

Lawful act duress revisited  
*Pakistan International v Times Travel*

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# Setting the scene...

- Existing relief – undue influence, unconscionable bargain, misrep, penalties etc.
- Existing statutory intervention – UCTA, consumer contracts, competition etc.
- Importance of and primacy of **certainty** in commercial dealings – courts will not readily re-write commercial bargains notwithstanding imbalance in bargaining power
- English law does not recognise any overriding doctrine of **good faith** in contracting or of **imbalance of bargaining power**



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# Setting the scene...

- Evolution of common law of duress – once confined to duress of person and duress of goods – extended to economic duress, but important distinction between **unlawful act ED** and **lawful act ED**
- *“The boundaries of lawful act duress are not fixed and the courts should approach any extension with caution, particularly in the context of contractual negotiations between commercial entities”*
- Only handful of reported decisions to date where plea of lawful act ED has succeeded
- Important case – 2 fundamental questions – (1) Does lawful act ED exist? (2) If so, what is its scope?

# Lawful vs. unlawful duress?

Lawful duress first recognised in 70s:  
*Occidental Worldwide Investment Corpn v Skibbs A/S Avanti* [1976] 1 Lloyd's Rep 293

*North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705

Affirmed in the 80s:

*Universe Tankships Inc of Monrovia v International Transport Workers Federation (The Universe Sentinel)* [1983] 1 AC 366 (Lord Diplock)

“Once one crosses [the] line to include threats of lawful acts, it is not easy to distinguish between threats that will count as duress and threats that will not”: [82]

Not recognized in New South Wales: [85]

# Structure

- Summary of background in *Pakistan International*
- What the majority decided...
  - ...and how they got there
  - Revision of *CTN Cash and Carry*
- Lord Burrows' dissent
- Perspectives on good faith and illegitimate demands
- Legal certainty?
  - Comparing the majority and the dissent

# *Pakistan Airlines: the background*

- C is a travel agent whose business was almost exclusively the sale of flight tickets to and from Pakistan
- D is well-known national flag carrier airline of Pakistan
- D was only airline operating direct flights between UK and Pakistan
- Contract between C and D – one-sided in favour of D
- Dispute between various travel agents and D in relation to non-payment of commission
- C's monopoly + D's vulnerable business model = C's much stronger bargaining power



# Background cont.

- D took 2 actions, both of which it was **legally entitled** to do – (1) gave notice to end existing contract (2) cut C's normal ticket allocation from 300 to 60 tickets a fortnight
- Offered C new contract on terms that included a wide waiver/release of C's claims for unpaid commission under earlier contract
- C reluctantly accepted terms of new contract
- C subsequently brings proceedings to recover unpaid commission under earlier contract – but needs to set aside/rescind new contract because of waiver/release – pleads misrep and duress

# Background cont.

- C succeeds at first instance (per Warren J) – plea of misrep fails but plea of duress succeeds – **NB no factual finding that D’s refusal to pay commission was based upon bad faith**
- D succeeds on appeal in the CA – importance of earlier CA decision in *CTN Cash and Carry*, which is the genesis of what has become known as the requirement for a ‘bad faith demand’ – since trial judge did not find as a fact that there had been a ‘bad faith demand’ = no duress
- Appeal to UKSC – appeal dismissed, no duress – but majority reach same conclusion as CA for different reasons

# What the majority decided

- Lawful act ED exists in this jurisdiction
- Elements – **(1) making of an illegitimate (albeit lawful) threat by one party** (2) sufficient causation between that threat and threatened party entering into contract (3) lack of any reasonable alternative other than giving into threat
- As threat lawful, illegitimacy to be determined by focussing on nature and justification of demand having regard to *inter alia* the behaviour of threatening party (including nature of pressure applied) and circumstances of threatened party – **illegitimacy = reprehensible or unconscionable conduct of the order that would found undue influence**
- Since law generally tolerates pursuit of commercial self-interest in commercial bargaining, demand motivated by commercial self-interest would, in general, be justified – something much more is needed
- Jettisoned approach to illegitimacy based upon principle of good faith dealing, and also approach based on ‘range of factors’ (a la *Patel v Mirza* re illegality)

