Commercial Negotiations or Illegitimate Pressure? Lawful Act Economic Duress in Light of *Pakistan International Airline Corporation v Times Travel (UK) Ltd*

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I Introduction

The law on economic duress is in its comparative infancy.[1] The common law recognises a small number of categories in which a party can avoid a binding contract. One of those is the doctrine of duress. A contract that has been obtained by the exertion of illegitimate pressure on the plaintiff so as to compel the plaintiff to enter into it is voidable at common law on the ground of duress.[2] Early cases required that the pressure be by way of actual or threatened violence to the person or to property. More recent developments show that duress can take other forms, and in particular that economic pressure alone may suffice.[3]

Economic duress can be further subcategorised into cases of lawful act economic duress and unlawful act economic duress. The relatively more established concept of unlawful act duress concerns the situation where the defendant, in support of a specific demand, proposes to violate the plaintiff's existing legal entitlements (whether sourced in criminal law, tort law, contract law, or elsewhere) that comprise the normative backdrop of the plaintiff and the defendant's pre-transactional relationship or encounter.[4] Hence, in exercising regular duress, the defendant threatens a consequence that would be unlawful per se, that is, if the threat were to be implemented. Threats of unlawful acts will usually amount to illegitimate pressure and may render a contract entered into as a compelled result of the threat voidable for duress.[5] By contrast, the imprecise scope of lawful act duress and indeed its very existence has attracted criticism.[6] Lawful act economic duress involves a demand by the defendant coupled by a threat

[1] Rick Bigwood *Exploitative Contracts* (Oxford University Press, 2003) at 308; Rex Ahdar "Contract Doctrine, Predictability and the Nebulous Exception" (2014) 73 CLJ 39 at 47.
[2] *McIntyre v Nemesis DBK Ltd* [2009] NZCA 329, [2010] 1 NZLR 463 at [20] per O'Regan J; *Universe Tankships Inc of Monrovia v International Transport Workers Federation, The Universe Sentinel* [1983] AC 366 at 401 per Lord Scarman.
[3] Roger Halson "Opportunism, Economic Duress and Contractual Modifications" (1991) 107 LQR 649; Stephen Todd and Matthew Barber *Commercial Law in New Zealand – 2 Duress, Undue Influence and Unconscionability* (LexisNexis, 2021) at [5.2.1].
[4] Rick Bigwood "Throwing the baby out with the bathwater? Four questions on the demise of lawful-act duress in New South Wales" (2008) 27 UQLJ 41 at 41.
[5] *Attorney-General for England and Wales v R* [2003] UKPC 22, [2004] 2 NZLR 577 at [16]; *McIntyre v Nemesis DBK Ltd* [2009] NZCA 329, [2010] 1 NZLR 463 at [28]-[31]; *Universe Tankships Inc of Monrovia v International Transport Workers Federation, The Universe Sentinel* [1983] AC 366 at 400C per Lord Scarman: "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."
[6] Peter Birks *An Introduction to the Law of Restitution* (1989) at 177; Graham Virgo *The Principles of the Law of Restitution* (3rd ed, Oxford University Press, 2015) at 218; Paul Davies and William Day "'Lawful act' duress (again)" (2020) 136 LQR 7 at 12; *Australia and New Zealand Banking Group Ltd v Karam* [2005] NSWCA 344, [2005] 64 NSWLR 149 at [66].

to carry out an action that the defendant is legally entitled to do, which will have an economic effect on the plaintiff, should performance of the demand not take place.[7]

It should also be noted that the illegitimate pressure must be coercive, but it is not necessary to show that the victim's will was totally overborne. However, there should not be too great an emphasis on the will aspect; the more significant elements are whether the pressure applied went beyond what the law is prepared to countenance as legitimate and whether it induced the victim to enter into the contract.[8] This dissertation will almost solely focus on the requirement that the pressure be illegitimate.

Recently, the UK Supreme Court analysed and updated the doctrine of lawful act economic duress at depth in *Pakistan International Airline Corporation v Times Travel (UK) Ltd*.[9] The New Zealand Court of Appeal also recently grappled with the doctrine in *Dold v Murphy*.[10]

This dissertation will provide analysis into the question of whether, and if so in what kinds of situations, a contract entered into as a compelled result of a defendant's lawful action or threat of carrying out a lawful action should constitute illegitimate pressure such that a key requirement for rendering the contract voidable is satisfied. Specifically, this dissertation will—

(a) analyse and critique Lord Hodge's lead judgment in *Times Travel*;
(b) analyse and critique Lord Burrows' concurring judgment in *Times Travel*;
(c) analyse the New Zealand Court of Appeal's approach taken in *Dold v Murphy*; and
(d) recommend a course of action for New Zealand to take in light of *Times Travel* for the future.

I will argue that both Lord Hodge's lead judgment and Lord Burrows' concurring judgment each have their own unique advantages and drawbacks. Throughout this dissertation I will outline the difficulties of the support for the doctrine of lawful act economic duress. I will also aim to draw a distinction between lawful act duress of the economic kind and lawful act duress

[7] Debbie Wilson and Darryl Saunders "Legal act economic duress and PHOs" [2005] NZLJ 426 at 428.
[8] See *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40 (NSWCA) at 46; Stephen Todd and Matthew Barber *The Laws of New Zealand* (LexisNexis, 2020) at 195.
[9] *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40.
[10] *Dold v Murphy* [2020] NZCA 313.

of the non-economic kind. Ultimately, I will argue that lawful act duress, at least of the economic type, should be abolished.

II Pakistan International Airline Corporation v Times Travel (UK) Ltd

A Facts and Lower Courts' Judgments

The appellant claimant, Times Travel (UK) Ltd ("Times Travel") is a small family-owned travel agency in Birmingham. Its business was very largely dependent on its ability to sell Pakistan International Airline Corporation ("PIAC")'s tickets.[11]

By 2012, a large number of PIAC's ticketing agents had either commenced or threatened proceedings to recover substantial sums they said PIAC owed to them by way of commission.[12] In September 2012, PIAC gave lawful notice of the termination of its existing agency contracts and offered Times Travel a new contract. The new contract contained a waiver by Times Travel of its claims for unpaid commission under the prior arrangements. Times Travel accepted and signed the new contract.[13] PIAC considered, and there was no reason to doubt that PIAC genuinely (although wrongly) believed, that the commission owing to Times Travel had ceased to be payable in law.[14]

In 2014, Times Travel brought proceedings to recover unpaid commission and other payments which it said were due to it under the prior contractual arrangements by alleging, inter alia, that it was entitled to rescind the new agreement because Times Travel had entered into it under economic duress.[15]

In the first instance, the High Court held that Times Travel was entitled to avoid the contract with PIAC on the grounds of lawful act economic duress.[16] On appeal, the Court of Appeal overturned the High Court's decision and held 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

[11] *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40 at [63].
[12] At [69].
[13] At [69].
[14] At [74]; *Times Travel (UK) Ltd and another v Pakistan International Airlines Corporation* [2017] EWHC 1367 (Ch) at [260(i)] and [262].
[15] *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40 at [72].
[16] *Times Travel (UK) Ltd and another v Pakistan International Airlines Corporation* [2017] EWHC 1367 (Ch) at [262] per Warren J.

reasonable grounds for that belief.[17] Stated in the negative, David Richards LJ considered himself bound by *CTN Cash and Carry v Gallaher* and said:[18]

> In my view, *CTN Cash and Carry v [Gallaher]* 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.

B CTN Cash and Carry v Gallaher

A material amount of analysis in the field of lawful act duress draws upon the case of *CTN Cash and Carry v Gallaher*.[19] For that reason, I shall briefly summarise the facts and the judgment of *CTN Cash and Carry* here.

The plaintiff company, CTN Cash and Carry Ltd ("CTN"), ran a cash and carry business from a number of warehouses. The defendant, Gallaher Ltd ("Gallaher"), 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. Gallaher 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.[20]

In rejecting the claim of economic duress, Steyn LJ, giving the leading judgment, held that a threat involving lawful conduct in pursuit of a bona fide claim is unlikely to constitute duress:[21]

> 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

[17] *Times Travel (UK) Ltd v Pakistan International Airlines Corporation* [2019] EWCA Civ 828 at [105] per David Richards LJ.
[18] At [62]; *CTN Cash and Carry v Gallaher Ltd* [1994] 4 All ER 714.
[19] *CTN Cash and Carry v Gallaher Ltd* [1994] 4 All ER 714.
[20] At 716-718; *Times Travel (UK) Ltd v Pakistan International Airlines Corporation* [2019] EWCA Civ 828 at [56].
[21] *CTN Cash and Carry v Gallaher Ltd* [1994] 4 All ER 714 at 719.

> 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. … 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. … 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.

Farquharson LJ agreed with the judgment of Steyn LJ and, also agreeing, Nicholls LJ said:[22]

> 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.

C Lord Hodge's Lead Judgment

1 Reprehensible Means 'Test'

Lord Hodge, giving the leading judgment (with whom Lord Reed, Lord Lloyd-Jones and Lord Kitchin concurred), rejected the bad faith demand requirement as set out by Steyn LJ in *CTN Cash and Carry*, David Richards LJ's Court of Appeal judgment of this case and Lord Burrows' concurring judgment of this case:[23]

> I therefore do not accept that the lawful act doctrine could be extended to a circumstance in which, without more, a commercial organisation exploits its strong bargaining power

[22] At 719.
[23] *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40 at [52]; *Times Travel (UK) Ltd v Pakistan International Airlines Corporation* [2019] EWCA Civ 828 at [62] and [105]; *CTN Cash and Carry v Gallaher Ltd* [1994] 4 All ER 714.

