. The deeds in question were therefore declared to be void so far as they concerned Barton.

Lord Cross of Chelsea

[delivering the judgment of the majority of their Lordships]

p. 632 Their Lordships turn now to consider the question of law which provoked a difference of opinion in the Court of Appeal Division. It is hardly surprising that there is no direct authority ↵ on the point, for if A threatens B with death if he does not execute some document and B, who takes A's threats seriously, executes the document it can be only in the most unusual circumstances that there can be any doubt whether the threats operated to induce him to execute the document. But this is a most unusual case and the findings of fact made below do undoubtedly raise the question whether it was necessary for Barton in order to obtain relief to establish that he would not have executed the deed in question but for the threats … There is an obvious analogy between setting aside a disposition for duress or undue influence and setting it aside for fraud. In each case—to quote the

> words of Holmes J in *Fairbanks* v. *Snow* (1887) 13 NE 596, 598—'the party has been subjected to an improper motive for action' … Had Armstrong made a fraudulent misrepresentation to Barton for the purpose of inducing him to execute the deed of January 17, 1967, the answer to the problem which has arisen would have been clear. If it were established that Barton did not allow the representation to affect his judgment then he could not make it a ground for relief even though the representation was designed and known by Barton to be designed to affect his judgment. If on the other hand Barton relied on the misrepresentation Armstrong could not have defeated his claim to relief by showing that there were other more weighty causes which contributed to his decision to execute the deed, for in this field the court does not allow an examination into the relative importance of contributory causes … Their Lordships think that the same rule should apply in cases of duress and that if Armstrong's threats were 'a' reason for Barton's executing the deed he is entitled to relief even though he might well have entered into the contract if Armstrong had uttered no threats to induce him to do so.
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> It remains to apply the law to the facts … If Barton had to establish that he would not have made the agreement but for Armstrong's threats, then their Lordships would not dissent from the view that he had not made out his case. But no such onus lay on him. On the contrary it was for Armstrong to establish, if he could, that the threats which he was making and the unlawful pressure which he was exerting for the purpose of inducing Barton to sign the agreement and which Barton knew were being made and exerted for this purpose in fact contributed nothing to Barton's decision to sign. The judge has found that during the 10 days or so before the documents were executed Barton was in genuine fear that Armstrong was planning to have him killed if the agreement was not signed. His state of mind was described by the judge as one of 'very real mental torment' and he believed that his fears would be at an end when once the documents were executed. It is true that the judge was not satisfied that Vojinovic [who was alleged by Barton to have been hired by Armstrong to kill him] had been employed by Armstrong but if one man threatens another with unpleasant consequences if he does not act in a particular way, he must take the risk that the impact of his threats may be accentuated by extraneous circumstances for which he is not in fact responsible. It is true that on the facts as their Lordships assume them to have been Armstrong's threats may have been unnecessary; but it would be unrealistic to hold that they played no part in making Barton decide to execute the documents. The proper inference to be drawn from the facts found is, their Lordships think, that though it may be that Barton would have executed the documents even if Armstrong had made no threats and exerted no unlawful pressure to induce him to do so the threats and unlawful pressure in fact contributed to his decision to sign the documents and to recommend their execution by Landmark and the other parties to them. It may be, of course, that Barton's fear of Armstrong had evaporated before he issued his writ in this action but Armstrong—understandably enough—expressly disclaimed reliance on the defence of delay on Barton's part in repudiating the deed.
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> In the result therefore the appeal should be allowed and a declaration made that the deeds in question were executed by Barton under duress and are void so far as concerns him.
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> …

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Lord Wilberforce and Lord Simon of Glaisdale

[dissenting]

The reason why we do not agree with the majority decision is, briefly, that we regard the issues in this case as essentially issues of fact, issues moreover of a character particularly within the sphere of the trial judge bearing, as they do, upon motivation and credibility. On all important issues, clear findings have been made by Street J and concurred in by the Court of Appeal—either unanimously or by majority. Accepted rules of practice and, such rules apart, sound principle should, in our opinion, prevent a second court of appeal from reviewing them in the absence of some miscarriage of justice, or some manifest and important error of law or misdirection. In our view no such circumstance exists in this case. Before stating those findings of fact, which are to our mind conclusive, we think it desirable to define in our own way the legal basis on which they rest.

The action is one to set aside an apparently complete and valid agreement on the ground of duress. The basis of the plaintiff's claim is, thus, that though there was apparent consent there was no true consent to the agreement: that the agreement was not voluntary.

This involves consideration of what the law regards as voluntary, or its opposite; for in life, including the life of commerce and finance, many acts are done under pressure, sometimes overwhelming pressure, so that one can say that the actor had no choice but to act. Absence of choice in this sense does not negate consent in law: for this the pressure must be one of a kind which the law does not regard as legitimate. Thus, out of the various means by which consent may be obtained—advice, persuasion, influence, inducement, representation, commercial pressure—the law has come to select some which it will not accept as a reason for voluntary action: fraud, abuse of relation of confidence, undue influence, duress or coercion. In this the law, under the influence of equity, has developed from the old common law conception of duress—threat to life and limb—and it has arrived at the modern generalisation expressed by Holmes J—'subjected to an improper motive for action': *Fairbanks* v. *Snow*, 13 NE Reporter 596, 598.

In an action such as the present, then, the first step required of the plaintiff is to show that some illegitimate means of persuasion was used. That there were threats to Barton's life was found by the judge. ...

The next necessary step would be to establish the relationship between the illegitimate means used and the action taken. For the purposes of the present case (reserving our opinion as to cases which may arise in other contexts) we are prepared to accept, as the formula most favourable to the appellant, the test proposed by the majority, namely, that the illegitimate means used was a reason (not the reason, nor the predominant reason, nor the clinching reason) why the complainant acted as he did. We are also prepared to accept that a decisive answer is not obtainable by asking the question whether the contract would have been made even if there had been no threats because, even if the answer to this question is affirmative, that does not prove that the contract was not made because of the threats.

> Assuming therefore that what has to be decided is whether the illegitimate means used was a reason why the complainant acted as he did, it follows that his reason for acting must (unless the case is one of automatism which this is not) be a conscious reason so that the complainant can give evidence of it: 'I acted because I was forced'. If his evidence is honest and accepted, that will normally conclude the issue. If, moreover, he gives evidence, it is necessary for the court to evaluate his evidence by testing it against his credibility and his actions.
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> In this case Barton gave evidence—his was, for practical purposes, the only evidence supporting his case. The judge rejected it in important respects and accepted it in others. ↵ The issues as to Barton's motivations were issues purely of fact … the findings as to motivation were largely, if not entirely, findings as to credibility. It would be difficult to find matters more peculiarly than these within the field of the trial judge who saw both contestants in the box, and who dealt carefully and at length with the credibility, or lack of credibility, of each of them. …
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> p. 634
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> In our opinion the case is far from being one in which a second appellate court should reverse findings made below and endorsed by a Court of Appeal. Respect for such findings—particularly where the issues depend so much upon credibility and an estimate of rival personalities—appears to us to be a central pillar of the appellate process. It is perhaps otiose, but also fair to the judges below, to say that we have no ground for thinking that the factual conclusions which they reached after so prolonged a search did not represent the truth of the situation—or at least the nearest approximation to truth that was attainable.
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> We would dismiss the appeal.

Commentary

The primary significance of *Barton* lies in the test applied by the court to determine whether there was a sufficient causal link between the pressure applied by Armstrong and Barton's decision to enter into the agreement on the terms on which he did. It was held that it sufficed for Barton to prove that the threats were 'a' reason which induced him to execute the deed. The threats did not have to be 'the' reason, the 'predominant' reason, or the 'clinching' reason. This is a very low threshold for a claimant to overcome. The analogy that was drawn by Lord Cross was with cases of fraudulent misrepresentation where a similar test is employed. In *The Law Debenture Trust Corporation plc* v. *Ukraine* [2023] UKSC 11, [2023] 2 WLR 699, [143] the Supreme Court, after referring to the analogy drawn with fraud, affirmed that in cases of duress of the person 'the victim of the duress does not have to establish that he would not have made the agreement but for the threats' and that the onus is on the party who made the threats to establish, if he can, that the threats 'contributed nothing to the victim's decision' to enter into the contract. But, at the same time, the Supreme Court recognised ([148]) that this relaxed approach is not appropriate for all cases of duress stating that 'the necessary causal relationship between the pressure imposed and the party's consent to the agreement differs according to the nature of the duress in question' (see further 18.3 for consideration of the test to be applied in the context of duress of goods and 18.4.1 for economic duress).

