LAWFUL ACT DURESS IN AUSTRALIA: AN ARGUMENT FOR GOOD FAITH

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This article considers the doctrine of lawful act duress. It considers developments in the United Kingdom and Australia. Various doctrinal bases have been suggested for this doctrine. These include unconscionability, proportionality and good faith. The article critically considers each of these, before concluding that good faith is the best option. It provides specific examples of how good faith could assist in resolving cases of lawful act duress and provide different outcomes than those which would occur if other doctrines were utilised. Thus, it makes a substantive difference which of the doctrinal bases is chosen.

I INTRODUCTION

Our system of commercial law is, at least as a starting point, premised on an assumption that contracts freely entered into by contracting parties should be given effect by the law.[1] This is because individual parties are in the best position to judge which transactions are in their own best interests, and parties are generally free to pursue commercial self-interest.[2] Of course, the law provides various doctrines that operate as exceptions to the general enforceability of contracts. These typically reflect a belief that one of the parties has engaged in conduct of which the law disapproves and/or that one of the parties did not truly consent to the transaction.[3] The doctrine of lawful act duress presents as something of an amalgam of these two strands, with the importance of consent-based theories as a justification for the law's intervention reducing over time.[4]

Duress was originally recognised in the law in the context of physical threats to a person. These are 'unlawful acts'.[5] That the law should recognise a person's right to evade legal responsibility for actions committed as a result of the duress they faced from an *unlawful* act is uncontroversial. However, the law also

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1 *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462, 465 (Sir George Jessel MR).

2 *Times Travel (UK) Ltd v Pakistan International Airlines Corparation* [2023] AC 101, 110 [1] (Lord Hodge DPSC, Lords Reed PSC, Lloyd-Jones and Kitchin JJSC agreeing) ('*Times Travel*').

3 See, eg, Rick Bigwood, 'Undue Influence: "Impaired Consent" or "Wicked Exploitation"?' (1996) 16(3) *Oxford Journal of Legal Studies* 503.

4 PS Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press, 1979) 406–8.

5 *Thorne v Kennedy* (2017) 263 CLR 85, 97 [27] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ) ('*Thorne*').

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recognised that there were other threats inducing behaviour that ought to trigger judicial intervention as being sufficiently analogous,[6] though the threat is to do something not in itself unlawful. For instance, blackmail should not be permitted.[7] Similarly, courts have set aside transactions entered into as a result of threats to report suspected criminal activity to the police if the person threatened did not do something.[8] Similarly, the making of threats is not unlawful behaviour in itself, yet a party might legitimately claim they were subjected to 'undue' and 'illegitimate' pressure in acceding to the threat.[9]

Duress was later recognised in the context of economic pressure.[10] Often, the application of economic pressure to another will be through acts that are, on their face, 'lawful'.[11] Thus, this necessitated acceptance of the possibility of lawful act duress, and it has been argued that there is no reason why both lawful and unlawful acts might not meet the standard of illegitimacy.[12] These are not the only kinds of duress that might affect a person's consent to a transaction.[13] Where duress is shown, a contract tainted by it will be voidable at the option of the victim. Duress was originally a common law doctrine, but equity subsequently developed a similar jurisdiction to deal with cases where undue (illegitimate) pressure had been placed on a contracting party.[14] For the purposes of this article, we can discuss the principles together, notwithstanding their disparate common law and equitable origins.[15]

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6 *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366, 384 (Lord Diplock), 400 (Lord Scarman) ('*The Universe Sentinel*').

7 Ibid 401 (Lord Scarman): 'blackmail is often a demand supported by a threat to do what is lawful'. Although note some jurisdictions have criminalised extortion.

