Singapore Journal of Legal Studies
[2010] 400–416

CONTRACTING UNDER LAWFUL ACT DURESS

NATHAN **TAMBLYN***

This article considers the case law identified in the academic literature as supportive of a doctrine of lawful act duress to determine whether a precise test of lawful act duress can be formulated.

I. INTRODUCTION

The core context of duress considered here is where one party (the 'duressor') threatens to do something, to avoid which the party threatened (the 'duressee') accedes to the duressor's demands and contracts with him on his terms. If what the duressor threatens to do is unlawful, the contract can be set aside, and restitution can be had of any benefits transferred. Unlawful act duress includes duress to the person, duress of goods, and threatened breach of contract. Do the same consequences follow if what the duressor threatens to do is lawful in itself? This is lawful act duress.

Some authors countenance such a possibility.[1] However, the general rule must be that, if it is lawful to do something, it is lawful to threaten to do it.[2] Otherwise a party would not be able to communicate part of his reasoning for adopting a particular stance. More than that, a party might not be able to communicate his stance at all. "This is my last offer" implicitly informs the offeree that, unless the offer is accepted, the offeror will perhaps walk away (a threat not to contract) or maybe issue proceedings (a threat to sue). It also provides the implicit explanation that the alternative of walking away or suing is preferable to any lower offer. The challenge, therefore, is not to rule out all threats of lawful action as illegitimate, but to distinguish between those which are legitimate and those which are not.

A miscellany of cases has been identified in the literature as supportive of lawful act duress. The purpose of this article is to consider those principal cases and determine whether a coherent and singular doctrine of lawful act duress can be formulated with any precision.

---

* Assistant Professor, Faculty of Law, the Chinese University of Hong Kong.

[1] Peter Birks, *An Introduction to the Law of Restitution* (Oxford: Clarendon Press, 1989) at 177-179, 184-185; Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (London: Sweet & Maxwell, 2006) at 22-34; Graham Virgo, *The Principles of the Law of Restitution*, 2nd ed. (Oxford: Oxford University Press, 2006) at 215-220 (who terms it "undue pressure"); Mindy Chen-Wishart, *Contract Law*, 2nd ed. (Oxford: Oxford University Press, 2008) at 336-337.

[2] Enonchong, *ibid.* at 20.

It is also important not to stray into neighbouring doctrines, in particular undue influence and unconscionable bargain, if lawful act duress is to be its own independent doctrine, and not merely a label for instances governed by other doctrines. To guard against that possibility, it is helpful at the outset to attempt to identify the essence of those neighbouring doctrines, and the following is offered by way of description for present purposes.

Undue influence concentrates upon the unfair exploitation by one party of his influence over another, usually shown by a relationship of trust and confidence which produces a transaction which is not readily explicable on ordinary motives.[3] The critical question is whether the influence is so invasive that a party's will is not so much the offspring of his own volition as the record of someone else's.[4]

Unconscionable bargain requires one party to be under a bargaining impairment which puts him at a serious disadvantage, which is exploited by the other party in a morally culpable manner, all of which results in a transaction which is manifestly unfair.[5] It is potentially a wide variety of circumstances which might constitute a bargaining impairment or serious disadvantage, including poverty, sickness, ignorance, lack of assistance, lack of advice, or need of any kind.[6]

This article now proceeds as follows. It starts with those cases which do expressly discuss the possibility of a doctrine of lawful act duress, albeit without any actual finding of duress, in three sections: threats akin to blackmail; threats not to contract; and threats to sue. It then considers those cases said to be consistent with or explicable by a doctrine of lawful act duress, albeit without being reasoned on that basis, in two sections: threats of criminal prosecution; and salvage. The results of the analysis are summarised in the conclusion.

II. Threats Akin to Blackmail

The starting point for lawful act duress is *The Universe Sentinel*.[7] In that case, a union had blacklisted a ship which effectively paralysed her in port, demanding that the ship owners pay money to the union's welfare fund. The ship owners paid the money and the ship was enabled to sail. The owners successfully sought to recover the money as paid under duress. The principal issue for the House of Lords was whether the union's activity was protected by statute. If so, what occurred was lawful, and it was conceded that there was no duress. If not, what occurred was unlawful, and it was conceded that there was duress. Accordingly, duress itself was not a live issue. The majority held the union's activity to be unlawful.

---

3 *Royal Bank of Scotland plc. v. Etridge (No. 2)*, [2001] UKHL 44, [2002] 2 A.C. 773; *R. v. England and Wales (A.G.)*, [2003] UKPC 22 at paras. 21-22 [*R.*].

4 *Drew v. Daniel*, [2005] EWCA Civ 507, [2005] 2 Butterworths Family Court Reports 365 at para. 36.

5 Enonchong, *supra* note 1 at 240; Hugh Beale, ed., *Chitty on Contracts*, 30th ed. (London: Sweet & Maxwell, 2008) at 662-663; Chen-Wishart, *supra* note 1 at 370-371.

6 *Blomley v. Ryan* (1956), 99 C.L.R. 362 at 405 (H.C.A.); *Alec Lobb Ltd. v. Total Oil (Great Britain) Ltd.*, [1983] 1 All E.R. 944 at 961 (Ch.), affirmed on this point but reversed on a different point in [1985] 1 All E.R. 303 (C.A.).

7 *Universe Tankships Inc. of Monrovia v. International Transport Workers Federation, The Universe Sentinel*, [1983] 1 A.C. 366 (H.L.) [*The Universe Sentinel*].

In a very short passage, Lord Scarman said that duress can "of course" exist even where the threat is one of lawful action, depending on the nature of the demand.[8] The only example he gave was blackmail, where he said a demand is often supported by a threat to do what is lawful (like publish information). Lord Scarman then referred to *Thorne v. Motor Trade Association*,[9] itself a blackmail case, and Lord Atkin's statement therein that what one has to justify is not the threat but the demand.[10]

Another case to discuss lawful act duress is *R. v. England and Wales (A.G.)*.[11] There, a soldier serving in the special forces was required to sign a confidentiality agreement, otherwise he would be lawfully returned to his original regiment, the latter said to involve a loss of reputation, exclusion from the social life of the special forces, and a reduced rate of pay. The soldier signed and later sought unsuccessfully to have the agreement set aside for duress. Lord Hoffmann accepted that a threat to do something lawful might amount to duress, but in so saying he only referred to Lord Scarman in *The Universe Sentinel* and the words there praised of Lord Atkin in *Thorne*.[12] He also said that the demand in *R.* (to sign the confidentiality agreement) was reasonable,[13] a further echo perhaps of the language of "reasonable cause" in *Thorne*, as we shall see.

