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CONSTRUCTING LAWFUL ACT DURESS

Times Travel (UK) Ltd v Pakistan International Airlines Corpn

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The debate over whether the doctrine of lawful act duress exists has been settled in the affirmative by the UK Supreme Court in Times Travel (UK) Ltd v Pakistan International Airlines Corpn. However, the elements by which one establishes lawful act duress was the subject of disagreement between Lord Hodge (who delivered the majority judgment) and Lord Burrows. The disagreement stems from how illegitimate pressure should be constructed. Should illegitimate pressure be ascertained from all the circumstances—without the necessity for a more detailed analytical structure? Or given the lawful nature of the threat, should one focus on what renders the demand unjustified, and require proof of a bad faith demand and conduct which created or increased the victim's vulnerability? We examine the debate over the existence of the doctrine, how it should be analysed, and how the answers are impacted by the existence of other legal controls over bargaining power and the value placed on the freedom of contract.

I. Introduction

In *Times Travel (UK) Ltd v Pakistan International Airlines Corpn*,[1] the United Kingdom ("UK") Supreme Court confirmed the existence of the doctrine of lawful act duress. In doing so, it settled the debate over whether the doctrine should exist in English law. While the English Court of Appeal in *CTN Cash and Carry Ltd v Gallaher Ltd*[2] recognised the existence of the doctrine, it has been positively applied in only two cases. Some commentators argue that the two cases are better explained as instances of unlawful act duress due to certain unlawful acts done in the course of dealing. In the interest of legal certainty and the avoidance of protracted litigation, it has been proposed that there should be no doctrine of lawful act duress, and that only unlawful acts can give rise to illegitimate pressure. In confirming the existence of lawful act duress, the Supreme Court had to grapple with the uncertainty that attends allowing lawful conduct to be regarded as illegitimate pressure.

Reduced to its essence, the duress claim in *Times Travel* sought to rescind a new agency agreement with Pakistan International Airlines Corporation ("PIAC")

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1 [2021] UKSC 40 [*Times Travel*].

2 [1994] 4 All ER 714 (CA) [*CTN*].

that replaced an earlier agreement, under which a number of UK travel agents had brought claims for the commission due. PIAC exercised its contractual right and gave notice to terminate the existing agreement. To induce the travel agents to sign the new agreement which contained less generous terms for commission, PIAC exercised its rights to reduce the ticket allocation for the duration of the notice period. To sign on to the new agreement, a travel agent was required to give up all accrued claims for commission and promise not to participate in proceedings arising from the earlier agreement. The business of the claimants in *Times Travel* were critically dependent on the sales of PIAC tickets, as their principal clientele was the local Pakistani community. As they would fold up without selling PIAC tickets, the claimants felt they had no choice but to enter into the new agreement. All of PIAC's acts were lawful. Thus, the issue arose whether lawful act duress applied for rescission of new agreement. At first instance, Warren J held that lawful act duress was established. The Court of Appeal disagreed. The Supreme Court agreed with the Court of Appeal that lawful act duress did not apply. However, it was divided on the analytical approach to be taken for lawful act duress.

Lord Hodge, who delivered the majority opinion (with whom Lord Reed, Lord Lloyd-Jones and Lord Kitchin agreed), would regard lawful act duress as established in two circumstances. First, the 'blackmail' scenario—where one exploits knowledge of criminal activity to demand a contract; and second, where one uses illegitimate means to manoeuvre another into a position of weakness to force the latter to waive his claim. Lord Burrows' minority judgment arose from his interpretation of the judicial precedents which constitute Lord Hodge's conception of the second set of circumstances. As regards a demand for waiver of a claim, a lawful act economic threat would amount to illegitimate pressure where two elements are satisfied: (i) the party making the demand has deliberately created or increased the other's vulnerability to the demand, and (ii) the former makes the demand in bad faith, that is, the party does not genuinely believe that he has a defence and there is in reality no defence to the claim.[3]

We begin by discussing why the Supreme Court was correct to confirm the existence of lawful act duress.

II. Lawful Act Duress as a Recognised Category of Duress

Despite "[t]he fear of wide-ranging disruption and uncertainty"[4] in the scholarly discourse and the rejection of lawful act duress in certain jurisdictions, the Supreme Court was firmly of the view that the English law of contract recognises the doctrine of lawful act duress. Three reasons were proffered by Lord Burrows. Firstly, in two leading House of Lords' authorities concerned with economic duress—*Universe Tankships Inc of Monrovia v International Transport Workers Federation (The Universe Senitel)*[5] and *Dimskal Shipping Co SA v International Transport Workers*

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3 *Supra* note 1 at para 112.

