Pakistan International Airline Corporation v Times Travel (UK) Ltd [2021] UKSC 40

Summary

The Pakistan International Airline Corporation ('PIAC') operated the only airline flying directly between the UK and Pakistan. Times Travel (UK) Ltd was a travel agent, specialising in selling tickets to fly between UK and Pakistan. Most of those tickets were allocated to Times Travel by PIAC, which made available to Times Travel 300 tickets a fortnight. A dispute arose between the two over how much Times Travel was entitled to charge by way of commission for the PIAC tickets that it sold to its customers. PIAC told Times Travel that if it continued to press its claim for unpaid commission, the amount of tickets that it would allocate to Times Travel would be cut to 60 tickets a fortnight. Instead, it proposed that Times Travel enter into a new contract with PIAC governing their relationship, under which Times Travel would agree to waive any claims it might have for unpaid commission. Faced with the alternative – losing 80% of its business selling PIAC tickets – Times Travel agreed to enter the new contract. However, Times Travel later sought to set the new contract aside on the basis that it had been entered into under economic duress, even though PIAC's threat to cut Times Travel's ticket allocation was entirely lawful, and bring proceedings to recover any unpaid commission under Times Travel's earlier arrangement with PIAC. Times Travel's claim was allowed at first instance, but denied in the Court of Appeal.

The UK Supreme Court agreed that (a) in principle, a contract might be set aside for 'lawful act duress', but (b) Times Travel's contract with PIAC could not be set aside on that ground. The UKSC disagreed as to the test that was to be applied to determine whether a contract could be set aside for 'lawful act duress'.

Lord Hodge gave the majority judgment (with which Lords Reed, Lloyd-Jones, and Kitchin agreed). He held that a contract could be set aside for 'lawful act duress' where the defendant engaged in 'morally reprehensible behaviour' ([3]) by threatening that if the claimant did not contract with the defendant, the defendant would do something that they were otherwise entitled to do. Lord Hodge identified two such situations ([4]).

The first was where the claimant agreed to pay the defendant money in response to the defendant's threatening that if the claimant didn't, the defendant would report to the authorities that the claimant, or someone close to the claimant, had committed a crime ([5]-[8]). The second was where the defendant was potentially liable to the claimant, but used 'illegitimate means to manoeuvre the claimant into a position of weakness' and subsequently capitalised on that by threatening to do something they were entitled to do in order to induce the claimant to waive any claims they might have against the defendant ([4]).

Lord Hodge gave two examples of this second situation from the case law: (i) *Borrelli* v *Ting* [2010] UKPC 21, where the defendant former chairman of a company that was being wound up secured an agreement from the claimant liquidators not to sue him for anything he had done while chairman by using a minority shareholding in the company to block the liquidators from doing their jobs for so long that they became desperate to agree to the defendant's terms; (ii) *The Cenk K* (aka *Progress Bulk Carriers* v *Tube City*) [2012] 2 All ER (Comm) 855, where the claimants chartered a ship from the defendant owners in order to allow them to deliver some scrap metal by a certain date, the defendant owners repudiated the contract but promised to provide the claimants with a replacement ship, but dallied so long over doing so that the claimants became desperate for a replacement to be made available to them – at which point the defendants made a 'take it or leave it' offer to the claimants of a

replacement ship in return for waiving all claims that the claimants might have against the defendant in respect of the repudiation of the initial charterparty.

Lord Hodge held that Times Travel's case did not fall into either of his two categories of situation where a contract might be voidable for lawful act duress. PIAC had not manoeuvred Times Travel into a position of weakness that it had then taken advantage of: instead, the 'pressure which it applied to obtain the waiver was the assertion of its power as a monopoly supplier' ([60]).

Lord Burrows held that 'it is a necessary requirement for establishing lawful act economic duress that the [defendant's] demand is made in bad faith in the particular sense that the [defendant] does not genuinely believe that it is owed what it is claiming to be owed or does not genuinely believe that it has a defence to the claim being waived by the [claimant]' ([102]). Lord Burrows went on to extract from *Borrelli* and the *Cenk K* a further requirement applying 'in relation to a demand for a waiver by the threatened party of a claim against the threatening party' that 'the threatening party has deliberately created, or increased, the threatened party's vulnerability to the demand' ([112]).