> or monopoly position to extract a payment from another commercial organisation by an assertion in bad faith of a pre-existing legal entitlement which the other organisation believes or knows to be incorrect.

Lord Hodge further elaborated that even if PIAC had made its demand in bad faith, that factor alone is not enough to per se make PIAC's lawful threat illegitimate, and that instead some sort of "reprehensibility characteristics" are needed:[24]

> 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* to which I have referred in para 18 above.

Although Lord Hodge found that the Court of Appeal was correct in deciding that Times Travel had not made out a case of economic duress, his Lordship put emphasis on PIAC's lack of reprehensible means used rather than its lack of bad faith demand:[25]

> Significantly, there are no findings that PIAC had used any reprehensible means such as were evident in *Borrelli* and *The Cenk K*, to manoeuvre Times Travel into a position of increased vulnerability in order to exploit that vulnerability. … While [PIAC's actions] entailed hard-nosed commercial negotiation that exploited PIAC's position as a monopoly supplier, it did not involve the reprehensible means of applying pressure which gave rise to the findings of lawful act economic duress in *Borrelli* and *The Cenk K*.

[24] *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40 at [57].
[25] At [58].

2 *Critique of the Reprehensible Means 'Test'*

Lord Hodge's emphasis or 'test' for determining whether a lawful threat amounts to illegitimate pressure, namely, whether a demander has used "reprehensible means", is not without vagueness and unwanted uncertainty. Exactly what kinds of lawful acts or threats that might amount to being reprehensible is not elaborated upon, at least without perhaps implied reference to situations where the defendant had committed other unlawful acts connected to the lawful threat or act. His Lordship referred to *Borrelli v Ting* and *Progress Bulk Carriers v Tube City IMS LLC, The Cenk K* as examples of reprehensible means used.[26]

In *The Cenk K*, ship owners withdrew their ship from a charterparty in breach of contract.[27] The owners offered a substitute vessel and to pay full compensation but, soon after, demanded that the charterers waive their rights to damages for the breach of contract in return for the substitute vessel. The charterers, facing serious losses, accepted these terms under protest.

In *Borrelli v Ting*, the claimants were the liquidators of a Bermudan company, "Akai", of which Mr Ting had been the corrupt and incompetent chairman and CEO.[28] Ting, through other companies, also held a minority shareholding in Akai. The claimants proposed a scheme of arrangement to raise money to fund the liquidation. Under Bermudan company law, that scheme had to be approved by Akai's shareholders. Ting threatened to use his indirect stake in Akai to prevent the scheme of arrangement, unless the liquidators entered into a settlement agreement under which they agreed not to pursue any claim against him. This they did. When the extent of Ting's wrongdoing whilst at the helm of Akai was discovered, the liquidators brought claims against him arguing that the settlement agreement was voidable for duress. This was upheld by the Privy Council.

According to Lord Hodge, the "reprehensible characteristics" of the behaviour in *Borrelli* and *The Cenk K* were explained in paragraph 18 of his judgment.[29] However, on inspection

[26] At [57]-[58]; *Borrelli v Ting* [2010] UKPC 21, [2010] Bus LR 1718; *Progress Bulk Carriers Ltd v Tube City IMS LLC, The Cenk Kaptanoglu* [2012] EWHC 273 (Comm), [2012] 2 All ER (Comm) 855.
[27] *Progress Bulk Carriers Ltd v Tube City IMS LLC, The Cenk Kaptanoglu* [2012] EWHC 273 (Comm), [2012] 2 All ER (Comm) 855.
[28] *Borrelli v Ting* [2010] UKPC 21, [2010] Bus LR 1718.
[29] *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40 at [57].

paragraph 18 provided little clear explanation as to exactly why such behaviour amounts to being reprehensible:[30]

> It is noteworthy that in *Borrelli*, at paras 32 and 35, Lord Saville placed emphasis on Mr Ting's breach of his duty as an officer of the insolvent company and his dishonest behaviour in concluding that the pressure which he applied to the directors was illegitimate. Similarly, in *The Cenk K*, Cooke J focused not only on the ship owners' prior breach of contract but also on their subsequent "misleading activity": the context of the demand was that the owners had induced the charterers to rely on the owners' assurances to their detriment.

One is simply left to draw inferences and speculation, and it is left unclear as to exactly what factors should be considered in determining whether a lawful threat or act crosses the line from being prima facie legitimate into being "reprehensible", so as to be illegitimate. The formulation is perhaps even tautological. By switching out one word, "illegitimate", for another, "reprehensible", little progress is made in substance to make the law or the test for illegitimacy any clearer. Grantham and Rickett, for example, have complained that the recruitment of conscience-based language and ideas into the duress inquiry, especially when the alleged duress involved is of the economic variety, renders the notion of illegitimate pressure notoriously uncertain and is "merely to replace on open-textured criterion with another".[31]

It is thus interesting that, in the context of the situation of a bad faith demand, Lord Hodge says that he takes the "narrower view" of the scope of lawful economic duress.[32] From one perspective, Lord Hodge's reprehensibility test could indeed be viewed as providing the narrower test for the scope of lawful act economic duress in the sense that it would allow bad faith demands to be not per se illegitimate. On the contrary perspective, however, the reprehensibility test could be viewed as providing the wider test for the scope of lawful act economic duress, as it is a more open-textured criterion which allows for more discretion to be had in determining the illegitimacy of pressure.

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[30] At [18].
[31] Ross Grantham and C E F Rickett *Enrichment and Restitution in New Zealand* (Oxford and Portland, 2000) at 193.
[32] *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40 at [57].

In my view, the much clearer and more readily ascertainable criterion underpinning the finding of 'lawful' act economic duress in *Borrelli* and *The Cenk K* is the unlawfulness of past connected acts. Academic writers and judges alike have noted that both those cases involved situations where the defendants committed unlawful acts that were very much connected to their respective lawful acts.[33] *The Cenk K* is explicable on the basis that a prior repudiation was an essential part of the narrative, and *Borrelli* can be explained on the basis that forgery and unconscionable conduct are inextricable parts of the narrative.[34]

In *The Cenk K*, Cooke J held that the later threat to refuse to agree to a variation of the charterparty was lawful but could not be divorced from the owners' prior breach of contract:[35]

> … [the lawful threat] has to been seen both in the light of that prior repudiatory breach which was unlawful and the Owners' subsequent attempts to take advantage of the position created by that unlawfulness

The Cenk K is therefore better viewed as a case of unlawful act duress because the owners' threats to refuse to vary the charterparty were part of the same chain of events as their prior breach of contract.[36]

Borrelli could be understood as involving lawful act duress because shareholders were entitled to vote against the scheme.[37] But there are two alternative approaches which allow the case to be seen as involving unlawful act duress. The first turns on the fact that all Ting's actions in opposing the scheme in order to force the liquidators to give up their claims against him were in breach of his duties under local insolvency law to co-operate in the liquidation.[38] The second approach is similar to that in *The Cenk K*. Ting had engaged in forgery and perjury in support

[33] *Dold v Murphy* [2020] NZCA 313 at [69]; Rex Ahdar "Contract Doctrine, Predictability and the Nebulous Exception" (2014) 73 CLJ 39 at 45-47; Paul Davies and William Day "'Lawful act' Duress" (2018) 134 LQR 5 at 7 and 10; see also discussion below at 30-33.
[34] See footnote 45 of *Dold v Murphy* [2020] NZCA 313 at [69].
[35] *Progress Bulk Carriers Ltd v Tube City IMS LLC, The Cenk Kaptanoglu* [2012] EWHC 273 (Comm), [2012] 2 All ER (Comm) 855 at [42].
[36] Paul Davies and William Day "'Lawful act' Duress" (2018) 134 LQR 5 at 7.
[37] *Borrelli v Ting* [2010] UKPC 21, [2010] Bus LR 1718.
[38] See *Borrelli v Ting* [2010] UKPC 21, [2010] Bus LR 1718 at [32].

of his opposition to the scheme of arrangement;[39] his threat to vote against the scheme could not be separated from those illegal acts.[40]

Lord Burrows also well critiques Lord Hodge's emphasis on reprehensible means and reference to general bad faith in that considerable uncertainty may be created:[41]

> 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.

I agree with Lord Burrows' critique. Referring to a test of reprehensibility and general bad faith without further guidance may be similar to a test of whether the lawful acts or threats in question are morally or socially unacceptable in the eyes of judges. It might be said to lead lawful act duress back to where it was in *CTN Cash and Carry*, where Steyn LJ held:[42]

> 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.

The uncertainty and lack of predictability in such a formulation, especially in the commercial context of contract law, is very much unwanted (as Lord Hodge himself recognises).[43] Making the test for lawful act duress dependent on social morality, or more accurately "reprehensibility" for this matter, as determined by the judges, hardly assuages the concerns of those already critical of the defence.[44]

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[39] *Borrelli v Ting* [2010] UKPC 21, [2010] Bus LR 1718 at [7].
[40] Paul Davies and William Day "'Lawful act' Duress" (2018) 134 LQR 5 at 7.
[41] *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40 at [133].
[42] *CTN Cash and Carry v Gallaher Ltd* [1994] 4 All ER 714 at 719b-c (emphasis added).
[43] *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40 at [50]; Graham Virgo *The Principles of the Law of Restitution* (3rd ed, Oxford University Press, 2015) at 215-221; *Equiticorp Finance Ltd (in liq) v Bank of New Zealand* (1993) 32 NSWLR 50 at 107.
[44] See Rex Ahdar "Contract Doctrine, Predictability and the Nebulous Exception" (2014) 73 CLJ 39 at 47.