The second point that is worth noting is that the Privy Council was content to accept the submission of counsel for Barton that the effect of duress was to render the deed 'void' as far as he was concerned. This is contrary to the generally accepted view which is that the effect of duress is to render the contract voidable (that is to say it remains valid until it has been set aside). It is not clear why the Privy Council acceded to the submission that duress rendered the deed 'void'. It may be that the point was never argued and that the assumption made that the deed was void was simply incorrect (it is certainly very difficult to reconcile with subsequent authority). There is, however, another possible view. It depends upon the conceptual foundation of duress. If it is the case that duress can rest on the absence of consent on the part of the party seeking to set aside the contract (or, as the case may be, the deed) then it becomes more plausible to argue that absence of consent can render a contract void. The difficulty with this argument is that in cases such as *Universe*
p. 635 *Tankships of Monrovia* v. *International Transport Workers' Federation (The Universe Sentinel)* [1983] 1 AC ↵ 366 and *Dimskal Shipping Co SA* v. *International Transport Workers' Federation (The Evia Luck)* [1992] 2 AC 152 the House of Lords implicitly rejected the proposition that there is an absence of consent in duress cases. This being the case, duress renders a contract voidable rather than void.

The final point to note regarding *Barton* relates to the illegitimacy of the pressure exerted by Armstrong. It was not necessary for their Lordships to consider the meaning of 'illegitimacy' further given that a threat to kill someone is self-evidently illegitimate. However, in *The Law Debenture Trust Corporation plc* v. *Ukraine* [2023] UKSC 11, [2023] 2 WLR 699, [176] the Supreme Court affirmed that the threat need not be directed at the claimant but could be directed at a member of the claimant's family or someone with whom the claimant was in a contractual relationship (such as an employee). The Supreme Court also held that a threat by a claimant to kill himself unless the defendant enters into a contract with him is illegitimate ([177]) and, in the case of a country, threats to the safety of the citizens of that country or its armed forces are also capable of constituting illegitimate threats ([179]). The common element here is that the threat must relate to physical well-being (and physical well-being should extend to threats of imprisonment). If, however, the threat is one that relates to the economic well-being of the claimant, such as a threat of financial ruin, it is not a case of duress of the person but of economic duress (*Holyoake* v. *Candy* [2017] EWHC 3397 (Ch), [233]). Given that the causal link required for duress of the person appears to be lower than that applicable to claims of economic duress (see earlier), the classification of the claim as either a case of duress of the person or economic duress may be a matter of some practical significance.

18.3 Duress of Goods

The law relating to duress of goods has struggled for recognition. For many years, the courts held that the unlawful detention of another's goods did not constitute duress. The principal authority for this proposition was:

Skeate v. Beale
(1841) 11 Ad & E 983, Court of King's Bench

The plaintiff distrained for arrears of rent, claiming that £19 10s was due from the defendant. The defendant agreed that, if the distress was withdrawn, he would pay £3 7s immediately and the outstanding £16 2s 6d within a month. He failed to pay the sum so promised and the plaintiff sued to recover the outstanding amount. The defendant argued that the seizure had been wrongful as the only sum due was £3 7s 6d and that he entered into the agreement only to prevent the plaintiff from carrying out his threat to sell the goods. It was held that the defendant was not entitled to set aside the transaction and that the plaintiff was entitled to judgment for the sum claimed.

Lord Denman CJ

[delivering the judgment of the court]

p. 636 We consider the law to be clear, and founded on good reason, that an agreement is not void because made under duress of goods. There is no distinction in this respect between a deed ↵ and an agreement not under seal; and, with regard to the former, the law is laid down … and the distinction pointed out between duress of, or menace to, the person, and duress of goods. The former is a constraining force, which not only takes away the free agency, but may leave no room for appeal to the law for a remedy: a man, therefore, is not bound by the agreement which he enters into under such circumstances: but the fear that goods may be taken or injured does not deprive any one of his free agency who possesses that ordinary degree of firmness which the law requires all to exert. It is not necessary now to enter into the consideration of cases in which it has been held that money paid to redeem goods wrongfully seized, or to prevent their wrongful seizure, may be recovered back in an action for money had and received: for the distinction between those cases and the present, which must be taken to be that of an agreement, not compulsorily but voluntarily entered into, is obvious. *Lindon* v. *Hooper* (1 Cowp 414), and *Knibbs* v. *Hall* (1 Esp 84), are, however, authorities to shew that, even if the money had been paid in this case, instead of the agreement to pay it entered into, no action for money had and received could have been sustained by the now defendant. For, although there is a difference in the circumstances, and, the distress having been made, and some rent admitted to be in arrear, no replevin could have been successfully made, yet if the plaintiff distrained goods of the value of 20l. when little more than 3l. were due, there is no doubt that, on payment of the value of the goods, or the sum claimed, an action would have lain for the excessive distress. And it is of great importance that parties should be holden to those remedies for injuries which the law prescribes, rather than allowed to enter into agreements with a view to prevent them, intending at the time not to keep their contracts. In the argument for the defendant, reliance was placed on the facts that the agreement was entered into under protest, and that the plaintiff must have known that only the smaller amount of rent was due. It is unnecessary to consider what the effect of these would have been; for neither of them is alleged in the plea. As, therefore, this plea relies solely on the menace as to the goods, under which the agreement was made, for avoiding it, we think it discloses no answer to the declaration. …

Commentary

While the unlawful detention of another's goods did not constitute duress, there was at the same time authority to support the proposition that money paid to release goods which had been unlawfully detained could be recovered. Authority for the latter proposition is *Astley* v. *Reynolds* (1731) 2 Str 915. The plaintiff pawned a plate to the defendant for £20. Three years later the defendant refused to allow the plaintiff to redeem the plate unless he paid him interest of £10. The plaintiff tendered £4 but the defendant refused to accept it and refused to release the plate. The plaintiff eventually paid the £10 in order to get his plate back, and then brought an action to recover the excess which he had paid over the legal interest which the defendant was entitled to charge. It was held that the plaintiff was entitled to the recovery of the money so paid under compulsion. Holt CJ stated (at p. 916):

> We think ... that this is a payment by compulsion; the plaintiff might have such an immediate want of his goods, that an action of trover would not do his business: where the rule volenti non fit injuria is applied, it must be where the party had his freedom of exercising his will, which this man had not: we must take it he paid the money relying on his legal remedy to get it back again.

p. 637 ↵ As the editors of Goff and Jones have pointed out (*The Law of Unjust Enrichment* (10th edn, Sweet & Maxwell, 2022), para 10-39), the decisions in *Skeate* and *Astley* require a distinction to be drawn between the following two cases:

> [I]f A demands a sum of money from B under duress of goods, and B pays the money, then he can recover it; yet if B makes a promise to pay a sum of money under similar duress from A, then provided that there is some consideration for the promise, B is bound to pay the money.

The editors of Goff and Jones continue (at para 10-40):

> It is logically very difficult to support a distinction of this kind, since there must have been a *scintilla temporis* when A must have agreed to pay before making the payment. In *Skeate* Lord Denman CJ justified the rule on the ground that, whereas duress to the person is a 'constraining force', 'the fear that goods may be taken or injured does not deprive anyone of his free agency who possesses that ordinary degree of firmness which the law requires all to exert'. But this requirement of bravery has surely now been abandoned. In fact, the rule in *Skeate* is in direct conflict with the modern view of duress, namely, that where a transaction has been entered into as a result of illegitimate pressure, consent has not been freely given and the transaction is voidable ... the current law is that an agreement induced by duress of goods is voidable at the instance of the coerced party.

Authority for the proposition that *Skeate* v. *Beale* is no longer good law is to be found in the speech of Lord Goff in *Dimskal Shipping Co SA* v. *International Transport Workers' Federation (The Evia Luck)* [1992] 2 AC 152 (18.4.1).

In *The Law Debenture Trust Corporation plc* v. *Ukraine* [2023] UKSC 11, [2023] 2 WLR 699, [183] the Supreme Court held that threats to invade a country which would almost inevitably result in damage to property, including damage to the property of the state, could amount to duress of goods. The Supreme Court did not, however, decide the exact nature of the causal link which must be established in cases of duress of goods. While the Supreme Court did, at times, seem to classify duress of goods with duress of the person (see [148] and [189]) it is less clear why a claimant in a case of alleged duress of goods should be entitled to put upon the party making the threat the burden of establishing that the threats made no contribution to the claimant's decision to enter into the contract. In accordance with the normal standards of proof, it should be for the claimant to establish that the threats made in relation to his property were the 'but for' cause of his decision to enter into the contract.

18.4 Economic Duress

As has been noted (18.1), economic duress was a late arrival in English law, not being formally recognized until the decision of Kerr J in *Occidental Worldwide Investment Corporation* v. *Skibs A/S Avanti (The Siboen and The Sibotre)* [1976] 1 Lloyd's Rep 293. Since then it has had a somewhat chequered career. One of the principal difficulties has been in identifying the elements that have to be proved in order to make out a case of economic duress. However, the stage has now been reached in the development of economic duress where the principal elements of economic duress have been authoritatively determined. Lord Burrows in *Pakistan*
p. 638 *International Airline Corporation* v. *Times Travel (UK) Ltd* [2021] UKSC 40, [2023] ↵ AC 101, [78]–[79] (see 18.1) identified the three essential elements to an economic duress claim, namely (i) a threat or pressure exerted by the defendant that is illegitimate, (ii) that illegitimate threat or pressure caused the claimant to enter into the contract, and (iii) the claimant must have had no reasonable alternative to giving in to the threat or pressure. Of these elements the most difficult is the identification of pressure or threats that are for this purpose 'illegitimate'. We shall therefore postpone the discussion of the meaning of 'illegitimate' until after our examination of the other two essential elements of economic duress.