4 *Ibid* at para 83.

5 [1983] 1 AC 366 at 284 (HL), per Lord Diplock.

Federation (The Evia Luck)[6]—the Appellate Committee chose to speak of "illegitimate" rather than "unlawful" pressure.[7] Secondly, since a threat of lawful action is capable of amounting to the crime of blackmail, "it would be very odd for the civil law of duress not to include threats of lawful acts when the criminal law of blackmail does so".[8] Thirdly, there is a class of cases from the equitable doctrine of (actual, or Class 1) undue influence which might now be reclassified as lawful act duress, though threats involved in those cases are of a reputational or emotional, rather than economic, nature.[9]

Until *Times Travel*, whether the doctrine of lawful act duress should exist in English law was the subject of much debate. The blackmail cases—the line of precedents where a person demanded a contract in return for not exposing criminal activity that would lead to the prosecution of the other contracting party or his family member—were decided before economic duress was recognised. Thus, while *Williams v Bayley*[10] and *Mutual Finance Ltd v John Wetton and Sons Ltd*[11] are today regarded as instances of duress, the actual ground for which the contracts were rescinded was the equitable doctrine of undue influence.

Lawful act duress was acknowledged as possible by Steyn LJ in the Court of Appeal's decision in *CTN*.[12] However, it was also a case where the plea of lawful act duress failed. The defendant, who was a regular supplier of the claimants, delivered a consignment of cigarettes to the wrong warehouse. When the goods were stolen, the defendant erroneously took the view that the risk lay with the claimant. It threatened the claimant that, unless the claimant agreed to pay the purchase price of the stolen consignment, it would not extend credit for future purchases. The defendant was entitled to refuse to enter into any contract with the claimant, whatever the reason. Indeed, no reasons need be provided. The defendant was within its lawful rights to communicate the terms on which it was prepared to deal in the future. While the Court of Appeal recognised the possible existence of lawful act duress, it rejected the argument that there was duress in the circumstances of the case. The exercise of monopoly power was a matter for Parliament, not the courts, to regulate. Moreover, the parties were trading at arm's length. The court also regarded as "critically important" the fact that defendant held the *bona fide* belief that the goods were at the risk of the plaintiff and that it was owed the sum by the claimant. Significantly, *CTN* was an instance where lawful act duress was not established. There are only two reported instances where lawful act duress succeeded: *Borrelli v Ting*[13] and *Progress Bulk Carriers Ltd v Tube City IMS LLC (Cenk Kaptanoglu)*[14].

In *Borrelli,* Ting was the chairman and chief executive officer of an insolvent company who held a crucial minority shareholding in the company. The liquidator proposed a scheme of arrangement to raise more funds. Ting threatened to use the

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6 [1992] 2 AC 152 at 165 (HL), per Lord Goff of Chieveley.
7 *Times Travel*, *supra* note 1 at para 87.
8 *Ibid* at para 88.
9 *Ibid* at para 89.
10 (1866) LR 1 HL.
11 [1937] 2 KB 389 [*Mutual Finance*].
12 [1994] 4 All ER 714 (CA) [*CTN*].
13 [2010] Bus LR 1718 (PC) [*Borrelli*].
14 [2012] 2 All ER (Comm) 855 (HC) [*Progress Bulk Carriers*].

votes he controlled to block the proposed scheme of arrangement. Faced with the prospect of having no funds to continue the liquidation, the liquidators entered into a settlement agreement with Ting. Under the settlement, Ting agreed to withdraw his objection to the scheme of arrangement; in return, the liquidators promised that no claims would be brought against him and all investigations into past misconduct would cease. The Privy Council, in an advice given by Lord Saville of Newdigate, held that Ting had employed illegitimate means in procuring the settlement agreement, "namely by opposing the scheme for no good reason and in using forgery and false evidence in support of that opposition, all in order to prevent the liquidators from investigating his conduct of the affairs of Akai Holdings Ltd or making claims against him arising out of that conduct."[15] The judgment also referred to Ting's "unconscionable conduct",[16] which was constituted by his "failure to provide any assistance to the liquidators; his opposition to the scheme; and his resort to forgery and false evidence in order to further that opposition."[17]