3 Other Manoeuvring

Lord Hodge did not think the Court of Appeal in *CTN Cash and Carry* would be correct to decide that, had Gallaher made its demand in bad faith (not believing it to be well founded), the payment was to have been made under duress, absent circumstances which involved the manoeuvring by Gallaher of CTN into a position of vulnerability by means which—

(i) involved bad faith; or

(ii) were similarly reprehensible and went beyond the use of its position as a monopoly supplier; or

(iii) brought the transaction within the ambit of the equitable doctrine of unconscionable transactions.[45]

This view may imply that lawful act duress could have been made out in *CTN Cash and Carry* if Gallaher manoeuvred CTN into a position of vulnerability by means which brought the transaction within the ambit of the equitable doctrine of unconscionable transactions.[46] However, supposing that the doctrine of unconscionable transactions does not apply or succeed for the claimant, it seems unclear as to when acts would fall under the "ambit of the equitable doctrine of unconscionable transactions". The equitable doctrine of unconscionable transactions has features and elements of which are very distinct from the common law doctrine of duress. Exactly how far within the "ambit" of the equitable doctrine of unconscionable transactions the manoeuvring needs to be is unclear. For instance, if a set of actions amount to an arguable claim under the unconscionable transactions doctrine which is very close to succeeding but does not succeed, do those actions still fall under its ambit, so as to be able to be succeed under lawful act duress instead? It would seem too low of a bar to merely require the plaintiff to prove the defendant had manoeuvred it into a position of vulnerability where the manoeuvring amounts only to an arguable case in the doctrine of unconscionable transactions, to say then that such manoeuvring is illegitimate under the doctrine of duress. And the case is still more unclear in the situation where a claim under the doctrine of unconscionable transactions is less arguable. Moreover, if the acts or threats do squarely fall under the ambit of unconscionable transactions, it is questionable as to why resort need be had to the doctrine of duress at all.[47]

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[45] *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40 at [59].
[46] At [59].
[47] See footnote 54 of *Dold v Murphy* [2020] NZCA 313 at [74].

There is also uncertainty as to when exactly a party manoeuvres another party into a position of vulnerability by means which go "beyond its use as a monopoly supplier", supposing that such conduct is beyond the ambit of competition law.

Lord Burrows further outlined a potential logical inconsistency in Lord Hodge's referencing to general bad faith where Lord Hodge had simultaneously rejected the bad faith demand requirement:[48]

> 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.

D Lord Burrows' Concurring Judgment

Lord Burrows, giving the concurring judgment, argued that the defendant's demand for a waiver by the plaintiff of a claim against the defendant would amount to lawful act economic duress where (i) the defendant did not genuinely believe that it had a defence to the claim (and there is no defence) – ie there is a "bad faith demand", and (ii) the defendant has deliberately created or increased the defendant's vulnerability to that demand.[49]

1 Bad Faith Demand Requirement

Lord Burrows held that *CTN Cash and Carry* established the bad faith demand requirement, namely, that:[50]

> … 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

[48] *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40 at [133].
[49] At [45] per Lord Hodge and [136] per Lord Burrows.
[50] At [102].

> is not legally owing or there is no defence to the claim being waived by the threatened party.

In relation to PIAC, Lord Burrows considered:[51]

> … the "bad faith demand" requirement is crucial for determining the illegitimacy of the lawful act threat. Had TT proved that PIAC was in bad faith in making the demand for the waiver, its claim for rescission would have succeeded in this case.

Further, Lord Burrows saw an implication in the Court of Appeal's reasoning in *CTN Cash and Carry* that if Gallaher had sought the payment in bad faith and had exploited their monopoly position in the knowledge that the money was not due, the money would have been recoverable on the basis of economic duress.[52] Lord Burrows derived support for that conclusion from (i) the judgment of David Richards LJ in this case, saying "If [Gallaher] 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";[53] and (ii) the commentary of Mitchell, Mitchell and Watterson's *Goff and Jones on the Law of Unjust Enrichment*:[54]

> If the claimants could have shown that when the defendants made their threat they knew that the goods were at the defendants' risk, then the claimants would surely have succeeded, for the money would then have been extorted from them, and commercial self-interest is not unbridled.

Steyn LJ's statement that Gallaher's bona fide belief that the goods were at the risk of CTN when they were stolen was "a third, and critically important, characteristic" of the case also supported that view.[55]

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[51] At [115].
[52] At [43] and [137]; *CTN Cash and Carry v Gallaher Ltd* [1994] 4 All ER 714.
[53] *Times Travel (UK) Ltd v Pakistan International Airlines Corporation* [2019] EWCA Civ 828 at [96].
[54] Charles Mitchell, Paul Mitchell and Stephen Watterson (eds) *Goff & Jones: The Law of Unjust Enrichment* (9th ed, Sweet & Maxwell, 2016) at para 10-70; *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40 at [43] and [122].
[55] *CTN Cash and Carry v Gallaher Ltd* [1994] 4 All ER 714 at 718b-c.

2 Critique of the Bad Faith Demand Requirement

Lord Hodge criticised the use of the bad faith demand requirement, in that a bad faith demand (as Lord Burrows has defined it) can be viewed no different to a condition for entering into a contract:[56]

> Where B is induced to meet A's demand because of the stark inequality of bargaining power which gives B no effective choice but to meet the demand which B knows is not justified, it is not obvious to me that, without more, B could have a claim for economic duress in the absence of a general principle of good faith in contracting or a doctrine of imbalance of bargaining power, neither of which currently exists. It is difficult in principle to distinguish such a circumstance from a circumstance in which A makes an exorbitant demand in the course of negotiations as a condition for entering into contractual relations with B.

I would agree on this point. Take the situation of *CTN Cash and Carry* for example. It should not matter if Gallaher had known its demand was ill-founded and had made its demand in bad faith as, in my view, such is no different in principle to Gallaher demanding a payment price from CTN for extending its credit to CTN. Perhaps one might argue that an important distinguishing feature of Gallaher's demand, if it were hypothetically made in bad faith, was that Gallaher might not have intended the demand to be consideration for its extension of credit but rather for something else (an ulterior motive). However, I would contend that the demand could still be viewed as consideration for the extension of credit, even if Gallaher had not contemplated it as such itself. In other words, a commercial and economic reality should be recognised as existing wholly independently from a demander's own internal state of mind. In the context of a demand for the waiver of a prior claim in which the demander knows it has no defence to, Lord Hodge said:[57]

> … the demand for a waiver, to which A 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…. Lord Burrows in para 125 of his judgment accepts that economic duress could not be made out in the latter circumstance. If the demand for money, which is supported by the

[56] *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40 at [49].
[57] At [54].

> 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?

Interestingly, Lord Burrows provided a direct rebuttal on this point:[58]

> … 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 would contend that Lord Hodge's view is more convincing. First it must be conceded that, by definition, Lord Burrows is correct in saying that the principled difference between a demand for payment, based on bad faith, and a demand for payment as a pre-condition to entering into a contract is that the former involves bad faith and the latter does not. The heart of the issue and the more important question to be asked, however, is whether bad faith, as Lord Burrows defines it (ie no genuine belief of a defence to a claim or no genuine belief of a claim to payment), is a relevant consideration in assessing the "illegitimate pressure" element of the lawful act duress inquiry. I would argue that a lack of genuine belief of a defence to a claim or a lack of genuine belief of a claim to payment should not be a relevant consideration at all. Take a comparison of the following hypotheticals as illustration—

Example A:

> The first party wants to make a demand $Z from the counterparty and thinks about threatening the counterparty that it will do a lawful act that will adversely affect the counterparty if it does not accede to its demand. At the same time, the first party is unable to defend a separate claim by the counterparty, and knows that it is unable to defend that claim. The first party will always, as a matter of fact, have the option to simply lose out on that claim and pay damages or the equivalent thereof to the counterparty. Suppose then that the first party does not dispute the claim and pays out the equivalent of damages worth $X to the counterparty. After payment, the first party then threatens the counterparty that it will perform a lawful act that will adversely affect the counterparty if the counterparty does not accede to a demand of payment of $Y.

[58] At [135].

> The demand of $Y is put forward to the counterparty as an increase in price for the supply of goods, thus not being made in bad faith. The counterparty, with no realistic alternative options in the commercial context, accedes to the demand pays $Y to the first party. Here, duress cannot be made out under the bad faith demand requirement (as Lord Burrows has defined it). This might rather be categorised as commonplace negotiation.

Example B:

> The first party is unable to defend a claim by the counterparty, and knows that it is unable to defend that claim. The first party in bad faith demands payment of $B from the counterparty and threatens the counterparty that it will perform a lawful act that will adversely affect the counterparty if the counterparty does not accede to its demand $B. The counterparty, with no realistic alternative options in the commercial context, accedes to the demand and pays $B to the first party. Here, duress may be made out, since the lawful threat was based on a bad faith demand, as the first party knew that it was unable to defend the counterparty's claim.

