

Lawful economic duress and reasonableness

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The Times Travel (UK) LTD v Pakistan International Airlines Corporation decision

1. It is now well established that a contract can be avoided on the ground of illegitimate commercial pressure being applied by one party to another to such an extent that there is a lack of practical choice for the innocent party but to enter into the contract. This is known as economic duress. It has also been established that the threatened acts can be lawful if made in pursuit of demands to which the threatening party did not in good faith believe itself lawfully entitled.
2. The issue before the Court of Appeal in this case was whether, in a case where the Claimant claimed lawful act duress had failed to prove that the Defendant made its demands in bad faith, a contract could nevertheless be avoided because the Defendant's belief that its demand was in good faith was unreasonable.

3PB's Analysis

3. The Claimant, which was the Respondent on Appeal, Times Travel (UK) Limited ('TTL') was a travel agent that specialised in selling airline tickets for travel to Pakistan. The Defendant and Appellant, Pakistan International Airlines Corporation ('PIAC') was an airline that was the only airline operating direct flights between the United Kingdom and Pakistan. TTL's business was accordingly very dependent on its ability to sell PIAC tickets, for which it had a contract with PIAC.
4. By 2012, a significant number of PIAC's agents had commenced or were threatening proceedings to recover substantial sums said to be due by way of a commission. In September 2012, PIAC gave notice of termination of existing agency contracts in accordance with their terms and offered new contracts but only on terms that the agents waived their existing claims. TTL accepted the terms offered by PIAC.
5. In 2014, TTL brought proceedings to recover the commission and other payments which it said were due under the earlier arrangements. One of PIAC's defences to the claim was the waiver given by TTL. TTL sought to defeat this by arguing economic duress.

6. It was common ground between the parties that PIAC's threat to not enter into a new contract with TTL was lawful. Warren J further found that PIAC genuinely, albeit wrongly, believed that the commission being claimed by the various travel agents had ceased to be payable following its replacement by a different system in 2010. Accordingly, he found that PIAC's demand that TTL sign the waiver and enter into the new contract was unreasonable, but made in good faith. The judge nevertheless found that TTL had established economic duress and accordingly gave judgment for TTL on its claim.
7. PIAC appealed on the basis that Warren J had wrongly found that TTL could avoid the waiver due to economic duress. David Richards LJ, giving the leading judgment, agreed.
8. In doing so, he first noted that neither the common law nor equity countenanced as grounds for setting aside contracts factors such as inequality of bargaining power or the exploitation of a monopoly position. He further noted that intervention in relation to these and other factors seen as going to the fairness of contractual terms and the relative positions of the parties had instead been carried out through legislation.
9. He then considered previous case law, and in particular the Court of Appeal case of *CTN Cash and Carry Ltd v Gallagher Ltd* [1994] 4 All ER 714. In that case, the Defendant wrongly invoiced the Defendant for a consignment of cigarettes that had been stolen, and then terminated credit facilities and refused to reinstate them until the invoice was paid. Steyn LJ, giving the leading judgment, noted that a critically important characteristic was that the Defendant *bona fide* thought that the Claimant owed the Defendant the sum in question. The most relevant part of Steyn LJ's judgment, at p.719, is quoted below:

'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 high when the critical inquiry is not whether the conduct is lawful but whether it is morally or socially unacceptable. That is the inquiry in which we are engaged. In my view there are policy considerations which militate against ruling that the defendants obtained payment of the disputed invoice by duress.

Outside the field of protected relationships, and in a purely commercial context, it might be a relatively rare case in which 'lawful act duress' can be established. And it might be particularly difficult to establish duress if the defendant *bona fide* considered that his demand was valid. In this complex and changing branch of the law I deliberately refrain from saying 'never'. But as the law stands, I am satisfied that the defendants' conduct in this case did not amount to duress.'
10. TTL cited the recent High Court Case of *Al Nehayan v Kent* [2018] EWHC 333 (Comm), decided by Leggatt LJ at first instance following Warren J's judgment in this case. At paragraph 187, Legatt LJ stated the following:

‘This is a difficult area of the law. But for my part I see no reason to doubt the correctness of the approach adopted in the *Times Travel* case. Whereas the distinction between lawful and unlawful behaviour may be critical in determining whether the defendant's conduct is actionable in tort, I see no reason why it should be decisive of whether the defendant can retain money or other benefits demanded from a claimant in a situation of extreme vulnerability. For this purpose it is appropriate to take account of the legitimacy of the demand and to judge the propriety of the defendant's conduct by reference not simply to what is lawful but to basic minimum standards of acceptable behaviour.’

11. David Richards LJ disagreed with Leggatt LJ's analysis for two primary reasons. Firstly, he interpreted Steyn LJ's reference to ‘morally or socially unacceptable’ conduct as going no further than making demands in bad faith. Secondly, he considered that whilst the sentiments expressed by Leggatt LJ were difficult to disagree with in general terms, they caused difficulty and uncertainty when being applied to particular cases. He ultimately came to the conclusion that those precepts were not engaged where a party used lawful pressure to achieve a result to which it considered itself in good faith to be entitled, and that accordingly TTL could not avoid the waiver as it had not entered into the agreement under duress.

Impact of the Decision

12. The decision has provided certainty on a small but complex area of contract law, namely economic duress. By clarifying that lawful acts cannot cause duress unless they are used in pursuit of a demand that the demanding party is making in bad faith, the Court of Appeal has kept the tests for economic duress subjective, and refrained from importing an objective element of reasonableness into it. By preferring certainty and contractual freedom between contracting parties over wider court oversight, the Court is following a wider trend in the higher courts to prioritise the former over the latter.

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