Neutral Citation Number: [2019] EWCA Civ 828

Case No: A3/2017/2065

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
Mr Justice Warren
HC-2014-00247

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14 May 2019

Before:

LORD JUSTICE DAVID RICHARDS
LORD JUSTICE MOYLAN
and
LADY JUSTICE ASPLIN

- -

Between:

TIMES TRAVEL (UK) LIMITED	**Respondent**
- and -	
PAKISTAN INTERNATIONAL AIRLINES CORPORATION	**Appellant**

- -
- -

Nigel Jones QC and Thomas Bell (instructed by **City Solicitors Limited trading as Farani Taylor Solicitors**) for the **Appellant**
Philip Shepherd QC and Heather Murphy (instructed by **Invictus Law LLP**) for the **Respondent**

Hearing dates: 28-29 November 2018

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Approved Judgment

Lord Justice David Richards:

Introduction

1. It is now well-established that a contract may be avoided on the grounds of economic duress, although its scope remains uncertain. This appeal concerns the area of perhaps the greatest uncertainty, that of lawful act duress, where a contract results from a threat of a lawful act or omission. Does lawful act duress exist at all and, if so, in what circumstances may it be invoked?

2. Following a six-day trial, in which a wide range of issues were investigated, Warren J held in a reserved judgment that the respondent Times Travel (UK) Limited (Times Travel) was entitled to avoid, on grounds of economic duress, a contract with the appellant Pakistan International Airline Corporation (PIAC). Under that contract, PIAC re-appointed Times Travel as an agent for the sale of flight tickets on terms that included a waiver by Times Travel of its claims for unpaid commission under prior arrangements. At the relevant time, PIAC was the only airline operating direct flights between the United Kingdom and Pakistan and the business of Times Travel was almost exclusively the sale of flight tickets to members of the Pakistani community in and around Birmingham for travel to and from Pakistan. Its business was therefore very largely dependent on the ability to sell PIAC tickets, for which it needed a contract with PIAC.

3. By 2012, a significant number of agents had commenced or were threatening proceedings to recover substantial sums said to be due by way of commission. In September 2012, PIAC gave notice of termination of existing agency contracts in accordance with their terms and offered new contracts but only on terms that the agents waived their existing claims. Not all agents succumbed to this pressure and continued their proceedings, while some other agents successfully bargained for a term in their new contracts that entitled them to receive from PIAC a sum equivalent to recoveries made in the litigation as if they had brought or continued proceedings. Other agents, including Times Travel, accepted the terms offered by PIAC. The judge held that, because of its dependence on PIAC for so much of its business, Times Travel had no practical alternative to accepting those terms if it wished to remain in business.

4. In 2014, Times Travel brought proceedings to recover the commission and other payments which it said were due under the earlier arrangements. One of PIAC's defences to the claim was the waiver given by Times Travel. This defence was defeated by the judge's acceptance of Times Travel's case that the contract containing the waiver had resulted from economic duress on the part of PIAC. Times Travel succeeded in most, but not all, of its claims.

The facts

5. The facts in a little more detail are as follows.

6. Times Travel is a small family-owned travel agency in Birmingham. Its directors are Asrar Ahmad and his son Ismail Ahmad. In 2008, it was approved by the International Air Transport Association (IATA) as a Passenger Sales Agent and as such was required to enter into an IATA standard form agreement with any airline by which it

was authorised to sell tickets. In the same year, it was appointed an agent for PIAC. As the judge found, PIAC was an important trading partner for any travel agent selling airline tickets to the Pakistani community in the UK. As the judge found, Times Travel would be forced out of business if it could not sell PIAC tickets.

7. The contractual arrangements in force between the parties from 2008 to their termination in 2012 were not straightforward, as the judge explained at [9]-[17] of his judgment. At the start, Times Travel was entitled to commission at a rate of 9% on the price of tickets sold (9% Basic Commission) and to overriding commission (ORC) as an incentive relating to total sales.

8. Under the terms of these arrangements, each party was entitled at any time to give notice of termination, to take effect at the date specified in the notice which was not to be earlier than the end of the month following the month in which notice was given.

9. Disputes arose at an early stage as to the 9% Basic Commission and ORC both with Times Travel and with PIAC-appointed agents generally. A trade association, called the Association of Pakistan Travel Agents (APTA), was formed to represent the interests of PIAC-appointed agents as regards these disputes. At about the end of 2008, Times Travel became aware of the formation of APTA and its efforts to negotiate a deal with PIAC about amendments to the 9% Basic Commission for the benefit of APTA agents. It was later told by PIAC that these negotiations had broken down and that PIAC was going to stop paying the 9% Basic Commission and replace it with remuneration on a net fare basis.

10. Times Travel regularly chased PIAC for payment of the OCR. It was told that PIAC would be introducing a new commission scheme but that outstanding OCR for 2009 would be sorted out.

11. In 2010, Times Travel became aware of APTA members asserting claims against PIAC and threatening legal proceedings. PIAC advised Times Travel not to get involved with APTA and not to bring proceedings, and that an amicable solution would be reached.

12. The first action against PIAC in respect of 9% Basic Commission and ORC was commenced in February 2011, by an APTA member.

13. On 14 September 2012, PIAC sent a notice of termination to Times Travel, as it did also to all other agents in the UK, terminating its appointment with effect from 31 October 2012. The notice also stated that PIAC offered terms of re-appointment as set out in an attached document. On 17 September 2012, PIAC reduced Times Travel's fortnightly allocation of tickets from 300 to 60. As the judge found, this reduction in ticket allocation had a major impact on Times Travel's business and, if continued for much longer, would have put it out of business. It is not suggested that PIAC was acting in breach of contract, or otherwise unlawfully, in reducing the ticket allocation.

14. At a meeting on 24 September 2012, Times Travel signed a new agreement with PIAC (the New Agreement). The meeting was attended by Asrar and Ismail Ahmad, and two employees of Times Travel, and by two representatives of PIAC. The New Agreement, already signed on behalf of PIAC, was provided to the representatives of Times Travel. Earlier in September 2012, Asrar Ahmad had been shown a draft of the

agreement but his request to take a copy with him, in order to read it carefully, discuss it with his son and obtain legal advice, had been refused.

15. The New Agreement was expressed to replace with immediate effect the previous arrangements and to be "the sole, exclusive and entire agreement" between the parties. Following the meeting, Times Travel's ticket allocation was restored to its usual level.

16. Under the terms of the New Agreement, Times Travel became entitled to net sale remuneration (NSR), whereby it was offered tickets at a discount of 7% to the price at which PIAC sold the tickets to the public. It also became entitled to commission under the Agent Productivity Scheme (APS) whereby commission was payable after specific, tiered sales targets were met. Although the written terms provided that this would be available only for the period from 1 July 2012 to 31 December 2012, the judge held that it was orally agreed that it would run beyond the end of 2012 "and well into the future" which the judge held to be at least until 31 December 2013. The New Agreement was terminable by either party on 60 days' notice.

17. Critically for present purposes, under the New Agreement Times Travel released PIAC from all claims to commission or remuneration on any basis other than as set out in the New Agreement. In other words, it released PIAC from all such claims arising under the arrangements in force prior to the making of the New Agreement. It is this provision that Times Travel alleged, and the judge found, had been agreed as a result of economic duress on the part of PIAC. The release was expressed to be in consideration for the introduction of APS but the judge held that the terms of the New Agreement and the APS may have represented adequate reward for future services but they could not be seen as adequate compensation for the waiver of existing claims.

18. The judge found that at the meeting on 24 September 2012 the representatives of Times Travel were told that the New Agreement was to be signed by all agents and that failure to sign it would result in consequences that would be out of the hands of PIAC's managers. The judge found that this was reasonably understood to mean that Times Travel's agency would come to an end and so would be unable to sell PIAC tickets. It was also said that if Times Travel signed the New Agreement its allocated ticket stock would be restored.

19. The judge found that:

> "The Ahmads felt under pressure to sign the New Agreement in the light of the fall in ticket sales since the reduction in the ticket allocation and did not want TT to be put out of business, an outcome which they saw as the inevitable consequence of the withdrawal of TTs agency. They did not want to sign but considered that they had no alternative because of that pressure. I reject PIAC's suggestion that TT could have found other business to replace that derived from PIAC within a reasonable time-scale. It may well be that, in the longer term, TT would have been able to do so. But the result of a refusal to sign the New Agreement would have resulted in termination of the agency on 31 October, a matter of only weeks away, by which time TT could not have hoped to replace the PIAC business."

20. I mentioned earlier that in February 2011, the first action for the recovery of commission alleged to be due had been commenced by a member of APTA. Further proceedings were threatened and, on 25 October 2012, 30 agents commenced proceedings and applied for an injunction to restrain PIAC from giving effect to the notices of termination served on them. The application was compromised on the basis of undertakings given by PIAC that the claimants who signed the New Agreement would do so without prejudice to their case that it had been procured by economic duress and that ticket allocations would be restored to their previous levels. In December 2012, Master Leslie, sitting in the Queen's Bench Division, entered judgment against PIAC in respect of a claim in the action commenced in February 2011, relating to the payment of commission on the fuel surcharge element of ticket prices. In so holding, he followed an appellate decision of the Federal Court of Australia in *Leonie's Travel Pty Ltd v Qantas Airways Ltd* [2010] FCAFC 37 on the same point.