In example A, the first party will very likely have incorporated or factored in its loss of $X into the calculation of its demand $Y. It is very likely that $Y (its later actual demand) will be equal or roughly equal to $Z+|X| (its original planned demand plus the absolute value of what it paid out to the counterparty's claim in which it had no defence to). This is especially so where the first party is in a stronger bargaining position than the counterparty, which will be the case in most if not all argued situations of lawful act duress. Accordingly, in example A, the first party is able to "commit" lawful act economic duress and get away with it, bypassing the bad faith demand requirement.

In example B, the counterparty's acceded demand of $B will be voidable for lawful act economic duress under the bad faith requirement as the first party knew that it had no defence to the counterparty's claim, and $B will be awarded back to the counterparty. But after the award of restitution, what is to stop the first party from then threatening to perform a lawful act which will adversely affect the counterparty, should the counterparty not accede to the same or a similar demand, B_2? If the first party was in a strong enough bargaining position to coerce the counterparty into paying the demand of $B in the first place, then what is to stop the same

first party from being able to coerce the counterparty into paying demand of $\$B_2$ after the award of restitution? The situation may, economically speaking, be largely equivalent to that of example A (putting aside litigation costs for finding duress) where the first party is able to "commit" lawful act duress and get away with it, under the bad faith demand requirement.

Thus, although Lord Burrows may be correct in saying that, quite literally, there is a difference between a demand for payment, based on bad faith, and a demand for payment as a pre-condition to entering into a contract, I contend that such an analysis obscures the more important commercial reality and equivalence of the two. A demand for payment based on bad faith and a demand for payment as a pre-condition or post-condition for entering into a contract are better to be viewed as commercially and economically equivalent. In other words, if the first party can get away with their demand after the paying out a claim, they should also be able to get away with their demand before paying out a claim. This is one viewpoint for why the bad faith demand requirement is not particularly logically consistent in the commercial context.

Moreover, Lord Hodge argues that from a practical standpoint the bad faith demand requirement may likely be of limited utility because it does not adequately account for the defendant's often uncertain state as to its lack of entitlement. Lord Hodge notes that the vast majority of commercial disputes do not go to trial and are not expected to do so, and that each organisation may have to reach its own view as to its entitlements and resolve the dispute accordingly. Then, it would be very difficult for the plaintiff to establish its case if it would have to demonstrate the defendant's subjective bad faith, as questions of legal judgment are often not agreed upon by reasonable legal advisers, and as what is envisaged in the bad faith demand requirement "is that there is little, if any, uncertainty as to [the defendant]'s lack of entitlement".[59]

[59] At [51].

3 Created or Increased Vulnerability Requirement

Lord Burrows held that *Borrelli v Ting* and *Progress Bulk Carriers* can be taken to have established that in the context of demands of waivers of prior claims, a threat will be illegitimate where:[60]

> … 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).

It is clear from Lord Burrows' wording that his "created or increased vulnerability to the demand" sub-element is not a sufficient requirement for establishing a threat's illegitimacy. However, what is less clear is whether Lord Burrows had envisaged it to be a necessary requirement for establishing illegitimacy. On a literal reading, it may be viewed as a necessary requirement. But if it were a necessary requirement, there can be familiar situations where the exertion of pressure will then be legitimate, whereas previously many would consider those same pressures to be illegitimate.

In circumstances such as that in *Borrelli v Ting*, it is clear that the defendant had created or increased the plaintiff's vulnerability to its demand, as in that case before the defendant's lawful threat the defendant had unlawfully failed to cooperate with the liquidators and used forgery and false evidence to block the scheme of arrangement. Similarly, much the same can be said for the facts in *The Cenk K*, where the defendant deliberately created or increased the plaintiff's vulnerability by misleading it as to the substitute ship, which it was then able to exploit by making its demand. And in the situation of *Times Travel*, PIAC arguably increased Times Travel's vulnerability which it was then able to exploit by making the demand for the waiver by cutting Times Travel's normal ticket allocation from 300 to 60.[61]

However, how the vulnerability requirement would apply to situations such as that in *CTN Cash and Carry* is less clear. Arguably, the defendant in that case did not deliberately create or increase the plaintiff's vulnerability to its demand. There were no prior deliberate actions on

[60] At [112] (emphasis added).
[61] At [132].

the part of the defendant to suggest so. The plaintiff's vulnerability can be explicable on the basis of the inequality of bargaining power between the plaintiff and the defendant rather than any deliberate manoeuvring by the defendant to create, or increase, the plaintiff's vulnerability. Quite simply, to the defendant's mind it merely wished for payment to be made for its supply of cigarettes. Perhaps one may argue that a wider interpretation should be had, such that the defendant's supplying of credit facilities to the plaintiff be viewed as constituting a deliberate creation or increasing of the plaintiff's vulnerability to the demand. However, such an interpretation would likely render the vulnerability requirement to be redundant as in most, if not all, situations where the plaintiff concedes under pressure to the defendant's demand, the plaintiff will necessarily be in an economically vulnerable position to the defendant in ways explicable by the defendant's dealings or relationship with the plaintiff.

On the other hand, if one is to take the narrower interpretation, the defendant who makes a bad faith demand but does not deliberately create, or increase, the plaintiff's vulnerability to its demand would theoretically not be exerting illegitimate pressure. Under the narrower interpretation, if the defendant in *CTN Cash and Carry* had made its demand for payment in bad faith (ie not believing that it had a genuine claim to it) its pressure would arguably not be illegitimate. Such a finding is contrary to Lord Burrows' view that, had Gallaher made its demand in bad faith, CTN would have succeeded in its lawful act economic duress claim.[62]

Indeed it is interesting that in effect, Lord Burrows seems to prefer or establish the narrower interpretation by saying:[63]

> [In the situation of *CTN Cash and Carry*], one cannot say that the defendants had deliberately created, or increased, the claimants' vulnerability (as one could in *Borrelli v Ting* and *Progress Bulk Carriers* and on the facts of this case) …

What is perhaps curious then is that Lord Burrows considers that had Gallaher made its demand in bad faith, its demand would nevertheless have been unjustified thereby rendering the threat illegitimate, as the defendants "must have known that the claimants were in an exceptionally vulnerable position because of the defendants' monopoly position".[64] How exactly this

[62] At [43] and [137].
[63] At [122] per Lord Burrows.
[64] At [122].

conclusion fits with the supposed "requirement" of the defendant needing to create, or increase, the plaintiff's vulnerability to the demand is unclear. It might suggest that the "requirement" is neither sufficient nor necessary, so as to not be a requirement at all but rather merely an important factor that may be taken into account.

E Existence of Lawful Act Economic Duress

Both lead and concurring judgments in *Times Travel* held that lawful act duress does, and should, exist in English law.[65] Three reasons are given for this.[66] I shall summarise and analyse these reasons as (i) the "illegitimate pressure / precedential reason", (ii) the "blackmail analogy reason", and (iii) the "equitable doctrines reason" below. I will argue that these reasons are not entirely convincing for why lawful act duress should exist.

1 Illegitimate Pressure / Precedential Reason

The first reason which Lord Burrows gives draws upon precedent, namely, that the crucial element for duress has been characterised as "illegitimate" pressure rather than "unlawful" pressure:[67]

> 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". … And, in *The Evia Luck*, as we have seen in the passage set out above in para 78, Lord Goff, giving the leading speech in the House of Lords, referred to the economic pressure needing to be "illegitimate".

Lord Burrows continues:[68]

> 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). These

[65] At [1] and [92].
[66] At [86]-[91].
[67] At [87].
[68] At [91].

> include *CTN Cash and Carry Ltd v Gallaher Ltd* [1994] 4 All ER 714; *Alf Vaughan & Co Ltd v Royscot Trust Plc* [1999] 1 All ER (Comm) 856; *Borrelli v Ting* [2010] UKPC 21; [2010] Bus LR 1718; *Progress Bulk Carriers Ltd v Tube City IMS LLC (The Cenk Kaptanoglu)* [2012] EWHC 273 (Comm), [2012] 1 Lloyd's Rep 501; *Marsden v Barclays Bank Plc* [2016] EWHC 1601 (QB); [2016] 2 Lloyd's Rep 420; *The Flying Music Co Ltd v Theater Entertainment SA* [2017] EWHC 3192 (QB); and *Al Nehayan v Kent* [2018] EWHC 333 (Comm); [2018] 1 CLC 216.

This reason is not unconvincing per se, as precedents indeed have significant influential weight in our common law system. However, since this reason is solely a precedential one, I would contend that it should have little weight, if any, for the more important normative question of whether lawful act duress should or should not exist. In other words, without convincing normative justifications, insisting that one should continue to do something because 'it has always been done that way' is, in my view, no good reason at all for continuing to do that thing. Considering that this judgment will be a landmark case and will most likely be heavily influential on the topic of lawful act economic duress, as well as the fact that this was held in the apex court of the UK jurisdiction, normative reasoning should be expected to be relied upon rather than mere precedential reasoning. Thus, although there perhaps may have been convincing reasons within the previous case law for why lawful act duress should exist, without drawing upon those reasons, this precedential reason should not be viewed as a convincing one.

2 Blackmail Analogy Reason

The second reason given is the (frequently used) analogy of lawful act duress to the crime of blackmail:[69]

> 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

[69] At [88].

