

LAWFUL ACT ECONOMIC DURESS: THE SUPREME COURT EMPHASISES NARROW APPLICATION OF DOCTRINE

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Can a claimant escape a contract that a defendant coerced them to enter into on the basis of threats to do something legal but potentially economically devastating to the claimant? That was the question addressed recently by the UK Supreme Court in *Pakistan International Airline Corporation v Times Travel (UK) Ltd*¹. Though the Supreme Court affirmed the existence of a doctrine of lawful act economic duress, the decision also makes it quite clear that the doctrine only applies in a rare set of circumstances. On the facts of the case in question, the doctrine did not apply, and the Supreme Court therefore found against the claimant.

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BACKGROUND

Times Travel, the claimant, was a travel agency based in Birmingham. At the time of the dispute its business almost entirely involved the sale of flights to Pakistan on planes owned by the defendant, Pakistan International Airlines, the national flag air carrier of Pakistan and the only airline operating direct flights between the UK and Pakistan. In return for each flight sold, the claimant received commission. This contractual arrangement could be terminated by the defendant with one month's notice.

In 2011 and 2012, a number of other travel agencies claimed that the defendant had failed to pay certain sums due by way of commission for flights sold and started proceedings to recover the unpaid amounts. The claimant, under pressure from the defendant, chose not to join those proceedings. Nonetheless, in September 2012, the defendant reduced the claimant's ticket allocation and gave notice that it would terminate the existing contract at the end of October 2012, as it was fully entitled to do. This would in all likelihood have put the claimant out of business. The defendant proposed new commercial terms and the claimant signed a new contract with the defendant by which it waived any claims it might have for the unpaid commission (the "New Contract").

The claimant later brought proceedings to recover the unpaid commission under the previous contract, alleging that the New Contract should be rescinded on the basis of economic duress. At first instance, the High Court agreed with the claimant, although it accepted that the defendant genuinely believed that the commission was not payable. On appeal, the Court of Appeal held that as the notice to terminate the previous contract was lawful, duress could only be established if the defendant had acted in bad faith during negotiations with the claimant over the New Contract. Since the defendant genuinely believed that it had a defence to the commission claim, the High Court's decision was overturned. The claimant appealed to the Supreme Court.

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The doctrine of economic duress entitles a claimant to rescind a contract where:

1. there is a threat (or pressure exerted) by the defendant which is illegitimate;
2. that illegitimate threat (or pressure) caused the claimant to enter into the contract; and
3. the claimant had no reasonable alternative to giving in to the threat (or pressure).

In this case, it was not in dispute that the claimant entered into the New Contract because of the defendant's pressure, and that the claimant had no reasonable alternative to doing so. The issue before the Supreme Court was whether the pressure exerted by the defendant was illegitimate in circumstances where it was accepted that the termination of the contract which brought about that pressure was lawful.

This is a question of some controversy and it is not hard to see why. As Lord Burrows noted, many contracts are entered into in circumstances involving some form of pressure, in both commercial and non-commercial contexts. If that pressure is unlawful then it is clearly appropriate for the counterparty to be entitled to rescind that contract. However, allowing a party to escape a contract on the basis of lawful pressure could lead to uncertainty and disruption, particularly for commercial parties.

WHEN IS A THREAT OR PRESSURE ILLEGITIMATE?

The Supreme Court was unanimous in its decision that lawful act economic duress exists in principle as a doctrine of English law but concluded that, in this case, it did not entitle the claimant to rescind the New Contract. In reaching this conclusion, Lords Hodge and Burrows took slightly different approaches as to what constitutes an illegitimate threat or pressure.

Both justices noted the importance of clarity and certainty in commercial law, meaning the concept of lawful act duress should not be stated too widely. Rejecting calls for a wide principle of good faith, and observing that there is no doctrine of inequality of bargaining power under English law, meaning that parties can generally pursue their own self-interest in commercial bargaining, they agreed that it will only be a rare case where lawful act duress will be found to exist in the context of such bargaining. They also considered that it is appropriate to focus on the nature and justification of the demand, rather than the legality of the threat or pressure.

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However, Lord Hodge (with whom the other justices agreed), focussed on the influence of equity and the notion of “unconscionability” on the development of the law of duress, noting that in cases where the English courts have found lawful act duress, the courts have treated the relevant conduct as unconscionable, and used “illegitimate” as a synonym for “unconscionable”. Lord Hodge added that unconscionability is not an overarching criterion to be applied across the board, without regard to context, noting that equity takes account of the factual and legal context of a case.

Lord Burrows took a slightly different approach, suggesting that the key issue is whether the demand made by the threatening party is made in “*bad faith*”. A demand to waive a claim where the threatening party does not genuinely believe it has any defence to the claim would likely demonstrate bad faith. Lord Hodge rejected this argument, holding that it was difficult to anchor such an extension of the doctrine in any recognised legal principle and, in the absence of an underlying principle, it would create commercial uncertainty. However, Lord Burrows considered that if the essential guide was whether the defendant’s conduct was unconscionable, that would itself create considerable uncertainty in the realm of commercial contracts.

DID THE DEFENDANT’S THREATS AMOUNT TO LAWFUL ACT ECONOMIC DURESS?

The Supreme Court held that there was no evidence that the defendant used reprehensible means to manoeuvre the claimant into a position of vulnerability. The defendant was entitled, under the pre-existing contractual arrangements, to cut the claimant’s flight allocation and terminate the contract with a month’s notice. The ‘take it or leave it’ offer for the claimant to sign the New Contract (which waived any claims for unpaid commission), while amounting to “*hard-nosed commercial negotiation that exploited [the defendant’s] position as a monopoly supplier*” did not amount to an unconscionable means of applying pressure which would give rise to lawful act economic duress. The defendant’s genuine belief, as found by the High Court, that it had a defence to the claimant’s claim was further evidence that its behaviour was not unconscionable.

Despite the contrasting analysis on what amounted to illegitimate threats in the context of lawful act economic duress, Lord Burrows reached the same conclusion as Lord Hodge, finding that there was no lawful act economic duress in this case as the threatened lawful act was not coupled with a ‘bad faith demand’. In other words, the defendant had a genuine belief that it was not contractually liable to pay the disputed commission.

COMMENT

This decision emphasises the premium placed on commercial certainty in English law and makes it clear that the doctrine of lawful act economic duress will be applied narrowly.

Lawful act economic duress can now only be expected to offer a reprieve in situations where the threatening party behaves in an unconscionable way which the court considers amounts to illegitimate pressure. In case law, the doctrine has been applied in two circumstances. First, where a defendant exploits knowledge of criminal activity. Second, where a defendant has manoeuvred the claimant into a position of weakness to force them to waive a claim. Although the Supreme Court was clear that the doctrine is not restricted to these circumstances only, its decision should serve to limit the application of the doctrine in other areas.

[1] [2021] UKSC 40

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