21. In February 2013, some of the litigating APTA agents reached a settlement with PIAC under which they received new commission agreements for three years commencing in February 2013 providing for incentive payments of £20 per ticket sold in year 1 and £15 per ticket sold in years 2 and 3. When, in December 2013, Times Travel requested similar incentives, PIAC declined to provide them.

Times Travel's monetary claims

22. In the present proceedings, Times Travel made claims for commission payments under a number of different heads.

23. First, it claimed 9% Basic Commission on ticket sales from October 2010 to the date of contractual termination of the existing arrangements in October 2012. In October 2010, PIAC implemented a change in the basis of remuneration for many agents from 9% Basic Commission to NSR. The judge rejected Times Travel's case that PIAC had no power under the contract to make this change in the basis of remuneration, but he held that no, or inadequate, notice of the change, as required by the contract, had been given to Times Travel, so that PIAC's intended change had not taken effect. Times Travel therefore succeeded in this part of its claim.

24. Second, Times Travel claimed that it was entitled to receive 9% Basic Commission on that part of the ticket price representing a fuel surcharge. This is known as the YQ claim because YQ is the IATA code for fuel surcharges. This claim also succeeded, for the period both before and after the purported introduction of NSR in October 2010. If PIAC had given proper notice of the introduction of NSR in October 2010, Times Travel would have failed in its YQ claim for the period from October 2010.

25. Third, Times Travel claimed overriding commission (ORC) at a rate of 2% on annual ticket sales over £250,000. PIAC defended this claim on the basis that the ORC scheme ended on 30 June 2008, whereas Times Travel's case was that PIAC agreed that it would continue and that it did continue until 31 October 2012. The judge rejected Times Travel's claim.

26. As to the amounts of these claims and interest on them, the position is not entirely clear. The judge ordered accounts to be taken but some indication is given by the interim payment of £725,000 which PIAC agreed to make. According to a schedule put before the court below by Times Travel in March 2018, the total amount claimed under Warren J's judgment was just over £1.27 million plus interest of about £380,000. Against the principal amount, Times Travel had to give credit for income of some £435,000 received in respect of ticket sales between October 2010 and October 2012. The element represented by the YQ claim for the period up to October 2010 is shown as £56,639, with the balance of £1.215 million representing the claim for 9% Basic Commission from October 2010 to October 2012. We were not given any figures for the unsuccessful claim for OCR, but on a very rough basis it must have been of the order of £250-300,000.

27. Leaving aside the specific defences to each of these claims, PIAC's overall defence was that all these claims had been compromised and released by the terms of the New Agreement. Times Travel challenged the validity or enforceability of the New Agreement, or of the release, on three grounds: economic duress, misrepresentation and as being unfair under the Unfair Contracts Terms Act 1977. The judge rejected the challenge based on misrepresentation and on the Unfair Contracts Terms Act, and there is no cross-appeal by Times Travel on those points. Nor is there any appeal or cross-appeal against the judge's decision on the specific features of each head of claim to commission. The only issue on this appeal is the judge's decision that Times Travel was entitled to avoid the New Agreement on the grounds that it had been procured by economic duress.

28. I should mention that a second claimant, Nottingham Travel (UK) Limited, made similar claims to those advanced by Times Travel. The judge held that it was bound by the release contained in the New Agreement, because, under a collateral contract with PIAC, it became entitled to the same terms as the APTA agents might achieve in their litigation. There is no appeal against this decision.

The judgment below

29. The judge analysed the law on economic duress at [247]-[255]. He identified three necessary ingredients for a successful claim. First, there must be illegitimate pressure applied to the claimant. Second, the pressure must be a significant cause inducing the claimant to enter into the contract. Third, the practical effect of the pressure is that there is compulsion on, or a lack of practical choice for, the claimant.

30. This appeal is concerned with the first of these ingredients.

31. The second and third ingredients do not arise on the appeal because there is no challenge to the judge's findings of fact that the pressure applied by PIAC was a significant cause inducing Times Travel to enter into the New Agreement and that Times Travel had no practical choice other than to enter into the New Agreement. Those ingredients do not therefore arise for consideration, whether as a matter of law or fact. I would only comment that, as regards the third ingredient identified by the judge, the essence as demonstrated by the authorities is the lack of any practical choice, rather than the higher test of compulsion.

32. The particular point arising in this case is that the pressure applied by PIAC was in all respects in itself lawful. It was neither a breach of contract nor a tort or other actionable wrong nor an offence for PIAC to reduce Times Travel's ticket allocation, to give notice of termination of the existing contractual arrangements or to insist on the inclusion of the waiver of past claims in the New Agreement.

33. The judge held that lawful conduct can in some circumstances amount to economic duress, relying on the discussion in *Chitty on Contracts* (2015, 32nd ed) at 8-046:

> "**Threat to commit otherwise lawful act**. Threatening to carry out something perfectly within one's rights will not normally amount to duress; for instance, a party who relies on his existing contractual rights to drive a hard bargain is not, on that ground alone, guilty of economic duress. But there can be no doubt that even a threat to commit what would otherwise be a perfectly lawful act may be improper if the threat is coupled with a demand which goes substantially beyond what is normal or legitimate in commercial arrangements. It was at one time suggested that it could not be unlawful to threaten to exercise one's legal rights, no matter what the motive. But such a principle is too widely stated. There are, for example, many cases where a man who has a "right", in the sense of a liberty or capacity to do an act which is not unlawful, but which is calculated seriously to injure another, will be liable to a charge of blackmail if he demands money from that other as the price of abstaining, e.g. from disclosing discreditable incidents in the victim's life. Although it is, in general, true to say that a contract is not rendered voidable by reason of the fact that pressure has been lawfully applied so as to compel the promisor to accept its terms, it is unlikely that a court would refuse to entertain an action at the suit of one who had paid money under a threat amounting to blackmail, or to set aside any agreement entered into as the result of such a threat."

34. The judge also cited a passage from the judgment of Dyson J in *DSND Subsea Ltd v Petroleum Geo-Services ASA* [2000] BLR 530 at [131], to which I refer below.

35. At [260], the judge made a number of findings that underpinned his decision on the issue of economic duress. I should set these out in full:

> "It is important to note the following matters:
>
> (i) PIAC considered (wrongly, as I have held, but I have no reason to doubt that PIAC genuinely believed it to be true) that the 9% Basic Commission had ceased to be payable, having been replaced by Net Sales Remuneration in October 2010.
>
> (ii) The New Agreement was in all material respects in precisely the same terms as the pre-existing arrangements, both incorporating Resolutions 818g and 824. One difference between the old arrangements and the New Agreement – and

> the only major difference – related to the giving up by the Claimants of their pre-existing claims to commission, thus including 9% Basic Commission on Net Ticket Price (*ie* including the YQ element of the fare) and ORC.
>
> (iii) The New Agreement was offered to the Claimants in the very letter (that is to say, the Notice) which gave notice of termination of the old agreement. There was, therefore, quite clearly no desire on the part of PIAC that Agents should in practice cease to be agents for PIAC; what PIAC wanted to achieve was simply an end to any claims by the Claimants for their outstanding commission. The Notice was in reality a threat that, unless the Claimants gave up those claims, their agency would come to an end. It of course went beyond a mere threat because, if the Claimants did not sign the New Agreement, their appointments would come to an end automatically on the expiry of the notice period.
>
> (iv) The Claimants were given no opportunity to discuss the service of the Notice. Some of the reasons which I have been given for the service of the Notice, in particular concerns about financial risk, simply do not stand up to scrutiny in relation to the Claimants.
>
> (v) The Claimants' claims were all genuine and arguable. The YQ claim in respect of the period up to 16 October 2010 was very strong indeed in the light of the decisions of the Australian court and Master Leslie. Had the summary judgment application proceeded, it would, in my view, have been bound to succeed. The claim to 9% Basic Commission (including commission on the YQ element) for the period after October 2010 was less clear. For the reasons which I have already given, I consider that it would have been a good claim. The ORC claim is one which, on the evidence before me, I have rejected. It was, however, part of the APTA litigating agents' claim in relation to which the evidence may have been very different. It would be wrong to say that, when the New Agreement was made, there was no prospect of success in the ORC claim.
>
> (vi) The New Agreement provided benefit for the Claimants in the shape of the APS and the collateral contracts provided the different benefits for TT and NT which I have described."

36. I would comment that it does not appear that sub-paragraph (ii) is accurate. The judge held that under the old arrangements Times Travel was entitled to 9% Basic Commission, whereas that was replaced by Net Sale Remuneration under the New Agreement. The New Agreement also included, as the judge noted at sub-paragraph 9(vi), the APS.