> for the civil law of duress not to include threats of lawful acts when the criminal law of blackmail does so.

There is difficulty with the blackmail analogy. I contend that it would not be very odd for the civil law of duress to not include threats of lawful acts when the criminal law of blackmail does so, especially in the context of economic duress. Blackmail should be viewed as the exception to the rule, rather as so much influencing the rule itself.[70]

First, in the context of blackmail, there would be no obvious negative or immoral implications if the civil law of duress did not include threats of lawful acts. Since the situation of a demander using blackmail to extract a contract out of a person is already covered by the criminal law, the entirety of the threat along with the demand, viewed as a whole, can be categorised as being covered under the more established law of unlawful act duress.

Secondly, reasoning that the civil law should adopt doctrine X solely because the criminal law has an analogous doctrine Y provides little, if any, convincing normative justification for why doctrine X should be adopted in the particular context of civil law. The two areas of law are distinct from one another for good reason; that is, because (i) the factual circumstances in which they operate are usually different from one another, and (ii) the moral objectives of the two are different from one another. The criminal law of blackmail, in my view, exists predominantly as a principle of public policy; namely, that the law should not allow people to benefit from withholding from reporting crimes, and that the law should protect the interests of people's personal dignity in situations where the blackmailer is threatening to disclose information that will damage a person's reputation. This is a clear and distinct situation where the law converts, and should convert, an otherwise lawful set of actions into one that is unlawful when viewed as a whole. In contrast, it is not as entirely obvious that lawful act duress, a doctrine which covers a much broader scope of conduct, has an equally strong public policy need for its existence, especially in the commercial context.

Thirdly, one could also view the blackmail situation as within the category of non-commercial duress, and that perhaps the law should either make a distinction or put emphasis on the

[70] See Peter Birks, Andrew Burrows and Alan Rodger *Mapping the law essays in memory of Peter Birks* (Oxford University Press, 2006) at 189.

difference between situations of lawful threats in the commercial context and lawful threats in the non-commercial context. In Australia, Professors Edelman and Bant comment:[71]

> 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. ... 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.

Consensus for illegitimacy, reprehensibility or bad faith can be more readily ascertained in cases that involve conduct or threats of the non-economic kind, for example those that go towards damaging a person's dignity or obstructing criminal justice. Conversely, consensus for the same is much harder to form in cases that involve conduct that damages a party's solely economic interests.[72]

Fourthly, in implied rebuttal to my first point, Lord Burrows purports to avoid circularity "by excluding the possibility of the crime of blackmail having been committed when considering what counts as lawful act duress".[73] It is not at all obvious to me how this reasoning supports the existence of lawful act duress. Indeed it may support the opposite. First, the law of blackmail cannot be pragmatically ignored or excluded *in its entirety*, as that is not the legal reality in which we live in. Then, analysis must only be had for situations where a demander threatens to commit a lawful action that does not amount to blackmail, withstanding blackmail's existence in criminal law. I would contend that allowing the doctrine of lawful act duress to be open would imply that the doctrine extends beyond the moral scope of the criminal law of blackmail, as by definition it covers that which blackmail does not. Accordingly, a narrative of "on the basis of moral consistency and values, doctrine X should exist in the civil law because a similar doctrine Y exists in the criminal law" is not arguable, as lawful act duress as a doctrine would be covering greater ground than that of blackmail. Therefore, I would contend that more convincing normative reasoning is needed if one is to rely on the analogy

[71] James Edelman and Elise Bant *Unjust Enrichment* (2nd ed, Oxford and Portland, 2016) at 217; *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40 at [33] and [129].
[72] See discussion below on the distinction between lawful act duress and lawful act economic duress at 42-43.
[73] *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40 at [88].

that lawful act duress should be open as a doctrine because of the existence of the criminal law of blackmail.

3 Equitable Doctrines Reason

The third reason Lord Burrows gives for supporting the existence of lawful act duress is that there has been a history of cases that have come under the equitable doctrine of undue influence which involved lawful threats:[74]

> … 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. … 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).

First, I would contend that the earlier cases' underlying element is not identical to that of duress. Undue influence is its own doctrine, with its distinct elements and developed line of cases. While the law of duress could cover cases involving coercive conduct, equity recognised early on that abuse could occur in other ways, and that relationships existed where the court ought to prevent one party to a relationship unconscientiously taking surreptitious advantage of the weakness and necessity of the other.[75] A doctrine of undue influence therefore developed in equity in order to cover relationships of this kind and to prevent a party to such a relationship from abusing his or her position of power or dominance. Undue influence consists in the gaining of an unfair advantage by an unconscientious use of power by a stronger party against

[74] At [89]-[90].
[75] *Earl of Chesterfield* (1751) 2 Ves Sen 125, 28 ER 82.

a weaker in the form of some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating, and generally, though not always, some personal advantage obtained by the stronger party.[76] The doctrine is founded on the principle that equity will protect the party who is subject to the influence of another from victimisation.[77]

Secondly, even if the element underlying the older cases of undue influence involving lawful threats is to be viewed as identical to that of duress, I would contend that it should not *ipso facto* follow that duress should be extended to cover lawful acts or threats. To the contrary, it is arguable that because those cases are covered by the doctrine of undue influence, there is no need for the doctrine of duress to be extended so as to cover the same. Associate Professor Tamblyn argued that it is important for the doctrine of duress not to stray into neighbouring doctrines, in particular undue influence and unconscionable bargain, if duress is to be its own independent doctrine, and not merely a label for instances governed by other doctrines.[78] The New Zealand Court of Appeal also recently espoused a similarly circumspect view on applying or extending unconscionability principles to duress:[79]

> There is nothing necessarily wrong with applying unconscionability principles in a commercial context, but such principles do not define the more restrained doctrine of duress. [In a case of unlawful act duress, the unlawful act (be it threat or demand) may of course be unconscionable: see for example [*Borrelli*] *v Ting* [2010] UKPC 21, [2010] Bus LR 1718 at [32]; and *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40 (NSWCA) at 46. But that begs the question why duress need then be resorted to at all.]

Thus, I contend that Lord Burrows' three reasons for why lawful act duress should exist (the "illegitimate pressure / precedential" reason, the "blackmail analogy" reason and the "equitable doctrines" reason) are not strong or convincing arguments.

[76] Stephen Todd and Matthew Barber *The Laws of New Zealand* (LexisNexis, 2020) at 201.
[77] *Contractors Bonding v Snee* [1992] 2 NZLR 157 (CA).
[78] Nathan Tamblyn "Contracting Under Lawful Act Duress" [2010] SJLS 400 at 401.
[79] *Dold v Murphy* [2020] NZCA 313 at [74].

In the first New Zealand appellate court decision considering whether exemplary damages are available for breach of contract, Chambers J in *Paper Reclaim v Aotearoa International* commented:[80]

> It is easy for a Court to hedge and say that exemplary damages should not be possible save "in very rare cases" or "in exceptional circumstances". But the downside of "leaving an out" is that any plaintiff can blithely plead a claim for exemplary damages, asserting that his or her case is in the "exceptional" category. The defendant will never be successful in having the claim struck out, as the Court will not be able to assess at a strike-out stage whether the case factually comes within the exceptional category where exemplary damages might lie. A claim may go to trial unnecessarily, the plaintiff hoping that he or she may win …. The fact that the odds may be slim may not deter a plaintiff with stars in his eyes. Alternatively, defendants may feel compelled to offer something in order to get rid of the possibility that this case is found to be within the exceptional category. It is quite wrong to give plaintiffs a powerful weapon with which they can harass defendants and, perhaps, extract large settlements, because the costs of defending even an unmeritorious claim may be huge (Swan, p 645). Mr Beck is right that the time has come for this "bull … to be grasped by the horns and slaughtered" and that exemplary damages have "no place in a principled system of contractual damages" (Contract [2005] New Zealand Law Rev 53, p 64).

Perhaps much the same could be said for lawful act economic duress. The literature is clear that instances of lawful act economic duress made out will be rare.[81] The law surrounding the doctrine is also not without enormous difficulty, complexity and inconsistency with differing opinions and tests, so much so that it seems that no one clear view has yet been formed. I would therefore argue that time has come for this 'bull to be grasped by the horns and slaughtered'. However, other threats with demands that are non-commercial in nature, such as blackmail, should be left open to either lawful act 'non-economic' duress or unlawful act duress (see discussion directly below).

[80] *Paper Reclaim Ltd v Aotearoa International Ltd* [2006] 3 NZLR 188 (CA) at [181] per Chambers J.
[81] *CTN Cash and Carry v Gallaher Ltd* [1994] 4 All ER 714 at 719 per Steyn LJ; *Dold v Murphy* [2020] NZCA 313 at [69]; *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40 at [136] per Lord Hodge.

F Unlawful Act Duress Instead?