In *Progress Bulk Carriers*, the owners of the *Cenk Kaptanoglu* agreed with the charterers to provide the vessel for the carriage of goods from the Mississippi River to China. Without the approval of the charterers and in repudiatory breach of the charterparty, they chartered the vessel to another party. However, the owners gave assurance to the charterers that a substitute vessel would be provided, and that compensation would be provided for all damages arising from the repudiatory breach. The charterers relied on the owner's assurances and did not seek a substitute vessel. The charterers then commenced negotiations with the cargo receivers for the latter to accept a later shipment. When an alternative vessel was offered, the owners offered a discounted freight rate that did not fully compensate the charterers. The charterers were agreeable to the proposed freight rate but reserved their rights in respect of breach of the original charterparty. The next day, the charterers amended the sale agreement with the cargo receivers which reflected the negotiated price reduction for the later delivery. Later the same day, the owners made a 'take it or leave it' offer to the charterers, that is, the substitute vessel would only be provided if the charterers waived all its claims for loss and damage resulting from the nomination of the substitute vessel outside the contractual laycan and to its late arrival. As the charterers had run out of time, they agreed to the owners' terms under protest. Cooke J affirmed the arbitrator's decision that the waiver agreement was voidable for economic duress. Illegitimate pressure was found by taking into account the entire course of conduct, from the owners' repudiatory breach to the owners' subsequent manoeuvring of the charterers into a position where the owners could drive a hard bargain.

Some commentators have sought to rationalise *Borrelli* and *Progress Bulk Carriers* as unlawful act duress cases. Davies and Day would categorise these two cases as one where the threat is "part of the same chain of events as unlawful conduct";[18] accordingly, there are no true judicial decisions of lawful act duress.

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15 *Borrelli*, *supra* note 13 at para 35.

16 *Ibid* at para 32.

17 *Ibid*.

18 Paul S Davies & William Day, "'Lawful act' duress" (2018) 134 Law Q Rev 5 at 7, 10 [Davies & Day, "'Lawful act' duress"].

Conte proposes viewing the lawful acts in *Borrelli* as being "tainted" by fraudulent means, and thereby rendered unlawful.[19] The first problem with these approaches is that it unduly elevates the importance of the evidence relating to unlawful conduct. In both cases, the unlawful conduct was merely a component of the factual matrix which led to the finding that there was illegitimate pressure. Neither case placed especial emphasis on the element of unlawful conduct. Indeed, without the threatening party's unacceptable exploitation of the position into which he had manoeuvred the counterparty, there would probably be insufficient grounds to find illegitimate pressure. The repudiatory breach in *Progress Bulk Carriers* was merely background; the critical circumstances for the finding of illegitimate pressure were the initial assurances provided by the threatening party and the subsequent insistence on terms when time was running out for the counterparty. Similarly, the emphasis in *Borrelli* was on illegitimate means (of which unlawful conduct was only a part) and unconscionable conduct. In both cases, it was clear that illegitimate pressure involved a holistic evaluation of all the facts, and a value judgment that, in all the circumstances, the pressure went beyond the bounds of what was legally acceptable.

There is much to be said for the desire for certainty in the law. However, insisting on unlawful conduct brings out other problems. Consider the notion of tainting.[20] What is the requisite proximity between the unlawful conduct and the technically lawful threat for the latter to be 'tainted'? Should the gravity of the unlawful conduct affect its potential to taint a subsequent threat to do something lawful? How long should the "chain of events" be stretched? If the unlawfulness involved is merely incidental in the chain of events, should it not count? To be fair to the opponents of lawful act duress, the above cases do involve some element of unlawful conduct. Nonetheless, one should also be mindful that the focus was on the holistic appraisal of the evidence for illegitimate pressure, and that the unlawful conduct was only part of the evidence. Neither case suggested that unlawfulness was necessary.

Opponents of lawful act duress argue that the existence of blackmail in criminal law does not support the existence of lawful act duress in the civil law of contract. This proceeds from the premise that blackmail is criminal in nature; accordingly, a threat which amounts to blackmail would axiomatically fall within the ambit of unlawful act duress.[21] To this we have two replies.