37. The judge concluded:

> "262. So far as TT is concerned, I consider that it has established its claim based on economic duress. Taking account of all of the matters set out in paragraph 260 above, I consider that the elements required to be established are made out. This is one of those cases where, although acting lawfully, the defendant, PIAC, has placed illegitimate pressure on TT. Further, that pressure was a significant cause of TT entering into the contractual arrangements which it did, that is to say the collateral contract and the New Agreement. In reaching that conclusion I take account of the factors listed by Dyson J in the passage set out at paragraph 250 above. As to those factors:
>
> (i) The case concerning YQ at least prior to October 2010 was very strong. I feel confident that summary judgement would have been given. PIAC ought to have paid 9% commission on the YQ element in respect of the periods prior to October 2010 before the New Agreement was signed. It was in breach of contract in having failed to do so. There is no limitation point here, since all of the Claimants' claims arose in respect of periods within 6 years of the New Agreement.
>
> (ii) Whether PIAC has acted in good faith or bad faith is moot. The Claimants have not established that there was bad faith but nor has PIAC established good faith. It is clear to me that the whole basis on which the Notice was served and the terms of the New Agreement were formulated was to ensure that agents would lose their claims to accrued rights in a situation where some of those rights (in particular, 9% commission on YQ) were clear. Indeed, Mr Schama [counsel for PIAC] accepted that this was the motivation for the Notice. Whether this demonstrates bad faith is a matter on which different minds might take different views.
>
> (iii) It does not, I think on any view, reflect well on PIAC that it should treat this particular agent, NT [a misprint for TT], in the way which it did when TT was a successful, honest and reliable agent with a substantial period of loyal service. It was given no adequate period of notice to allow it to adjust its businesses; it was not allowed, even during the short period of notice, to acquire for cash its pre-existing ticket allocations.
>
> (iv) TT, in my judgment, had no practical alternative but to submit to the pressure and take what was on offer.
>
> (v) TT protested at the time, saying that the New Agreement was unfair.
>
> 263. In my view, the pressure put on TT, in the light of all of the matters which I have identified and in the light of the factors

> listed by Dyson J, was illegitimate. The benefit of the New Agreement and of the APS for 2012 do not, in my judgment render the pressure legitimate. The New Agreement and the limited APS may represent a possibly adequate reward for future services; but they cannot be seen as compensating TT in an adequate way for its forced waiver of its existing claims."

The law

38. It is necessary to trace some of the development of the principle of economic duress in English law, and in particular the proposition that lawful acts or the threat of lawful acts could provide a sufficient basis for its application.

39. Before doing so, it should be observed that the common law attaches great significance to the enforceability of contracts validly made. A contract which is not validly made – for lack of an essential element such as agreement on terms or lack of consideration or for want of capacity or consent - is necessarily unenforceable. A validly made contract will be set aside or be voidable at the option of a party on only a few grounds which are clearly defined. Most of these grounds will involve fault, sometimes limited to bad faith, on the part of a party. Examples are fraudulent misrepresentation, unilateral mistake (which may bar remedies or ground a claim for rectification), unconscionable transactions and, in some cases, undue influence.

40. The equitable doctrines of unconscionable transactions (or undue pressure, as it is called in some jurisdictions such as Australia) and undue influence are particularly relevant in the context of economic duress. Both involve the possibility of the court setting aside a contract made in circumstances which may involve pressure being put on a party to enter into the contract. There is no lack of clarity in the criteria that must be satisfied for their application. Undue influence, which may be actual or presumed, is based on the relationship between the parties. The doctrine of unconscionable transactions applies where a party is suffering from a particular kind of vulnerability, the terms of the transaction are oppressive to that party and the other party knowingly took advantage of his vulnerability: see *Snell's Equity* (33rd ed 2015) at 8-042. The elements of an unconscionable transaction were summarised by Lord Templeman giving the judgment of the Privy Council in *Boustany v Piggott* (1995) 69 P&CR 298 at 303. It has not been suggested that the New Agreement in the present case could be set aside under either of these equitable doctrines.

41. The common law and equity have not countenanced as grounds for setting aside contracts factors such as inequality of bargaining power or the exploitation of a monopoly position. Intervention in relation to these and other factors seen as going to the fairness of contractual terms and the relative positions of the parties has been through legislation, directed principally to consumer contracts and consumer credit. Commercial dealings have been left largely untouched by statute.

42. The need for clarity and certainty in the law of contract, particularly in commercial dealings, has been emphasised many times. Speaking in the context of rectification, Lord Neuberger MR said in *Daventry DC v Daventry Housing Ltd* [2011] EWCA Civ 1153, [2012] 1 WLR 1333 at 194:

> "Rectification is an equitable remedy, which means that its origins lie in conscience and fair dealing, but those origins cannot be invoked to justify an unprincipled approach: far from it. Particularly as rectification is normally invoked in a contractual context, it seems to me that its principles should reflect the approach of the law to contracts, in particular to the formation and interpretation of contracts. Similarly, as rectification most commonly arises in a commercial context, it is plainly right that the applicable principles should be as clear and predictable in their application as possible."

43. I turn then to duress. Historically, the avoidance of contracts on grounds of duress was confined to acts or threats of personal violence or imprisonment and, more recently, unlawful threats to property.

44. The scope of duress was significantly broadened with the acknowledgement that a contract might be avoided on grounds of economic duress. This was recognised for the first time in English law in two first instance commercial cases: *Occidental Worldwide Investment Corp v Skibbs A/S Avanti* [1976] 1 Lloyd's Rep 293 and *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705. In the first of these cases, a charterer of vessels alleged that it had no substantial assets and threatened that if the hire rates were not reduced it would go into bankruptcy. These statements were fraudulently made and the owners were held entitled to avoid the contract containing the lower hire rates on that ground. Kerr J rejected a case of duress on the facts but said that English law was open to development in relation to contracts concluded under some form of compulsion not amounting to duress to the person or to property. In the latter case, Mocatta J held that the plaintiff would have been entitled to avoid for duress a contract whereby it agreed to pay an increased price for the construction of a ship as a result of threats by the shipyard to terminate the shipbuilding contract in breach of its terms, if it had not subsequently affirmed the revised contract. He held at p.719 that a contract made under the coercion of economic duress was voidable and that a threat to break a contract could amount to economic duress.

45. In both these early cases, the pressure amounting to economic duress comprised unlawful threats: fraudulent statements in one case and a threatened breach of contract in the other. The legality or otherwise of the relevant threats was also at the heart of the two decisions of the House of Lords which authoritatively established the existence in English law of a principle of economic duress. Both cases involved the "blacking" of vessels, whereby trade unions instructed their members not to provide tug services to the vessels and thereby prevent them leaving port. This involved the unions in inducing their members to break their contracts of employment.

46. In the first of these cases, *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] AC 366, the instructions constituted a tort, unless they were issued in furtherance of a trade dispute in which event the union enjoyed immunity under the Trade Union and Labour Relations Act 1974. The demand for one of the payments which the plaintiff shipowner was required to make in order to secure the release of its vessel docked at Milford Haven was held to be outside the statutory immunity. The blacking of the vessel in order to obtain that payment was therefore tortious and constituted economic duress, entitling the

shipowner to recover it. In the second case, *Dimskal Shipping Co SA v International Transport Workers Federation* [1992] 2 AC 152, the facts were similar, except that the vessel was docked in Sweden. Under Swedish law, the union enjoyed immunity but did not do so under English law. The House of Lords held that the legality of the blacking of the vessel was to be judged by the governing law of the contract whereby the shipowner agreed with the union to make payments to secure its release. As this was English law, the blacking was tortious and was held to amount to economic duress, entitling the shipowner to avoid the contract.

47. While, therefore, the central point at issue in the case before us was not present in those cases, they are important for the discussion in the judgments of the principle of economic duress. This is so, notwithstanding that it was conceded that, if unlawful, the blacking threat amounted to economic duress entitling the shipowner to avoid the contract under which the payment was made, and that as a result Lord Diplock said at p.383 that the appeal was not the occasion for a general discussion of "the developing law of economic duress as a ground for treating contracts as voidable and obtaining restitution of money paid under economic duress as money had and received to the plaintiff's use".

48. Lord Diplock went on to say at p.384:

> "It is, however, in my view crucial to the decision of the instant appeal to identify the rationale of this development of the common law. It is not that the party seeking to avoid the contract which he has entered into with another party, or to recover money that he has paid to another party in response to a demand, did not know the nature or the precise terms of the contract at the time when he entered into it or did not understand the purpose for which the payment was demanded. The rationale is that his apparent consent was induced by pressure exercised upon him by that other party which the law does not regard as legitimate, with the consequence that the consent is treated in law as revocable unless approbated either expressly or by implication after the illegitimate pressure has ceased to operate on his mind. It is a rationale similar to that which underlies the avoidability of contracts entered into and the recovery of money exacted under colour of office, or under undue influence or in consequence of threats of physical duress.
>
> Commercial pressure, in some degree, exists wherever one party to a commercial transaction is in a stronger bargaining position than the other party. It is not, however, in my view, necessary, nor would it be appropriate in the instant appeal, to enter into the general question of the kinds of circumstances, if any, in which commercial pressure, even though it amounts to a coercion of the will of a party in the weaker bargaining position, may be treated as legitimate and, accordingly, as not giving rise to any legal right of redress. In the instant appeal the economic duress complained of was exercised in the field of industrial relations to which very special considerations apply."