18.4.1 Causation

In his judgment in *Pakistan International Airline Corporation* v. *Times Travel (UK) Ltd* [2021] UKSC 40, [2023] AC 101, [78] Lord Burrows, when discussing the test that is to be applied when seeking to determine whether there is a sufficient causal link between the illegitimate pressure or threat and the decision of the claimant to enter into the contract, quoted from the judgment of Lord Goff in *Dimskal Shipping Co SA* v. *International Transport Workers' Federation (The Evia Luck) (No 2)* [1992] 2 AC 152, 165. A slightly fuller extract from the judgment of Lord Goff captures the essence of his judgment on this issue:

> It was at one time thought that, at common law, the only form of duress which would entitle a party to avoid a contract on that ground was duress of the person. The origin for this view lay in the decision of the Court of Exchequer in *Skeate* v. *Beale* (1841) 11 Ad & El 983. However, since the decisions of Kerr J in *Occidental Worldwide Investment Corporation* v. *Skibs A/S Avanti (The Siboen and The Sibotre)* [1976] 1 Lloyd's Rep 293, of Mocatta J in *North Ocean Shipping Co Ltd* v. *Hyundai Construction Co Ltd* [1979] QB 705, and of the Judicial Committee of the Privy Council in *Pao On* v. *Lau Yiu Long* [1980] AC 614, that limitation has been discarded; and it is now accepted that economic pressure may be sufficient to amount to duress for this purpose, provided at least that the economic pressure may be characterised as illegitimate and has constituted a significant cause inducing the plaintiff to enter into the relevant contract (see *Barton* v. *Armstrong* [1976] AC 104, 121, per Lord Wilberforce and Lord Simon of Glaisdale (referred to with approval in *Pao On* v. *Lau Yiu Long* [1980] AC 614, 635, per Lord Scarman) and *Crescendo Management Pty. Ltd* v. *Westpac Banking Corporation* (1988) 19 NSWLR 40, 46, per McHugh JA). It is sometimes suggested that the plaintiff's will must have been coerced so as to vitiate his consent. This approach has been the subject of criticism; see Beatson, *The Use and Abuse of Unjust Enrichment* (1991), 113–17; and the notes by Professor Atiyah in (1982) 98 *LQR* 197–202, and by Professor Birks in [1990] 3 *LMCLQ* 342–51. I myself, like McHugh JA, doubt whether it is helpful in this context to speak of the plaintiff's will having been coerced. It is not however necessary to explore the matter in the present case.

Two points should be noted here. The first relates to Lord Goff's comments concerning the coercion of the will theory and his apparent approval of the criticisms that have been levelled against that theory. The second point relates to his insertion of the word 'significant' before 'cause'. The addition of 'significant' is important and is to be contrasted with the approach taken in *Barton* v. *Armstrong* [1976] AC 104 (on which see 18.2) where it was held that the pressure need only be 'a' cause of the decision to enter into the contract.

p. 639 Why does the law differentiate in this way between cases of duress of the person (and possibly duress of goods) and cases of economic duress? The answer given by the Supreme Court ↵ in *The Law Debenture Trust Corporation plc* v. *Ukraine* [2023] UKSC 11, [2023] 2 WLR 699, [148] is that duress of the person and duress of goods have 'always been considered illegitimate' whereas economic duress is 'illegitimate only in limited circumstances'. While this differentiation would appear to be directed principally to the identification of the threats that are to be regarded as 'illegitimate', the Supreme Court also observed that 'the necessary causal relationship between the pressure imposed and the party's consent to the agreement differs according to the nature of the duress in question'.

Thus the test for causation in cases of economic duress is more stringent than that adopted in the context of duress of the person. The more difficult question relates to the extent of that difference and whether a 'significant cause' test differs from the traditional 'but for' test. In many ways it would be more straightforward were the courts to conclude that a 'significant cause' is, for this purpose, to be equated with the 'but for' test (a view which derives support from the judgment of Christopher Clarke J in *Kolmar Group AG* v. *Traxpo Enterprises Pty Ltd* [2010] EWHC 113 (Comm), [2010] 2 Lloyd's Rep 653, [92]). On the other hand, as Mance J observed in *Huyton SA* v. *Peter Cremer GmbH & Co* [1999] 1 Lloyd's Rep 620, 636–639, a simple application of the 'but for' test 'could lead too readily to relief being granted'. But it is important to note that Mance J also had regard to the other elements of an economic duress claim, in particular the availability of

alternative forms of redress. Thus it may be that it is these other elements that will keep the doctrine of economic duress within reasonable bounds and that there is no need to depart from the more traditional 'but for' test in this context. An alternative approach would be to avoid drawing hard-and-fast lines in this area, leaving it to the courts to apply a sliding scale according to which the causal threshold diminishes as the degree of illegitimacy increases (so that threats to kill are at one end of the spectrum, where the causal requirement is at its lowest, and cases of economic duress at the other). The difficulty with the latter approach is that it leads to uncertainty and so for this reason it may be preferable to apply the 'but for' test to cases of economic duress. The point does, however, await authoritative resolution.

18.4.2 The Lack of Reasonable Alternatives

In his judgment in *Pakistan International Airline Corporation* v. *Times Travel (UK) Ltd* [2021] UKSC 40, [2023] AC 101, [79] (see 18.1) Lord Burrows referred to the requirement that the claimant must have had no reasonable alternative to giving in to the threat (or pressure). As he observed, it would appear that this requirement is applicable to cases of economic duress but not to other forms of duress (thus further emphasizing the differences that exist between cases of economic duress and other forms of duress). One of the authorities which he cited in support of this requirement was the judgment of Lord Saville, giving the judgment of the Privy Council in *Borrelli* v. *Ting* [2010] UKPC 21, [35], where he stated:

> The Board is of the view that in the present case the Liquidators entered into the Settlement Agreement as the result of the illegitimate means employed by James Henry Ting, namely by opposing the scheme for no good reason and in using forgery and false evidence in support of that opposition, all in order to prevent the Liquidators from investigating his conduct of the affairs of Akai Holdings Ltd or making claims against him arising out of that conduct. As the Board has already observed, by adopting these means James Henry Ting left the Liquidators with no reasonable or practical alternative but to enter into the Settlement Agreement.

p. 640 ↵ A case which illustrates the role that the lack of reasonable alternatives can play in cases of alleged economic duress is provided by the decision of the Court of Appeal in *B & S Contracts and Design Ltd* v. *Victor Green Publications Ltd* [1984] ICR 419. The plaintiffs agreed to erect stands at Olympia for the defendants but they experienced difficulties with their workforce, who refused to erect the stands unless they were paid £9,000 in severance pay. The plaintiffs offered to pay the workmen £4,500 but this offer was rejected. When the defendants were informed of these difficulties, they offered to provide the plaintiffs with an advance of £4,500 but this offer was also rejected by the plaintiffs. The plaintiffs informed the defendants that they would be unable to perform the contract unless their workforce could be persuaded to stay at work. In these circumstances one of the defendants' directors said to the plaintiffs' finance director 'Well, you have me over a barrel' and so the defendants paid £4,500 to the plaintiffs. The defendants then deducted the £4,500 from the final sum due to the plaintiffs. The plaintiffs responded by suing the defendants for £4,500. The defendants resisted the claim on the ground that the money had been paid under duress. The Court of Appeal held that the money had indeed been paid under duress so that the defendants were not liable to pay the £4,500 demanded by the plaintiffs. The clearest articulation of the significance of the lack of reasonable available alternatives is to be found in the judgment of Kerr LJ who stated:

> I … bear in mind that a threat to break a contract unless money is paid by the other party can, but by no means always will, constitute duress. It appears from the authorities that it will only constitute duress if the consequences of a refusal would be serious and immediate so that there is no reasonable alternative open, such as by legal redress, obtaining an injunction, etc … There was no other practical choice open to the defendants in the present case, and accordingly I agree that this is a case where money has been paid under duress, which was accordingly recoverable by the defendants provided they acted promptly as they did, and which they have recovered by deducting it from the contract price. …

Support for the significance of the lack of reasonable available alternatives can also be gleaned from the judgment of Griffiths LJ in the same case who stated that the defendants were in an 'impossible position' and that if they had not paid the £4,500 they would have 'caused grave damage to their reputation' and might have exposed themselves to heavy claims in damages from exhibitors who had leased space at the exhibitions.