8 This was considered in cases such as *Williams v Bayley* (1866) LR 1 HL 200 (ostensibly decided on undue influence grounds); *Kaufman v Gerson* [1904] 1 KB 591 (Court of Appeal) (multiple references to 'morality' in explaining why the contract was not enforceable); *Mutual Finance Ltd v John Wetton & Sons Ltd* [1937] 2 KB 389 (ostensibly decided on undue influence grounds). The Supreme Court of the United Kingdom referred to this trilogy of cases in *Times Travel*, concluding that they would now fall within the umbrella of lawful act duress claims: *Times Travel* (n 2) 111–12 (Lord Hodge DPSC, Lords Reed PSC, Lloyd-Jones and Kitchin JJSC agreeing).

9 In *Tsarouhi & Tsarouhi* [2009] FMCAfam 126 the Court set aside a divorce agreement. It found that the wife had only agreed to it after the husband threatened to expose her criminal activity. The Court accepted this amounted to duress from which it should provide relief. The husband's act was, in itself, lawful.

10 *The Universe Sentinel* (n 6) 400 (Lord Scarman).

11 As noted below, there is uncertainty regarding the precise meaning of the word in this context.

12 *Al Nehayan v Kent* [2018] 1 CLC 216, 276–7 [187] (Leggatt LJ) ('*Al Nehayan*'); *Thorne* (n 5) 115–16 [72] (Nettle J).

13 Felicity Maher, 'Clarity or Confusion? Duress, Undue Influence and Unconscionable Conduct in the High Court' (2018) 12(1) *Journal of Equity* 91, 111.

14 *Barton v Armstrong* [1976] AC 104, 118 (Lord Cross for Lords Kilbrandon, Cross and Sir Garfield Barwick), 121 (Lords Wilberforce and Simon).

15 GE Dal Pont, *Equity and Trusts in Australia* (LawBook, 6th ed, 2015) [8.10]; James Edelman and Elise Bant, *Unjust Enrichment* (Hart Publishing, 2nd ed, 2016) 199; Claudia Carr, 'Lawful Act Duress in Australia' (2020) 13(3) *Journal of Equity* 292, 295: 'the boundaries between common law duress and equitable pressure are blurred, and the importance of those boundaries is diminishing'.

The very existence of the doctrine of lawful act duress is in question.[16] As will be elaborated upon below, there is Australian appellate authority for the proposition that the doctrine does not exist, or should not exist, in a standalone form, and that it is really part of other legal doctrines.[17] There is disagreement as to the approach to be taken to the concept of 'illegitimacy'. These questions await definitive High Court determination. Recently, in *Times Travel (UK) Ltd v Pakistan International Airlines Corporation* ('*Times Travel*'),[18] all members of the United Kingdom Supreme Court reaffirmed the existence of the doctrine in that jurisdiction. While that unanimity is welcome, there was less agreement regarding the tests to be utilised in applying the doctrine. This state of affairs invites a consideration of the law in this area. The article will address two questions: (1) whether the doctrine should exist as a standalone legal doctrine or be subsumed into other doctrines; and (2) if it should retain an independent existence, what its doctrinal basis should be and why.

This area is beset by uncertainty. It is not clear whether the doctrine exists, or should exist, as an independent doctrine. Fundamentally, it is not entirely clear what is meant by 'lawful' act duress, in contrast with 'unlawful' act duress, which enjoys a more settled position in the law. It is not clear what will count as 'illegitimate' pressure for the purposes of the doctrine.[19] It is clear that parties in commercial situations may often face difficult choices, and may feel pressure, and it is likely that one contracting party will be in a stronger bargaining position than the other. However, mere inequality of bargaining power is not sufficient in itself to warrant court intervention in a contracting situation.[20] Thus, the question arises as to what characteristics of a commercial situation where one of the parties is under 'pressure' in relation to it will justify the court's intervention.[21] This is particularly an issue in the law of contract, where at least one of the goals is often stated to be to provide certainty to those engaged in business activity, or at least as much certainty as is reasonably possible.[22] Further, the two main tests given in *Times Travel* for recognising lawful act duress are also argued to be

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16 Iona Branford and Jodi Gardner, 'Reconceiving Wrongdoing in Lawful Act Duress' (2023) 139 (October) *Law Quarterly Review* 629, 631: 'it seems paradoxical … that one could have the right to commit an act, but not the right to threaten to do so in combination with a lawful demand'. These authors suggest the doctrine should be limited to situations where the threat relates to past *unlawful* behaviour. With respect, it is not entirely clear why this should be so.