49. At p. 385, Lord Diplock stated that use of economic duress was not a tort per se and that the form that the duress takes may or may not be a tort.

50. Lord Scarman dissented on the live issue of the extent of the union's immunity but, as regards the elements of economic duress, his speech has been influential. At p.400, he observed that it was already established law that economic pressure can amount to duress. For such duress to exist, it must be shown that that the victim had no "practicable choice but to submit" and that, quoting the dissenting joint speech of Lord Wilberforce and Lord Simon of Glaisdale in *Barton v Armstrong* [1976] AC 104 at 121, "the pressure must be one of a kind which the law does not regard as legitimate". He continued:

> "As the two noble and learned Lords remarked at p. 121D, in life, including the life of commerce and finance, many acts are done "under pressure, sometimes overwhelming pressure": but they are not necessarily done under duress. That depends on whether the circumstances are such that the law regards the pressure as legitimate.
>
> In determining what is legitimate two matters may have to be considered. The first is as to the nature of the pressure. In many cases this will be decisive, though not in every case. And so the second question may have to be considered, namely, the nature of the demand which the pressure is applied to support.
>
> The origin of the doctrine of duress in threats to life or limb, or to property, suggests strongly that the law regards the threat of unlawful action as illegitimate, whatever the demand. Duress can, of course, exist even if the threat is one of lawful action: whether it does so depends upon the nature of the demand. Blackmail is often a demand supported by a threat to do what is lawful, e.g. to report criminal conduct to the police. In many cases, therefore, "what [one] has to justify is not the threat, but the demand…": see *per* Lord Atkin in *Thorne v. Motor Trade* Association [1937] AC 797, 806."

51. Of particular importance to the present case is the recognition by Lord Scarman that whether pressure is "illegitimate" comprises two questions, focussing on the nature of the threat and on the nature of the demand. The same point was made by Lord Hoffmann giving the majority opinion of the Privy Council in *R v Attorney General for England and Wales* [2003] UKPC 22, [2004] 1 LRC 132 at [16]. Lord Scarman's observation that the threat of unlawful action will be treated as illegitimate, whatever the demand, holds good for the commission or threat of a tort or similar wrong or an offence. It will also be true of many, perhaps most, threats of a breach of contract, but academic writers are nearly unanimous in thinking that there may be some threats of breach of contract which will not be treated as illegitimate: see *Chitty on Contracts* (33rd ed 2018) at paras 8-038–8-045, *Goff & Jones: The Law of Unjust Enrichment* (9th ed 2016) at 10-61-10-63, *Burrows: The Law of Restitution* (3rd ed 2011) at pp 267-275. It was also the view of Dyson J in *DSND Subsea Ltd v Petroleum Geo-Services ASA* [2000] BLR 530 at [134].

52. Where, as in the present case, the acts or threatened acts are lawful, the focus will be on the nature of the demand. I will return later to this element.

53. Mr Shepherd QC, appearing for Times Travel, emphasised that the judges had deliberately chosen "illegitimate" to describe the pressure that could amount to duress to indicate a wider category of pressure than what was just unlawful. As will be seen, I accept that in some circumstances lawful acts or the threat of lawful acts can give rise to duress, but I am not sure that "illegitimate", which has "unlawful" as one of its principal meanings, was chosen with this intention. In *Dimskal Shipping*, the blacking of the vessel was held to be outside the immunity from liability in tort for action in furtherance of a trade dispute in English law and thus to constitute illegitimate pressure for the purposes of economic duress. In considering the meaning of "illegitimate", it may be noted that at p.164 Lord Goff equated it, on the facts of the case, with unlawful. The question was whether the pressure applied by the union was "legitimised" by the grant of immunity under the relevant system of law. While Lord Scarman in *Universe Tankships* referred to duress involving lawful acts, the example he gave was blackmail. A threat may be lawful if viewed on its own but, when combined with a demand and other circumstances that turn it into blackmail, the making of the threat is a criminal offence and thus unlawful for all purposes, including the law of duress.

54. In referring to the nature of the demand as relevant to the existence of economic duress, Lord Scarman in *Universe Tankships* referred at p.401 to the decision of the House of Lords in *Thorne v Motor Trade Association* [1937] AC 797. The plaintiff was a member of a trade association which, under its constitution, prohibited members from selling articles at less than list price. In order to enforce this rule, the association was entitled to put a member's name on a stop list or, alternatively, to require the member to make a payment within reasonable limits. In a "friendly proceeding" to determine the validity of this power, the plaintiff alleged that it was illegal because any order made under it would be illegal or would necessarily require an illegal act to be done, on the basis that it involved the making of demands with menaces without reasonable or probable cause, thus committing blackmail as then defined in the Larceny Act 1916.

55. The House of Lords, affirming the decision of the courts below, held that no illegality would be involved. Lord Atkin accepted that a demand for money as an alternative to being put on a stop list was a demand with menaces but not one without reasonable or probable cause. He said at p.807:

> "It appears to me that if a man may lawfully, in the furtherance of business interests, do acts which will seriously injure another in his business he may also lawfully, if he is still acting in furtherance of his business interests, offer that other to accept a sum of money as an alternative to doing the injurious acts. He must no doubt be acting not for the mere purpose of putting money in his pocket, but for some legitimate purpose other than mere acquisition of money."

56. The first clear discussion of the possibility of lawful act duress in the authorities was in the judgments of this court in *CTN Cash and Carry Ltd v Gallagher Ltd* [1994] 4 All ER 714. The defendant supplied cigarettes to the plaintiff company on a regular

basis and arranged credit facilities. Each supply was under a separate contract and the defendant was not obliged either to make further supplies or to provide credit facilities. It invoiced the plaintiff for a consignment that had been stolen before it reached the correct delivery address. Gallagher did so in good faith, wrongly believing that it was entitled to payment. When the plaintiff refused to pay the invoice, the defendant terminated its credit facilities and refused to reinstate them unless the invoice was paid. Against this pressure, the plaintiff paid the invoice but subsequently brought proceedings to recover the payment on the grounds that it had been procured by means of economic duress.

57. In rejecting the claim of economic duress, Steyn LJ, giving the leading judgment, stressed three characteristics of the case. First, it did not involve either a protected relationship, thus engaging the equitable doctrine of undue influence, or dealings between a supplier and a consumer, thus engaging the legislation that gives protection to consumers. Nor could the defendant's monopoly of supply of particular brands of popular cigarettes convert what was not duress into duress. Second, the defendant was lawfully entitled to refuse to enter into further supply contracts with the plaintiff and to withdraw credit facilities. The third characteristic was stated by Steyn LJ at p.718 as follows:

> "A third, and critically important, characteristic of the case is the fact that the defendants bona fide thought that the goods were at the risk of the plaintiffs and that the plaintiffs owed the defendants the sum in question. The defendants exerted commercial pressure on the plaintiffs in order to obtain payment of a sum which they bona fide considered due to them. The defendants' motive in threatening withdrawal of credit facilities was commercial self-interest in obtaining a sum that they considered due to them."

58. Steyn LJ held that the combination of these three features meant that the case of economic duress could not succeed. Citing a passage from *Birks: An Introduction to the Law of Restitution* (1989), he said that he readily accepted that the fact that the defendant had used lawful means did not by itself remove the case from the scope of the doctrine of economic duress. He also cited *Thorne* and the two blacking cases in the House of Lords as showing that English courts had accepted that a threat may be illegitimate when coupled with a demand for payment, even if the threat is one of lawful action.

59. At p.719, Steyn LJ said:

> "We are being asked to extend the categories of duress of which the law will take cognisance. That is not necessarily objectionable, but it seems to me that an extension capable of covering the present case, involving 'lawful act duress' in a commercial context in pursuit of a bona fide claim, would be a radical one with far-reaching implications. It would introduce a substantial and undesirable element of uncertainty in the commercial bargaining process. Moreover, it will often enable bona fide settled accounts to be reopened when parties to commercial dealings fall out. The aim of our commercial law

> ought to be to encourage fair dealing between parties. But it is a mistake for the law to set its sights too highly when the critical inquiry is not whether the conduct is lawful but whether it is morally or socially unacceptable. That is the inquiry in which we are engaged. In my view there are policy considerations which militate against ruling that the defendants obtained payment of the disputed invoice by duress.
>
> Outside the field of protected relationships, and in a purely commercial context, it might be a relatively rare case in which 'lawful act duress' can be established. And it might be particularly difficult to establish duress if the defendant bona fide considered that his demand was valid. In this complex and changing branch of the law I deliberately refrain from saying 'never'. But as the law stands, I am satisfied that the defendants' conduct in this case did not amount to duress.
>
> It is an unattractive result, inasmuch as the defendants are allowed to retain a sum which at the trial they became aware was not in truth due to them. But in my view the law compels the result."