First, insofar as the opponents of lawful act duress seek to dismiss the relevance of blackmail to the question of whether English law should recognise lawful act duress on the ground that blackmail would amount to an unlawful act, they have mistaken the rationale of drawing a parallel between blackmail and lawful act duress. Today, the most cogent theoretical explanations of blackmail are predicated on coercion and exploitation,[22] which is, as many have argued, also the underlying

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19 Carmine Conte, "The Continued Obscurity of Economic Duress" [2010] LMCLQ 333 at 335.

20 For a critique of the concept of 'tainting' in the context of the illegality defence, see Alexander Loke, "Tainting Illegality" (2014) 34 LS 560.

21 *Times Travel (UK) Ltd v Pakistan International Airlines Corp* [2019] 3 WLR 445 at para 53 (CA); Davies & Day, "'Lawful act' duress", *supra* note 18 at 8; Paul S Davies & William Day, "Lawful act duress (again)" (2020) 136 Law Q Rev 7 at 10.

22 David Ormerod & Karl Laird, *Smith, Hogan and Ormerod's Criminal Law*, 15th ed (Oxford: Oxford University Press, 2018) at 1001.

theoretical premise of economic duress.[23] What blackmail and lawful act duress share is this: a threat to carry out an otherwise legal act*, coupled with an element of exploitation*. If the criminal law, being more restrictive and draconian than the civil law, is prepared to criminalise and ascribe penalties to *exploitative* but technically lawful threats through the offence of blackmail, why should the civil law of contract limit the doctrine of economic duress to unlawful threats, especially given their shared agenda of policing *exploitation*?

Secondly, in noting the need for careful handling of the link between blackmail and lawful act duress, Lord Burrows said that one should "exclude[e] the possibility of the crime of blackmail having been committed when considering what counts as lawful act duress".[24] An inference to be drawn from this dictum is that blackmail for the purposes of duress in civil law may not be confined to blackmail as defined in criminal law. The 'blackmail' cases involved, in reality, the doctrine of undue influence. Indeed, it has never been suggested that the elements of criminal blackmail must be proved in order to establish circumstances of blackmail amounting to 'duress' for the purpose of rescinding a contract. The criteria for analysing whether a 'blackmail'-type case amounts to duress depends on whether there is illegitimate pressure, notwithstanding the lawful act.

III. Constructing Lawful Act Duress

How is lawful act duress to be established?

Lord Hodge, who delivered the majority opinion, characterised the judicial precedents on lawful act duress as falling into two types of circumstances.[25] The first is where one exploits knowledge of criminal activity to demand a contract—the 'blackmail' scenario. The second type of circumstance consists in the use of illegitimate means to manoeuvre another into a position of weakness so as to force the latter to waive his claim.

Lord Burrows, while agreeing with the majority that the appeal should be dismissed, adopted a different reasoning for scenarios involving demands for waiver of an existing claim. His Lordship emphasised that the focus in lawful act duress should be on the demand, since the threatened action is something the party is entitled to do. The critical issue is whether the demand is unjustified. In his view, a demand is unjustified where:

> [F]irst, 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.[26]

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[23] Andrew Burrows, *The Law of Restitution*, 3d ed (Oxford: Oxford University Press, 2011) at 274-275; Rick Bigwood, *Exploitative Contracts* (Oxford: Oxford University Press, 2003) at 281.

[24] *Times Travel*, *supra* note 1 at para 88.

[25] *Ibid* at para 4.

[26] *Ibid* at para 136; see also para 112. The concept of the 'bad faith demand' is developed in para 102.

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The unjustified demand, once established, renders the 'lawful act economic threat' illegitimate.

Hence, the most patent difference lies in the different control mechanisms adopted to circumscribe the ambit of this category of lawful act duress. Both approaches require an identification of how the threatening party's actions placed the victim into a vulnerable position or increased the victim's vulnerability. Lord Hodge would then take a holistic appraisal of the means used and proceed to make a value judgment whether the means employed were illegitimate. For Lord Burrows, the value judgment principally turns on the bad faith demand. This entails a determination that the threatening party did not genuinely believe he had a defence to the claim for which the waiver is sought.