17 *Australia and New Zealand Banking Group Ltd v Karam* (2005) 64 NSWLR 149, 167 [62], 168 [66] ('*Karam*'). Although note the apparent obiter disagreement of Nettle J in *Thorne* (n 5) 114 [71]-[72].

18 *Times Travel* (n 2).

19 Edelman and Bant (n 15) 210–11.

20 *Times Travel* (n 2) 118 [25] (Lord Hodge DPSC, Lords Reed PSC, Lloyd-Jones and Kitchin JJSC agreeing).

21 *Equiticorp Finance Ltd (in liq) v Bank of New Zealand* (1993) 32 NSWLR 50, 106 (Kirby P).

22 *Herculito Maritime Ltd v Gunvor International BV* [2024] Bus LR 580, 600 (Lord Hamblen JSC for the Court); *Times Travel* (n 2) 110 [1] (Lord Hodge DPSC, Lords Reed PSC, Lloyd-Jones and Kitchin JJSC agreeing), 140 [93] (Lord Burrows).

uncertain.[23] This makes the issues ripe for consideration at the High Court level in Australia. The article seeks to inform that consideration.

This article is structured as follows. Part II considers English case law leading up to the recent decision of the United Kingdom Supreme Court in *Times Travel*, and the decision itself. Part III considers the limited Australian case law on the matter. It will be demonstrated that there has been some lower court consideration of the issue, but no definitive High Court decision. Part IV then considers the main legal approaches to lawful act duress, based on the case law. These include unconscionability, proportionality, and good faith. It also considers whether a range of factors should be utilised to determine the matter, and whether there is a need for a distinct principle of lawful act duress in the law at all. This article makes a substantive contribution to the literature by specifically advocating for a good faith approach to be taken to claims of lawful act duress. It will be shown that this would make a substantive difference in outcomes, when compared with other approaches. Part V concludes.

II English Law on Lawful Act Duress

A *The Position Prior to* Times Travel

The possibility of an action for lawful act duress in cases of behaviour regarded as 'illegitimate' was recognised in the judgment of Lord Diplock (with whom Lord Cross and Lord Russell agreed) in *The Universe Sentinel*,[24] and in that of Lord Goff in *Dimskal Shipping Co SA v International Transport Workers Federation ('The Evia Luck')*.[25] These were both cases of *unlawful* act duress, so the comments were necessarily obiter. Duress was originally conceived in terms of coercion of the will which vitiated consent,[26] such that the victim's will was 'overborne',[27] but later cases have relaxed this requirement.[28] The person who complains of duress will typically have retained the ability to decide.[29] The focus is on the illegitimacy of

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[23] Harry Sanderson and Henry Cooney, 'A Fall Between Two Stools: The Supreme Court Confines Lawful Act Duress' (2022) 73(3) *Northern Ireland Legal Quarterly* 546, 552 ('A Fall Between Two Stools').

[24] *The Universe Sentinel* (n 6) 384.

[25] *Dimskal Shipping Co SA v International Transport Workers Federation* [1992] 2 AC 152, 165 (Lord Goff, Lords Keith, Ackner and Lowry agreeing) ('*The Evia Luck*').

[26] *Pao On v Lau Yiu Long* [1980] AC 614, 635 (Lord Scarman for the Court).

[27] *The Universe Sentinel* (n 6) 400 (Lord Scarman).