It is important to observe the role that a lack of a reasonable alternative plays in the case law. It is but one element in the inquiry. Thus a claimant who proves that he had no other option open to him but to agree to the terms proposed by the defendant will not be able thereby to establish a case of duress, at least where the defendant has not applied any illegitimate pressure. It is for this reason that a person who sells his house for a low price because he concludes that he has no alternative open to him but to sell at the proposed price cannot set aside the contract on the ground of duress. However, the reasonable alternative requirement assumes significance in the case where the claimant does have a reasonable alternative open to it, but decides not to take it. So on the facts of *B & S Contracts and Design* matters might have been different had the defendants had the time available to them in order to go off to court in order to contest the validity of the plaintiffs' demand, or had they been able lawfully to terminate the contract with the plaintiffs and obtain performance elsewhere. In such circumstances, the presence of a reasonable alternative might have prevented them from making good their claim that they had only agreed to pay the £4,500 under duress.

p. 641

18.4.3 Illegitimate Pressure

When is a threat or the application of pressure 'illegitimate' for the purposes of the law relating to economic duress? In *R* v. *Attorney-General for England and Wales* [2003] UKPC 22, [16] Lord Hoffmann, giving the judgment of the Privy Council, stated:

> 16. The legitimacy of the pressure must be examined from two aspects: first, the nature of the pressure and secondly, the nature of the demand which the pressure is applied to support: see Lord Scarman in the *Universe Tankships* case, at p. 401. Generally speaking, the threat of any form of unlawful action will be regarded as illegitimate. On the other hand, the fact that the threat is lawful does not necessarily make the pressure legitimate. As Lord Atkin said in *Thorne* v. *Motor Trade Association* [1937] AC 797, 806:
>
> > 'The ordinary blackmailer normally threatens to do what he has a perfect right to do —namely, communicate some compromising conduct to a person whose knowledge is likely to affect the person threatened … What he has to justify is not the threat, but the demand of money.'

Lord Hoffmann thus appeared to envisage a two-stage approach to illegitimacy. First, if the threat or the pressure is unlawful, it will generally be illegitimate. Secondly, where the threat is lawful but is used to support a demand which amounts to blackmail, it will also be regarded as illegitimate. In this section we shall examine the approach of the courts to the identification of illegitimate pressure or threats in two contexts. The first is where the threat takes the form of a threatened breach of contract. The second is where the threat is to do something which the defendant is entitled to do. Both issues have given rise to difficulty, but the second of them has proved to be particularly difficult and it was the subject of the recent decision of the Supreme Court in *Pakistan International Airline Corporation* v. *Times Travel (UK) Ltd* [2021] UKSC 40, [2023] AC 101. First, however, we will deal with those cases in which the illegitimate pressure is said to take the form of a threatened breach of contract.

18.4.3.1 Illegitimate Pressure and Threats to Breach a Contract

Where the threat made, or pressure applied, by the defendant takes the form of a threat to commit an unlawful act, such as a crime or a tort, the courts have generally experienced no difficulty in concluding that such a threat is 'illegitimate' (see, for example, *Universe Tankships of Monrovia* v. *International Transport Workers' Federation (The Universe Sentinel)* [1983] 1 AC 366). More problematic is the case where the pressure or threat assumes the form of a threatened breach of contract.

A breach of contract is not unlawful in the sense that it amounts to a crime. A breach of contract will only rarely involve the commission of a criminal offence. But a breach of contract is a civil wrong (as is the commission of a tort) so that a party who threatens to breach a contract is threatening to do something which it is not lawfully entitled to do. On this basis one might expect a threatened breach of contract always to be classified as an illegitimate threat for the purposes of economic duress. On the other hand, there are some signs of a reluctance to conclude that all threatened breaches of contract are illegitimate, particularly in the case where the party issuing the threat believed in all good faith that it was entitled to make the demand which it made. It is not uncommon for there to be some uncertainty as to the correct interpretation of the contract (see generally Chapter 11). In such a case there may be a genuine doubt as to whether or not the
p. 642 defendant was entitled to make the threat which ↵ it made. If the matter is subsequently litigated, and a court determines that the defendant was mistaken in its interpretation of the contract so that it was in fact threatening to breach the contract between the parties, does it automatically follow in such a case that the

threat made is an illegitimate one? On one view the answer is that it should automatically follow because the existence of a breach of contract does not generally depend upon the good faith or bad faith of the party who is said to be in breach. Given that the presence of good faith on the part of the party said to be in breach is not a defence to the claim that the contract has been breached, why should it be a relevant factor when considering whether the threat is 'illegitimate'? On the other hand, there is a concern that a conclusion that all threatened breaches of contract are illegitimate could make it more difficult for parties to renegotiate a contract because of the fear that a bona fide attempt to defend one's own position could subsequently be characterized as the application of illegitimate pressure.

An early case in which a court was required to consider whether a threatened breach of contract amounted to the application of economic duress is the decision of Mocatta J in the following case:

North Ocean Shipping Co Ltd v. Hyundai Construction Co Ltd (The Atlantic Baron)
[1979] QB 705, Queen's Bench Division

In 1972 the defendants entered into a contract under which they agreed to construct a tanker for the plaintiffs. The contract stated that the price, which was to be paid in US dollars, was not to be subject to adjustment except in certain specific circumstances (which did not occur). In June 1973, after the devaluation of the dollar by 10 per cent, the defendants demanded that they be paid an extra 10 per cent for the work done under the contract. The plaintiffs refused to pay the money so demanded on the ground that there was no basis in law for the demand, and they suggested that the matter be referred to arbitration. The defendants refused to agree to this suggestion and they threatened to terminate the contract if the sum was not paid. The plaintiffs were advised that the defendants were not entitled to make such a demand under the terms of the contract but, as a result of an advantageous sub-contract into which they had entered, they were anxious to obtain delivery of the tanker at the agreed time, and so they promised to pay the extra sum demanded. They paid the additional 10 per cent on each of the remaining instalments, and the ship was delivered to the plaintiffs in November 1974. In July 1975 the plaintiffs sought to recover the extra 10 per cent on the ground that there was no consideration for their payment and that they had agreed to make the payment only when subject to duress. The court held that there was consideration to support the agreement but that the plaintiffs had entered into the contract as a result of duress. However the plaintiffs were held not to be entitled to set aside the contract because they had affirmed the contract by making the final payments without protest and by their delay in making their claim for repayment.

Mocatta J

[Having reached the conclusion that there was consideration for the agreement turned to consider whether it should be set aside on the ground of economic duress.]

Before proceeding further it may be useful to summarise the conclusions I have so far reached. First, I do not take the view that the recovery of money paid under duress other than to the person is
p. 643 necessarily limited to duress to goods falling within one of the categories ↵ hitherto established by the English cases. … Secondly, from this it follows that the compulsion may take the form of 'economic duress' if the necessary facts are proved. A threat to break a contract may amount to such 'economic duress'. Thirdly, if there has been such a form of duress leading to a contract for consideration, I think that contract is a voidable one which can be avoided and the excess money paid under it recovered.

I think the facts found in this case do establish that the agreement to increase the price by 10% reached at the end of June 1973 was caused by what may be called 'economic duress'. The Yard were adamant in insisting on the increased price without having any legal justification for so doing and the owners realised that the Yard would not accept anything other than an unqualified agreement to the increase. The owners might have claimed damages in arbitration against the Yard with all the inherent unavoidable uncertainties of litigation, but in view of the position of the Yard vis-à-vis their

> relations with Shell it would be unreasonable to hold that this is the course they should have taken: see *Astley* v. *Reynolds* (1731) 2 Str 915. The owners made a very reasonable offer of arbitration coupled with security for any award in the Yard's favour that might be made, but this was refused. They then made their agreement, which can truly I think be said to have been made under compulsion, by the telex of June 28 without prejudice to their rights. I do not consider the Yard's ignorance of the Shell charter material. It may well be that had they known of it they would have been even more exigent. …
>
> The owners were … free from the duress on November 27, 1974, and took no action by way of protest or otherwise between their important telex of June 28, 1973, and their formal claim for the return of the excess 10% paid of July 30, 1975. … I have come to the conclusion that … the correct inference to draw, taking an objective view of the facts, is that the action and inaction of the owners can only be regarded as an affirmation of the variation in June 1973 of the terms of the original contract by the agreement to pay the additional 10 per cent.

Commentary

In this case, decided at an early stage in the development of economic duress, one can see clear authority for the proposition that a threatened breach of contract can constitute economic duress. In reaching the conclusion that the agreement to pay the higher sum was caused by economic duress, Mocatta J did not ask himself whether or not the defendants were in bad faith in demanding that the plaintiffs pay an extra 10 per cent. The fact that he did not ask the question suggests that, for him, it was not a relevant consideration. Further, it can be said that the present case demonstrates that it may be no easy task to define 'bad faith' in this context. It could be said that the defendants were in bad faith in that they knew that they were not entitled to the extra 10 per cent. On the other hand, they had what might be called a 'good reason' for demanding the extra money on the basis that they were simply attempting to cover themselves against devaluation of the dollar: they were not seeking to exploit any vulnerability on the part of the plaintiffs.