60. Farquharson LJ agreed with the judgment of Steyn LJ and, also agreeing, Nicholls LJ said at p.719:

> "It is important to have in mind that the sole issue raised by this appeal and argued before us was duress. The plaintiff claims payment was made by it under duress and is recoverable accordingly. I agree, for the reasons given by Steyn LJ, that that claim must fail. When the defendant company insisted on payment, it did so in good faith. It believed the risk in the goods had passed to the plaintiff company, so it considered it was entitled to be paid for them. The defendant company took a tough line. It used its commercial muscle. But the feature underlying and dictating this attitude was a genuine belief on its part that it was owed the sum in question. It was entitled to be paid the price for the goods. So it took the line: the plaintiff company must pay in law what it owed, otherwise its credit would be suspended.
>
> Further, there is no evidence that the defendant's belief was unreasonable. Indeed, we were told by the defendant's counsel that he had advised his client that on the risk point the defendant stood a good chance of success. I do not see how a payment demanded and made in those circumstances can be said to be vitiated by duress."

61. It was critical for the decision that the defendant acted in good faith. Steyn LJ added that, in a purely commercial context, it would be relatively rare for lawful act duress to be established and, while refraining from saying "never", it might be particularly difficult to do so if the defendant acted bona fide. Nicholls LJ agreed but also laid

some emphasis on the absence of evidence that the defendant's belief was unreasonable.

62. In my view, *CTN Cash and Carry v Gallagher* can be taken to establish that where A uses lawful pressure to induce B to concede a demand to which A does not bona fide believe itself to be entitled, B's agreement is voidable on grounds of economic duress. It cannot be taken to establish that if A genuinely but unreasonably believes the demand to be well-founded, the same result follows. While it may be that Nicholls LJ would have favoured that outcome, it runs counter to the judgment of Steyn LJ.

63. I do not consider that the handful of subsequent authorities in this area have taken this issue much further. We were, in particular, referred to three later cases.

64. *DSND Subsea Ltd v Petroleum Geo-Services ASA* [2000] BLR 530 concerned a variation of an existing contract agreed against the background of difficulties appreciated by both parties in performance of the contract and a limited breach of contract by one party, the claimant. One of the defences raised to a claim under the contract as varied was that the variation was the result of economic duress on the part of the claimant. Dyson J rejected this defence, on the grounds that such pressure as the claimant exerted did not cause the defendant to agree to the variations. In a frequently-quoted passage, cited also by Warren J in this case, Dyson J said:

> "In determining whether there has been illegitimate pressure, the courts take into account a range of factors. These include whether there has been an actual or threatened breach of contract; whether the person allegedly exerting the pressure has acted in good or bad faith; whether the victim had any realistic practical alternative but to submit to the pressure; whether the victim protested at the time; and whether he affirmed and sought to rely on the contract. These are all relevant factors. Illegitimate pressure must be distinguished from the rough and tumble of the pressures of normal commercial bargaining."

65. Although Dyson J introduced this passage as being a statement of some of the factors that the courts take into account in determining whether there has been illegitimate pressure, it is fair to say that some of them - whether the victim had any realistic practical alternative, whether the victim protested and whether the victim has affirmed and sought to rely on the contract – go to questions of causation and affirmation, not to the illegitimacy of the pressure. In other words, Dyson J was addressing factors relevant to all aspects of a plea of economic duress. The two factors directly relevant to the legitimacy or otherwise of the pressure are whether there was an actual or threatened breach of contract and whether the person allegedly exerting the pressure had acted in good or bad faith. In the context of the case, the question of good or bad faith arose in relation to the admitted breach of contract by the claimant which Dyson J regarded as "reasonable behaviour by a contractor acting bona fide in a very difficult situation". As the report does not list the authorities cited by counsel, we do not know whether *CTN Cash and Carry* was cited to him but, if it was, this reference to good or bad faith could also extend to the question there regarded as critical, whether Gallagher's demand was made in good or bad faith. However, I do not consider that it is right to read this reference as put forward by Dyson J as a general and freestanding touchstone of illegitimate pressure.

66. *Borrelli v Ting* [2010] UKPC 21, [2010] Bus LR 1718 was a decision of the Privy Council, on appeal from Hong Kong. The respondent used his ability to frustrate the approval of a scheme of arrangement, which was essential to ensuring some return to creditors in the insolvent liquidation of the company concerned, to secure the release of claims that the company had against him. The release was held to be voidable on grounds of economic duress. His ability to frustrate the scheme arose because he falsely maintained that he had caused companies under his control to vote against the scheme and the issue of the validity of the votes could not be determined by the court in time for the scheme to provide any benefit. In fact, as he knew, his purported signatures on the board resolutions of those companies, apparently authorising the votes to be cast against the scheme, were forgeries and he procured his agent to swear a false affidavit asserting that the signatures were genuine. In these circumstances, a finding of duress is not surprising. The settlement agreement was, as Lord Saville said giving the judgment of the Board at [35], "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 arising out of that conduct." Lord Saville had said at [32] that these means, together with his failure in breach of statutory duty to provide any assistance to the liquidators, amounted to "unconscionable conduct on his part".

67. *Progress Bulk Carriers Ltd v Tube City IMS LLC, The Cenk Kaptanoglu* [2012] EWHC 273 (Comm), [2012] 2 All ER (Comm) 855 was a decision of Cooke J in the Commercial Court. Owners had chartered a named vessel but without the approval of the charterers they chartered it to another party. This put the owners in repudiatory breach of the charterparty but, rather than accepting the repudiation and terminating it, the charterers accepted the owners' assurance that they would find an alternative vessel and compensate them for all their losses. When an alternative vessel was offered, the owners were prepared to agree a discount on the freight rate but only on terms that the charterers waived all claims for loss and damage arising out of the nomination of the substitute vessel outside the contractual laycan and its late arrival. To avoid increasing its liabilities to the receiver of the freight, the charterer had no practical choice but to accept these terms.

68. Cooke J affirmed the decision of arbitrators that the settlement agreement was voidable on grounds of economic duress. At [36], he said that it was clear from the authorities that "illegitimate pressure can be constituted by conduct which is not in itself unlawful, although it will be an unusual case where that is so, particularly in the commercial context. It is also clear that a past unlawful act, as well as a threat of a future unlawful act can, in appropriate circumstances, amount to illegitimate pressure". At [39] the judge observed that the root cause of the problem was the owners' repudiatory breach, and their continuing conduct thereafter (described as "misleading" at [44]) was designed to put the charterers in a position where they had no option but to accept huge losses on their sale contract to the receivers. He observed that it would be very odd if the threat of a future breach of contract could constitute pressure, but not a past breach coupled with subsequent conduct such as that of the owners.

69. In my judgment, none of these cases provides assistance in the present case where the pressure applied by PIAC, though harsh, was in all respects lawful, and where the focus must therefore be on the nature of the demand made by PIAC.

70. In the light of what I take to be the effect of the decision of this court in *CTN Cash and Carry*, the critical issue for the purposes of this case is whether economic duress can, in a commercial context, arise where lawful acts or threats are made by A in support of a demand which A genuinely believes he is entitled to make. If that belief is reasonably, as well as genuinely, held, I can see no basis on which a plea of economic duress could succeed and it would, in any event, be contrary to the decision in *CTN Cash and Carry*. But, what is the position if the belief, though genuine, is unreasonable?

71. *CTN Cash and Carry* provides an important starting point for this inquiry. Steyn LJ was clear that a critically important characteristic of that case was that Gallagher bona fide thought its claim to be well-founded. In a passage I have already quoted, he said that an extension of the categories of duress to cover lawful act duress in a commercial context in pursuit of a bona fide claim would be a radical extension with far-reaching implications, introducing a substantial and undesirable element of uncertainty in the commercial bargaining process. While he deliberately refrained from saying 'never', he considered that it might be particularly difficult to establish duress if the defendant bona fide believed his demand to be valid.

72. There is little or no support in other authorities for the extension of lawful act duress in a commercial context to cover a demand which is made in good faith but unreasonably.

73. In *Progress Bulk Carriers*, Cooke J at [30] placed emphasis on the statement of Steyn LJ in *CTN Cash and Carry* at p.719 that "the critical inquiry is not whether the conduct is lawful but whether it is morally or socially unacceptable". Taken on their own, those words might suggest a broad-ranging inquiry by judges as to the circumstances in which contracts should be set aside, but it is clear from Steyn LJ's judgment that he saw the inquiry in a commercial context in very narrow terms, precisely because of the policy reasons to which he referred. Nearer the mark is the observation of Cooke J at [35], when discussing the views of textbook writers that "however unusual the situation may be, the courts are willing to apply a standard of impropriety rather than technical unlawfulness". Impropriety has to date involved, in the context of lawful acts, deliberate wrongdoing in the sense of pursuing claims known to be invalid. There is nothing in the decision in *Progress Bulk Carriers* to support an extension of lawful act duress to demands made in good faith.

