BCLP. Client Intelligent

Insights

HOBSON'S CHOICE, THE LATEST ON ECONOMIC DURESS

Oct 08, 2021

"I'm going to make him an offer he can't refuse", was Vito Corleone's favourite negotiating tactic. While his methods are a far cry from how things are done in the construction industry, commercial pressure can be used to force a party to accept an unfavourable deal. When does such behaviour cross the line and become *illegitimate pressure or duress*? Is it where a party, possibly a monopoly, tells the other it will never deal with it again unless it gives up all its claims? That is the situation that the *Supreme Court looked at recently* but it is worth looking at how this works in a construction context.

THE DENNING APPROACH

If you are the sort of person who asks "What would Lord Denning do?", *D&C Builders Ltd v Rees [1966] 2 QB 617* is a good example of his approach to construction disputes. The claimant contractor was a company made of two individuals, a decorator and a plumber, and the defendant had a shop where he sold builders' materials. The contractor pressed for months for a debt of £482 13s 1d to be paid, only to be told by the defendant's wife, who knew they were in financial difficulties, they could agree to be paid £300 in settlement of the debt or they would get nothing. They accepted payment but then sued for the balance.

The case raised interesting issues about consideration and estoppel but Lord Denning MR made it clear that while a genuine settlement would be enforceable, this was not the case where this would be inequitable and undue pressure was being placed by threatening to break the contract (by paying nothing) to compel the creditor to do what it was unwilling to do. As he put it:

> *"No person can insist on a settlement procured by intimidation."*

This was the background to the doctrine of economic duress, where it is necessary to show causation and that the effect of the pressure is that there is no practical alternative. But the biggest difficulties have concerned the need to identify what amounts to illegitimate commercial pressure.

IT'S ALL ABOUT THE FACTS

It always helps to look at specific examples when considering general principles. In *Williams v Roffey Bros and another*, a sub-contractor asked for more payments, knowing the main contractor

would otherwise be exposed to delay damages. The Court of Appeal considered duress but noted there was no finding of duress on the facts as it was the main contractor who offered to pay the additional sum. But the opposite conclusion was reached on similar circumstances in another construction case 12 years later in *Carillion Construction Ltd v Felix (UK) Ltd [2001] BLR 1*.

Here the cladding sub-contractor threatened to stop supplies unless the final account was agreed at the amount claimed. A note disclosed by the sub-contractor stated under "Carillion weaknesses" that "[t]hey need to finish the work" and "[n]o deliveries until we get agreement".

The judge held that the pressure applied by the sub-contractor was illegitimate, relying on the fact it knew there was a number of trades that were dependent on the cladding works, that Carillion could not complete the main contract works without the cladding and that it would be impossible to find an alternative supplier in time.

It is not only sub-contractors who sometimes take advantage of their position. In *Adam Opel GmbH, Renault SA v Mitras Automotive (UK) Ltd*, it was Mitras, Opel's sole supplier of a mount for the front bumper who, when given a valid six months' notice of termination, demanded to be paid compensation and threatened to suspend supplies until this was agreed.

When Opel realised they only had 24 hours' worth of supplies remaining and that the potential losses could be substantial (and having failed to obtain an injunction), it agreed to Mitras' demands. The judge followed the approach in the *Carillion* decision and held that the pressure created by the threat to stop supplies was illegitimate, which meant the agreement to pay compensation was voidable.

LAWFUL ACT DURESS – THE SUPREME COURT DECISION IN TIMES TRAVEL

The difficulty with arguing duress tends to focus on what is illegitimate pressure. Serious breaches of contracts or tortious acts are easy but is it possible to have duress by acting lawfully?

This was the issue in *Pakistan International Airline Corporation (Respondent) v Times Travel (UK) Ltd (Appellant)*. Times Travel was a small family-owned travel agency that almost exclusively sells plane tickets for flights to Pakistan. Pakistan International Airline Corporation (PIAC) was at the relevant time the only airline operating between the UK and Pakistan. Their contractual relationship began in 2006 and it is easy to see how dependent Times Travel was on its relationship with PIAC.

In 2011, Times Travel started claims against PIAC for unpaid commissions of over £1.2m. In 2012, PIAC gave notice, as it was entitled to do, terminating its agreement with Times Travel and offering new terms that included a release of all claims and a reduction of ticket allocation from 300 to 60. Times Travel had no choice but to agree to the new terms but then started proceedings to claim the unpaid commissions on the basis of economic duress.

Times Travel was successful in the *High Court*, but the decision was *reversed on appeal* and it was unsuccessful in its *appeal to the Supreme Court*. The details of the Supreme Court decision were *outlined by Ned Beale, Richard Samuel and Thomas Roe QC* who observed that many will find the decision disappointingly conservative, identifying only two situations where it could apply.

In the Supreme Court, Lord Hodge (with whom the other lord justices agreed) made the point that English law does not have an overarching *principle of good faith* and that unconscionability cannot apply across the board as otherwise judges would have to be arbiters of what is morally and socially acceptable. That meant that lawful act duress had a limited role in commercial life. Lord Burrows agreed that the scope of lawful act duress should be limited as in his view many forms of contracts are entered into under some form of pressure exerted by the other party and that it was inappropriate to rely on a general principle of good faith. He, however, considered it was also necessary that there should be a bad faith demand for lawful act duress to arise. On the facts, this was not the case, as PIAC genuinely believed it did not have to pay the commissions.

WHERE ARE WE NOW?

The doctrine of economic duress was always limited to unusual circumstances. People will have their own views as to how common commercial pressure is in construction and whether it should be seen as duress. However, if this was not the case for Times Travel, it is difficult to see when it could arise.

One can only wonder if the *Carillion* decision would have been decided on the same basis, especially as when the demands were first made the sub-contract was yet to be signed so arguably the sub-contractor was acting lawfully, but it continued its demands after the sub-contract was signed, when the threats would have amounted to a breach of contract. This is not unusual in construction when works can start without a full formal contract in place.

Nonetheless, the Supreme Court made it clear the doctrine exists and should exist. Despite some signs of recovery from COVID 19, the current economic climate will put *pressure on the supply chain* and parties may well end up accepting unfavourable terms. In a small number of such cases, economic duress may still have a role to play.

This article first appeared on the Practical Law Construction blog dated 6 October 2021.

RELATED CAPABILITIES

- Commercial Construction & Engineering

MEET THE TEAM

Shy Jackson

London

shy.jackson@bclplaw.com
+44 (0) 20 3400 4998