# How the majority got there...

- 2 conceptually different streams of cases where lawful act duress has been recognised
- (1) Exploitation of knowledge of criminal activity – not what we are concerned with – NB historic cases which pre-dated recognition of lawful act duress and instead were founded on undue influence – modern view is that they are examples of lawful act duress – demonstrates close interaction of principles of undue influence and duress
- **(2) Using illegitimate means to manoeuvre C into position of weakness to force him to waive his claim – only 2 reported decisions which have succeeded!**

# Illegitimate Means – *Borrelli v Ting*

- Liquidators of company which had collapsed into an insolvent winding-up wished to enter into scheme of arrangement to obtain money to fund liquidation
- Scheme needed shareholder approval
- D, company's former chairman and CEO, held a crucial minority shareholding through company's within his control, which meant he could block scheme
- D had failed to comply with duty as former officer of company to provide information to liquidators
- Sought to use minority shareholding to block scheme
- Forged a document and procured the provision of false evidence to liquidators in opposition to scheme
- Liquidators objected to D's votes at scheme meetings and applied to court to disallow votes – D opposed
- Time running out to meet court deadline to approve scheme
- Settlement agreement which included wide waiver/release in D's favour
- D dropped opposition to scheme

# *Borrelli* cont.

- Liquidators commence proceedings against D
- Enforceability of settlement agreement?
- PC determine that settlement agreement invalid on ground of illegitimate economic pressure and D's behaviour having been unconscionable, leaving liquidators with no reasonable alternative
- Unconscionable because: (1) failure to cooperate with liquidators (2) D had procured opposition to scheme solely with intention of depriving liquidators of funds and so preventing them from investigating D's conduct of company's affairs (3) forgery and false evidence
- Judgment refers in a number of places to 'good faith' or lack thereof
- But UKSC of view that unconscionability/illegitimacy was the basis for decision, not good faith principles

# Illegitimacy – *The Cenk K*

- C charterers entered into charterparty with D owners of vessel for carriage of scrap metal to China
- C had entered into separate contract to sell metal to purchasers in China with a fixed shipment date
- D, in repudiatory breach of charterparty, chartered the vessel to another party, but gave C assurances that they would provide substitute vessel and would compensate C for all damages resulting
- In reliance on assurance, C did not seek to find alternative vessel
- D eventually offered substitute vessel which would have delayed shipment date, and offered a discount which fell short of sum needed to compensate C for losses it would suffer
- D required C to waive its claims against D
- C accepted under protest

## *The Cenk K cont.*

- Determined in arbitration that waiver voidable for economic duress
- Appeal dismissed (Cooke J)
- Repudiatory breach + manoeuvring thereafter into position of weakness (based on earlier misleading assurances) + waiver demand = illegitimate pressure
- No reasonable alternative but to submit to pressure

# The influence of equity and its limits

- Illegitimacy vs unconscionability – closely aligned
- Not only is duress closely aligned with principles derived from undue influence and unconscionable bargains but contours of lawful act duress need to reflect remedies which equity already provides
- *“Unconscionability is not an overarching criterion to be applied across the board without regard to context. Were it so, judges would become arbiters of what is morally and socially acceptable. Equity takes account of the factual and legal context of a case and has identified specific contexts which call for judicial intervention to protect the weaker party”*

# Inequality of bargaining power and good faith contracting

- These doctrines do not exist in English common law
- Tension between those doctrines and certainty
- English law relies instead on piecemeal solutions to demonstrated problems of unfairness
- Absence of those doctrines restricts scope of lawful act duress
- Role of legislature to set standards of moral and social acceptability, not courts
- Very restrictive approach to lawful act duress: *“Against this commercial background the pressure applied by a negotiating party will very rarely come up to the standard of illegitimate pressure or unconscionable conduct”*