IV. Interrogating the Bad Faith Demand

A. *Lord Hodge's Rejection of the Bad Faith Demand*

Since much of the disagreement within the Supreme Court lies in the bad faith demand, it is necessary to subject it to closer scrutiny. According to Lord Burrows, the bad faith demand is firmly rooted in the notion of dishonesty, in the sense that there is "either dishonest assertion of an existing right or the dishonest removal (by waiver) of an existing right."[27] Therefore, insofar as the bad faith demand as applied in the context of extracting a payment, this is to be distinguished from a demand for payment as a pre-condition for entering into a contract, a scenario to which economic duress would not, according to Lord Burrows, apply because there is no pre-existing legal relationship between the parties.[28]

Lord Hodge rejected the bad faith demand as applied in the contexts of (a) extraction of payments and (b) waivers of claims. There is no principled distinction between a case where the demand is made where there is existing contractual relationship between the parties on the one hand and, on the other hand, a case where there is none—whether the demand concerns payment of a sum[29] or waiver of claims.[30] Moreover, the bad faith demand would generate uncertainty.[31] Lord Hodge then proffered further reasons as to why the bad faith demand would not work in relation to each scenario.

As regards the extraction of payment scenario, his Lordship said that the bad faith demand is of "limited utility"[32] because litigants often enter into disputes without an informed idea of their respective rights and obligations; as a result, it would be extremely difficult to prove the stronger party's subjective bad faith.

Regarding the waiver of claims scenario, two additional reasons were given. One of them is that "the proposition that the mere assertion of bargaining power … could

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27 *Ibid* at para 125.
28 *Ibid*.
29 *Ibid* at para 44.
30 *Ibid* at para 54.
31 *Ibid* at paras 50, 55.
32 *Ibid* at para 51.

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without more amount to illegitimate pressure" is not supported by either *Borrelli* or *Progress Bulk Carriers*.[33] Lord Hodge provides another compelling reason as to why the bad faith demand ought to be rejected. His Lordship pointed out that the role of bad faith in *Borrelli* and *Progress Bulk Carriers* is not restricted to the specific sense defined in the bad faith demand, but extends to "the content of the demand" and to "the context in which the demand is made".[34] Indeed, it is the reprehensible nature of the conduct or behaviour of the threatening parties, rather than the presence of belief that they had no defence against the claims sought to be waived, which led to the finding of lawful act duress in these two cases.

B. *Further Concerns with the Bad Faith Demand*

The distillation of the bad faith demand from *CTN* is problematic. The outcome in *CTN* rests on a number of factors, the *accumulation* of which led the Court of Appeal to conclude that the contract was not entered into under duress. However, what Lord Burrows did was to isolate *one* of the factors and elevate it to a general requirement for the application of lawful act duress. As Lord Hodge rightly observed, *CTN* "is authority for what is not [lawful act] duress and *not* for what it is".[35] The difficulty of squaring the bad faith demand with *Borrelli* and *Progress Bulk Carriers* points to a fundamental difficulty with the methodology underlying Lord Burrows' approach. His Lordship sought to distil two requirements from two different lines of cases featuring demands of quite distinct natures: the bad faith demand from *CTN* (demand for payment of a sum), and the creating or increasing vulnerability requirement from *Borrelli* and *Progress Bulk Carriers* (demand for waiver of a claim). The problem with this approach is that the requirement in question might not work beyond the type of cases from which that requirement is extrapolated. Apart from the tension between *Borrelli* and *Progress Bulk Carriers* on the one hand, and the bad faith demand on the other, Lord Burrows' attempt to demonstrate the presence of the creating or increasing vulnerability requirement in *CTN* is also problematic. His Lordship reasoned that "although one cannot say that the defendant [in *CTN*] had deliberately created, or increased, the claimants' vulnerability… the defendant must have known that the claimants were in an exceptionally vulnerable position because of the defendants' monopoly".[36] This is puzzling because knowledge of vulnerability is certainly different from its deliberate creation or heightening of the same. The latter requires some active steps to be taken by the threatening party, not just an awareness of vulnerability. "The postulated satisfaction of the 'bad faith demand'"[37] in *CTN* is, therefore, fundamentally flawed.

Relatedly, insofar as Lord Burrows perceived the bad faith demand to be underpinned by "a workable standard of dishonesty",[38] it is unclear how his Lordship

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[33] *Ibid* at para 57.
[34] *Ibid* at para 56.
[35] *Ibid* at para 43 [emphasis added].
[36] *Ibid* at para 122.
[37] *Ibid*.
[38] *Ibid* at para 125.