Professor Davies and Mr Day suggested that at best for the plaintiff the case is one of *unlawful* act duress, because the prior breach of contract by the airline could not be severed, was part of a "single chain of events" and that the purpose of the threat (not to contract) was that the airline be excused that unlawful conduct.[82]

It is therefore interesting that Lord Burrows (with whom the majority agreed) viewed this case as well as *Progress Bulk Carriers* and *Borrelli v Ting* to be cases not of unlawful act duress, but rather lawful act duress, by focusing on the threats in isolation:[83]

> It should be noted that it was not argued by TT that the breach of contract by PIAC, in failing to pay commission owed, meant that this was a case of unlawful, rather than lawful, act duress. In my view, this acknowledgement by TT that we are here concerned with lawful act duress was correct.
>
> …
>
> If one focuses on the threat (or pressure) that directly induced the contract (or non-contractual payment), we are in the realm of lawful act duress. In my view, therefore, *Progress Bulk Carriers* can be correctly viewed as a decision on lawful act duress.
>
> …
>
> The relevant threats by Ting, which induced the settlement agreement, were lawful. But they had been preceded by unlawful acts in failing to cooperate with the liquidators and in initially using forgery and false evidence to block the scheme of arrangement. For that reason, one might argue that this was not a case of lawful act duress. However, the fact remains that the pressure that finally led to the settlement was lawful.

In *Progress Bulk Carriers Ltd v Tube City IMS LLC, The Cenk Kaptanoglu*, the ship owners had chartered a named vessel but without the approval of the charterers they chartered it to another party.[84] 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

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[82] Paul Davies and William Day "'Lawful act' Duress" (2018) 134 LQR 5 at 9; *Dold v Murphy* [2020] NZCA 313 at [77].
[83] *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40 at [81], [107], [110]-[111]; *Progress Bulk Carriers Ltd v Tube City IMS LLC, The Cenk Kaptanoglu* [2012] EWHC 273 (Comm), [2012] 2 All ER (Comm) 855; *Borrelli v Ting* [2010] UKPC 21, [2010] Bus LR 1718.
[84] *Progress Bulk Carriers Ltd v Tube City IMS LLC, The Cenk Kaptanoglu* [2012] EWHC 273 (Comm), [2012] 2 All ER (Comm) 855.

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 to 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.

There, Cooke J said "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". He observed that the root cause of the problem was the owners' repudiatory breach, and their continuing conduct thereafter 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.[85] 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.

Considering Cooke J's judgment, PIAC's pressure could be thought of as economic duress based off past unlawful acts (breach of contract) coupled with subsequent pressure to waive claims against those unlawful acts, so as to amount to unlawful act duress rather than lawful act duress. It would be artificial to look at the lawfulness of the threat or threatened conduct narrowly, in isolation from the wider circumstances that involved unlawful conduct.[86] The New Zealand Court of Appeal recently espoused this view:[87]

> Those that appear to be lawful act duress cases turn out, on closer inspection, to be explicable on the basis of an unlawful act. [*Progress Bulk Carriers Ltd v Tube City IMS LLC* [2012] EWHC 273 (Comm); [2012] 2 All ER (Comm) 855 is explicable on the basis that a prior repudiation was an essential part of the narrative. [*Borrelli*] *v Ting* [2010] UKPC 21; [2010] Bus LR 1718 can be explained on the basis that forgery and unconscionable conduct are inextricable parts of the narrative.]

[85] *Progress Bulk Carriers Ltd v Tube City IMS LLC, The Cenk Kaptanoglu* [2012] EWHC 273 (Comm), [2012] 2 All ER (Comm) 855 at [39].
[86] Paul Davies and William Day "'Lawful act' Duress" (2018) 134 LQR 5 at 10.
[87] *Dold v Murphy* [2020] NZCA 313 at [69].

Professor Ahdar provides support for the same:[88]

> *Progress Bulk Carriers Ltd. v Tube City IMS LLC (The Cenk Kalpanoghu)* has been cited as a case where a claim of lawful act duress was upheld. But the facts indicate that unlawful conduct on the defendant's part featured prominently in the court's overall determination that economic duress was present. … [In *Borrelli v Ting*], as with *The Cenk Kalpanoghu*, the unlawful acts (forgery and false evidence) combined with the ostensibly lawful acts (the opposition to the settlement scheme, albeit due to an improper motive) to render the entirety of Ting's conduct illegitimate. But was Ting's refusal to give consent to such a settlement scheme ipso facto lawful conduct? … Much turns on precisely what is meant by "lawful" in this context. Something can be lawful—in the sense of not being in breach of the criminal law and not constituting a tort—but still be unethical, or, more relevantly, unconscionable. It is strained to say that a threat that amounts to unconscionable conduct (as that vitiating doctrine is defined in contract law) can still be characterized as legitimate or lawful.

Professor Davies and Mr Day furthers:[89]

> *Progress Bulk Carriers* is therefore better viewed as a case of unlawful act duress because the owners' threats to refuse to vary the charterparty were part of the same chain of events as their prior breach of contract.

Therefore, the approach of viewing the lawfulness of the threat in isolation in order to make a distinction between unlawful act duress and lawful act duress is somewhat dubious from a logical standpoint. Such an approach lacks coherence in that the wider context of the prior unlawful acts are artificially siloed and separated from the lawful threat in question, both of which may have a substantial connection to one another. This is especially logically unsatisfactory where it is arguable that the finding of illegitimacy of the lawful threats were likely due to the unlawfulness, per se, of the prior connected acts. Further, from a normative standpoint, an emphasis on the unlawfulness of connected prior acts would increase the amount of certainty in the law in this area. The (albeit wide) range of unlawful acts are usually already known and can be ascertained, whereas the alternative of moral impropriety is a vaguer and

[88] Rex Ahdar "Contract Doctrine, Predictability and the Nebulous Exception" (2014) 73 CLJ 39 at 45-47.
[89] Paul Davies and William Day "'Lawful act' Duress" (2018) 134 LQR 5 at 7.

more subjective criterion, of which reasonable and intelligent minds may readily disagree on in different situations (especially in the “cut and thrust” of the commercial context).

Conversely, a key challenge with the reasoning that lawful threats should be viewed in the wider context of other previous unlawful acts will be how to group the individually distinct lawful and unlawful acts together into one group that is considered together as being unlawful. In other words, there is question to be had as to how connected a lawful threat and a previous unlawful act has to be. In such an analysis, a question of timing and a matter of degree and circumstance of the connection between the acts and threats will be critical. Despite this challenge, I contend that this approach is more satisfactory than the alternative, as a focus on the unlawfulness of connected acts would (i) not purport to ignore the real relevancy of the unlawfulness of such connected acts in determining a finding of illegitimacy of connected lawful ones, and (ii) provide more wanted certainty to the law than an approach which focuses on more subjective factors such as bad faith or reprehensibility.

III Lawful Act Economic Duress in New Zealand

The New Zealand Court of Appeal has similarly observed that in the context of commercial negotiations, lawful act economic duress will rarely apply.[90] However, what is now less clear is the scope of illegitimate pressure under New Zealand law. Prior to *Times Travel*, our Court of Appeal had rejected the position that "reprehensible" behaviour is necessarily illegitimate, and disavowed the use of unconscionability to define the scope of the doctrine.[91] It remains to be seen whether the New Zealand courts will reconsider that position in light of *Times Travel*.[92]

A Dold v Murphy

Most recently, the New Zealand Court of Appeal in *Dold v Murphy* grappled with the issue of lawful act duress. This is one of the few appellate level New Zealand court decisions where a claim of lawful act economic duress was pleaded and judgment had been given on the matter.[93]

1 Facts

Roger Dold was formerly a shareholder in a Queensland-based tourism company, Cruise Whitsundays Pty Ltd. Mr Dold owned 46.9% of the shares in the company. The remaining shares were owned by Chris Jacobs (also 46.9%) and Peter Murphy (6.2%), with a shareholders' agreement between the three.[94]

In mid-2016, the shareholders received an offer of AU$110 million for their shares in the company, which significantly exceeded their own valuation of the company. At Mr Murphy's urging, the shareholders and their advisors successfully negotiated an increase in the offer to AU$112 million, subject to a memorandum of understanding being signed within five days.[95]

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[90] *McIntyre v Nemesis DBK Ltd* [2009] NZCA 329, [2010] 1 NZLR 463; *Dold v Murphy* [2020] NZCA 313.
[91] *McIntyre v Nemesis DBK Ltd* [2009] NZCA 329, [2010] 1 NZLR 463 at [59]; *Dold v Murphy* [2020] NZCA 313 at [74].
[92] *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40; David Friar, Liam McNeely and Zavara Farquhar "Commercial negotiations vs illegitimate pressure: UK Supreme Court rules on scope of lawful economic duress" (September 2021) Bell Gully <https://www.bellgully.com/Pages/Commercial-negotiations-vs-illegitimate-pressure--UK-Supreme-Court-rules-on-scope-of-lawful-economic-duress-.aspx>.
[93] The other two relevant cases include *Attorney-General for England and Wales v R* [2003] UKPC 22, [2004] 2 NZLR 577; and *Pharmacy Care Systems Ltd v Attorney-General* (2004) 17 PRNZ 308 (NZSC); neither of which were successful in their claims for lawful act economic duress.
[94] *Dold v Murphy* [2020] NZCA 313 at [1].
[95] At [13]-[14].

However, Mr Murphy then advised that he would refuse to participate in the sale unless the majority shareholders agreed to pay him an additional AU$5 million from their shares of the sale proceeds (a demand that he later reduced to AU$4 million). Forced to choose between Mr Murphy's ultimatum and the loss of a highly lucrative offer, the majority shareholders agreed to pay Mr Murphy.[96]

Mr Dold subsequently commenced proceedings seeking to recover his portion of the AU$4 million premium paid to Mr Murphy. He was unsuccessful in the High Court, and appealed to the Court of Appeal.