Lord Burrows went on to find that the 'bad faith requirement' was not satisfied in this case ([115], [138]) – PIAC honestly believed that Times Travel did not have a good claim against them for the amounts of commission Times Travel were saying PIAC owed them.

Lord Burrows went on to consider how the 'bad faith requirement' would apply in a case where the defendant did not procure a waiver of a claim from the claimant but where the defendant obtained a promise from the claimant to pay the defendant money. In such a case, Lord Burrows held, 'The law on lawful act economic duress would be far too wide if, generally, the illegitimacy of the threat turned on whether the threatening party did, or did not, bona fide believe that it was entitled to what was demanded' ([125]). This was because 'ordinary contractual negotiations' would be undermined if A could not safely threaten not to supply goods to B (that B was not entitled to) unless B agreed to pay him money that – A would readily acknowledge – B did not already owe A. It followed that in the context of promises to pay money, the 'bad faith requirement' would only be satisfied where the money that A demanded B agree to pay him was money that A claimed (insincerely) to be owed under an existing relationship between the parties 'which provides a clear and certain standard against which [the] alleged bad faith of [A] can be assessed' (ibid).

Comments

Hodge versus Burrows

There seem to be two principal differences between Lords Hodge and Burrows: (1) the bad faith requirement; and (2) the treatment of promises to pay money.

(1) *The bad faith requirement*. Lords Hodge and Burrows both attached a lot of importance to the differences between them on the role of bad faith in the application of the law on lawful act duress. But it is not clear where those differences lie. Lord Burrows was fairly clear that he thinks there should be relief for lawful act duress in the following situation: (i) A manoeuvres B into a position of weakness, (ii) A asserts *in bad faith* that he has a pre-existing legal entitlement in relation to B, (iii) A demands that B give effect to that pre-existing legal entitlement, and (iv) B is induced to do so by A's threatening that B if does not do this, A will do something A is entitled to do.

Lord Hodge denies that (ii), (iii) and (iv) *on their own* can give rise to relief for lawful act duress: 'I...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' ([52]). But Lord Burrows does not seem to think this either – he seems to agree (at [112]) that (i) is a crucial element in establishing that lawful act duress has been made out.

In emphasising that (i) needs to be made out as well as (ii), (iii) and (iv) for lawful act duress to be made out, Lord Hodge took the position that A's manoeuvring B into a position of weakness has to be done in bad faith: [56], [59]. It is not clear whether Lord Burrows would disagree with that: he merely observes in his judgment that 'it not clear to me what Lord Hodge means by that' ([133]) and expresses concern that a requirement that 'the defendant's conduct must be "reprehensible" or "unconscionable" or using "illegitimate means"' will result in 'considerable uncertainty in the realm of commercial contracts' (ibid). Lord Burrows would probably think that if (ii) is made out, there is no need for any added requirement of bad faith in making (i) out.

It is not clear either whether Lord Hodge would disagree with (ii). Would he say that lawful act duress is made out if A in bad faith manoeuvres B into a position of weakness in support of a demand that A believes is justified in law? It is not at all clear – not least because, in line with Lord Burrows' observation above, it is not clear how in real life A could be said to be acting in bad faith in manoeuvring B into a position of weakness in order to get B to give effect to an entitlement that A believes in good faith that he has against B. In dismissing Times Travel's claim, Lord Hodge *did* observe that 'There are also no findings that PIAC acted in bad faith in making the demands which it did' ([58]) – which might indicate some support for (ii).

Lord Burrows observes that one consequence of the differences between them is that if the demand for money in *CTN Cash and Carry* v *Gallaher* [1994] 4 All ER 714 had *not* been made in good faith, he thinks that 'the claimants would have succeeded in their claim...based on lawful act economic duress. But Lord Hodge takes the contrary view' ([135] – for Lord Hodge's view see [44]). *CTN* was a case where Gallaher demanded that CTN pay for a consignment of cigarettes that Gallaher had delivered to the wrong location, and had been stolen before Gallaher could recover them. Gallaher backed its demand up with a threat not to deliver cigarettes on credit to CTN in future if CTN did not pay up. Gallaher believed that CTN owed it the money for the stolen consignment – and so (ii) was not made out.

