

Economic Duress

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Topics Covered

- The principles in outline.
- The *Times Travel* case.
- In what circumstances will lawful acts amount to economic duress?

What is the point of economic duress?

Economic duress is an available ground on which the wronged party can set aside a contract.

If economic duress is established the contract is voidable rather than automatically void.

Economic duress does not give rise to a free-standing cause of action, but setting aside a contract may lead to restitution, or enable a claim to be pursued that would otherwise be precluded.

However, there are related torts which are free-standing causes of action for seeking damages or injunctive relief, particularly (1) causing loss by unlawful means, (2) lawful means conspiracy, and (3) unlawful means conspiracy.

Neighbouring but distinct principles

Economic duress is distinct from other forms of duress, such as physical coercion, threats of violence, or duress to goods. It has only been recognised as such relatively recently, in first instance decisions in the 1970s and in the House of Lords decision in *Universe Tankships Inc of Monrovia v International Transport Workers Federation (The Universe Sentinel)* [1983] 1 AC 366. However, there are earlier decisions which are now recognised as resting on the same principle.

It is also distinct from the equitable concept of 'unconscionable bargain'. That principle is unlikely to apply between two commercial parties, as it involves exploitation by one party of a particular weakness of the other. However, it is not entirely impossible; see *Alec Lobb Garages Ltd v Total Oil (Great Britain) Ltd* [1985] 1 WLR 173, at 190-191.

Similarly, undue influence is distinct but rare in commercial cases.

The requirements

There are three essential requirements for being able to set aside a contract on the ground of economic duress:

1. A threat or pressure exerted by the defendant that is illegitimate.
2. The illegitimate threat or pressure caused the claimant to enter into the contract.
3. The claimant had no reasonable alternative to giving in to the threat or pressure.

These requirements were confirmed by the Supreme Court in *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40; see paragraphs [1], [78] and [79].

Two flavours of economic duress

Economic duress may take the form of threats to carry out unlawful acts. In such cases, it can readily be understood how the threat or pressure is illegitimate.

However, economic duress may take the form of lawful threats, but which are nevertheless regarded as illegitimate in the circumstances. Obviously it is much harder to identify what is illegitimate in this context despite being otherwise lawful.

The *Times Travel* case was concerned with where that line was to be drawn.

An analogy can be drawn with the criminal offence of blackmail, which can be committed where the blackmailer is threatening to do something that is not itself illegal, but the demand is nevertheless an unwarranted demand with menaces.

The facts of the *Times Travel* case

TT was licensed by PIAC to sell tickets, and was paid a commission. TT was almost exclusively reliant on its relationship with PIAC for its business.

PIAC apparently genuinely believed that the commission ceased to be payable and was replaced by 'Net Sales Remuneration'.

A number of travel agents commenced proceedings against PIAC for non-payment of commission. TT did not join this, having been pressured by PIAC not to.

PIAC gave notice to terminate the contract and cut TT's ticket allocation to a level that, if continued, would put TT out of business.

A new agreement was proposed, with a waiver clause abandoning any claim to commission. TT reluctantly agreed.

The decision in the *Times Travel* case

The judge at first instance held that there was economic duress.

That decision was overturned by the Court of Appeal, and the failure of the claim was unanimously confirmed by the Supreme Court.

However, there was a difference of views about where the line between legitimate and illegitimate pressure is to be drawn.

Two views in the *Times Travel* case

The majority (Lord Hodge and others) held at paragraph [3] that “...Times Travel’s claim for lawful act economic duress would not have succeeded in this case even if it had shown that Pakistan International Airline Corporation (“PIAC”) had made what Lord Burrows has defined as a bad faith demand.”

Lord Burrows had a different view, at paragraph [138]:

“Lawful act economic duress was not made out on the facts of this case because the threatened lawful act was not coupled with a bad faith demand. On the facts found by Warren J, TT failed to establish bad faith by PIAC in the specific sense relating to PIAC’s genuine belief as to its not being contractually liable for the unpaid commission. The Court of Appeal correctly applied the “bad faith demand” requirement in this case.”