Subsequent cases have confirmed the validity of the proposition that a threatened breach of contract will generally amount to the application of illegitimate pressure (see, for example, *Universe Tankships of Monrovia* v. *International Transport Workers' Federation (The Universe Sentinel)* [1983] 1 AC 366, *Atlas Express Ltd* v. *Kafco* [1989] QB 833, and *Carillion Construction Ltd* v. *Felix (UK) Ltd* [2001] BLR 1) but they have stopped short of affirming that it will always do so. Further, there are cases in which the defendant appeared to threaten to breach its contract with the claimant but the court nevertheless concluded that there had been no duress on
p. 644 the facts. These cases may, however, be explicable on grounds other ↵ than the illegitimacy of the threat. Thus in *Williams* v. *Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1 (see 5.2.2.3.2) there does not seem to have been any 'threat' made by the plaintiff to break the contract given that the offer to pay more for the completion of the work appeared to have been made voluntarily by the defendant at a meeting between the parties. A second case in which there was found to be no economic duress is *DSDN Subsea Ltd* v. *Petroleum Geo-Services ASA* [2000] BLR 530, [131], where Dyson J included among the factors to be taken into account by a court when determining whether there has been illegitimate pressure 'whether the person allegedly exerting the pressure has acted in good or bad faith'. However, on the facts of the case, the threat to break the contract did not seem to have been a significant cause of the decision to enter into the contract, given the lack of

contemporaneous evidence to substantiate the claim that economic duress had been exercised and so the case may properly be explained on the latter ground and it did not therefore turn on the presence or absence of good faith.

The current state of the law was, perhaps, best summed up by Christopher Clarke J in *Kolmar Group AG* v. *Traxpo Enterprises Pty Ltd* [2010] EWHC 113 (Comm), [2010] 2 Lloyd's Rep 653, [92], when he stated that 'a threat to break a contract will generally be regarded as illegitimate, particularly where the defendant must know that it would be in breach of contract if the threat were implemented'. The words 'generally' and 'particularly' are important here. 'Generally' suggests that there is no absolute rule and that it may be necessary to have regard to the facts and circumstances of the individual case. 'Particularly' is noteworthy in so far as it identifies the case in which a threatened breach of contract is most likely to be illegitimate, namely in the case where the defendant knows that it is not entitled to make the threat that it has made. This leaves the difficult case of the party who genuinely but incorrectly believed that it was entitled to make the threat which it made. Cases such as *The Atlantic Baron* suggest that good faith on the part of the defendant should not prevent a court from concluding that the pressure was illegitimate and this view derives support from the fact that, as has been noted, English law does not generally distinguish between a good faith and a bad faith breach of contract. On this basis it is suggested that a threatened breach of contract should generally constitute the application of illegitimate pressure, although the possibility cannot be ruled out that a court, in an exceptional case, may conclude that the pressure applied was not illegitimate when account is taken of the fact that the defendant acted in good faith in making the demand which it made.

The Atlantic Baron is also significant in so far as it demonstrates that a party who wishes to rely on economic duress in order to set aside an agreement should act quickly once freed from the duress. A party who is dilatory in making a complaint of duress is likely to be held to have affirmed the contract. This leads on to the third point which is that Mocatta J concluded that duress rendered the contract voidable, and not 'void' as in *Barton* v. *Armstrong* (18.2). It is now generally accepted that economic duress renders a contract voidable and not void.

Finally, the case underlines the link between consideration and duress (on which see *The Atlantic Baron*) in that the first point taken by the plaintiffs was that there was no consideration for their promise to pay an extra 10 per cent. Mocatta J found that consideration had been supplied but would have set the contract aside on the ground of duress had the plaintiffs not affirmed the contract. This might be said to be an example of duress being used as the more appropriate regulator of contract modifications.

18.4.3.2 Lawful Act Duress

Perhaps the most difficult issue in the law of economic duress is the question whether English law should
p. 645 recognize a doctrine of lawful act duress. This was the issue at the heart ↵ of the decision of the Supreme Court in *Pakistan International Airline Corporation* v. *Times Travel (UK) Ltd* [2021] UKSC 40, [2023] AC 101.

On the facts of the case the claimant travel agents sought to set aside an agreement into which it had entered with the defendant airline company ('PIAC'). The claimant's business consisted almost entirely of the sale to the local Pakistani community of air tickets for travel to Pakistan and at the relevant time PIAC was the only operator who provided direct flights between the UK and Pakistan. Following a dispute between PIAC and a

number of its agents over the non-payment of commission to the agents, PIAC gave notice to terminate its existing agency contracts and it offered to its agents new contracts on terms that the agents waived their existing claims against PIAC for unpaid commission. In giving notice to terminate the existing contract and in offering new terms to the claimant, PIAC was acting lawfully. The claimant accepted the terms proposed by PIAC but subsequently brought proceedings to set aside the agreement on the ground that it had entered into the new agreement as a result of the application by PIAC of economic duress and it sought to recover from PIAC the unpaid commission under its previous agency contract with PIAC. It was held by the Supreme Court that the claimant was not entitled to set aside the agreement on the ground of economic duress.

There are two principal aspects to the decision of the Supreme Court. The first relates to the question whether or not English law recognizes a doctrine of lawful act duress. The Supreme Court unanimously answered this question in the affirmative. The second aspect relates to the scope of the doctrine of lawful act duress. On this issue there was some common ground between the Justices of the Supreme Court but it was also an issue on which the Supreme Court divided. The majority judgment was given by Lord Hodge, with whom Lord Reed, Lord Lloyd-Jones, and Lord Kitchin expressed their agreement. The minority judgment on the issues where the court divided was given by Lord Burrows (although it is important to note that Lord Hodge expressed his agreement with the judgment of Lord Burrows on a number of issues and on these issues the judgment of Lord Burrows has the support of the entire court and so represents the judgment of the court). It is also worth noting that, while the context for the consideration of lawful act duress was a case of alleged economic duress, the judgments of the Supreme Court extend beyond economic duress and take account of a broader range of circumstances in which the exercise of lawful act duress may entitle a party to set aside a contract.

Our analysis will proceed in four stages. At the first stage (18.4.3.2.1) consideration will be given to the question whether English law recognizes a doctrine of lawful act duress. At the second stage (18.4.3.2.2) attention will switch to the scope of lawful act duress in English law and to those issues relating to the scope of lawful act duress which were unanimously agreed by the Supreme Court. The third stage (18.4.3.2.3) is the most difficult stage and it consists of an analysis of the grounds on which the Supreme Court diverged in relation to the scope of lawful act duress. The fourth and final stage (18.4.3.2.4) will offer some concluding observations.

18.4.3.2.1 Does Lawful Act Duress Exist?

The judgment of the Supreme Court on the issue of whether or not English law recognizes a doctrine of lawful act duress was given by Lord Burrows, with whom Lord Hodge and the other judges in the Supreme Court expressed their agreement. Lord Burrows stated:

p. 646

82. Lawful act duress is controversial. This is essentially because many contracts are entered into under some form of pressure exerted by the other party and, plainly, one would not wish to undermine all such contracts. An insistence that the threat must be one to do something unlawful draws a clear line with a standard that is easily understood and can easily be applied. But once one crosses that line to include threats of lawful acts, it is not easy to distinguish between threats that will count as duress and threats that will not. Peter Birks, in *An Introduction to the Law of Restitution*, revised ed (1989), at p 177, expressed this difficulty as follows:

> 'Can lawful pressures also count? This is a difficult question, because, if the answer is that they can, the only viable basis for discriminating between acceptable and unacceptable pressures is not positive law but social morality. In other words, the judges must say what pressures … are improper as contrary to prevailing standards. That makes the judges, not the law or the legislature, the arbiters of social evaluation.'

…

83. The fear of wide-ranging disruption and uncertainty, particularly for commercial parties, has led some distinguished commentators to argue that lawful act duress should not exist. …

85. I am also conscious that lawful act duress has been rejected by the Court of Appeal of New South Wales in *Australia and New Zealand Banking Group Ltd* v. *Karam* [2005] NSWCA 344; (2005) 64 NSWLR 149 (albeit that one needs to be careful in making comparisons given that particular statutory interventions in that jurisdiction may be thought relevant). …

86. Despite that support for the non-recognition or abolition of lawful act duress, it is my view (as it was the view of Birks in the continuation of the passage cited in para 82 above) that lawful act duress does, and should, exist as a ground for rescinding a contract (or for the restitution of non-contractual payments) in English law. There are three reasons for this.