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would conceive of the elements required to establish the 'blackmail' category. The three cases which Lord Hodge cited as "exploitation of knowledge of criminal activity" do not involve a demand to waive a claim or to pay a sum, but a demand for the threatened party to assume contractual obligations which did not previously exist. In *Mutual Finance*, the bank which exerted pressure on the older brother to regularise the forged signature on the guarantee document made by the younger brother was the victim of fraud. The bank might have thought it was perfectly justified for it to use the threat of criminal prosecution to obtain the replacement guarantee. However, Porter J held that the pressure amounted to undue influence in equity. Even if the bank thought itself justified to use pressure to rectify the fraud it suffered, what mattered was the judge's view that such pressure was illegitimate. A similar observation may be made of *Williams v Bayley*. Here, the bank had received promissory notes in which the son had forged father's signature. The bank then exerted pressure on the father to undertake the repayment of sums borrowed by the son. This category of cases poses a problem for the bad faith requirement. In these cases at least, whether the demand is to be regarded as justified or unjustified does not depend on whether the threatening party subjectively thought in good faith that it was justified in its actions. Instead, the evaluation involved the judge's value judgment of the threatened actions. While Lord Burrows is correct to say that lawful act duress turns on whether there is an unjustified demand, what constitutes an unjustified demand must necessarily take into account all relevant circumstances. A demand may be unjustified because of the manner by which it co-opts the threat of lawful action to exploit the counterparty's vulnerability.

V. Trajectory for Future Development

The Supreme Court's robust endorsement of lawful act duress stands in stark contrast to the decisive rejection of the doctrine by the Court of Appeal of New South Wales in *Australia and New Zealand Banking Group Ltd v Karam*.[39] Is there a way to rationalise this jurisdictional divergence? Apart from the "vagueness inherent in the terms 'economic duress' and 'illegitimate pressure'",[40] the NSW Court of Appeal also thought that even if the threat or conduct is not unlawful, the agreement might still be set aside on the basis of undue influence or unconscionable conduct, or where there has been a contravention of the relevant provisions in the Trade Practices Act which police unconscionable conduct.[41] The reference to undue influence and unconscionable conduct echoes Lord Hodge's remarks that "the place of lawful act economic duress in English law needs to be seen against the backdrop of the remedies which equity already provides".[42] The upshot is that if there are existing doctrinal or statutory devices available in the threatened party's armoury, this may militate against the development of lawful act duress.

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39 (2005) NSWCA 309 at paras 39-40.
40 *Ibid*.
41 *Ibid*.
42 *Times Travel*, *supra* note 1 at para 23.

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A. *Unconscionable Bargains: Situational or Circumstantial Disadvantage*

The English doctrine of unconscionable bargain requires the claimant to establish, amongst other things, that he suffers from certain inherent special disadvantage or vulnerability, such as being "poor and ignorant",[43] or labouring under "poverty, or ignorance or lack of advice".[44] If one proceeds on the premise, as the Supreme Court did in *Times Travel*, that *Borrelli* and *Progress Bulk Carriers* were correctly decided, a useful inquiry is whether the outcomes of the two decisions can be comfortably accommodated within the doctrinal parameters of unconscionable bargains. A fundamental hurdle of that exercise is that the vulnerable positions in which the liquidators in *Borrelli* and charterers in *Progress Bulk Carriers* were placed do not stem from their inherent attributes or characteristics, but from the *circumstances* in which they found themselves. Would the doctrine of unconscionable bargain or conduct in other common law jurisdictions yield the same result?

In Australia, a distinction has been drawn between 'constitutional' and 'situational' disadvantage in *Australian Competition and Consumer Commission v Samton Holdings Pty Ltd*: the former derives from "age, illness, poverty, inexperience or lack of education", while the latter stems from "particular features of a relationship between actors in the transaction such as the emotional dependence of one on the other".[45] The Supreme Court of Canada in *Uber Technologies Inc v Heller* recently revisited the doctrine of unconscionability, and held that it is circumscribed by two elements: an inequality of bargaining power which stems from some weakness or vulnerability of the claimant, and an improvident transaction.[46] This is demonstrably more liberal than the stringent requirements imposed in the English (or even Australian) doctrine of unconscionable bargains. Apart from 'personal' vulnerability which arises from the characteristics of the claimant personally, the court acknowledged that the vulnerability can take the form of 'circumstantial' vulnerability, which concerns vulnerabilities peculiar to certain situations.[47]

For jurisdictions where the doctrine of unconscionability adopts a notion of vulnerability which extends to situational or circumstantial special disadvantages or vulnerabilities, the argument for developing the doctrine of lawful act duress might be less persuasive than for jurisdictions, such as England and Wales, where the doctrine of unconscionable bargain does not cover situations where the vulnerability of the weaker party is attributable to situational or circumstantial disadvantages.

