

Doctrine of duress clarified: lawful commercial pressure or economic duress?

A contract can be avoided on the grounds of economic duress but, to date, it has been far from clear when lawful commercial pressure crosses the line into duress. The Supreme Court has clarified the scope of the doctrine of lawful act duress in a detailed and important judgment, which considered the concept of illegitimate pressure and the extremely limited circumstances in which a contract can be rescinded because of a threatened unwelcome, but not unlawful, act (*Pakistan International Airline Corporation v Times Travel (UK) Ltd* ([2021] UKSC 40).

Disputes over commission

Times Travel (UK) Ltd is a small, family business that sold tickets for Pakistan International Airline Corporation's (PIA) flights. At the time, PIA was the only operator of direct flights between the UK and Pakistan, and Times Travel's business was almost exclusively tied to that route. Disputes arose relating to the rate and payment of commission between PIA and some of its sales agents, including Times Travel. Ultimately, PIA gave notice to terminate its contract with Times Travel in accordance with its terms. As a condition of entry into a new contract, PIA required Times Travel to provide a waiver of any prior claims, including those relating to the disputed entitlement to commission under the previous contract.

The High Court held that the new contract could be avoided on the grounds of economic duress ([2017] EWHC 1567). The Court of Appeal, however, disagreed ([2019] EWCA Civ 828; www.practicallaw.com/w-020-8957). It 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 the pressure believes, in good faith, it is entitled. The court held that PIA had believed that it was entitled to the disputed commission and therefore the new contract could not be avoided. Times Travel appealed.

Analysis of lawful act duress

The Supreme Court unanimously upheld the Court of Appeal's decision, although differed from the Court of Appeal's reasoning in some respects, and dismissed the appeal.

The court examined the following three requirements for the tort of lawful act duress:

Interventions

In *Pakistan International Airline Corporation v Times Travel (UK) Ltd*, interventions were made on behalf of Ukraine, The Law Debenture Trust Corporation plc and The All Party Parliamentary Group on Fair Business Banking ([2021] UKSC 40). Ukraine and The Law Debenture Trust Corporation are parties to an appeal to the Supreme Court, in which judgment is pending. In *Pakistan International Airline*, The Law Debenture Trust Corporation submitted that lawful act duress should be abolished as a cause of action, whereas Ukraine and the All Party Parliamentary Group argued to the contrary, with the latter proposing that these claims should be determined by reference to the extent to which a defendant acted with good faith in the context of the relevant dealings.

- There is an illegitimate threat or pressure by the defendant.
- The cause of the claimant entering into the contract is the illegitimate threat.
- The claimant has no reasonable alternative but to enter into the contract.
- The use of illegitimate means to manoeuvre the claimant into a position of weakness to force it to waive its claim.

The focus of the court's analysis was on the first of these three elements: the illegitimacy of the threat.

Illegitimate threats. An illegitimate threat can include a threat to do a perfectly lawful act. What makes it illegitimate, according to the majority judgment, is that it leads to an agreement which it would be unconscionable for the party making the threat to enforce.

Unconscionability can be defined as "morally reprehensible behaviour". This concept is closely connected to, but distinct from, the equitable concepts of undue influence and unconscionability. Unconscionability, the court emphasised, is not a test to be applied across the board and without context. The courts should not become the arbiters of what is morally and socially acceptable. In fact, because in English contract law, by contrast to that of other jurisdictions, there is no doctrine of good faith or imbalance of bargaining power, the court made it clear that the scope for lawful act duress in commercial contractual negotiations is extremely limited.

The court identified two principal circumstances in which the courts have recognised lawful act duress:

- The exploitation of knowledge of criminal activity.

The latter circumstance potentially applied on the facts. However, the court found that PIA did not act in an unconscionable or morally reprehensible manner. There was no finding that it had used reprehensible means to manoeuvre Times Travel into a position of increased vulnerability for it to exploit.

For that reason, the court agreed with the Court of Appeal that there had been no economic duress. It also clarified that, although the tort of lawful act duress exists, and should continue to exist, it will only apply in a rare circumstance (see box "Interventions").

The role of bad faith

Where the court disagreed with the Court of Appeal was in relation to the role of bad faith. The majority found that acting in bad faith alone is not sufficiently unconscionable or morally reprehensible to constitute illegitimate pressure. It observed that bad-faith demands based on an asserted pre-existing entitlement may not be a rare occurrence in commercial life and that discreditable behaviour can be a feature of commercial activity. Even if it had found that PIA had not believed in its entitlement to the disputed commission, it would not therefore have found PIA's actions to have been illegitimate. Bad faith has a role to play in economic duress in relation to the analysis of the overall context but it is not, of itself, a necessary or definitive ingredient of the tort.

Lord Burrows, giving a minority judgment, disagreed. In relation to waiver, Lord Burrows

held that a demand would be unjustified, and therefore illegitimate, where both:

- The threatening party deliberately created or increased the threatened party's vulnerability to the demand.
- The demand was made in bad faith.

The majority, however, considered that Lord Burrow's test would expand the scope of claims for lawful act duress too broadly.

Bad faith in these circumstances would be where the threatening party did not genuinely believe that it had any defence and there was no defence to the claim being waived. Lord Burrows therefore agreed

with the Court of Appeal, that if PIA had not held a genuine belief in its entitlement to commission, its actions could have constituted duress.

Implications in practice

While the tort of lawful act duress exists, the Supreme Court has severely restricted its scope and set the bar higher where parties assert these claims. The cornerstone of the majority judgment was the need to consider the overall context and whether the threatening party deliberately manoeuvred the threatened party into a position of increased vulnerability. Beyond that, the court expressed its reluctance to intervene in commercial negotiations, commenting that the courts have taken the position that

it is for Parliament, and not the judiciary, to regulate inequality of bargaining power where a person is trading in a manner which is not otherwise contrary to law.

For businesses such as financial institutions, where negotiations frequently take place against a backdrop of unequal bargaining power and inevitable financial pressure, this decision is likely to provide welcome clarity. The scope of liability for threatening to do something that a business is, by law, entitled to do has been severely curtailed.

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