87. The first reason is that, although the facts of the leading cases of *The Universe Sentinel* and *The Evia Luck (No 2)* concerned alleged unlawful act duress—by threats to commit a tort in the context of the 'blacking' of ships sailing under flags of convenience—the House of Lords chose to use the language of the pressure needing to be 'illegitimate' not 'unlawful'. …

88. The second reason is that the crime of blackmail, which is contained in section 21 of the Theft Act 1968, clearly includes threats of lawful action. … Classic examples of (the actus reus of) blackmail involving lawful threats would be a threat by A, unless money is paid by B, to reveal true information about B to a newspaper or to B's family or to the police. Although the link between the crime of blackmail and lawful act duress has to be very carefully handled to avoid circularity—this is best done by excluding the possibility of the crime of blackmail having been committed when considering what counts as lawful act duress—it would be very odd for the civil law of duress not to include threats of lawful acts when the criminal law of blackmail does so. Lord Scarman expressly drew an analogy with blackmail in *The Universe Sentinel* at p 401. …

89. The third reason is that there have been several cases—and not just recent cases—in which it has been accepted that threats of lawful action should entitle the threatened party (the claimant) to rescind a contract (or to have the restitution of non-contractual payments). A long-established area, although traditionally thought of as within the equitable doctrine of undue influence rather than the common law doctrine of duress, has comprised illegitimate threats to prosecute the claimant or a member of the claimant's family. These were not economic duress cases. Rather the threats in question were threats to reputation or emotional threats. But the important point is that (avoiding the circularity of blackmail: see the previous paragraph), the threats in question were threats to do lawful acts. So, for example, in *Williams* v. *Bayley* 1 HL 200 a father agreed to pay promissory notes in favour of a bank (secured by a charge over his property) in order to avert the bank's implied threat to prosecute his son for forging his signature on the notes. As a separate ground from the contract being 'illegal' (as stifling a criminal prosecution) it was held that the contract was
p. 647 invalid as it had been procured by undue influence. And in *Mutual Finance Ltd* v. *John Wetton and Sons Ltd* [1937] 2 KB 389 a guarantee of payment to the claimant company was signed by Percy Wetton on behalf of the defendant company in order to avert the claimant company's implied threat to prosecute Joseph Wetton (Percy's brother) for forgery in acquiring a lorry on hire purchase. Percy Wetton signed the agreement for fear that prosecution of his brother would kill their father who was very ill. Porter J distinguished duress at common law, which he regarded as being confined to duress of the person, but held that the contract here was voidable for undue influence. See also, for example, *Kaufman* v. *Gerson* [1904] 1 KB 591.

90. Although these cases may have used the language of undue influence, it is clear that they were not concerned with the standard case of undue influence where the relationship between the parties is such that one party's judgment is not being exercised freely and independently of the other party. That standard area of 'relational' undue influence was not in issue in those cases. Rather one was looking at actual undue influence where the influence was being exerted by a lawful threat. At the time of those cases, and prior to the development of economic duress in the 1970s, common law duress was thought to be confined to duress of the person or, in the context of the restitution of non-contractual payments, duress of goods. The threats in question in those cases were not ones of physical violence or detainment or to seize or retain goods. They therefore fell outside those two categories of common law duress. But now that economic duress has been recognised at common law, there is no reason to hive off those earlier cases from duress by labelling them as cases on undue influence. On the contrary, the underlying element is identical—it is an illegitimate, albeit lawful, threat—and it is therefore rational today to treat them as examples of duress (albeit not economic duress). …

91. Furthermore, since the recognition of economic duress, there have been several cases in which lawful act economic duress can be said to have been accepted as a ground for the avoidance of a contract or restitution (whether made out on the facts or not). …

92. For these three reasons, the better view is that, although controversial, lawful act duress does, and should, exist as a matter of English law.

At paragraphs [83] and [84] Lord Burrows refers to the writings of academics who have been critical of the proposition that English law should recognise a doctrine of lawful act duress. In essence their view is that the making of a lawful threat should not in principle suffice to set aside a contract and that certainty and stability in the law would best be provided by a firm rule that lawful act duress act does not exist. A clear rule to this effect is believed by such writers to be preferable to a recognition of the possibility of an exception which is of such narrow scope that it will never in practice be invoked but which may result in expensive litigation as parties attempt, unsuccessfully, to rely on the possibility of there being such an exception. Powerful though these arguments are, they did not persuade the Supreme Court for the reasons given by Lord Burrows. It is a very bold step to shut the door completely on the recognition of lawful act duress. It is for this reason that many judges are very reluctant, or refuse, to say never to the existence of a claim. Further, some of the commentators who appear to wish to shut the door completely on a lawful act duress claim may in fact leave open another escape route for the courts. Thus Professor Virgo, one of the authors cited by Lord Burrows, states that 'a lawful threat may still result in restitution, but only … if the more stringent test of unconscionability is satisfied'. It is not obvious that this approach results in greater certainty because it simply moves the problem elsewhere, namely to the doctrine of unconscionability. It is also, as Lord Burrows observes, very difficult to shut the door entirely on lawful act duress given the existence of the blackmail
p. 648 cases (unless one treats these cases ↵ as cases in which the ground for intervention by the courts is not duress but the commission of a criminal offence). Although the issue is a difficult one, the approach adopted by Lord Burrows has the merit of recognizing openly that there may be exceptional cases in which lawful act duress can, for the reasons which he gave, suffice to set aside a contract. On this basis it is suggested that the Supreme Court was correct to conclude that lawful duress does exist as a matter of English law.

18.4.3.2.2 Common Ground on the Scope of Lawful Act Duress

There were a number of issues in relation to the scope of lawful act duress on which the Supreme Court was unanimous. The first is that there was agreement on the importance of certainty and clarity in commercial contract law and that there is 'a significant danger' that the reputation of English law for certainty and clarity would be lost if the law on lawful act economic duress were to be stated 'too widely or with insufficient precision' (see [93]). This being the case, lawful act duress should be kept within very narrow confines.

Secondly, it was agreed that 'because the threat is of a lawful act, the question of whether it is illegitimate should focus on the nature of the demand rather than the nature of the threat' ([96]), a proposition which is classically reflected in the case of blackmail where the blackmailer has to justify the demand for money, not the threat which has been made, given that the ordinarily blackmailer often threatens to do what he has a right to do.

Thirdly, it was agreed that, in the context of lawful act economic duress, 'a demand motivated by commercial self-interest is, in general, justified' ([136](iv) and to similar effect see [97]–[99]). Thus Lord Burrows stated (at [136](iv)) that 'lawful act economic duress is essentially concerned with identifying rare exceptional cases where a demand, motivated by commercial self-interest, is nevertheless unjustified'.

Fourthly, there was agreement that it was not appropriate to develop the law by adopting an approach based on a 'range of factors' according to which a court would have regard to a number of factors when deciding whether lawful act duress should entitle a party to set aside a contract. There was held to be no need to inject

such a degree of uncertainty into a developing area of the law. On the contrary, Lord Burrows stated (at [94]) that the law relating to lawful act duress was 'in its infancy and the best approach is for the common law to be clarified or developed in a traditional incremental way'.

The final issue on which there was unanimity was that this was not an appropriate case in which to rely on a general principle of good faith dealing ([95]) and, in this context, Lord Burrows stated ([95]) that 'the better strategy, at this stage in the law's development, is to try to set out a limited but clear and workable boundary for the concept of lawful act economic duress in the context of the facts with which this case is concerned'.

18.4.3.2.3 Differences in Relation to the Scope of Lawful Act Duress

Although Lord Burrows stated that the 'better strategy' was to seek to establish a 'limited but clear and workable boundary for the concept of lawful act economic duress' the Supreme Court found it much more difficult to establish these boundaries and indeed they disagreed as to the limits of lawful act duress. As has been noted, the division here is between Lord Hodge (with whom the other Justices of the Supreme Court expressed their agreement) and Lord Burrows. Given that his approach represents the majority approach, we shall commence with the analysis of Lord Hodge. We shall then move on to consider the criticisms made of this approach by Lord Burrows before examining the approach preferred by Lord Burrows and the reasons given by Lord Hodge for rejecting that approach.

p. 649 ↵ The analysis of the majority in relation to the scope of lawful act duress was set out by Lord Hodge in the following terms:

> 2. … the courts have developed the common law doctrine of duress to include lawful act economic duress by drawing on the rules of equity in relation to undue influence and treating as 'illegitimate' conduct which, when the law of duress was less developed, had been identified by equity as giving rise to an agreement which it was unconscionable for the party who had conducted himself or herself in that way to seek to enforce. In other words, morally reprehensible behaviour which in equity was judged to render the enforcement of a contract unconscionable in the context of undue influence has been treated by English common law as illegitimate pressure in the context of duress.
> 3. The boundaries of the doctrine of lawful act duress are not fixed and the courts should approach any extension with caution, particularly in the context of contractual negotiations between commercial entities. In any development of the doctrine of lawful act duress it will also be important to bear in mind not only that analogous remedies already exist in equity, such as the doctrines of undue influence and unconscionable bargains, but also the absence in English law of any overriding doctrine of good faith in contracting or any doctrine of imbalance of bargaining power. …
> 4. If one focuses on the few cases in which a remedy has been provided for what would now be analysed as lawful act duress, there are to date two circumstances in which the English courts have recognised and provided a remedy for such duress. The first circumstance is where a defendant uses his knowledge of criminal activity by the claimant or a member of the claimant's close family to obtain a personal benefit from the claimant by the express or implicit threat to report the crime or initiate a prosecution. The second circumstance is where the defendant, having exposed himself to a civil claim by the claimant, for example, for damages for breach of contract, deliberately manoeuvres the claimant into a position of vulnerability by means which the law regards as illegitimate and thereby forces the claimant to waive his claim. In both categories of case the defendant has behaved in a highly reprehensible way which the courts have treated as amounting to illegitimate pressure.