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[43] *Fry v Lane* (1888) 40 Ch D 312 at 322, per Kay J.

[44] *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1983] 1 WLR 87 at 94-95 (CA), per Peter Millet QC.

[45] (2002) 189 ALR 76 at 92, per French J, followed in *Fair Work Ombudsman v Toyota* [2013] FCCA 1881 at para 65; *Perpetual Trustees Australia Ltd v Manfred Peter Schmidt* [2010] VSC 67 at para 207.

[46] 2020 SCC 16 at para 62.

[47] *Ibid* at para 67.

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B. *Statutory Norms Policing Unconscionable Conduct*

In the UK, the unwillingness of Parliament to implement the recommendations of the Law Commission to extend to small businesses the current consumer protection norms against unfair terms[48] accentuates the role that the common law might play to address exploitative bargains. However, in jurisdictions where the legislature has created robust norms to check exploitative bargaining behaviour, there is less urgency for judicial development of the common law to cover the same terrain.

For example, in Australia, there exists a robust and sophisticated legislative framework to police the exercise of bargaining power through the proscription of unconscionable conduct. Section 21 of the *Australian Consumer Law* proscribes a person, in trade or commerce, from engaging in unconscionable conduct, in relation to the supply or possible supply of—or the acquisition or possible acquisition of—goods or services to or from a person.[49] A cognate provision, concerning the supply or acquisition of financial services, can be found in section 12CB of the *Australian Securities and Investments Commission Act 2001*[50]. The notion of statutory unconscionability embodied in these provisions is not confined to consumer counterparties. Business-to-business transactions,[51] such as those in *CTN* and *Times Travel*, fall within their ambit. Moreover, statutory unconscionability is "not limited by the unwritten law of the States and Territories relating to unconscionable conduct".[52] The court is required to administer the statutory unconscionability standard taking into account a non-exhaustive list of factors identified in section 22 of the *ACL* and section 12CC(1) of the *ASIC Act*. In *ACCC v Lux Distributors Pty Ltd,* the Federal Court adopted the notion that statutory unconscionable conduct involved conduct "not done in good conscience", which is evaluated by considering the current moral or ethical standards applicable to the conduct in issue.[53]

If the conduct in question is not caught by statutory unconscionability, section 20 of the *ACL* and section 12CA of the *ASIC Act* would apply instead. Under these provisions, unconscionable conduct is that under the unwritten law. Its utility lies in the menu of enforcement and remedial options that thereby become available by statute. At common law, unconscionable dealing is a vitiating factor—a reason for rescinding the contract. A victim who suffers loss due to contravention of the above provisions may sue under sections 21 and 20 of the *ACL* (or sections 12CB and 12CA of the *ASIC Act*) for damages or a compensation order. Depending on the severity of the matter, the regulators may bring civil actions seeking pecuniary penalties.

It may fairly be said that in Australia, there exists robust legislation norms which police the exercise of bargaining power. This may explain why the NSW Court

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48 The Law Commission & The Scottish Law Commission, *Unfair Terms in Contract*, Law Com No 292 & Scot Law Com No 199 (February 2005) at Part 5.

49 *Competition and Consumer 2010* (Cth), Schedule 2 [*ACL*].

50 *Australian Securities and Investments Commission Act 2001* (Cth) [*ASIC Act*].

51 An amendment in 2018 extended the protection of s 21 of the *ACL* to a listed public company: *Treasury Laws Amendment (Australian Consumer Law Review) Act 2018*, s 5.

52 *ACL*, *supra* note 49, s 21(4); *ASIC Act*, *supra* note 50, s 12CB(4).

53 [2013] FCAFC 90 at para 23, followed in *PT Ltd v Spuds Surf Chatswood Pty Ltd* [2013] NSWCA 446; *Paciocco v ANZ Banking Group* [2015] FCAFC 50.

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of Appeal in *Crescendo Management* first recognised the existence of lawful act duress, but later in *Karam* reversed course and preferred the use of other equitable and statutory devices to deal with circumstances suggestive of lawful act duress.