[28] *The Evia Luck* (n 25) 166 (Lord Goff, Lords Keith, Ackner and Lowry agreeing); *Thorne* (n 5) 97 [26] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ). Leggatt LJ in *Al Nehayan* (n 12) phrased it not in terms of whether there was a lack of consent, but whether it was unjust to enforce the agreement made by the parties given the way in which consent was obtained: at 277 [189]; Rick Bigwood, 'Coercion in Contract: The Theoretical Constructs of Duress' (1996) 46(2) *University of Toronto Law Journal* 201, 207 ('Coercion in Contract').

[29] *Thorne* (n 5) 97 [26] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ); Hamish Stewart, 'Economic Duress in Canadian Law: Towards a Principled Approach' (2003) 82(2) *Canadian Bar Review* 359, 373 stating that in these cases, the claimant's 'problem is simply that his or her freedom of action

pressure causing the plaintiff to act, in circumstances where there was no practical alternative other than to accede to the pressure.[30]

Lawful act duress was considered by the Court of Appeal in *CTN Cash and Carry Ltd v Gallaher Ltd* ('*CTN Cash*').[31] There the defendants supplied the plaintiffs with cigarettes for sale. The defendant was under no legal obligation to supply the plaintiff with a particular quantity; it was legally free to decline any order made. The defendant also provided some customers, including the plaintiff, with a line of credit. The plaintiff placed a large order for cigarettes with the defendant. The plaintiff operated its business from multiple outlets. The defendant filled the order, delivering it to one of the plaintiff's warehouses. However, it was discovered that it had been sent to the wrong outlet. The defendant agreed to transport the product to the correct address. While the goods were awaiting re-delivery, they were stolen from the plaintiff's outlet. The defendant subsequently invoiced the plaintiff for the stolen cigarettes. At the time, it believed that risk in the goods had passed to the plaintiff, and so it was entitled to so invoice them. In fact, risk in the goods had not passed to the plaintiff. The plaintiffs refused to pay the invoice. A representative of the defendant told the plaintiff that, unless the invoice was paid, no further line of credit would be provided. The plaintiff then paid the invoice. The question was whether this payment could be set aside on the basis of duress.

The Court of Appeal noted that the defendant was within its legal rights to refuse to deal with the plaintiff, and to refuse to grant them credit. Thus, the defendant was clearly engaging in lawful behaviour in stating that it would not extend further credit if the invoice were not paid. This was a possible case then of lawful act duress. However, the Court found that the defendant acted in good faith in making the demand for payment. It genuinely believed it was entitled to payment. Steyn LJ, with whom Farquharson LJ agreed, indicated that a lawful act duress claim would be difficult to make out in a situation such as this where the party accused of committing lawful act duress had made a claim in good faith.[32] Steyn LJ indicated that cases of lawful act duress involved questions as to whether the defendant's activities were 'morally or socially unacceptable'.[33] Sir Donald Nicholls VC agreed, also referring to the fact that the defendant here had made a

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has been wrongfully reduced, and this problem has little if anything to do with the state or his or her will'.

30 *Times Travel* (n 2) 135 [78]–[79] (Lord Burrows, Lords Hodge DPSC, Reed PSC, Lloyd-Jones and Kitchin JJSC agreeing at 110 [1]).

31 [1994] 4 All ER 714 ('*CTN Cash*').

32 Ibid 719.

33 '[T]he critical inquiry is not whether the conduct is lawful but whether it is morally or socially acceptable': ibid 719. This has been criticised on the basis it is vague and beyond the judicial remit: see Paul S Davies and William Day, '"Lawful Act" Duress (Again)' (2020) 136 (January) *Law Quarterly Review* 7, 9. Rick Bigwood and Joachim Dietrich, 'Uncertainty in Private Law: Rhetorical Device or Substantive Legal Argument?' (2021) 45(1) *Melbourne University Law Review* 60, 84 conclude it is 'not a test that should commend itself to anyone'.

claim in good faith.[34] As a result, the Court of Appeal unanimously dismissed the claim for lawful act duress on the facts.