74. In *R v Attorney-General for England and Wales*, on appeal from New Zealand, the Privy Council held that a confidentiality agreement signed by a member of the SAS which continued in effect after he left the armed forces was not voidable on grounds of duress. The soldier was threatened with transfer to an ordinary unit, which would be seen as a stigma, if he did not sign the agreement. The trial judge had found that the soldier was ordered to sign the agreement, which he was required to obey as a matter of military law. The Privy Council agreed with the New Zealand Court of Appeal that this was incorrect and that, as Lord Hoffmann said at [20], the soldier "was faced with a choice which may have constituted 'overwhelming pressure' but was not an exercise by the MOD of its legal powers over him". The MOD was

reasonably entitled to regard anyone unwilling to give an undertaking of confidentiality as unsuitable for the SAS. Thus, Lord Hoffmann said at [18] that "the threat was lawful and the demand supported by the threat could be justified". Lord Hoffmann concluded at [20]: "The legitimacy of the pressure therefore falls to be examined by normal criteria and as neither of the courts in New Zealand considered either the threat to be unlawful or the demand unreasonable, it follows that the contract was not obtained by duress".

75. The reference to the demand not being unreasonable does not introduce a new basis for economic duress in a commercial context. First, of course, it was not a commercial case. Second, it involved the exercise of powers to which public law considerations applied. The MOD did not enjoy an unfettered, absolute right to transfer soldiers out of the SAS. A threat to do so in support of an unjustified demand would, as Lord Hoffmann said at [18], be unlawful. In order for the threat to be lawful, the demand had to be reasonably made, which it was held to be by the Privy Council.

76. It is to be noted that when at [16] Lord Hoffmann said that the fact that the threat is lawful does not necessarily make the pressure legitimate, he cited the example of blackmail, quoting Lord Atkin in *Thorne v Motor Trade Association*.

77. In *Dimskal Shipping*, Lord Goff cited the judgment of McHugh JA in the decision of the Court of Appeal of New South Wales in *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40 in support of his statement at p.165 that "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". He specifically agreed with McHugh JA that it was probably not helpful to speak of the plaintiff's will having been coerced, a point on which there is now general agreement.

78. We were referred to the judgment of McHugh JA. The judgment is for the most part concerned with the causation aspect of duress but at p.46 he said:

> "The proper approach in my opinion is to ask whether any applied pressure induced the victim to enter into the contract and then ask whether that pressure went beyond what the law is prepared to countenance as legitimate. Pressure will be illegitimate if it consists of unlawful threats or amounts to unconscionable conduct. But the categories are not closed. Even overwhelming pressure, not amounting to unconscionable or unlawful conduct, however, will not necessarily constitute economic duress."

Mr Shepherd placed some emphasis on the breadth of the conduct which, on this approach, might constitute illegitimate pressure. This part of McHugh JA's judgment was *obiter*, because the court was unanimous in affirming the trial judge's finding that any pressure exerted by the bank played no part in the execution of the mortgage under challenge. The other two members of the court (Samuels JA and Moloney JA) stated that they were expressing no view on this part of McHugh JA's judgment.

79. At our invitation, counsel for both parties after the hearing undertook research into how economic duress had developed in Australia since the decision in *Crescendo*, and I am very grateful to them. It has been the subject of a good deal of consideration, but no clear picture has emerged throughout Australia.

80. The Court of Appeal of New South Wales has since rejected any concept of lawful act duress, disagreeing with McHugh JA and taking the view that it should be treated, if at all, as part of the narrower doctrine of unconscionable transactions: see *Australia and New Zealand Banking Group Ltd v Karam* [2005] NSWCA 344, [2005] 64 NSWLR 149. In a single judgment, the court (Beazley, Ipp and Basten JJA) drew attention at [54] to the difficulty caused by McHugh JA's reference to "unconscionable conduct". Following the approach of Kirby P in the same court in *Equitycorp Finance Ltd v Bank of New Zealand* (1993) 32 NSWLR 50, the court held at [62] that "the principled approach is to adopt equitable principles relating to unconscionability…That approach will allow the weaker party to invoke principles of undue influence, or rights to relief based on unconscionable conduct in circumstances where the weaker party suffers from a 'special disadvantage', in the sense identified in *Amadio*" [*Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, a case on the equitable doctrine of unconscionable transaction]. At [66], the court said:

> *"*The vagueness inherent in the terms 'economic duress' and 'illegitimate pressure' can be avoided by treating the concept of 'duress' as limited to threatened or actual unlawful conduct. The threat or conduct in question need not be directed to the person or property of the victim, narrowly defined, but can be to the legitimate commercial and financial interests of the party. Secondly, if the conduct or threat is not unlawful, the resulting agreement may nevertheless be set aside where the weaker party establishes undue influence (actual or presumptive) or unconscionable conduct based on an unconscientious taking advantage of his or her special disability or disadvantage, in the sense identified in *Amadio*. Thirdly, where the power to grant relief is engaged because of a contravention of a statutory provision such as s.51AA, s.51AB or S.51AC of the Trade Practices Act, the Court may be entitled to take into account a broader range of circumstances than those considered under the general law."

81. This passage was cited with approval by the Court of Appeal of New South Wales in *May v Brahmbhatt* [2013] NSWCA 309 (Beazley P, Basten JA and Bergin CJ) at [38] and [40].

82. In other states, the views of McHugh JA in *Crescendo* have been cited with approval: *Mitchell v Pacific Dawn Pty Ltd* [2011] QCA 98 at [50]-[52] (Queensland Court of Appeal), *Electricity Generation Corporation t/a Verve Energy v Woodside Energy Ltd* [2013] WASCA 36 at [24]-[25] (Court of Appeal of Western Australia) and *Doggett v Commonwealth Bank of Australia* [2015] VSCA 351 at [73] (Court of Appeal of Victoria).

83. In *Thorne v Kennedy* [2017] HCA 49 at [29], the High Court of Australia declined to address the arguments for and against the decision in *ANZ v Karam* that duress at

common law requires proof of threatened or actual unlawful conduct or whether the recognition of lawful act duress adds anything to the doctrine of unconscionable transactions, it being unnecessary to do so for the disposal of the case before it.

84. Support for a broader doctrine of lawful act duress was provided by Leggatt LJ in an *obiter* discussion in a case which he heard as a first instance judge (but gave judgment after his appointment to the Court of Appeal), *Al Nehayan v Kent* [2018] EWHC 333 (Comm). The claim was for just over €15 million due under an agreement and a promissory note. The defence included a claim that the agreement and promissory note had been procured by duress, comprising threats of physical violence, threats of litigation and economic duress involving breaches of contractual and fiduciary duties. The judge found on the evidence that threats were made to the defendant's life and threats were made to bring legal proceedings which the claimant knew to be without foundation, in order to induce the defendant to enter into the agreement. In addition, the judge accepted that the claimant had threatened to act in breach of contractual and fiduciary duties for the same purpose. It is not surprising that, but for issues of affirmation and restitution, the judge held that the defendant would have been entitled to rescind the agreement and promissory note.

85. At [179]-[191], Leggatt LJ set out a general discussion of the elements of duress, particularly economic duress. Having referred to *Universe Tankships*, *Dimskal Shipping*, *Thorne v Motor Trade Association* and the subjective test involved in the criminal offence of blackmail, as defined in section 21 of the Theft Act 1968, he said at [181]:

> "In civil as well as in criminal law, the state of mind of the defendant is naturally a relevant consideration where the question is whether the defendant has acted wrongfully. But the factors which render a contract defective and make it just to require contractual benefits to be restored are not limited to cases where the defendant has acted wrongfully. They include, for example, cases where a party lacks capacity or where one party is under the undue influence of the other, even though such influence may not involve any wrongdoing. They may also, in principle, include cases where the defendant has exploited a position of extreme vulnerability on the part of the claimant to induce the claimant to agree to a wholly unreasonable demand. There is no reason why, in this context, the availability of relief should depend on the defendant's own perception of whether his conduct was justified. On the contrary, as in other cases where the law sets limits to freedom of contract by requiring the parties to observe certain minimum standards of behaviour, the appropriate arbiter of those standards is the independent judgment of the court."

86. At [182], Leggatt LJ referred to *CTN Cash and Carry*, saying that Steyn LJ "declined to accept the defendant's state of mind [as] conclusive" and, like Cooke J in *Progress Bulk Carriers*, laid emphasis on Steyn LJ's statement that the critical inquiry was whether the conduct was morally or socially acceptable. He also quoted the references to whether the conduct in question was "unconscionable" in a number of judgments: McHugh JA's judgment in *Crescendo*, as quoted by Lord Goff in *Dimskal Shipping*,

Mance J's judgment in *Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyd's Rep 620 at 637-8 and the Privy Council's judgment in *Borelli v Ting*. He referred also to Cooke J's judgment in *Progress Bulk Carriers* and to the passage in *Chitty* on which Warren J relied in the present case.