The law is therefore that a bad faith demand will not suffice.

What is the bad faith demand point?

The point arises from the Court of Appeal decision in *CTN Cash and Carry Ltd* [1994] 4 All ER 714.

The defendant had, under a mistake as to the legal position, demanded payment for some goods it had supplied which had been stolen. The defendant threatened to withdraw its credit facilities unless it was paid. The claimant acquiesced, but claimed for the return of the money.

In that case the economic duress argument failed. It is therefore a decision about what does not suffice.

The fact that the demand was *bona fide* (though wrongly) considered to be valid was regarded as critically important by the Court of Appeal in that case. Such circumstances are extremely likely to defeat a claim, but a bad faith demand does not make a claim.

What is the bad faith demand point?

The majority in *Times Travel* took a cautious approach, holding at paragraph [3] that, “The boundaries of the doctrine of lawful act duress are not fixed and the courts should approach any extension with caution, particularly in the context of contractual negotiations between commercial entities.”

They held at paragraph [52] that lawful act duress ought not to be developed based on the idea of a bad faith demand:

“I therefore do not accept that the lawful act doctrine could be extended to a circumstance in which, without more, a commercial organisation exploits its strong bargaining power or monopoly position to extract a payment from another commercial organisation by an assertion in bad faith of a pre-existing legal entitlement which the other organisation believes or knows to be incorrect.”

What kinds of claims have succeeded?

The majority in *Times Travel* identified two categories of previously successful claims at paragraph [4].

“The first circumstance is where a defendant uses his knowledge of criminal activity by the claimant or a member of the claimant’s close family to obtain a personal benefit from the claimant by the express or implicit threat to report the crime or initiate a prosecution.

The second circumstance is where the defendant, having exposed himself to a civil claim by the claimant, for example, for damages for breach of contract, deliberately manoeuvres the claimant into a position of vulnerability by means which the law regards as illegitimate and thereby forces the claimant to waive his claim. In both categories of case the defendant has behaved in a highly reprehensible way which the courts have treated as amounting to illegitimate pressure.”

What kinds of claims have succeeded?

However, there are very few examples of reported cases in that second category. The judgments in the Supreme Court identified two.

However, it is notable that both of them did involve unlawful conduct (certainly if deliberate breach of contract is counted) as important circumstances.

In *Borrelli v Ting* [2010] UKPC 21; [2010] Bus LR 1718, a settlement agreement undertaking not to pursue the defendant was set aside on the ground of economic duress. The pressure involved obstructing a scheme of arrangement. The means employed included forgery and false evidence and breaches of duties owed as an officeholder. Those were considered important circumstances. However, the case ultimately turned on lawful threats that induced the settlement agreement; see *Times Travel* at [107].

What kinds of claims have succeeded?

The second case is *Progress Bulk Carriers Ltd v Tube City IMS LLC (The Cenk Kaptanoglu)* [2012] EWHC 273 (Comm); [2012] 2 All ER (Comm) 855.

Shipowners had chartered a ship to the claimant, but in repudiatory breach of their agreement chartered the ship to someone else. They provided assurances that a substitute vessel would be provided and that compensation for losses would be provided. The purchasers of the cargo required a discount for the delayed delivery. The shipowner offered a substitute ship but with only a lesser discount, and demanded a waiver of any claims. The claimant agreed under protest, explaining the situation was urgent and they needed to mitigate their losses.

The combination of a prior breach of contract and misleading assurances was crucial in the finding of illegitimate pressure by the (otherwise) lawful threat of not providing a substitute ship.

Conclusion

Economic duress is relatively well established where the threat is to do something illegal or the means employed to exert the pressure that induces the contract are illegal.

Lawful act economic duress is a narrowly confined doctrine. Hardball negotiation and the exploitation of monopoly power is permissible.

Blackmail-type cases are the most clearly established category of situations where a lawful act economic duress case may succeed. This is something to bear in mind in settlement negotiations in litigation generally.

Otherwise, it is difficult to see lawful act economic duress being established in the absence of a civil wrong plus circumstances that make it 'reprehensible'.

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