A final preliminary case to consider is *Norreys v. Zeffert*.[14] That case did not expressly refer to lawful act duress, but it is often said to be consistent with such a doctrine. There, a gambler owed a debt which the creditor sought to render enforceable by making it the subject of a compromise agreement. The supposed compromise was that, if the gambler paid the debt, the creditor would not tell the horse racing authorities or his social club or the trade protection societies that the debt was unpaid. It was held by Atkinson J. that there was no agreement on the facts, only an expression of hope by the gambler that he might in the future be able to pay if the creditor were to come back later.

Nevertheless, Atkinson J. went on to say, admittedly *obiter*,[15] that any agreement might not have been enforceable. He said that the threat to report the gambler to the horse racing authorities was a threat to invoke a recognised procedure for the protection of the creditor's business interests, so that refraining from doing so would have been good consideration for any promise to pay the debt. But he said that the threat to inform the gambler's social club and trade protection societies was a threat to defame or an injuring threat, so that refraining from doing so would not have been good consideration for any promise to pay the debt.[16] In so saying, Atkinson J. relied heavily upon the analysis in *Thorne*.

All these cases squarely quadrate lawful act duress with blackmail, and in particular the blackmail case of *Thorne*. That is not inappropriate: blackmail is itself an example of how a threat to do something lawful can be illegitimate (here criminal).

---

8 *Ibid.* at 401.

9 [1937] A.C. 797 (H.L.) [*Thorne*].

10 *Ibid.* at 806.

11 *Supra* note 3.

12 *Ibid.* at paras. 15-16.

13 *Ibid.* at paras. 17-18.

14 [1939] 2 All E.R. 187 (K.B.D.).

15 *Ibid.* at 190.

16 *Ibid.* at 188-190.

As for *Thorne* itself, there, the constitution of a trade association enabled it to insist upon a fine as an alternative to putting a member on a "stop list" for infringing its rules. The question for the House of Lords was whether this amounted to a demand of money with menaces, without reasonable and probable cause,[17] so as to render it blackmail pursuant to the then *Larceny Act*, *1916*.[18] The plea of blackmail was rejected. It was held that a threat to do what was lawful could still be a menace, but that an accompanying demand (*i.e*. the alternative to suffering the threat), if made in furtherance of the association's business interests, rather than with the purpose of injuring the other party, would be a demand made with reasonable cause.

We should return in passing to *Norreys v. Zeffert*. There, Atkinson J. also said that "the mere fact that a person may have a legal right to do something which will injure another is not sufficient justification for the demand of money as the price of not doing it".[19] This statement has been seized upon as supportive of a doctrine of lawful act duress.[20] However, it must be treated with caution. What is clear from *Thorne* is that there is sufficient justification if the demand is made with reasonable cause, and that reasonable cause is readily forthcoming in many everyday scenarios. Lord Wright gave the examples of it being legitimate for an employee to threaten to seek out alternative employment unless paid increased wages, or for someone to agree not to build upon his land if his neighbour pays him money to refrain.[21] Even in *Norreys v. Zeffert* itself, Atkinson J. accepted that the demand of money as the price of not lawfully reporting the gambler to the horse racing authorities would have been justified.

Through *Thorne*, a further link is established with lawful act conspiracy (often termed 'conspiracy to injure'). Again this is not inappropriate, since conspiracy is another example of how doing something lawful can still be illegitimate (here tortious).

The leading case is *Crofter Hand Woven Harris Tweed Co. Ltd. v. Veitch*.[22] There, it was held that a combination wilfully to damage a man in his trade is unlawful, unless the predominant purpose of the combination is an honest attempt to advance the defendants' own legitimate interests. (The tort is made out if the agreement is acted upon and results in damage.) Legitimate interests were not restricted to business interests, but nevertheless frequent reference was made to the case of *Ware and De Freville Ltd. v. Motor Trade Association*.[23] Involving the same defendant as in *Thorne*, this time the trade association put a non-member on its stop list, and instead of pleading blackmail, the claimant alleged that the use of the stop list by the trade association amounted to lawful act conspiracy. That argument was rejected on the basis that the stop list was employed, not to injure the claimant, but to further the business interests of the association. *Ware and De Freville* was itself the basis of the decision in *Thorne*. This point was also expressly noted in *Crofter*.[24] Thus the

---

[17] Lord Wright thought "probable" added nothing to "reasonable": *Thorne*, *supra* note 9 at 817.
[18] *Larceny Act*, *1916* (U.K.), 6 & 7 Geo. V, c. 50.
[19] *Norreys v. Zeffert*, *supra* note 14 at 189.
[20] Virgo, *supra* note 1 at 218.
[21] *Thorne*, *supra* note 9 at 819-820.
[22] [1942] A.C. 435 (H.L.) [*Crofter*].
[23] [1921] 3 K.B. 40 (C.A.) [*Ware and De Freville*].
[24] *Supra* note 22 at 476, Lord Wright.

relationship between blackmail and lawful act conspiracy has been made express. Indeed, in *Clerk & Lindsell on Torts*, in discussing lawful act conspiracy, *Thorne* is cited separately from *Ware and De Freville* as an example of action taken in furtherance of legitimate interests.[25]

In summary, what the cases in this section suggest, flowing as they do from the 'founding jurisdiction' as it were of lawful act duress in *The Universe Sentinel*, is that lawful act duress is closely aligned with blackmail and lawful act conspiracy, so much so that it seems any test of lawful act duress which draws upon these cases would be one which adopted the test articulated in *Thorne* and *Crofter*. Specifically, a threat to do something lawful may be illegitimate if it accompanies a demand made, not in furtherance of the duressor's legitimate interests, but for the purpose of injuring the duressee.