Lord Hodge thought that even if (ii) were made out in *CTN*, Gallaher would still *not* have been liable to CTN on the basis of lawful act duress. This was because (i) was not made out: [47]. Lord Burrows acknowledged that there was some difficulty in saying that (i) was made out in *CTN*: 'one cannot say that the defendants had deliberately created, or increased, the claimants' vulnerability' ([122]). But he seemed to think that (i) was made out on the basis that 'the defendants must have known that the claimants were in an exceptionally vulnerable position because of the defendants' monopoly position' and this created 'a compelling analogy to the facts of *Borrelli* v *Ting* and *Progress Bulk Carriers* [*The Cenk K*]' (ibid). The reasoning here seems very shaky (as does Lord Burrows' willingness in the *Times Travel* case (at [132]) to find that (i) was satisfied; something criticised by Lord Hodge at [57]) but what is clear is that the differences between Lords Burrows and Hodge over how *CTN* should have been decided had Gallaher's demand been made in bad faith have *nothing to do* with any differences between them over requirement (ii) ('the bad faith requirement') and *everything to do* with how willing they are to find that requirement (i) ('the manoeuvre requirement') is satisfied.

As the Captain in *Cool Hand Luke* (1967) observed, 'What we've got here is [a] failure to communicate.' (See, in particular paras [45]-[46] in Lord Hodge's judgment where

he says that Lord Burrows 'argues that A's demand for a waiver by B of a claim against A would amount to lawful act economic duress where (i) A did not genuinely believe that it had a defence to the claim..., and (ii) A has deliberately created or increased B's vulnerability to that demand' and says that taking this position 'would extend the doctrine of lawful act duress well beyond' its existing boundaries – when it is very difficult to see much difference between this statement of Lord Burrows' position and Lord Hodge's at [4].) There aren't enough differences between Lords Hodge and Burrows on this first issue to justify the amount of time spent by them on it. It is a shame no one could have got them both in the same room and asked them: What *precisely* is the difference between you on the relevance of bad faith in lawful act duress? So far as I can see, there is very little.

(2) *The treatment of promises to pay money*. Again there is more heat than light in regard to this issue. Lord Burrows says that his bad faith requirement can only be satisfied in the case where (1) B promises to pay A money where A's demand for that money was based on A's asserting (insincerely) that B already owes him that money ([125]). So where (2) A's demand that B pay him that money is not based on a claimed pre-existing right to that money, A is not (and cannot be) acting in bad faith ([135]). Lord Hodge says that this means that Lord Burrows 'accepts that economic duress could not be made out' in situation (2) ([54]).

Not quite. This would mean that Lord Burrows took the view that there would be no relief in the case where A blackmails B into promising to pay him money (Lord Hodge's first situation where lawful act duress will be made out), when Lord Burrows relied on blackmail type cases as a reason for recognising the category of lawful act duress in the first place: [88]-[89]. Instead, Lord Burrows makes it clear that his 'bad faith requirement' was intended 'to set out a limited but clear and workable boundary for what constitutes an unjustified demand – so that a lawful act economic threat is illegitimate – *in the context of the facts with which this case is concerned*' ([135], emphasis added). So Lord Burrows' 'bad faith requirement' is not meant to operate as a *general* limit on the operation of the law on lawful act duress, but only to apply in cases where A claims that he has a pre-existing entitlement against B and demands that B agree to comply with that entitlement, backing up his demand with a threat that if B does not comply, A will do something he is entitled to do.

So how would either Lord Burrows or Hodge handle *Reference*?