87. At [185]-[186], Leggatt LJ referred to Warren J's judgment in the present case. He said that Warren J "had declined to find that the airline had acted in bad faith in requiring the agents to give up their claims for past commission. But, applying the test stated in *Chitty*, he held that the agents had been induced to enter into the agreement by illegitimate pressure and were entitled to rescind it".

88. Leggatt LJ said at [187]-[188]:

> "187. This is a difficult area of the law. But for my part I see no reason to doubt the correctness of the approach adopted in the *Times Travel* case. Whereas the distinction between lawful and unlawful behaviour may be critical in determining whether the defendant's conduct is actionable in tort, I see no reason why it should be decisive of whether the defendant can retain money or other benefits demanded from a claimant in a situation of extreme vulnerability. For this purpose it is appropriate to take account of the legitimacy of the demand and to judge the propriety of the defendant's conduct by reference not simply to what is lawful but to basic minimum standards of acceptable behaviour. To the complaint that this makes the law uncertain, I would give two replies. First, as the authorities have emphasised, the standard of unconscionability is a high one and it is only in cases where the demand made and means used to reinforce it are completely indefensible that the courts will intervene. Second, no apology is needed for intervening in such cases, as the enforcement of basic norms of commerce and of fair and honest dealing is an essential function of a system of commercial law. As Mance J said in *Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyd's Rep 620, 637-8; [1999] CLC 230, 251:
>
> "The law has frequently to form judgments regarding inequitability or unconscionability, giving effect in doing so to the reasonable expectations of honest persons. It is the law's function to discriminate, where discrimination is appropriate, between different factual situations …"
>
> 188. It does seem to me, however, that the test suggested in *Chitty on Contracts* could be made more precise by transposing into objective requirements the elements of the offence of blackmail. On this basis a demand coupled with a threat to commit a lawful act will be regarded as illegitimate if (a) the defendant has no reasonable grounds for making the demand and (b) the threat would not be considered by reasonable and honest people to be a proper means of reinforcing the demand."

89. I will return later to what Leggatt LJ said in these paragraphs.

90. The academic literature reveals little support for an extension of lawful act duress to cover demands which are made in good faith, albeit unreasonably.

91. As noted above, Warren J in the present case quoted and relied on para 8-046 of *Chitty* (32nd ed.) which he described as "an accurate, albeit incomplete summary" (although why it was considered to be incomplete is not explained). The important statement in that paragraph for the purposes of Warren J's decision was that "there can be no doubt that even a threat to commit what would otherwise be a perfectly lawful act may be improper if the threat is coupled with a demand which goes beyond what is normal or legitimate in commercial arrangements". By itself, this statement leaves at large the question of what is normal or legitimate in commercial arrangements, but the writer, Professor Beale, goes on to instance blackmail, saying (and I entirely agree) "it is unlikely that a court would refuse to entertain an action at the suit of one who had paid money under a threat amounting to blackmail, or to set aside any agreement entered into as a result of such a threat".

92. Professor Beale refers to US law and in particular a decision of the Court of Civil Appeals of Texas in *Mitchell v C.C. Sanitation Company Inc* (1968) 430 S.W. 2d 933. It was there held, on an appeal from an order dismissing a claim on summary grounds, that an employee who was pressured into releasing claims for personal injuries by a threat of lawful dismissal would arguably be entitled to avoid the release on grounds of duress. I agree with Professor Beale that an English court would reach the same result but (i) such a threat would itself be unlawful in this jurisdiction as a threatened unfair dismissal and (ii) in any event, the equitable doctrines of unconscionable bargain and, perhaps, undue influence would be available.

93. Overall, the approach taken in *Chitty* is one of caution. So, para 8-046 ends by saying "care must be taken in treating threats lawful in themselves as amounting to duress, for otherwise threats commonly used in business (e.g. of lawful strikes) would fall into the category of economic duress" and para 8-048, dealing with threats not to contract, starts by saying "It is not clear whether a threat not to enter into a contract unless the threatener's terms are met could ever amount to improper pressure, for example where the threatener's terms are extortionate".

94. The editors of *Goff & Jones: The Law of Unjust Enrichment* (9th ed. 2016), after warning that economic pressure of some kind is virtually inevitable in commercial dealings and that economic duress should not therefore be found lightly (para 10-55), state that the concept of illegitimate pressure is both noticeably open-textured and still in the process of development, with the result that it is not possible to offer definitive statements about the limits and scope of the concept (para 10-58). They are at this point considering not only lawful act duress but also those unlawful acts, principally breaches of contract, which may not be illegitimate. When considering specifically lawful acts, reference is made to blackmail and to threats made for illegitimate purposes (para 10-67). Commenting on *CTN Cash and Carry*, they say that if Gallagher had known that their claim was ill-founded, "the claimants would surely have succeeded, for the money would then have been extorted from them, and commercial self-interest is not unbridled" (para 10-70). A threat not to enter into a contract is generally not an illegitimate act (para 10-71).

95. Professor Burrows in *The Law of Restitution* (3rd ed 2011) discusses the issue at pp 277-280 without suggesting grounds for a wider application than is established by the authorities, save in one possible respect. As regards *CTN Cash and Carry*, he says that it might be arguable that, as the case did not involve setting aside a contractual obligation (as the present case does), economic duress could be given a wider scope so that the bona fides of Gallagher was irrelevant.

96. Professor Virgo takes a very sceptical approach to the whole notion of lawful act duress in *The Principles of the Law of Restitution* (3rd ed. 2015). In line with the approach of the Court of Appeal of New South Wales in *ANZ v Karam*, he advocates that lawful pressure should be subject to the equitable doctrines of undue influence and unconscionable bargain, not the common law of duress which should in this context be confined to pressure by means of unlawful acts or threats. He writes extensively about the uncertainty created by a doctrine of lawful act duress. It will be apparent from what I have already said that I do not agree that, in English law as it stands, lawful act duress is part of the equitable doctrines. Such an analysis cannot stand with the decision in *CTN Cash and Carry*, and I do not agree that the real reason for the decision was that Gallagher's threat to withdraw credit facilities was not a threat to do an unlawful act. If Gallagher had made its demand in bad faith, not believing it to be well-founded, the court would have held the payment to have been made under duress. However, the concerns expressed by Professor Virgo remain relevant to the proper ambit of lawful act duress.

97. Professor Beatson (later, Beatson LJ) dealt with lawful act duress in *The Use and Abuse of Unjust Enrichment* (1991) at pp129-134. This was written after *Universal Tankships* but before *CTN Cash and Carry*. He concluded that "the scope of lawful-act duress is thus extremely limited and the imperfect blackmail analogy should not be used to suggest otherwise". On the general issues involved, he wrote at pp 129-130:

> "…it is ordinarily not duress to threaten to do what one has a right to do: to lawfully terminate a contract or to refuse to enter into a contract. The general rule is, moreover, based on good reasons. First, whereas in the developing body of public law principles of propriety of purpose, relevance, and rationality – *Wednesbury* reasonableness – limit the exercise of power, the basic position in private law is a Diceyan one. All that is not prohibited is permitted and there is no general doctrine of abuse of rights. If therefore a person is permitted to do something, he will generally be allowed to do it for any reason or for none. In the context of contractual negotiations this position enables people to know where they stand and provides certainty as to what is acceptable conduct in the bargaining process but it does leave forms of socially objectionable conduct unchecked. Again, this is soundly based for judges should not, as a general rule, be the arbiters of what is socially unacceptable and attach legal consequences to such conduct. Secondly, the less the emphasis is on the 'wrongfulness' of the threat, the closer duress becomes to a doctrine of inequality of bargaining power

> which, as we have seen, Lord Scarman considers is a doctrine that should only be introduced by statute."

98. There is nothing in the court's reasoning in *CTN Cash and Carry* that would require any change in this passage in Professor Beatson's book, as can be seen from pp 382-383 of the current edition of *Anson's Law of Contract* (30th ed 2016), edited by, among others, Sir Jack Beatson.

99. In their book *Unjust Enrichment* (2nd ed 2016), James Edelman (now a Justice of the High Court of Australia) and Professor Elise Bant, having reviewed authorities including *CTN Cash and Carry*, wrote at p.217:

> "The general reluctance of courts to recognise lawful economic or commercial threats as disproportionate to commercial goals (and thus illegitimate) is to be applauded. Any other approach would cut across the statutory competition law rules which draw complex distinctions between lawful and unlawful commercial behaviour. An infringement of rules of competition law should be unlawful and illegitimate for the purposes of the unjust factor of duress. Only in the most exceptional circumstances, if at all, should it be illegitimate to threaten to engage in conduct which a plaintiff has a right to engage in and which is not proscribed by competition law. However, where the threatened conduct is non-commercial in nature, such as threats to publish information or threats to foster rumours about a company, a finding that the threat is disproportionate and therefore illegitimate may be more readily made."