Finally, it is relevant to note that the law relating to blackmail has moved on since *Thorne*. Under the *Larceny Act*, *1916*, in force at the time of *Thorne*, blackmail involved a demand with menaces without reasonable and probable cause. Now, under section 21 of the *Theft Act 1968*,[26] blackmail involves an unwarranted demand with menaces. A demand is unwarranted if the accused has no honest belief that the demand is reasonable or that menaces are appropriate. In other words, the requirement of reasonable cause has been replaced by a requirement that the accused believe the demand to be reasonable and the threat appropriate. It is not necessary that the demand actually be reasonable.

In this latter regard, Lord Wright had suggested otherwise in *Thorne*.[27] But in the same case, Lord Roche thought that an unreasonable demand would simply be evidence that the true purpose of the demand was to injure,[28] and Lord Atkin spoke only in terms of making an honest demand.[29] Further, it is clear from *Crofter*, and even the judgment of Lord Wright himself therein, that a merely honest demand suffices in the analogous context of lawful act conspiracy.[30] At any rate, *Thorne* and *Crofter* aside, any test of lawful act duress which tracks blackmail as the guide to when lawful threats become socially unacceptable (*i.e.* illegitimate) ought to follow legislative updating. So the better approach for lawful act duress is to reflect the *Theft Act 1968*, and thus *Crofter* and the majority in *Thorne*, and inquire whether the duressor was honestly (rather than reasonably) acting in furtherance of his legitimate interests.

III. Threats Not to Contract

A threat not to contract is usually a threat to do something lawful. Yet against that background, the following cases have discussed lawful act duress.

In *CTN Cash and Carry Ltd. v. Gallaher Ltd.*,[31] distributors regularly sold cigarettes to wholesalers. The distributors threatened to withdraw lawfully the

---

[25] Anthony M. Dugdale, ed., *Clerk & Lindsell on Torts*, 19th ed. (London: Sweet & Maxwell, 2006) at 1625.

[26] *Theft Act 1968* (U.K.), 1968, c. 60.

[27] *Supra* note 9 at 818.

[28] *Ibid.* at 824.

[29] *Ibid.* at 807.

[30] *Supra* note 22 at 446-447, Viscount Simon L.C., 469, 477-478, Lord Wright.

[31] [1994] 4 All E.R. 714 (C.A.) [*CTN Cash and Carry*].

wholesalers' credit facility (in that regard, threatened not to continue contracting) unless the wholesalers paid for a consignment of stolen cigarettes which the distributors wrongly believed were at the wholesalers' risk at the time of the theft. The wholesalers capitulated but later sought unsuccessfully to recover the money as paid under duress.

Steyn L.J. was open to the possibility that there might be (or come to be) a doctrine of lawful act duress, but in rejecting the plea of duress in *CTN Cash and Carry* he noted the following three "distinctive features" of the case. First, he said that this was not a protected relationship, but an arm's length commercial transaction.[32]

Second, Steyn L.J. said that the distributors were entitled in law to refuse to contract for any reason or no reason.[33] But that is the entire premise of lawful act duress, that the duressor threatens something lawful. It still leaves open the question of whether or not the lawful threat is legitimate. So if Steyn L.J. was making a point of substance, rather than simply begging the question, the suggestion would seem to be that threatening to refuse to contract might never support a plea of lawful act duress, at least in the context of a commercial transaction.

Third, Steyn L.J. said that the distributors' motive in threatening to withdraw credit was their commercial self-interest in receiving a sum which they honestly thought was due. In such circumstances, he said that it would introduce too much uncertainty into the commercial bargaining process to extend duress to encompass the honest pursuit of a claim in a commercial context.[34] This third point suggests two possible approaches to lawful act duress in the context of threats not to contract.

First, talk of "honest pursuit" of "commercial self-interest" suggests a test already encountered: a threat not to contract might be illegitimate if the accompanying demand seeks a sum of money the purpose of which is not the honest pursuit or furtherance of the duressor's business interests. This clearly parallels *Thorne* and *Crofter*. More than that, this approach is prefigured by Viscount Cave L.C. in *Sorrell v. Smith*.[35] That is another case of lawful act conspiracy (and in terms of pedigree, that case also endorsed the decision in *Ware and De Freville*, the precursor to *Thorne*, and was itself followed in *Crofter*). In *Sorrell v. Smith*, Viscount Cave (with whom Lord Atkinson agreed) said that if it is lawful to withdraw custom, then a *threat* to withdraw custom is also lawful, "subject always to the condition that the purpose of the threat is to forward [one's] trade interests and not wilfully…injure the trade of another".[36]

A second approach to lawful act duress and threats not to contract, suggested by the need to take account of Steyn L.J.'s third point in *CTN Cash and Carry*, is that a threat not to contract might be illegitimate if supportive of a demand made in bad faith, knowing the sum demanded is not due. There is some academic support for this view.[37] Indeed, Goff and Jones assert that the specific outcome in *CTN Cash and*

32 *Ibid.* at 717.
33 *Ibid.* at 718.
34 *Ibid.* at 718-719.
35 [1925] A.C. 700 (H.L.).
36 *Ibid.* at 714.
37 Enonchong, *supra* note 1 at 29.

Carry would have been different if the distributors knew that the cigarettes were at their own risk.[38] But this approach is too wide to take account of the following case.

In *Alf Vaughan & Co. Ltd. v. Royscot Trust plc.*,[39] one party went into administrative receivership which triggered in another a right to terminate hire-purchase contracts and to retake possession of various vehicles. The receivers wanted to sell the business as a going concern including the vehicles and offered to pay the amount outstanding under the hire-purchase contracts (£34,000). The other party refused to sell unless more was paid (£82,000). The receivers relented and their subsequent attempt to recover the difference was unsuccessful. The case was pleaded as duress to goods, the threat being to repossess the vehicles, but it is clearly consonant with a threat not to contract (a threat not to sell).