A number of points should be noted here. The first is the willingness of Lord Hodge (at [2]) to draw on the rules of equity in relation to undue influence (on which see Chapter 19) when considering how the law of duress should develop (to similar effect see *The Law Debenture Trust Corporation* v. *Ukraine* [2023] UKSC 11, [2023] 2 WLR 699, [141]). The second is the need for caution in the development of the law, particularly where the contract is one entered into between commercial parties (see [3]). But the most important point relates to the identification by Lord Hodge (at [4]) of the 'two circumstances in which the English courts have recognised and provided a remedy for' lawful act duress. It is perhaps going too far to conclude that these are the only two circumstances in which English law will recognise the existence of lawful act duress. As Lord Hodge stated ([3]), and the Supreme Court has subsequently confirmed (*The Law Debenture Trust Corporation* v. *Ukraine* [2023] UKSC 11, [2023] 2 WLR 699, [142]), 'the boundaries of the doctrine of lawful act duress are not fixed'. However, it is also important to note Lord Hodge's observation (also confirmed by the Supreme Court in *The Law Debenture Trust Corporation* v. *Ukraine*, [142]), that 'the courts should approach any extension with caution, particularly in the context of contractual negotiations between commercial entities'. The latter emphasis is likely to make it difficult to establish a case of lawful act duress beyond these two circumstances.

Lord Hodge expanded on these two circumstances in paragraphs [5]–[16] of his judgment. Of the two
p. 650 circumstances, the first is the more straightforward. It consists of cases in which a ↵ defendant exploits knowledge of criminal activity for his own benefit. Lord Hodge cited three cases that fall within this category, namely *Williams* v. *Bayley* (1866) LR 1 HL 200 (on which see 19.1), *Kaufman* v. *Gerson* [1904] 1 KB 591, and *Mutual Finance Ltd* v. *John Wetton & Sons Ltd* [1937] 2 KB 389 (all of which are cited by Lord Burrows in his judgment at [89] above).

The more difficult exception is the second case, where the defendant uses illegitimate means to manoeuvre the claimant into a position of weakness in order to force him to waive his claim. There would appear to be a number of components to this exception. First, the claimant must be in a position of vulnerability. Secondly, the defendant must have deliberately manoeuvred the claimant into that position of vulnerability. Thirdly, the means used by the defendant to achieve this must have been 'illegitimate' or 'highly reprehensible' or 'unconscionable' (all terms used by Lord Hodge). Lord Hodge cited two examples in this category, namely *Borrelli* v. *Ting* [2010] UKPC 21 and *Progress Bulk Carriers Ltd* v. *Tube City IMS LLC (The Cenk Kaptaboglu)* [2012] EWHC 273 (Comm), [2012] 2 All ER (Comm) 855 (the latter case is also referred to in the judgments as *The Cenk K*).

In *Progress Bulk Carriers* the claimants agreed to charter a vessel to the defendants. In repudiatory breach of contract the claimants then allocated the vessel to the performance of another contract and sought to allocate a new vessel to the charter with the defendants. The claimants initially assured the defendants that they would compensate the defendants for any loss suffered as a result of their failure to provide the contracted vessel. The defendants were initially willing to accept the substitution of the vessel on the basis that they reserved their right to seek damages from the defendants in respect of any liability which they incurred towards their contracting party as a result of the loss of the contracted-for vessel. However, the claimants subsequently stipulated that they would only provide the substitute vessel if the defendants agreed to waive their right to recover damages in respect of the claimants' original breach of contract. Given the late stage at which the claimants introduced this stipulation, the defendants agreed to it under protest in order to avoid incurring liability to their own customers. It was held that the agreement under which the defendants agreed to waive their claim against the claimants was voidable for economic duress.

According to the analysis of Lord Hodge (at [17]), the basis for the decision in *Progress Bulk Carriers* was (i) the existence of a legal claim by the defendants against the claimants and (ii) the manoeuvring by the claimants of the defendants by reprehensible means (namely their prior breach of contract and their subsequent 'misleading activity') into a vulnerable position where the defendants had no alternative but to waive their pre-existing rights amounted to illegitimate pressure.

One of the difficulties with Lord Hodge's second category lies in explaining why the facts of *Times Travel* did not fall within this category. After all, this was a case in which Times Travel had a claim against PIAC for unpaid commission which it waived after PIAC withheld a very large amount of commission which it owed to Times Travel, and further PIAC increased the vulnerability of Times Travel by cutting substantially its normal ticket allocation. This point was picked up by Lord Burrows in the following terms:

> 132. … On the face of it, PIAC's conduct seems to fall within Lord Hodge's lawful act duress category comprising 'using illegitimate means to manoeuvre the claimant into a position of weakness to force him to waive his claim'. The fact that the claimant was already in a weak position (because of the monopoly) cannot make the claim for lawful act economic duress less deserving than if the claimant had been in a stronger bargaining position. It follows that, in my view, contrary, as I understand it, to that of Lord Hodge, it is the 'bad faith demand' requirement, as I have explained it, that is critical to the decision that there was no lawful act economic duress in this case.

p. 651 ↵ Lord Burrows then moved on to express further concerns in relation to the approach of Lord Hodge:

> 133. With great respect, I am also very concerned that, without any focus on the 'bad faith demand' requirement, defined in the specific sense that I have set out, and with instead the essential guide being that the defendant's conduct must be 'reprehensible' or 'unconscionable' or using 'illegitimate means' (which is, by definition, distinct from unlawful means), one will be permitting lawful act economic duress to create considerable uncertainty in the realm of commercial contracts. While not supporting a 'bad faith demand' requirement, Lord Hodge also refers at some points to 'bad faith' as being relevant (see, for example, paras 56 and 59) but it is not clear to me what Lord Hodge means by that and how that approach is consistent with his rejection of a 'good faith dealing' principle. I have tried to make clear (see para 95) that I am precisely not advocating a general principle of good faith dealing; and the 'bad faith demand' requirement that I have been relying on … is narrow and sharply defined.

Lord Burrows refers in this section of his judgment to his preferred approach which he described as his 'bad faith demand requirement'. He explained the content of this requirement with reference to the decision of the Court of Appeal in *CTN Cash and Carry Ltd* v. *Gallaher Ltd* [1994] 4 All ER 714 (to which we will return at 18.4.3.2.4) in the following section of his judgment.

> 102. … [*CTN Cash and Carry*] may … be said to establish what I shall refer to hereinafter as the 'bad faith demand' requirement. This requirement can be expressed as follows. In the context we are focusing on—of a demand for what is claimed to be owing, or analogously, as on the facts of this case, a demand for the waiver of a claim—it is a necessary requirement for establishing lawful act economic duress that the demand is made in bad faith in the particular sense that the threatening party 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. This is on the assumption that, as a matter of law, what the threatening party claims to be owing is not legally owing or there is no defence to the claim being waived by the threatened party. …
>
> 112. Taken together, what *Borrelli* v. *Ting* and *Progress Bulk Carriers* can be taken to have established is that, in relation to a demand for a waiver by the threatened party of a claim against the threatening party, the demand is unjustified, so that the lawful act economic threat is illegitimate where: first, the threatening party has deliberately created, or increased, the threatened party's vulnerability to the demand; and, secondly, the 'bad faith demand' requirement is satisfied (ie the threatening party does not genuinely believe that it has a defence, and there is no defence, to the claim being waived). …
>
> 125. … the 'bad faith demand' requirement is dependent on there being an existing legal right and duty between the parties (whether contractual or otherwise) which provides a clear and certain standard against which alleged bad faith of the threatening party can be assessed. Without that tie to an existing legal right and duty, the 'bad faith demand' requirement loses its force as being underpinned by a workable standard of dishonesty: the bad faith demand is concerned with either a dishonest assertion of an existing right or the dishonest removal (by waiver) of an existing right. It also loses its force as providing a clear and certain means of controlling the scope of lawful act economic duress and of distinguishing a demand that is unjustified from one that is made in ordinary commercial bargaining.