> *Reference*. A is one of B's law teachers at university. B writes to A on February 1st, 'I was hoping you could give me a reference for a job I am applying for. The reference should be sent to xxxxxxx. The deadline is February 20th. Do let me know if you would be okay with doing this.' A deliberately does not reply. B waits a couple of weeks and writes again: 'Just following up on my previous email. I was wondering whether you had a chance to do that reference for me – the deadline is in five days.' A then springs his trap: 'I'm sorry – I should have been in touch about this earlier. I'm also sorry to say that I have a new policy of charging students £100 a time to write a reference for them. If you are happy to pay this, I'll get the reference done by your deadline. If not, maybe you could find someone else?' B has no real choice but to agree to pay the fee, as there is no one else who will write a reference for her at such short notice. A writes the reference and invoices B for £100.

B cannot rely on misrepresentation (A is quite right to say 'I should have been in touch about this earlier'!) or unlawful act duress (A is perfectly entitled not to write a reference for B) or undue influence (B is acting under pressure, not influence) to escape having to pay A's bill. Can she rely on lawful act duress?

Lord Burrows does not rule it out. Instead he says that the law on lawful act duress should develop incrementally, from its 'secure base' in allowing relief where (i)-(iv), above, are made out ([135]). It might be thought that allowing relief in *Reference* would be regarded by him as an acceptable 'incremental development' in the law in this area, but it is not clear.

As for Lord Hodge, *Reference* does not fall into either of the 'two circumstances' identified by him as ones 'in which the English courts have recognised and provided a remedy for [lawful act] duress' ([4]). (It should be noted that Lord Hodge's 'second circumstance' is where the defendant gets a claimant to *waive* a claim that she has against the defendant by manoeuvring her, through illegitimate means, into a position of vulnerability where he can threaten her with unpleasant (though lawful, on his part) consequences if she does not agree to waive the claim. Promises to pay money are not covered at all by his 'second circumstance' – when *CTN*, for one, was a case involving a promise to pay money.) It is not clear, then, how he would deal with a case like *Reference*.

It is a shame that in judgments occupying almost 60 A4 pages, and 138 paras, that we should have been given very little idea how the law on lawful act duress would apply in a case like *Reference*. Lord Burrows does not provide a comprehensive statement as to when the law on lawful act duress applies (which is puzzling for someone who in an earlier incarnation produced a restatement of the law of contract) and if Lord Hodge's para [4] is intended to provide such a comprehensive statement, it is not drafted rigorously enough and as a result cannot be safely relied on.

Abolition?

Given the interpretative difficulties that surround both Lords Hodge and Burrows' judgments, one might be tempted to wish that they had simply decided to jettison the law on lawful act duress altogether. After all, they both acknowledged the need for the law in this area to be certain ([1] (per Lord Hodge), [93] (per Lord Burrows)) and both accused each other's approach to lawful act duress of making the law in this area too uncertain ([50] (per Lord Hodge), [133] (per Lord Burrows) – and the law in this area would certainly be certain if it didn't exist! Lords Hodge and Burrows also acknowledged that it would only be in very rare cases – at least where commercial parties are concerned – that agreements would be voidable on the ground of lawful act duress ([28], [30], [58] (per Lord Hodge), [99], [136] (per Lord Burrows)). So why maintain such a rarely-invoked area of law in place?

That lawful act duress should be abolished as a head of relief was the suggestion of Paul Davies and William Day in their 'excellent' (Lord Burrows' accolade: [84]) casenote on the Court of Appeal's decision in the *Times Travel* case: (2020) 136 LQR 7. They suggest that duress should be limited to 'threatened or actual unlawful conduct' (ibid, 10) and that most of the cases that are currently dealt with under the heading of 'lawful act duress' can be so analysed. For example, the blackmail cases involve illegality: blackmail is, after all, a crime. *The Cenk K* involved an initial breach of contract that the ship owners in that case sought to evade being sued for through their promises of a replacement ship and eventual threats not to supply one. And in *Borrelli* v *Ting*, the defendant committed a breach of duty in failing to co-operate with the claimant liquidators ([2010] UKPC 21, [32]) and it was that breach of duty that put him in a position to demand that the liquidators abandon any claims against him. Moreover, in a case where A insincerely claims that he has a certain entitlement against B as the basis for demanding that B comply with that entitlement (or take the consequences of A's doing something he is entitled to do), then B will probably be able to rescind any agreement to comply with that supposed entitlement on the basis of fraud (something conceded by Lord Hodge at [49]), especially after the UKSC's decision in *Hayward* v *Zurich Insurance Co plc* [2017] AC 142, holding that a contract can be rescinded for fraud so long as the fraudulent representation played some part in the contract being entered into, even if it was not believed.