C. *Leaving the Regulation of Bargaining Power to Parliament: The Role of Competition Law*

According to Lord Hodge, the restrictive scope of lawful act duress is influenced by the absence of a doctrine of inequality of bargaining power in English law.[54] The circumspection which the Supreme Court adopted in delineating the ambit of lawful act duress reflects the desire to avoid fashioning judicially-created rules on the exploitation of market or bargaining power[55]—an area of law which is demarcated by carefully crafted competition statues and regulations.

One problem with such an approach is that the concerns of competition law are not necessarily about the exploitative conduct or unfair dealings between contracting parties. At the risk of over generalisation, competition law seeks to protect the process of competition with the aim of maximising consumer welfare. A strong bargaining position is a concern only if there are anti-competitive concerns. To press one's advantage arising from a strong bargaining position does not necessarily amount to an abuse of dominant position. There must be shown a dominant position in a relevant market, and an abuse of said dominant position. Hence, a refusal to supply *per se* is not regarded as abusive—though a refusal to supply can be abusive if it is anti-competitive[56] and/or falls under the controversial essential facilities doctrine.[57] There must be satisfied the element of indispensability, *ie,* it is factually or legally impossible to duplicate the input or facility, or its duplication is not economically viable.[58] The requirement that the input or access to the facility must be essential speaks to the critical harm to competition resulting from the refusal to supply. Even if a dominant position in a relevant market can be established in *CTN* (the sole distributor of popular brands of cigarettes)[59] and *Times Travel* (the only airline operating direct flights between the UK and Pakistan),[60] it is doubtful whether the refusal to supply will amount to an *abuse* of a dominant position. The concern of competition law is not necessarily the fairness of the conduct or deal between the contracting parties; its concerns relate to competition in the market.[61]

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54 *Times Travel*, *supra* note 1 at para 26.

55 *Ibid* at para 33.

56 *Istituto Chemioterapico Italiano S.p.A. and Commercial Solvents Corporation v Commission of the European Communities* [1974] ECR 223; *United Brands v Commission* [1978] ECR 207; *BBI/Boosey & Hawkes: Interim Measures* [1987] OJ L286/36; *Napier Brown - British Sugar* [1998] OJ L284/41, [1990] 4 CMLR 196.

57 *London-European Sabena* [1988] OJ L317/47; *British Midland-Aer Lingus* [1992] OJ L96/34; *Oscar Bronner GmbH & Co KG v Mediaprint* (*Oscar Bronner*) [1998] ECR I-7791 [*Oscar Bronner*].

58 *Oscar Bronner*, *supra* note 57 at paras 61-66.

59 *CTN*, *supra* note 2 at 716d.

60 *Times Travel*, *supra* note 1 at para 63.

61 Indeed, as indicated in *Oscar Bronner*, *supra* note 57 at 66: "in order for refusal of access to amount to an abuse, it must be extremely difficult not merely for the undertaking demanding access but for any other undertaking to compete".

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Thus, judicial restraint in checking the exploitation of bargaining positions between parties *inter se* runs the risk of ignoring a problem which competition law is not meant to address.

VI. Conclusion

What is the future of lawful act duress after *Times Travel*? Given Lord Hodge's remark that "there are *to date* two circumstances in which English courts have recognised and provided remedy for [lawful act] duress",[62] the categories merely summarise the doctrine's development to date. One cannot preclude further development of new categories. However, his Lordship stopped short of providing guidance on how lawful act duress should be further developed, save to express the sentiment that an absence of a doctrine of inequality in bargaining power and of a principle of good faith in contracting means that it would be rare for lawful act duress to be established in the context of commercial negotiations. The incremental approach that characterises the common law means that it is perhaps still too early to develop a theory for lawful act duress. *Times Travel* is therefore unlikely to be the last word. From a comparative law perspective, one should be mindful of the context in which *Times Travel* is situated and the values which underpin it: a robust competition law which regulates market power, the judicial reluctance to countenance a general principle of good faith and preferring maintenance of the freedom of contract where Parliament has not spoken. Jurisdictions considering whether to embrace lawful act duress, and if so, whether to go beyond *Times Travel*, will want to consider the nature of the existing checks on the exploitation of market power as well as the values which explain the judicial reservations over developing the common law to check the exploitation of bargaining power.

[62] *Times Travel*, *supra* note 1 at para 4 [emphasis added].

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