2 Judgment Relying on Bad Faith Demand Test

The Court dismissed the claim as:[97]

> The case on appeal … is yet another stage removed from those where duress is advanced to avoid a variation entered under pressure. That is because Mr Murphy's threat was not to break a contract. Rather, it was a threat not to *enter* one. A threat not to enter a contract, all other things being equal, is most unlikely to be an unlawful or illegitimate act.

In consideration of the England and Wales Court of Appeal's *Times Travel* "bad faith demand" requirement, of which Lord Burrows for the UK Supreme Court supported thereafter, the Court concluded that:[98]

> … the Court of Appeal's *Times Travel* decision is of little assistance to Mr Dold. … contracting at large as he did, the question of the genuineness of Mr Murphy's belief in his entitlement to make the demand did not arise. In fact, he appeared genuinely to believe he was so entitled. In law, he was entitled to act in his own self-interest, even if his actions were both unexpected and ungenerous.

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[96] At [15]-[18].
[97] At [75]-[76].
[98] At [79]; *Times Travel (UK) Ltd v Pakistan International Airlines Corporation* [2019] EWCA Civ 828; *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40.

The Court provided no critique nor comment on the merits of the bad faith demand requirement set out in the Court of Appeal's *Times Travel* judgment. Therefore, it seems that a void has opened up in light of the UK Supreme Court's *Times Travel* judgment as to which lawful act duress test for illegitimate pressure New Zealand law should adopt – Lord Hodge's or Lord Burrows'.[99]

However, the Court of Appeal may have impliedly suggested that it does not prefer Lord Hodge's reprehensibility approach, which can be said to be founded on unconscionability principles:[100]

> In *Al Nehayan v Kent* Leggatt LJ (as he then was, but sitting in the Commercial Court) suggested that:[101]
>
> > In a number of cases courts have recognised that making a lawful threat to press an illegitimate demand may constitute duress and that the measure of legitimacy for this purpose is not the defendant's self-assessment but *prevailing standards of morality and commercial propriety*.
>
> That unhappily uncertain proposition too may be doubted, not least because the common law does not yet impose a duty of good faith in contractual dealing, and it was rejected by the English Court of Appeal in *Times Travel (UK) Ltd v Pakistan International Airlines Corp*.[102] But what is arresting about Leggatt LJ's analysis is its reliance on the related but distinct, equitable, doctrine of unconscionability. Indeed, apart from *CTN Cash and Carry Ltd v Gallaher*[103] (in which the claim of duress failed) all the cases Leggatt LJ cites in support of that proposition are unconscionability ones.[104] There is nothing necessarily wrong with applying unconscionability principles in a commercial context, but such principles do not define the more restrained doctrine of duress. [In a case of unlawful act duress, the unlawful act (be it threat or demand) may of course be

[99] *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40.
[100] *Dold v Murphy* [2020] NZCA 313 at [74]; *Times Travel (UK) Ltd v Pakistan International Airlines Corporation* [2019] EWCA Civ 828; *Al Nehayan v Kent* [2018] EWHC 333 (Comm).
[101] *Al Nehayan v Kent* [2018] EWHC 333 (Comm) at [182] (emphasis added).
[102] *Times Travel (UK) Ltd v Pakistan International Airlines Corporation* [2019] EWCA Civ 828 at [101]-[103].
[103] *CTN Cash and Carry v Gallaher Ltd* [1994] 4 All ER 714.
[104] See *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40 (NSWCA); *Huyton SA v Peter Cremer GmbH & Co* [1999] 1 Lloyd's Rep 620 (EWHC); and *Borrelli v Ting* [2010] UKPC 21, [2010] Bus LR 1718.

unconscionable: see for example [*Borrelli*] *v Ting* [2010] UKPC 21, [2010] Bus LR 1718 at [32]; and *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40 (NSWCA) at 46. But that begs the question why duress need then be resorted to at all.]

As Lord Hodge's test of reprehensibility draws upon general unconscionability principles, and as the New Zealand Court of Appeal did not critique David Richards LJ's bad faith demand test, there is perhaps a suggestion that the Court would prefer Lord Burrows' bad faith demand test over Lord Hodge's test of reprehensibility in the context of lawful act duress.

B Recommendation for New Zealand

1 PIAC v Times Travel

The differing tests of "reprehensibility" and "bad faith demand" of Lord Hodge's lead and Lord Burrows' concurring judgments each have their own respective drawbacks and benefits, as discussed before. Lord Hodge's reprehensibility test arguably creates greater uncertainty, whereas Lord Burrows' bad faith demand test is more concrete and certain in its exact requirements. Adopting a reprehensibility test may put the law back to where it was in Steyn LJ's *CTN Cash and Carry*, and as such this may risk the reasoning in future judgments to become conclusory, by which I mean that the court appears to prefer to state a result rather than to explain why that result is required by the principle.[105] The Court of Appeal in Singapore in *BOM v BOK* also rejected an umbrella doctrine of unconscionability principally because there were no practically workable legal criteria which the court could use to determine what amounts to unconscionable behaviour that vitiates a contract.[106] An umbrella doctrine, the judge said, would lead to excessive subjectivity, which would engender excessive uncertainty and unpredictability and would undermine the sanctity of contract.[107]

However, despite providing more certainty in its requirements, Lord Burrows' bad faith demand test is arguably less logically coherent and may prove to be difficult to succeed in

[105] See Struan Scott "Duress and the Variation of Contracts – looking beyond general statements of principle to the results in particular cases" (2010) 12 Otago Law Review 391 at 392.
[106] *BOM v BOK* (2018) SGCA 83, (2018) 21 ITELR 607.
[107] *BOM v BOK* (2018) SGCA 83, (2018) 21 ITELR 607; *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40 at [35].

practice due to the onus being on the plaintiff to prove the defendant's subjective bad faith, especially where commercial parties usually receive non-concrete legal advice on the likelihood of success of their claims.

Although Lord Burrows' bad faith test would provide a more concrete test than that of reprehensibility, I argue that it should not be adopted simply due to its logical incoherence (as discussed in the critique above at 17-23).

A potential advantage of Lord Hodge's reprehensibility test, if one views it so, is that it allows for greater flexibility and discretion for judges to be the arbiters of what is socially acceptable conduct. Professor Birks provides a lucid explanation for the drawback as well as the advantage of allowing lawful act duress to be open as a doctrine, in that judges have the power to be the arbiters or guardians of social evaluation:[108]

> 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 (though lawful outside the restitutionary context) are improper as contrary to prevailing standards. That makes judges, not the law or the legislature, the arbiters of social evaluation. On the other hand, if the answer is that lawful pressures are always exempt, those who devise outrageous but technically lawful means of compulsion must always escape restitution until the legislature declares the abuse unlawful. It is tolerably clear that, at least where they can be confident of a general consensus in favour of their evaluation, the courts are willing to apply a standard of impropriety rather than technical unlawfulness.

Albeit perhaps an oversimplification, whether one prefers Lord Hodge's wider but less certain "reprehensibility" test or Lord Burrows' narrower but more certain "bad faith demand" test may in some respects come down to a matter of personal preference in whether one prefers more 'flexibility but at the cost of certainty' or more 'certainty but at the cost of flexibility'.

[108] Peter Birks *An Introduction to the Law of Restitution* (1989) at 177; *CTN Cash and Carry v Gallaher Ltd* [1994] 4 All ER 714 at 718.

2 *Australia's Rejection of Lawful Act Duress*

McHugh JA in the decision of *Crescendo Management v Westpac Banking Corporation* said that "pressure will be illegitimate if it consists of unlawful threats or amounts to unconscionable conduct".[109]

The Court of Appeal of New South Wales, however, has since rejected any concept of lawful act duress, taking the view that it should be treated, if at all, as part of the narrower doctrine of unconscionable transactions.[110] In *Australia and New Zealand Banking Group Ltd v Karam*, the court (Beazley, Ipp and Basten JJA) drew attention to the difficulty caused by McHugh JA's reference to "unconscionable conduct", including appearing to invoke equitable principles.[111] Following the approach of Kirby P in the same court in *Equiticorp Finance Ltd (in liq) v Bank of New Zealand*, the court held that:[112]

> … 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].

Karam supported the exclusion of lawful acts or threats from the doctrine of duress:[113]

> 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 …

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[109] *Crescendo Management Pty Ltd v Westpac Banking Corporation* (1988) 19 NSWLR 40 at 46.
[110] *Australia and New Zealand Banking Group Ltd v Karam* [2005] NSWCA 344, [2005] 64 NSWLR 149.
[111] At [54].
[112] At [62]; *Equiticorp Finance Ltd (in liq) v Bank of New Zealand* (1993) 32 NSWLR 50.
[113] *Australia and New Zealand Banking Group Ltd v Karam* [2005] NSWCA 344, [2005] 64 NSWLR 149 at [66].

That passage in *Karam* was cited with approval by the Court of Appeal of New South Wales in *May v Brahmbhatt*.[114]

In *Thorne v Kennedy*, the High Court of Australia declined to address the arguments for and against the decision in *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.[115]

3 Balancing Benefits with Drawbacks of Leaving Doctrine Open

Due to my reasons given in chapter II(E) "Existence of Lawful Act Economic Duress" above, the New Zealand courts should not be entirely convinced by the reasoning of the UK Supreme Court in *Times Travel* for why lawful act economic duress should exist. I would strongly suggest for New Zealand to take a more circumspect approach to the normative existence of the doctrine, and perhaps even consider its abolition altogether.