Judge Rich Q.C. accepted that the supposed duressor still owned the vehicles and that its consent to their possession by the hirer had been abrogated by the appointment of receivers. Also, he noted that the receivers had a right to apply to court for discretionary relief from forfeiture of the vehicles. Thus he said that the plea of duress depended on whether it would be illegitimate to threaten to retake the vehicles despite the right to apply for discretionary relief. He doubted this, because it would turn a right to apply in the future for discretionary relief into a current guaranteed right. In such circumstances, he said that duress might only arise in "special circumstances" where what the duressor was threatening was "unconscionable".[40] There are three points to make.

First, both *Alf Vaughan* and *CTN Cash and Carry* further undermine the breadth of Atkinson J.'s statement in *Norreys v. Zeffert* that threatening to do something lawful is not sufficient justification for demanding money as the price of not doing it: that is precisely what the court condoned in both *Alf Vaughan* and *CTN Cash and Carry*.

Second, the supposed duressor in *Alf Vaughan* was demanding a sum of money which it knew was not due. For this reason, *Alf Vaughan* has been described as a clear case of bad faith.[41] The outcome of that case suggests that bad faith is not what differentiates between legitimate and illegitimate threats not to contract. Indeed, Burrows has said that bad faith ought to be "largely irrelevant" to a plea of lawful act duress.[42]

Third, some authors share the view expressed in *Alf Vaughan* that lawful act duress ought to be tied to the unconscionable conduct or impropriety of the duressor.[43] Other authors seemingly discount that possibility,[44] preferring instead the question of whether the demand was reasonable[45] (although an honest but unreasonable demand is consistent with the cases discussed in the previous section). There was no elaboration in *Alf Vaughan* as to what might constitute unconscionable conduct.

---

38 Lord Goff of Chieveley & Gareth Jones, *Goff & Jones: The Law of Restitution*, 7th ed. (London: Sweet & Maxwell, 2007) at 344.

39 [1999] 1 All E.R. (Comm.) 856 (Ch.D.) [*Alf Vaughan*].

40 *Ibid.* at 862.

41 Andrew Burrows, *The Law of Restitution*, 2nd ed. (London: Butterworths LexisNexis, 2002) at 238; Chen-Wishart, *supra* note 1 at 336.

42 Burrows, *ibid.* at 238.

43 Birks, *supra* note 1 at 177; Virgo, *supra* note 1 at 219-220; Beale, *supra* note 5 at 617, n. 183.

44 Goff & Jones, *supra* note 38 at 344.

45 Enonchong, *supra* note 1 at 31-34.

Birks too only talks in general terms of improper conduct being that which is socially unacceptable.[46] Virgo suggests that unconscionable conduct might be shown by bad faith on the part of the duressor, such as where the duressor is aware that there are no grounds for claiming the benefit he demands, and a relationship between the parties of which the duressor takes unfair advantage.[47] But the former element is flatly contradicted by *Alf Vaughan*, and the latter element sounds less like compulsion and more like exploitation with its doctrines of undue influence and unconscionable bargain.

At any rate, the demand in *Alf Vaughan* was made in bad faith, and could thus fairly be described as unconscionable, and certainly unreasonable, especially given the size of the demand (more than double that outstanding), and made of a vulnerable party in receivership, yet still the duress plea was rejected. In *CTN Cash and Carry*, at trial the distributors came to accept that the cigarettes were at their risk after all at the time of the theft, and still the court held that the distributors were entitled to keep the money. Sir Donald Nicholls V.C. thought this result "unconscionable",[48] but he too was firm in rejecting the plea of duress in that case. He indicated (unconvincingly) that an alternative claim in unjust enrichment might instead have succeeded.[49] Nevertheless, the clear suggestion seems to be that unconscionability has nothing to do with duress. Or at least, unconscionability is irrelevant to threats not to contract with commercial parties, the fact pattern in both *Alf Vaughan* and *CTN Cash and Carry*.

In *Thorne*, Lord Atkin said that if a party may lawfully do acts in furtherance of his business interests, though they injure another, he may also offer to accept money as an alternative, as long as he is still acting in furtherance of his business interests, and "not for the mere purpose of putting money in his pocket".[50] As to that, *Alf Vaughan* suggests that it is legitimate, in furtherance of one's business interests, simply to put money into the pockets of one's business. This accords with what was said by Lord Wright in *Crofter*, that England being a competitive or acquisitive society, the law has adopted, for better or worse, the test of self-interest or selfishness as justifying lawful acts which inflict harm.[51]

In summary, what the cases in this section suggest is that a threat not to contract, at least with a commercial party, will perhaps never be illegitimate, at least if the accompanying demand seeks to increase profit rather than simply injure the other party. There is no separate element of bad faith or unconscionability in this test. Such issues are internalised and already resolved in favour of the duressor: if the duressor simply seeks to increase his business profit, that is a legitimate enterprise in itself, and so it does not matter that the duressor knows the money is not due.

---

[46] Birks, *supra* note 1 at 177. The examples he gave were blackmail (considered above) and threats to prosecute (considered below).

[47] Virgo, *supra* note 1 at 219-220.

[48] *CTN Cash and Carry*, *supra* note 31 at 720.

[49] Nicholls V.C. tended to favour mistake as the ground of unjust enrichment, but that would not work because it depends on the payor being mistaken, not the payee, the latter being the case in *CTN Cash and Carry* itself. For further doubts about an alternative approach in unjust enrichment on those facts, see Goff & Jones, *supra* note 38 at 344, n. 10.

[50] *Supra* note 9 at 807.

[51] *Supra* note 22 at 472.

IV. Threats to Sue

To return to *CTN Cash and Carry*, Steyn L.J. said, as we have seen, that duress should not encompass an honest claim in a commercial context.[52] By extension, it would seem that a threat to bring civil proceedings to enforce an honest claim will not be illegitimate.