However, none of these arguments could be used in *Reference* – so thinking about whether B should be allowed to escape her agreement to pay A £100 in that case may provide a useful test case for thinking about whether we should retain a doctrine of lawful act duress. It might be argued that even if we think that B should be allowed to get out of her agreement, there is still no need for a doctrine of lawful act duress. We could instead allow B to escape on the ground of unconscionability – A has behaved unconscionably in taking advantage of B's vulnerability to extract a wholly unwarranted promise to pay him £100. However, all the supposed advantages of abolishing the law on lawful act duress would be lost if we simply substituted unconscionability for lawful act duress as the ground of relief, in cases that previously would have been dealt with (and could only be dealt with) under lawful act duress. And something would be lost if we did this.

If we can identify a ground of relief (and when it will apply) without having to use the language of unconscionability we should – even if, ultimately, that ground of relief is based on considerations of what is conscionable and unconscionable. An analogy: we could say that A will owe B a duty of care when it is 'fair, just and reasonable' that he should, but if we can identify determinate situations where A will owe B a duty of care we should do so, and not rest content with a generic statement as to when A will owe B a duty of care. This is so even if all of the determinate situations where A will owe B a duty of care are ultimately based on the courts' perceptions as to when it will be 'fair, just and reasonable' to find that A owed B a duty of care (how could they not be? – imagine a court thinking that it will find that A owed B a duty of care when it is 'unfair, unjust and unreasonable' to do so). The rule of law demands that we state the law with as much precision as possible – with the result that even if the law on lawful act duress is based on considerations of unconscionability (something conceded by Lord Hodge at [22]-[23]), we would be failing the rule of law if we jettisoned that area of law and allowed the cases covered by it to be subsumed within the more generic ground of relief that unconscionability represents.

So, for me, the question of whether lawful act duress should be allowed to survive as a ground of relief comes down to whether we want to provide relief in a case like *Reference*. If we do, the most apt ground of relief is lawful act duress. Now – we might think that providing relief in *Reference* is a step too far for the law: while B's case is deserving, providing B with relief will inject too much uncertainty into the law. The *Times Travel* case shows that there will always be some uncertainty associated with the law on lawful act duress because it is not possible to sum up when relief will be provided on this ground in one snappy formula – there is no set of words that can simultaneously cover the blackmail cases and what we might call the 'manouevring' cases. So the set of situations that would be covered by lawful act duress – were we to recognise it as a ground of relief – will be inescapably plural, just as is the case with the range of situations giving rise to a duty of care. And if that is so, why should such a ground of relief be limited to two situations, and not three, or four, or five? The only way of mitigating this uncertainty is simply to rule that lawful act duress will be limited to two situations, and only two. The first would be blackmail, which does not apply in *Reference*. So if relief is to be provided in *Reference*, it has to come under the second situation. Lord Hodge's formulation at [4] of what this situation is will not do, as that only applies where A has 'exposed himself to a civil claim' by B and then wriggles out of the claim by reprehensibly manoeuvring B into a position of weakness that then allows A to require B to give up her claim, otherwise he will do something that he is otherwise entitled to do. None of that has anything to do with *Reference*. Instead, we would have to formulate this second situation as applying where A reprehensibly manoeuvres B into a situation where B feels she has no alternative but to comply with A's demand that she enter into an agreement with A, where A's demand is backed up with a threat that if B does not comply with it, A will do something that he is otherwise entitled to do. That formulation would cover *Reference* –

but I leave it as an exercise for you to consider whether adopting a formulation like that would render the law on lawful act duress unacceptably uncertain in terms of how it applies in cases that do not involve blackmail.

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