I would argue that New Zealand should at least preclude the possibility of lawful act *economic* duress for the reason that leaving the possibility of the doctrine open, with its uncertain principles, creates a greater cost to the commercial community than the possible injustice to which it purports to rescue. On balance, enough time has passed and enough judgments across the common law world have been made to suggest that, save for situations where blackmail or connected unlawful acts come into the picture, little if any injustice will actually occur in the absence of the doctrine of pure lawful act economic duress. Professor Davies and Mr Day well note that the welcome effect would be to place the law of contract on a more certain and stable footing, avoiding protracted and expensive litigation about the existence and scope of lawful act duress.[116] Professor Virgo provides similar support:[117]

> Despite the recent explicit recognition that a lawful threat can still be an illegitimate threat for economic duress, the better view is that only unlawful threats should suffice.

[114] *May v Brahmbhatt* [2013] NSWCA 309 at [38] and [40].
[115] *Thorne v Kennedy* [2017] HCA 49 at [29].
[116] Paul Davies and William Day "'Lawful act' duress (again)" (2020) 136 LQR 7 at 12.
[117] Graham Virgo *The Principles of the Law of Restitution* (3rd ed, Oxford University Press, 2015) at 218.

> A lawful threat may still result in restitution, but only … if the more stringent test of unconscionability is satisfied. This ensures that the law does not intervene unacceptably in commercial markets. Where a defendant has obtained a benefit as a result of an unlawful threat which caused the benefit to be transferred, it is appropriate for restitution to be awarded. Where the benefit was obtained as the result of a lawful threat, it is only appropriate to award restitution where the defendant's conduct is characterised as unconscionable …

Potential fears of leaving injustice open to arising in instances of blackmail and other unlawful acts related to lawful acts if lawful act duress were abolished can be assuaged by categorising such situations under the doctrine of unlawful act duress, through viewing the acts as a whole and by inquiring into the connectedness between the unlawful acts to the lawful acts or threats. This provides more certainty in the law as the determination of unlawful acts is arguably more concrete and situation-specific, with each their own tests, than that of a general reprehensibility or social morality type test. The only uncertainty that may arise with my suggestion is how to determine when an unlawful act has a sufficient connection or nexus to the lawful act in question. However, I would posit that such an analysis is to be preferred over the alternatives. In my view, it would likely be more obvious and there would likely be more consensus as to when an unlawful act is connected to a threatened lawful one than in trying to determine when a purely lawful act, in the commercial context, crosses the line from legitimate hard-nosed bargaining into being morally reprehensible.

It is an interesting idea that committing a lawful act could be reprehensible when the fact is that the free enterprise system, within which much of modern contract law functions, generally expects and condones the use of economic strength to extract favourable terms.[118] If a lawful act or threat is supposedly so reprehensible, it might even be better to amend the law governing the specific act in question rather than to use the doctrine of duress to patch up such behaviour, for the want of commercial certainty.

[118] Rick Bigwood "Throwing the baby out with the bathwater? Four questions on the demise of lawful-act duress in New South Wales" (2008) 27 UQLJ 41 at 50; *ACCC v C G Berbatis Holdings Pty Ltd* (2003) 197 ALR 153.

4 Lawful Act Duress vs Lawful Act Economic Duress

One possibility for the law to take is to make a distinction between lawful act duress and lawful act economic duress, in that if the doctrine is to be open, it should be open only to lawful act duress not of the economic kind. Consensus for illegitimacy, reprehensibility or bad faith can be more readily ascertained in cases that involve lawful conduct or threats that go toward damaging a person's dignity, physical health, life, and the like. Conversely, consensus for the same is much harder to form in cases that involve lawful conduct that damages a party's solely economic interests.[119]

Personal qualities that are at risk from the abuse of lawful acts are also arguably more sacrosanct than economic qualities, such that their protection from lawful acts in certain circumstances should be open even to the detriment of certainty in the law of contract. Circumstances which involve damage or risk to personal qualities also arguably need less certainty and usually adopt a more 'case-by-case' approach, even in the law of contract, than the law of contract concerning economic or commercial dealings, which (rightly) adopts greater emphasis on the need for certainty. This is so because, in my view, it is much less clear and ascertainable in commercial situations exactly when a transaction or conduct therein is unfair or reprehensible than in personal situations of say, life and death, physical harm, or harm to personal dignity.[120] Consider the following hypotheticals where the plaintiff will try to argue that their contract with the defendant should be voidable for duress—

Example X (personal lawful act duress):

> D encounters P, a stranger, who is drowning. There are no laws requiring D to save P from drowning, and D is lawfully entitled to not save P from drowning. D indicates to P that he will rescue P, but only if P agrees to pay him $100,000 (an exorbitant amount). There are no other potential rescuers – a fact known to both D and P. P reluctantly agrees to D's proposal, is rescued by D, and later refuses to pay the promised amount.

[119] Struan Scott "Duress and the Variation of Contracts – looking beyond general statements of principle to the results in particular cases" (2010) 12 Otago Law Review 391 at 397.
[120] See *Dold v Murphy* [2020] NZCA 313 at [72] per Kós P: "The difficulty then, is in deciding when a proposed variation to a contract is so freighted by threats as to overstep the market and constitute 'illegitimate pressure'"; see also *DSND Subsea Ltd (formerly DSND Oceantech Ltd) v Petroleum Geo-Services ASA* [2000] BLR 530 at [131] per Dyson J: "Illegitimate pressure must be distinguished from the rough and tumble of the pressures of normal commercial bargaining".

Example Y (commercial lawful act duress):

> D encounters P, a commercial partner, who is about to go bankrupt. There are no laws requiring D to save P from financial death, and D is lawfully entitled to not save P from financial death. D indicates to P that he will rescue P, but only if P agrees to pay him $100,000,000 (an exorbitant amount). There are no other potential rescuers – a fact known to both D and P. P reluctantly agrees to D's proposal, is rescued by D, and later refuses to pay the promised amount.

Even though in both examples D has acted in a morally reprehensible way by taking advantage of its situation to the detriment of P, the types of harm at risk are very different. D's conduct in example X is clearly more reprehensible than that in example Y. Again, the main reason for this is because physical life is typically regarded as more sacrosanct than financial life. Accordingly, it is arguable that lawful act duress should be permitted as a doctrine to save or 'patch' the possible defects of the law that do not adequately cover situations of duress of the non-economic kind, such as that in example X. The same cannot be as readily said for lawful act duress of the economic kind, such as that in example Y, for the fact that reasonable and intelligent minds can, and often will, disagree on whether some economically damaging lawful conduct is illegitimate or is simply a case of hard-nosed and commercially astute dealing. The vast number of competing views throughout recent history on what a workable test for lawful act economic duress should be, or whether such a doctrine should be open at all, supports the view that a general consensus regarding the doctrine is very difficult to reach.

For these reasons lawful act duress, at least of the economic type, should in my view be abolished.

IV Conclusion

Lord Hodge and Lord Burrows' judgments in *Pakistan International Airline Corporation v Times Travel (UK) Ltd* provide illuminating and contrasting viewpoints on the doctrine of lawful act economic duress. Both support the doctrine's existence, but disagree on what the test should be for considering when lawful acts or threats amount to "illegitimate pressure" – a critical element in establishing duress. The two differing viewpoints provide insights into the difficulties of each other's. Lord Hodge's test of "reprehensibility" and general bad faith can be said to put the law back to where it was in Steyn LJ's judgment in *CTN Cash and Carry*, namely, to place an emphasis on moral or social impropriety founded on unconscionability principles. I have argued that the drawback of such a test is that it leads to more unwanted uncertainty, but that the benefit is that it allows for greater flexibility and discretion to judges to be the arbiters of what is socially acceptable conduct. Lord Burrows' bad faith demand test, on the other hand, in some respects lacks logical consistency, but provides greater certainty and clarity in its formulation as a workable test, which is very much wanted in the context of commercial dealings and the law of contract.

New Zealand's position on lawful act economic duress, and more specifically its test for what lawful acts or threats constitute illegitimate pressure, is now somewhat unclear in light *Times Travel*. That is, it is yet to be seen whether Lord Hodge's lead test or Lord Burrows' concurring test is preferred. The recent New Zealand Court of Appeal case *Dold v Murphy*, however, might suggest that New Zealand would prefer Lord Burrows' bad faith demand test over Lord Hodge's reprehensibility test.

Although I appreciate that it would be a perhaps "radical" move, I would recommend for New Zealand to abolish the doctrine of lawful act economic duress, as the purported benefits of leaving the doctrine open is likely outweighed by the detriments it causes, namely, a lack of certainty in the law and therefore greater legal costs for all commercial parties. Perhaps lawful act duress of the non-economic kind can be left open, but certainly not that of the economic kind. The lack of injustice that would have occurred in modern history if the doctrine were abolished provides support for the little benefit that the doctrine provides in reality. Cases that were purported to be dependent on lawful act duress may at closer inspection be explicable by connected unlawful acts, so as to be able to be categorised as unlawful act duress instead.

The general rule must be that, if it is lawful to do something, it is lawful to threaten to do it.[121]

[121] Nelson Enonchong *Duress, Undue Influence and Unconscionable Dealing* (London: Sweet & Maxwell, 2006) at 20.

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