In *Harrison v. Halliwell Landau*,[53] Judge Eccles Q.C. followed *CTN Cash and Carry* to repeat that lawful act duress which sets aside a compromise would be rare.[54] In that case, solicitors issued proceedings against ex-clients for payment of fees, and a compromise was agreed which the ex-clients later sought unsuccessfully to set aside for duress (presumably the threat was pressing ahead with the civil litigation and its full consequences). The judge noted that the allegations of dishonesty had been withdrawn and that there was no residual bad faith, because the solicitors honestly believed that their claim for payment was well founded.[55]

In *CTN Cash and Carry*, Sir Donald Nicholls V.C. noted that the distributors' belief in their claim was not only honest but also reasonable, being based upon counsel's opinion.[56] This might suggest a higher test than that discussed by Judge Eccles Q.C. in *Harrison v. Halliwell Landau* and by Steyn L.J. in *CTN Cash and Carry*. However, Nicholls V.C. does not appear to have required a reasonable belief in order to refute a plea of duress. Rather, he appears to have referred to the distributors' reasonable belief by way of reinforcing the operative factual finding that the belief was honestly held. Thus an honest belief might have sufficed for Nicholls V.C. as well. This is in keeping with the test found in blackmail and lawful act conspiracy, discussed above, of a merely honest belief in the legitimacy of the demand.

There are two further points to discuss of *Harrison v. Halliwell Landau*. First, the judge applied the formula for duress as set out in *DSND Subsea Ltd. v. Petroleum Geo-Services A.S.A.*[57] Now *DSND Subsea* was a case of threatened breach of contract. Breach of contract is unlawful. If there is to be a doctrine of lawful act duress, it must surely have different or extra ingredients which reflect the fact that what is threatened is lawful rather than unlawful. There is an important difference, which would need to be recognised in the respective tests of duress, between threatening another person's rights, and threatening to do nothing unlawful but act pursuant to one's own rights. Thus even if *DSND Subsea* articulates the correct test for unlawful act duress, and even if the elements of duress as identified in *DSND Subsea* were made out on the facts of *Harrison v. Halliwell Landau*, a finding of lawful act duress ought not to follow without more.

Second, the judge in *Harrison v. Halliwell Landau* also saw fit to note that the compromise agreement was not so manifestly disadvantageous as to make it unconscionable for the solicitors to rely upon it.[58] Once again, this sounds less like duress and more like the doctrine of unconscionable bargain. *Harrison v. Halliwell Landau*

---

52 *Supra* note 31 at 719.
53 [2004] EWHC 1316 (QB), [2004] All England Direct Law Reports (Digests) 374 (May).
54 *Ibid.* at para. 91.
55 *Ibid.* at para. 93.
56 *Supra* note 31 at 719.
57 [2000] Building Law Reports 530 (Q.B.D.) [*DSND Subsea*].
58 *Supra* note 53 at para. 97.

does not define unconscionability nor does it seek to reconcile its absence from such cases as *Alf Vaughan*. But of course it did not have to, *Harrison v. Halliwell Landau* being yet another case where no unconscionable conduct was found.

Lawful act duress was not made out in *CTN Cash and Carry* and *Harrison v. Halliwell Landau*, where any threats to sue were made in support of claims advanced in good faith. This leaves open the question of whether a threat to sue might be illegitimate if the claim is advanced in bad faith, in the knowledge that it is unfounded. This is a different scenario from *Alf Vaughan*: there, an unfounded claim was advanced against a threat not to contract rather than a threat to sue. So can a threat to sue be illegitimate?

Sometimes a threat to sue can be a threat to do something unlawful.[59] For example, there is a tort of malicious civil proceedings, but this is restricted to a "few special cases", of which the predominant ones are perhaps bankruptcy and winding-up proceedings.[60] There is also a tort of abuse of process, but this is restricted to those proceedings, even if well founded, whose purpose is not the vindication of the claimant's rights in those proceedings but some ulterior purpose outside the ambit of the claim, so that the suit is used as an instrument of extortion in an unconnected matter.[61] But there is no general tort of knowingly bringing an unfounded claim.[62]

Nevertheless, it is suggested in *Chitty on Contracts* that it may still amount to lawful act duress to threaten non-tortious civil proceedings, if coupled with an unjustified demand, or if it preys upon a particular weakness of the duressee.[63] No citation is given to support the claim about an unjustified demand. As for preying upon weakness, this purports to find support in *Drew v. Daniel*.[64] That was a case in which the nephew of an aged aunt brought pressure to bear upon her to resign as trustee of farm property which was the subject of a family dispute. Ward L.J. cited the passage in *Chitty* and agreed with it.[65] But as Enonchong explains,[66] what the court found was that the "impact" of the threat (*i.e.* its coercive nature) was one relevant factor,[67] among many others,[68] in determining whether the aunt's will had been *manipulated* by the nephew sufficiently to amount to *undue influence*. This is a different inquiry from whether the aunt had decided *for herself* to avoid the threat, albeit with sufficient reluctance and lack of choice that a plea of *duress* might later be sustained.

Contrary to *Chitty*, some authors seem to support the view that a threat to bring non-tortious civil proceedings cannot amount to lawful act duress.[69] This is not

---

59 Dugdale, *supra* note 25 at 995-999; W.V.H. Rogers, ed., *Winfield and Jolowicz on Tort*, 17th ed. (London: Sweet & Maxwell, 2006) at 872-876.

60 *Gregory v. Portsmouth County Council*, [2000] 1 A.C. 419 (H.L.).

61 *Speed Seal Products Ltd. v. Paddington*, [1986] 1 All E.R. 91 (C.A.).

62 *Metall und Rohstoff A.G. v. Donaldson Lufkin & Jenrette Inc.*, [1990] 1 Q.B. 391 at 470 (C.A.).

63 Beale, *supra* note 5 at 620.

64 *Supra* note 4.

65 *Ibid.* at para. 40.

66 Enonchong, *supra* note 1 at 27.

67 *Drew v. Daniel*, *supra* note 4 at para. 41.

68 *Ibid.* at paras. 45-46.