# CTN Cash and Carry and the 'BFD'

- Important CA decision which featured prominently in CA's reasoning in this case
- C traded at arm's length with D, from whom it purchased consignments of cigarettes
- D was sole distributor in England of certain popular brands
- D was not contractually bound to sell to C and each sale was a separate contract
- D gave C credit facilities which D could withdraw at its discretion at any time
- C ordered a consignment which was delivered by D to wrong warehouse
- D agreed to redeliver that consignment to correct warehouse but consignment stolen before that could be done
- D erroneously believed that goods were at C's risk and demanded payment
- C initially refused but paid when D threatened to withdraw credit facilities in future dealings
- C brought proceedings to recover the sum paid, alleging economic duress

# CTN cont.

- Claim failed at first instance and appeal dismissed
- 3 features identified by Steyn LJ: (1) arm's length commercial dealings – monopoly position irrelevant on its own (2) D could lawfully refuse to enter into any future contracts and could also lawfully refuse to grant credit **(3) D thought in good faith that the goods were at C's risk when they were stolen**
- Regarded (3) as “critically important”
- Combination of 3 features meant claim failed
- Implication is that claim would have succeeded if the demand was made in ‘bad faith’ – view shared by learned editors of *Goff & Jones*
- Majority in UKSC take a different view and jettison the reliance placed on a ‘bad faith demand’ in *CTN, CA* in this case and by Lord Burrows – reliance not anchored in legal principle – would extend lawful act duress too far – would create uncertainty – limited utility as very difficult to prove
- So, even if there had been bad faith demand, C would have still failed – key difference between majority and CA and Lord Burrows

# Decision of Lord Burrows

- The lonely newcomer(?)
- BFD as central concept
  - Distinction with *unreasonable* demands
- Agreed on criteria: [78]
  - A threat/pressure;
  - That is illegitimate; and
  - Which causes the claimant to enter into the contract
- Focus on illegitimacy; other elements accepted
- Lawful duress still in its ‘infancy’: [94]



# Decision of Lord Burrows (cont'd)

- Need for certainty and clarity: [93]
  - Reputation of English law at stake
- ‘Range of factors’ rejected: [94]
  - “...in the realm of lawful act economic duress, there is no equivalent problem [cf. *Patel v Mirza*] of a series of rules being applied that are unsatisfactory. On the contrary... the best approach is for the common law to be clarified or developed in a traditional incremental way.”
- Good faith also rejected
  - Too radical
  - Requires courts to adjudicate on morals
  - Will be covered in a few moments...

# Decision of Lord Burrows (cont'd)

- **Focus on the BFD**
  - Illegitimacy stems from the demand, not the threat
  - Blackmail case of *Thorne v Motor Trade Association* [1937] AC 797, 806 (Lord Atkin)
- **Motivation of commercial self-interest ≠ BFD**
  - *DSND Subsea Ltd v Petroleum Geo-Services SA* [2000] BLR 530 at [131]
  - NZ case of *Dold v Murphy* [2020] NZCA 313
    - Refusal of shareholder to sell shares unless he was paid substantially more
  - Even applies in a monopoly situation: *CTN Cash and Carry* at 717-719
- **BFD can obviously be made to further commercial self-interest**
  - Requires that 'something more'

# Decision of Lord Burrows (cont'd)

- Opposite of BFD = good faith demand
  - But not 'good faith' in Leggatt sense
- New rationalisation of previous 'BFD' cases
  - *Borrelli v Ting* [2010] UKPCC 21
    - Opposing scheme for no good reason until liquidators agreed not to investigate director's conduct
  - *Progress Bulk Carriers Ltd v Tube City* [2012] EWHC 273 (Comm)
- Continuing analysis of CoA
- 'Easter egg' reference to unconscionable bargains: [77].