100. I return to the *obiter* comments of Leggatt LJ in *Al Nehayan v Kent.* They were adopted by Mr Shepherd QC as part of his case for Times Travel and I must therefore consider them in some detail. Leggatt LJ's decision was based on unlawful act duress, including duress to the person. Lawful act duress did not play a part in his decision and it is not clear that any submissions were made on the subject; certainly, none is recorded. Nonetheless they are of course entitled to respect.

101. I do not agree with all that Leggatt LJ said on this issue. First, as regards the discussion of *CTN Cash and Carry* and other cases at [182], I have already made clear my disagreement with an analysis of Steyn LJ's judgment that sees his reference to whether conduct is morally or socially acceptable as extending the concept of lawful act duress beyond the case of the demand made in bad faith. Other authorities are cited by Leggatt LJ for their references to unconscionability but that is the language of equity where unconscionable conduct has a well-understood meaning that, in the absence of protected relationships, does not embrace the use of lawful means for bona fide purposes.

102. At [187], Leggatt LJ said that, in determining whether "the defendant can retain money or other benefits demanded from a claimant in a situation of extreme vulnerability…it is appropriate to take account of the legitimacy of the demand and to judge the propriety of the defendant's conduct by reference not simply to what is lawful but to basic minimum standards of acceptable behaviour". The reference to a "situation of extreme vulnerability" again suggests a case to which the equitable

doctrine of unconscionable transactions might apply. But, if it does not apply (and it is not suggested that it applies in the present case), it becomes very unclear what constitute the applicable "basic minimum standards of acceptable behaviour". In particular, I find it difficult to see why the use of lawful means in pursuit of a bona fide demand should contravene such basic standards. Leggatt LJ refers to the standard of unconscionability being a high one and that the courts will intervene only in cases where the demand made, and the means used, are "completely indefensible" and where intervention is needed to enforce "basic norms of commerce and fair and honest dealing". Expressed in these general terms, it is difficult to disagree with these sentiments, but the difficulty and uncertainty comes in applying them to particular cases.

103. In deciding the present case, it is enough to say that these precepts are not, in my judgment, engaged where a party uses lawful pressure to achieve a result to which it considers itself in good faith to be entitled. I say this in a context of commercial dealings where parties owe no duties as to the manner in which they exercise their personal rights and where parties may choose whether to enter into a contract and, if so, on what terms, and against a background where the courts have repeatedly rejected both inequality of bargaining power and the use of a monopoly position as grounds for setting aside contracts.

104. At [188], Leggatt LJ suggested a new approach, transposing into objective terms the elements of the offence of blackmail. This is an interesting idea but there is no support for it in the authorities and it would involve a significant degree of uncertainty not presently found in the common law of contracts.

105. My conclusion on the central legal issue is that the doctrine of lawful act duress does not extend to the use of lawful pressure to achieve a result to which the person exercising pressure believes in good faith it is entitled, and that is so whether or not, objectively speaking, it has reasonable grounds for that belief. The common law and equity set tight limits to setting aside otherwise valid contracts. In this way undesirable uncertainty in a commercial context is reduced. I appreciate that in the context of the present case, which concerns the reasonableness of the grounds for resisting a claim, it can be said that a test of unreasonableness is not uncertain, because it can be tested and decided according to conventional legal standards. But that will not be the case in the much more common situation of a party using lawful commercial pressure in support of a purely commercial demand. There is no yardstick by which to judge such demands, save those that can be set out in legislation such as that applying to consumer contracts. Such demands are a matter of negotiation against the background of the pressures operating on both parties.

106. The relevant considerations go beyond uncertainty. In judging the use of lawful acts or threats of lawful acts as commercial pressure, there is a sharp distinction between such use to pursue demands made in good faith and those made in bad faith. As I earlier mentioned, a lack of good faith on the part of a contracting party is a feature in a number of the grounds on which contracts may be avoided. Rescission on grounds of fraudulent misrepresentation or unconscionable transaction are examples. It is a clear criterion involving conduct which all can agree is unacceptable and which is a fact capable of proof, often as it happens by reference to the lack of any reasonable grounds for the belief. By contrast, not only is reasonableness in this context a standard of very uncertain content but it is also very unclear why or on what basis the

common law should hold that a party with a private law right, whose exercise is not subject to any overriding duty, cannot use it to achieve a purpose which is both lawful and advanced in good faith.

107. Moreover, it is relevant to note that the economic pressure that PIAC was able to apply in this case resulted from its position at that time as a monopoly supplier of tickets for direct flights between the UK and Pakistan. As I have earlier mentioned, the common law has always rejected the use, or abuse, of a monopoly position as a ground for setting aside a contract, leaving it to be regulated by statute. In my judgment, it would be unprincipled to develop the doctrine of economic duress as a means of controlling the lawful use of monopoly power. As Steyn LJ said in *CTN Cash and Carry*, "In a sense the defendants were in a monopoly position. The control of monopolies is, however, a matter for Parliament. Moreover, the common law does not recognise the doctrine of inequality of bargaining power in commercial dealings…The fact that the defendants were in a monopoly position cannot therefore by itself convert what is not otherwise duress into duress".

Application of the law to the present case

108. I return to the judgment under appeal. The submissions and citation of authorities have been very much more extensive before us than before Warren J. In particular, it appears that he was not referred to *CTN Cash and Carry*. The principles applied by him were drawn principally from Dyson J's statement in *DSND Subsea Ltd v Petroleum Geo-Services ASA* and from *Chitty* at para 8-046.

109. Warren J did not find that PIAC lacked a genuine belief in its right to reject Times Travel's various claims and he specifically found at [260(i)] that PIAC genuinely believed that the 9% Basic Commission ceased to be payable from October 2010 on any part of the price payable by travellers, including the fuel surcharge. He found that all Times Travel's claims were genuine and arguable, but rejected one of them, to Overriding Commission. He regarded the YQ claim for the period up to October 2010 to be very strong indeed and that a summary judgment application would have been bound to succeed, while the YQ claim after October 2010 was "less clear". It is reasonable to infer, although he did not expressly find, that he considered there to be no reasonable grounds for the YQ claim for the period up to October 2010, but that is not a conclusion available as regards the other claims.

110. Warren J gave his reasons for finding that Times Travel established its claim based on economic duress at [262]. I have set out the paragraph earlier in this judgment. In my view, the reasons given by the judge are not capable of sustaining his conclusion. Sub-paragraphs (iv) and (v) go to causation which is not now in issue. As regards the illegitimacy of the pressure, the core of the reasoning is contained in sub-paragraph (ii) which I will repeat:

> "Whether PIAC has acted in good faith or bad faith is moot. The Claimants have not established that there was bad faith but nor has PIAC established good faith. It is clear to me that the whole basis on which the Notice was served and the terms of the New Agreement were formulated was to ensure that agents would lose their claims to accrued rights in a situation where some of those rights (in particular, 9% commission on YQ)

> were clear. Indeed, Mr Schama [counsel for PIAC] accepted that this was the motivation for the Notice. Whether this demonstrates bad faith is a matter on which different minds might take different views."

111. The references to good or bad faith in this passage are not easy to follow. The judge accepted that Times Travel had not established bad faith. That should have been the end of the discussion of good or bad faith. It was not for PIAC to establish its good faith. In the last sentence, the judge appears to consider that good or bad faith is a matter for objective evaluation, rather than a finding of fact. This perhaps suggests that the judge was regarding good faith as equivalent to morally or socially acceptable conduct but, if he was, he expressly disavowed reliance on it. What one is left with is (i) the admitted purpose of serving the notice of termination was to put pressure on Times Travel to release its claims and (ii) at least one claim, the claim to YQ commission before October 2010, was clear.

112. The position concerning a lack of reasonable grounds for advancing or rejecting a claim is complicated on the facts of this case because it is only the claim to pre-October 2010 YQ commission which, according to the judge's findings, was rejected without reasonable grounds. It represented only about 4.5% of the claims on which Times Travel succeeded and only about 3.75% of Times Travel's total claims. Would that be enough to avoid the entire release of the claims of Times Travel, if a lack of reasonable grounds were a basis for a finding of illegitimacy?

113. That is not a question which, on my view, requires to be answered. In my judgment, a lack of reasonable grounds is insufficient to engage the doctrine of duress where the pressure involves the commission or threat of lawful acts.

114. At [262(iii)], Warren J expressed his view that PIAC's treatment of Times Travel did not reflect well on it. It is not clear what, if any, part in his decision this factor played. I am inclined to think that it was not a ground for his decision which, as I have said, is really based on sub-paragraph (iii), but in any event I do not consider that such views can justify the application of the doctrine of duress.

115. For these reasons, I have come to the conclusion that the judge was wrong to hold that Times Travel was entitled to avoid the New Agreement and that this appeal should be allowed.

LORD JUSTICE MOYLAN:

116. I agree.

LADY JUSTICE ASPLIN:

117. I also agree and, in particular, endorse David Richards LJ's reasoning at [107]. It seems to me that despite the harsh result in circumstances such as these, it is not appropriate to develop the law of economic duress in a way which would fetter the lawful use of a monopoly position. As Steyn LJ noted in the *CTN Cash and Carry* case, the control of monopolies is a matter for Parliament.