69 Enonchong, *supra* note 1 at 26-28; Virgo, *supra* note 1 at 217-218. Goff & Jones, *supra* note 38 c. 10 discuss the "improper application of legal process" as a separate ground of duress alongside duress to the person, duress of goods and economic duress. Lawful act duress is discussed as an instance of economic duress. The tenor of their discussion concerning the improper application of legal process suggests it is a recognised type of duress only when the proceedings are tortious and therefore unlawful.

inconsistent with *CTN Cash and Carry* and *Harrison v. Halliwell Landau* which, despite their *dicta*, themselves reached no finding of duress. It is also the better view for the following three reasons.

First, the courts have elsewhere expressly confirmed that threats to sue do not amount to improper pressure,[70] or compulsion,[71] or duress,[72] and do not render payments made thereunder involuntary.[73] Instead, the party threatened is expected to resist the accompanying demand and contest the proceedings.

Second, this is entirely consistent with the courts' refusal to recognise any general tort of knowingly bringing an unfounded civil claim. It would subvert that clear policy decision if threats to do so were actionable.

Third, it would anyway be somewhat contradictory to recognise such threats. A claim of lawful act duress is itself only advanced through the courts or against a threat of civil proceedings. A duressee now invoking legal process ought to have engaged with it earlier when the threat was made, rather than submit to the demand and re-open the dispute at a later date. Indeed, it would in theory be possible for a dispute to be perpetually revived by the parties alternating in their pleas of lawful act duress by threats to sue, thereby fatally undermining the reliability of settlement agreements and the desirable value which they represent of bringing an end to disputes and litigation.

Of course, a party might not engage with legal process at an earlier stage if he was under some sort of impairment which prevented that possibility. But the idea of being under an impairment is more directly addressed by those doctrines which concern exploitation. In *Drew v. Daniel*, for example, the aged aunt was under an impairment in terms of her vulnerability and lack of advice, but that sustained a plea of undue influence, not duress.

None of this is to say that compromise agreements of claims dishonestly advanced are always binding, only that any ability to set them aside has nothing to do with lawful act duress by threats to sue. For example, in *Huyton S.A. v. Peter Cremer GmbH & Co.*,[74] a case of threatened breach of contract (*i.e.* unlawful act duress), Mance J. doubted that a "compromise" achieved by a party who had no belief in his claim was a compromise at all or furnished any consideration to support the agreement.[75] That suggests an alternative way of attacking the compromise of a bad faith claim.

V. Threats of Criminal Prosecution

Cases involving the threat of criminal prosecution invoked the equitable language of undue influence. That was at a time when duress at common law only recognised duress to the person. Some authors suggest that these cases are now better viewed as instances of lawful act duress.[76]

---

70 *Woolwich Equitable Building Society v. IRC*, [1993] A.C. 70 at 161, Lord Keith.
71 *Ibid.* at 165, Lord Goff.
72 *Ibid.* at 184, Lord Jauncey.
73 *Mason v. New South Wales* (1959), 102 C.L.R. 108 at 144, Windeyer J.
74 [1999] 1 Lloyd's L.R. 620 (Q.B.D.).
75 *Ibid.* at 637. See too: *Vantage Navigation Corp. v. Suhail and Saud Bahwan Building Materials L.L.C., The Alev*, [1989] 1 Lloyd's L.R. 138 at 146 (Q.B.D.).
76 Birks, *supra* note 1 at 184-185; Virgo, *supra* note 1 at 216-217; Chen-Wishart, *supra* note 1 at 336, 342.

The leading case is *Williams v. Bayley*.[77] There, a son forged his father's signature on promissory notes given to a bank. The promissory notes were not honoured and the forgery was discovered. The bank insisted upon the father paying the debt and providing security for it, on the understanding that the son would otherwise be prosecuted for fraud, with a certainty of conviction, and carrying with it the punishment of transportation for life. The father agreed to pay the debt and provide security in consideration of the promissory notes being delivered up to him. Subsequently the father successfully sought to have his agreement declared invalid.

Lord Cranworth L.C. said that this was an agreement to stifle a prosecution and therefore illegal or invalid.[78] Lord Chelmsford agreed and said that this was the foundation for his opinion that the agreement was extorted by undue pressure.[79] He also said that the father had not entered into the agreement freely and voluntarily, and that the agreement would be set aside as an instance of there being inequality between the parties of which the bank took unfair advantage.[80] But this latter formulation sounds less like duress and more like unconscionable bargain.

Lord Westbury (the third and final judge hearing the appeal) said that a contract to give security for the debt of another was a contract without consideration, and so especially required it to be entered into freely and voluntarily, which the father had not done in that case.[81] Lord Westbury also said that the agreement was invalid on public policy grounds because the bank concealed its knowledge of a crime from the authorities in order to extract private gain for itself.[82]

Williams v. Bayley was further explained by the Court of Appeal in *Flower v. Sadler*.[83] There, a person was employed to collect rents but failed to account for a sizeable sum. His employer threatened to prosecute him for embezzlement, and to secure the debt the employee endorsed bills of exchange drawn up by a third party. The latter subsequently sought to argue that the employer could not rely upon the bills of exchange because their endorsement amounted to an agreement to stifle a prosecution. The court disagreed; there had been no *agreement* to stifle a prosecution or otherwise, and a creditor was entitled to threaten his debtor in strong terms so as to secure the debt. *Williams v. Bayley* was distinguished because, there, the security was given by the father, not by the debtor, either without consideration, or the only consideration being the delivery up of forged documents (and thus invalid for stifling any criminal prosecution).