p. 652 ↵ Lord Hodge in turn 'respectfully' expressed his disagreement with Lord Burrows' 'bad faith demand' requirement and he rejected it for the following four reasons:

> 54. First, the demand for a waiver, to which A [the party making the demand] must know that it has no prior entitlement, is in principle no different from the demand for a sum of money as a pre-condition for entering into contractual relations in the context of a commercial negotiation … [where] Lord Burrows … accepts that economic duress could not be made out in the latter circumstance. If the demand for money, which is supported by the assertion of A's bargaining power, does not give rise to a claim for duress, why should a demand for a waiver of a valid claim which is backed up in the same way?
>
> 55. Secondly, the absence of an identifiable principle to distinguish those two circumstances would increase the undesirable uncertainty in commercial transactions. …
>
> 56. Thirdly, and in any event, bad faith plays a wider role in lawful act duress than merely the absence of belief in an entitlement to a pre-existing right or in the invalidity of a claim for which A seeks a waiver. In both *Borrelli* and *The Cenk K* the conduct of A by which A applied pressure to B involved bad faith or behaviour which was similarly reprehensible. … In both cases it was the combination of the probable or at least possible validity of B's claim against A combined with A's behaviour of that nature which gave rise to the court's conclusion that the waiver had been obtained through the application of illegitimate pressure. In other words, bad faith is potentially relevant both to the content of the demand and to the context in which A makes its demand. To my mind, the two cases do not support Lord Burrows' model.
>
> 57. Fourthly, there is no support in either *Borrelli* or *The Cenk K* for the proposition that the mere assertion of bargaining power, such as a lawful threat to terminate an existing contract or to reduce the supply of goods under the contract in a way which the contract allowed, could without more amount to illegitimate pressure. Lord Burrows considers that PIAC's deliberate act of cutting its ticket allocation, thereby increasing Times Travel's vulnerability to its demand for a waiver of a claim that it was in breach of contract, was an act which was beyond the mere exercise of monopoly power and would have amounted to illegitimate pressure if PIAC had known that it had indeed broken its contract. I respectfully disagree and take a narrower view of the scope of lawful act economic duress in this context. The reduction of the ticket allocation was a hard-nosed exercise of monopoly power, which, in the absence of a doctrine of unequal bargaining power, could not by itself amount to illegitimate pressure. Something more was needed, such as the reprehensible characteristics of the behaviour in *Borrelli* and *The Cenk K*. … As I have said … the scope for lawful act economic duress is extremely limited in the sphere of commercial transactions.

Lord Burrows for his part responded to Lord Hodge's criticism expressed at paragraph [54] above in the following terms:

> 135. … Lord Hodge suggests, at para 54 of his judgment, that there is no principled difference between a demand for payment, based on a bad faith demand, and a demand for payment as a pre-condition to entering into a contract. With respect, the principled difference is that one involves bad faith, as I have defined it, but the other does not. I have sought to make clear … that the 'bad faith demand' requirement is dependent on there being an existing legal right and duty between the parties. To try to apply it outside that context would risk unduly interfering with ordinary commercial bargaining; and it would deprive the requirement of its force as being underpinned by a workable standard of dishonesty and as providing a clear and certain means of controlling the scope of lawful act economic duress. It is also worth stressing that the root principle, to which one is seeking to provide a clear
> p. 653 guide, is that the demand is unjustified so that the lawful act economic threat is illegitimate. At this stage in the law's development, my strategy (see para 95 above) has been to set out a limited but clear and workable boundary for what constitutes an unjustified demand—so that a lawful act economic threat is illegitimate—in the context of the facts with which this case is concerned. Any incremental development of what the common law treats as an unjustified demand in relation to lawful act economic duress can in the future proceed cautiously, in the light of known facts, from that secure base.

18.4.3.2.4 Concluding Thoughts

This difference of view between Lord Hodge and Lord Burrows did not affect the outcome of the appeal in *Times Travel*. The Supreme Court was unanimous in its conclusion that Times Travel had not made good its claim of economic duress. Lord Hodge concluded (at [58]) that there were no findings that PIAC had used any reprehensible means to manoeuvre Times Travel into a position of increased vulnerability in order to exploit that vulnerability. While PIAC had used 'hard-nosed commercial negotiation that exploited PIAC's position as a monopoly supplier', it did not, at least according to Lord Hodge, involve the use of 'reprehensible means of applying pressure' which was evident in cases such as *Borrelli* v. *Ting* and *Progress Bulk Carrier* and there were also no findings that 'PIAC acted in bad faith in making the demands which it did'. For Lord Burrows, the claim of economic duress failed because the threatened lawful act 'was not coupled with a bad faith demand' (see [138]) because Times Travel had failed to establish bad faith by PIAC in that it had not established that PIAC did not genuinely believe that it was entitled to withhold the unpaid commission.

But in other cases the difference of view may be critical. A case which illustrates this potential difference is the decision of the Court of Appeal in *CTN Cash and Carry Ltd* v. *Gallaher Ltd* [1994] 4 All ER 714. The plaintiffs agreed to buy a consignment of cigarettes from the defendants. The defendants mistakenly delivered the cigarettes to the plaintiffs' Burnley warehouse instead of their Preston warehouse. When the mistake was discovered, the defendants agreed to collect the cigarettes from Burnley and deliver them to Preston. Before they could do so, the cigarettes were stolen from the Burnley warehouse. The defendants insisted that the plaintiffs pay for the stolen cigarettes, maintaining that the cigarettes were at the plaintiffs' risk at the time they were stolen. The trial judge found that the defendants believed in all good faith that the cigarettes were at the plaintiffs' risk, but that there was no legal basis for their belief. In subsequent negotiations, the defendants made clear to the plaintiffs that, unless they paid for the cigarettes, the defendants would withdraw the credit

facilities which the plaintiffs had hitherto enjoyed. The defendants were under no contractual obligation to continue to provide the plaintiffs with credit. The plaintiffs paid the money and then sought to recover the money on the ground that it had been paid under duress. The plaintiffs' claim failed.

The decision is clearly correct on its facts. But what would have been the position if the facts had been the same except that the defendants made their demand in bad faith because they did not genuinely believe that the plaintiffs owed the money which the defendants claimed was due to them. Although it was not necessary to resolve this point for the purposes of the appeal, Lord Burrows expressed the view that in such a case the 'bad faith demand requirement' would be met so that the demand would have been unjustified thereby rendering the threat illegitimate (see [122]). Lord Hodge disagreed (see [46]–[52]). Thus he concluded (at [59]) that if the defendants had not believed their demand to be well founded, the Court of Appeal would not have been correct to reach the conclusion that the payment had been made under duress

p. 654 ↵

> absent circumstances which involved the manoeuvring by Gallaher [the defendants] of CTN [the plaintiffs] into a position of vulnerability by means which involved bad faith or were similarly reprehensible and went beyond the use of its position as a monopoly supplier, or which brought the transaction within the ambit of the equitable doctrine of unconscionable transactions.

The difficulty with the latter passage, however, is the one raised by Lord Burrows, namely identifying precisely the scope of the principle laid down by Lord Hodge and the fear that it will generate uncertainty. While the principle itself does lack precision, it may be that it will not generate a great deal of uncertainty in practice because lower courts will pick up on the emphasis placed by the Supreme Court on the exceptional nature of a lawful act duress claim and resist the invitation to find that the case before them falls within that exception. An indication that this might be the outcome can be gleaned from the judgment of Mr Richard Salter QC in *Heritage Travel and Tourism Ltd* v. *Windhorst* [2021] EWHC 2380 (Comm), [34.3.3] where he stated:

> In the commercial context, it is only in extremely limited circumstances that the law will regard a threat to act lawfully as illegitimate or unconscionable. It is not ordinarily duress to threaten to do that which one has a right to do, for instance to refuse to enter into a contract or to terminate a contract lawfully. The pursuit of commercial self-interest is justified in commercial bargaining. The pressure applied by a negotiating party (unless it involves a threat to act unlawfully) will very rarely come up to the standard of illegitimate pressure or unconscionable conduct. It will therefore be a rare circumstance in which a court will find lawful act duress in the context of commercial negotiation.

Although the Supreme Court has not closed the door entirely on the doctrine of lawful act duress, it would appear likely that the courts will be very slow to open the door, in which case it may be some time before we see a successful claim of lawful act duress, at least in a contract entered into between two commercial parties. This point was confirmed by the Supreme Court in *The Law Debenture Trust Corporation plc* v. *Ukraine* [2023] UKSC 11, [2023] 2 WLR 699 where, not only did the Supreme Court affirm the approach of the majority in *Times Travel* but it was stated ([155]) that 'it is difficult to envisage circumstances … in which the exercise of

pre-existing contractual rights might constitute duress' and that the analysis in *Times Travel* 'certainly gives no support to such a contention'. This being the case, it will be no easy task in future to establish a case of lawful act duress.

Further Reading

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