# Decision of Lord Burrows: summary

- (i) Lawful act duress, including lawful act economic duress, exists in English law.
- (ii) Three elements need to be established for lawful act economic duress: an illegitimate threat; sufficient causation; and that the threatened party had no reasonable alternative to giving in to the threat.
- (iii) As the threat is lawful, the illegitimacy of the threat is determined by focusing on the justification of the demand.
- (iv) A demand motivated by commercial self-interest is, in general, justified. Lawful act economic duress is essentially concerned with identifying rare exceptional cases where a demand, motivated by commercial self-interest, is nevertheless unjustified.
- (v) In relation to a demand for a waiver by the threatened party of a claim against the threatening party, a demand is unjustified, so that the lawful act economic threat is illegitimate, where, first, the threatening party has deliberately created, or increased, the threatened party's vulnerability to the demand and, secondly, the "bad faith demand" requirement is satisfied. The demand is made in bad faith where the threatening party does not genuinely believe that it has any defence (and there is no defence) to the claim being waived.

# Good faith

- No generally implied term of GF + fair dealing

- *Walford v Miles* [1992] 2 A.C. 128

- But does exist where:

- Parties expressly agree
- In some types of contract, e.g., employment contracts, insurance contracts (*Ted Baker Plc v AXA Insurance UK Plc* [2017] EWCA Civ 4097), fiduciary relationships / agency agreements

- Lord Leggatt's legacy ('relational contracts')

"In some contractual contexts the relevant background expectations may extend further to an expectation that the parties will share information relevant to the performance of the contract such that a deliberate omission to disclose such information may amount to bad faith... many contracts do not fit this model and involve a **longer term relationship** between the parties which they make a substantial commitment. Such 'relational' contracts, as they are sometimes called, may require **a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty** which are not legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements. Examples of such relational contracts might include some joint venture agreements, franchise agreements and long-term distributorship agreements.

*Yam Seng Pte Ltd v International Trade Corpn Ltd* [2013] EWHC 111 (QB) at [143]

# Good faith: transatlantic perspectives

- Canada recognises economic duress and also requires illegitimate pressure BUT the Supreme Court has recognised a general organising principle of good faith in contractual performance and this may well have significant influence on direction of travel of Canadian jurisprudence because easier to justify interference
- Similarly, US recognises general duty of good faith and fair dealing in contract
  - “Every contract implies good faith and fair dealing between the parties to it”: *Wigand v Bachmann-Bechtel Brewing Co* (1918) 222 NY 272 at 277.
  - UCC § 1-203: “every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.”
  - Restatement (Second) of Contracts § 205: “every contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement.”
- NA might be more open to approach propounded by Lord Burrows
- Ironically, absence of counterpart in English law could be used to justify approach propounded by Lord Burrows

# A Closer Look: the division

- Does Lord Hodge characterise Lord Burrows' approach as an 'extension'? [2]-[3]
  - Is it? Is it too reliant on good faith as a concept? ([95], [133])
- Both majority and dissent emphasise need for clarity
  - Need for law to be clarified/developed in traditional and incremental way
  - Which analytical route achieves that purpose?
  - Reliance on 'shifting sands' of moral behaviour: [126]
- Court of Appeal decided on BFD analysis
  - David Richards, Moylan, Asplin LJJ + Lord Burrows: [132]
  - 4 appeal judges 'for' and 4 'against'!
- BFD depends on facts only known to one party
  - Does BFD requirement -> increase in number of claims?

# A Closer Look: evidence

- Using *CTN Cash and Carry* as an example
  - “Had the defendants made the demand in bad faith, not genuinely believing that the payment was contractually owing, the money would have been recoverable...” (Lord Burrows)
  - *CTN Cash and Carry* was rightly decided (Lord Hodge)
- Risks turning on subjective knowledge?
  - But evidential issues are prevalent in this area, regardless of the test: [118]

# A Closer Look: appellate courts

- Lawful act duress as a slippery concept
  - Academic concerns about its existence
  - How to circumscribe it?
  - Answers Lord Hodge's concerns
- 'Modern approach'
  - Need for law to clarified/developed in traditional and incremental way
  - More limited to case in front of the court
  - Limits claims by way of 'market sentiment'
- 'Traditional approach'
  - Incremental development...
  - ... but identifying rules from principles, policies and purposes ≠ creating rules
  - Better fulfilment of appellate function?
- Lord Burrows as 'modern traditionalist'?

# Questions...