Another case to consider is *Mutual Finance Ltd. v. John Wetton & Sons Ltd*.[84] There, a finance house obtained a guarantee from a family company to secure a debt incurred by a member of the family (another son) who had forged signatures to an earlier guarantee. This was obtained by threatening to arrest the son for forgery. The finance house knew that the later guarantee was only given because the forger's father was in such a state of ill health that the criminal prosecution of his son was

---

77 (1866), L.R. 1 H.L. 200.
78 *Ibid.* at 213.
79 *Ibid.* at 213-214.
80 *Ibid.* at 216.
81 *Ibid.* at 218-219.
82 *Ibid.* at 220-221.
83 (1882), 10 Q.B.D. 572 (C.A.).
84 [1937] 2 K.B. 389 (K.B.D.) [*Mutual Finance*].

likely to endanger his life. It was held that the guarantee could be set aside. Porter J. followed *Williams v. Bayley* and said that the second guarantee could be set aside for undue influence, and that the family company had obtained no benefit at all from the transaction.[85]

Both *Williams v. Bayley* and *Mutual Finance* seemingly involved two issues: whether the agreement was invalid as a matter of public policy for stifling a prosecution; and whether it was invalid for duress or undue influence. In *Goff & Jones*, it is suggested that these two questions are distinct but in practice shade into one another.[86] In *Williams v. Bayley*, Lord Chelmsford certainly treated the two issues as interdependent. Also, in *Mutual Finance*, Porter J. seemed to acknowledge the point that, in all cases where undue influence was based upon a threat of criminal prosecution, the sole consideration for the impugned contract was the stifling of the prosecution. Rather than separate out those two issues, Porter J. instead sought to bring the case before him within that account.[87]

The two issues are best viewed as interdependent, for the following reasons. In *Williams v. Bayley* and *Mutual Finance*, although the duressee was said to obtain no consideration in return for giving the security, of course there was the practical benefit of averting the criminal prosecution of the son. But that consideration was void as a matter of public policy, in that it stifled a public prosecution, and only for the private gain of the duressor. Once the only consideration had been set aside, all that remained was the threat.

But does that threat amount to actionable duress? If, contrary to the facts, money had been paid over pursuant to those security agreements, would the loss simply lie where it fell, or would the money have been recoverable? Some authors suggest it would have been recoverable for duress, noting that illegality would be no defence to any restitutionary claim because the parties were not *in pari delicto* (given that one party was under duress).[88] But this still begs the question why a threat to prosecute someone guilty of a crime amounts to duress in the first place.

Virgo suggests that the cases are explained by the dual test of whether the duressor honestly believed in the legitimacy of his claim, and whether the relationship between the parties was such that the duressor can be said to have taken unfair advantage of the duressee.[89] Once again, this latter element sounds less like duress and more like exploitation. But at any rate, the claim was legitimate in the above cases, in as much as the debt was owed and a crime had been committed. Further, the duressor was not taking any advantage of the relationship between duressor and duressee. Goff and Jones can be taken as suggesting that these threats of criminal prosecution amounted to duress because they were an improper application of the legal process.[90] But that too still begs the question why the threats were improper. Chen-Wishart suggests that this was because the demand was made against the wrong party (*i.e.* not the debtor), and used inappropriate means

---

[85] *Ibid.* at 395-397.
[86] *Supra* note 38 at 313.
[87] *Mutual Finance*, *supra* note 84 at 396-397.
[88] Burrows, *supra* note 41 at 239; Virgo, *supra* note 1 at 216; Goff & Jones, *supra* note 38 at 313.
[89] Virgo, *ibid.* at 219-220.
[90] *Supra* note 38 at 313.

to support the demand by leveraging upon the state's (not the duressor's) right to prosecute.[91]

There is an initial attraction in this latter approach. It has the potential to tie in with blackmail, where one explanation for the criminality of that activity is that the offender is extracting an advantage for himself unfairly through leverage derived from using someone else's interest, specifically the interest in receiving information of the person to whom publication is threatened.[92] But this has been criticised for assuming that the information interest belonged to someone else in the first place,[93] and it should be noted that markedly different rival theories for blackmail continue to be advanced with no academic consensus settling upon any one explanation.[94] Furthermore, it is doubtful that criminal prosecution is solely the interest of the state, to the exclusion of any interest in the victim of crime, such that it would be illegitimate for a victim of forgery to threaten recourse to prosecution. Indeed, *Flower v. Sadler* can be taken as authority against such a claim.

The point remains, however, that the demand, and not only the demand but also the threat, was made against the "wrong" party, and we can incorporate this into an explanation of why threats of criminal prosecution might amount to duress. The duressor threatens something lawful, the prosecution of a debtor who is also guilty of a crime, but he does not threaten the debtor or make a demand of the debtor. Instead he threatens a third party, whose relationship with the debtor renders the threat both coercive and causative of the subsequent agreement which accedes to the duressor's demands, as the duressor intended. The only consideration flowing to the third party is the promise not to prosecute the debtor, but this is invalid as a matter of public policy. So while the duressor threatens to do something lawful, the threat itself is inappropriate because it is made against a third party, and the accompanying demand (for money in return for stifling that prosecution) is unlawful.

This might appear to provide a tidy explanation of why threats of criminal prosecution amount to lawful act duress. However, it runs into the problem of being inconsistent with the other explanations of lawful act duress considered in previous sections. In those cases considered earlier, it sufficed to exculpate the duressor that he honestly believed that he was advancing his legitimate interests, or that he honestly believed that his use of threats was appropriate. Yet here, the threat is always inappropriate, being made to a third party, and the demand is always unlawful, for public policy reasons, all this regardless of what the duressor believes, indeed in spite of his attempts to act honourably in seeking to secure payment of a debt actually owed. For example, in *Williams v. Bayley*,[95] Lord Westbury was explicit in pointing out that he meant no reproach on the character of the duressor in that case, even acknowledging that the duressor may fairly have thought himself to be doing his best for the family of the forger—yet still the security was set aside. It seems, therefore, that in threats of criminal prosecution, the honesty and purpose of the duressor, exceptionally, have no role to play.

---

[91] *Supra* note 1 at 337.

[92] James Lindgren, "Unravelling the Paradox of Blackmail" (1984) 84 Colum. L. Rev. 670.

[93] Joseph Isenbergh, "Blackmail from A to C" (1993) 141 U. Pa. L. Rev. 1905 at 1916-1918.

[94] For examples of diverse rival theories for blackmail, see the symposium papers collected at (1993) 141 U. Pa. L. Rev. 1565-1991.

[95] *Supra* note 77 at 221-222.

This might suggest that lawful act duress is not a unified doctrine but a series of *sui generis* exceptions. However, these cases of threatened criminal prosecution can be (more) easily explained without recourse to lawful act duress, which in turn also leaves lawful act duress more coherent.

Any contract founded upon an agreement to stifle a prosecution is void as a matter of public policy, and if any money paid over pursuant to that agreement is to be recoverable (an open question), it could be on the basis of total failure of consideration, given that the only consideration was a promise not to prosecute, a promise which by law cannot be proffered or enforced. If a defence of illegality is invoked, the *fact* of the threat might be sufficient to render the duressee *non in pari delicto*, without needing to go so far as to say that the threat also amounts to actionable duress.

VI. Salvage

Some authors suggest that the law relating to salvage provides further support for lawful act duress.[96] The explanation given by Enonchong is that salvage contracts are set aside because the threat not to rescue (a threat not to contract), although lawful, is illegitimate to the extent that it exploits the salvee's emergency, when the accompanying demand for payment is unreasonable or exorbitant.[97] In fact, salvage provides very little analogy with lawful act duress, for the following reasons.

First, while some salvage cases can no doubt be explained by a concern to protect the salvee, this involves the doctrine, not of duress, but of unconscionable bargain. Enonchong himself uses the word "exploit", which gives the game away. S.A. Smith, while attempting to find a justification for duress more generally (and not lawful act duress specifically), suggests that these salvage contracts are similarly set aside for exploitation. He says that, to the extent that the contracts are substantively unfair, they constitute an enrichment for the salvor, unjustly obtained because the true consent of the salvee was abrogated by his "state of necessity".[98] But Smith openly acknowledges that "state of necessity" cases do not form part of the law of duress, and are better addressed as part of a doctrine of unconscionable bargain.[99] Other authors also address such salvage cases in the context of exploitation and unconscionable bargain.[100]

Second, these explanations are only half the story in salvage. Part of the driving force behind the law of salvage is a desire to encourage salvage, especially professional salvage. Under modern law, a salvage agreement can be set aside, or *modified*, if its terms are inequitable, or if the payment is in an excessive degree too large *or small*.[101] This was the position also under the old common law.[102] Thus salvage, unlike duress, is not just about setting aside agreements, but also about rewriting them, potentially even in favour of the salvor (the supposed duressor).

---

96 Enonchong, *supra* note 1 at 32-33; Chen-Wishart, *supra* note 1 at 336.

97 Enonchong, *ibid.* at 32-33.

98 S.A. Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) at 326-337.

99 *Ibid.* at 337-340, 364.

100 Burrows, *supra* note 41 at 268; Virgo, *supra* note 1 at 278.

101 *International Convention on Salvage, 1989*, 28 April 1989, 1953 U.N.T.S. 165, art. 7 (entered into force 14 July 1996) [*1989 Convention*], as enacted by the *Merchant Shipping Act 1995* (U.K.), 1995, c. 21.

102 *Silver Bullion* (1854), 2 Sp. Ecc. & Ad. 70, 164 E.R. 312; *The Phantom* (1866), L.R. 1 A. & E. 58.

Third, salvage agreements can be modified even if they were entered into *without* the influence of danger (*i.e.* in the absence of, or independent of, any threats).[103] Now in duress, there is a debate as to whether the threat might be a contributory cause or must be the predominant cause of any subsequent agreement. Nevertheless, the threat must certainly have been causative in some form. A counter-example is provided by the Australian case of *Crescendo Management Pty. Ltd. v. Westpac Banking Corp*.[104] There, the duressee sought to impugn a mortgage, but the court rejected the plea of economic duress once it found that the mortgage had been executed *before* any threats had been made.[105] Thus the requirement of causation in duress is yet another difference from salvage.

Finally, a salvor's unreasonable refusal to contract leaves the salvee potentially facing death, an unmeritorious position for the salvor to adopt, to put it mildly. Combined with the public policy of encouraging salvage, this perhaps explains why it is now a criminal offence to fail to render assistance, when otherwise safe to do so, to any person in danger of being lost at sea.[106] A threat not to contract in salvage may thus be a threat to commit a crime. This is a long way from cases like *CTN Cash and Carry* and *Alf Vaughan* where a threat not to contract, even in bad faith, but in the ordinary course of business, and without threat to life, was perfectly tolerated.

In this latter regard, it is not proposed that a further test of illegitimacy for lawful act duress be whether the duressee's life was imperilled. None of the cases considered in previous sections required as much. Further, it would fail to address the evil at hand. Specifically, the evil is not that a person whose life is imperilled is *threatened* with no assistance, but that the person whose life is imperilled is in fact *given* no assistance. The latter evil can only be addressed by creating a duty to contract in such circumstances, as is the case with salvage.

VII. Conclusion

A review of the miscellaneous cases said to support a doctrine of lawful act duress reveals the following conclusions. First, no case has actually been decided upon grounds of lawful act duress.[107] Second, to the extent that a unified doctrine of lawful act duress can be identified, it is an extremely narrow one—which is not inappropriate, given that what the duressor threatens to do is of course lawful. Third, that test is, again appropriately, aligned with other examples of what might be termed 'lawful act illegitimacy', namely blackmail and lawful act conspiracy. Fourth, threats to sue are never illegitimate. Fifth, threats to prosecute can only be brought within a doctrine of lawful act duress at the risk of fragmenting it, but are easily explained on other grounds without resorting to or distorting a doctrine of lawful act duress, and are thus better dealt with separately.

A test for lawful act duress can be identified in the following terms. A threat to do something lawful will be illegitimate if the accompanying demand has as

---

[103] *1989 Convention*, *supra* note 101, art. 7.
[104] (1988), 19 N.S.W.L.R. 40 (C.A.).
[105] *Ibid.* at 47.
[106] *1989 Convention*, *supra* note 101, art. 10 and the *Merchant Shipping Act 1995*, *supra* note 101, Sch. 11, Part II, para. 3.
[107] Chen-Wishart, *supra* note 1 at 336.

its predominant purpose the injury of the duressee rather than the honest (but not necessarily reasonable) pursuit of the duressor's own legitimate interests. In a commercial context, legitimate interests include simply increasing profit, and so threats not to contract, made with a view to increasing business profit, will not be illegitimate.