Notably, in terms of the discussion below, there was no reference to unconscionability.

Lawful act duress was at least one of the factors in the decision of the Privy Council in *Borrelli v Ting* ('*Borrelli*').[35] There, liquidators had been appointed to a company of which the defendant had been chairman and chief executive officer. Their investigations were hampered by the conduct of the defendant. The liquidators proposed a scheme of arrangement to deal with the company's affairs, which was resisted by the defendant. The liquidators suspected the defendant of wrongdoing in relation to the company's activities and in relation to his threats to thwart the scheme of arrangement. These suspicions required further investigation.

The time by which the liquidator had to obtain relevant approvals was running out, and the above claims had yet to be tested in court. The parties entered into a deed of settlement, whereby the liquidators agreed not to pursue any claims against the defendant. The defendant then dropped his opposition to the scheme of arrangement, and the court approved it. Later it was alleged the defendant had been involved in criminal activity in relation to the company's affairs. The liquidators commenced legal action against the defendant. The defendant sought to resist such action by arguing that the settlement precluded it.

The Privy Council found that the defendant could not rely on the settlement, because it had been entered into as a result of economic duress.[36] It defined economic duress as including where one party exerted illegitimate economic or other pressure on another.[37] Here, the defendant had done so. Importantly for subsequent cases, the Council used both the language of 'unconscionability'[38] and

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34 *CTN Cash* (n 31) 719.

35 [2010] Bus LR 1718 ('*Borrelli*'). There is a need for some caution in wording here, because there was factual material suggesting the defendant was engaged in unlawful act duress (withholding voting approval for a proposed scheme of arrangement and failing to assist the liquidators). This was allegedly for improper purposes, but the court did not identify the conduct as unlawful. Rather, it identified it as illegitimate. This conduct was referred to in the reasons for judgment. There were certainly allegations of criminality in relation to the alleged duress (including forgery of documents and falsification of evidence), which were also referred to in the reasons for judgment.

36 Ibid 1730 [42] (Lord Saville for the Court). Note the Board did not specify whether it based its decision on lawful act or unlawful act duress. At the time, it was not clear whether the allegations of voting irregularities associated with companies the defendant controlled were true. Thus, it could not be said whether the acts relied on as amounting to duress were lawful or unlawful.

37 Ibid 1728 [34].

38 The Board noted the defendant's failure to assist liquidators, opposition to the proposed scheme of arrangement and resort to forgery and false evidence 'amount to unconscionable conduct on his part': Ibid 1728 [32].

the language of 'good faith'[39] to describe the defendant's behaviour. Here the discussion of good faith is more closely related to the conduct argued to amount to duress — the defendant had engaged in arguably irregular voting, and voting for improper purposes, which put pressure on the liquidators to reach a timely settlement. Cases such as *Borrelli* and *Progress Bulk Carriers Ltd v Tube City IMS LLC* ('*The Cenk*')[40] are generally regarded as cases of lawful act duress. Although some of the prior conduct of the defendant was (at least arguably) unlawful, the acts relied on as involving duress were, in themselves, lawful.[41]

In *Al Nehayan v Kent* ('*Al Nehayan*'),[42] Leggatt LJ made important observations about lawful act duress. Lord Leggatt is now a member of the United Kingdom Supreme Court, but unfortunately was not one of the justices in *Times Travel*. In *Al Nehayan*, Leggatt LJ defined 'illegitimacy' in this context as a situation where the defendant had no reasonable basis for making the demand, and the threat would be considered by an honest and reasonable person to be an improper means of reinforcing the demand.[43]

B Times Travel

Recently, the Supreme Court of the United Kingdom affirmed the existence of lawful act duress in *Times Travel*.[44] There, the plaintiff was a travel agency whose business primarily involved selling tickets to flights operated by the defendant. This was on a commission basis. The defendant got into disputes with a number of its agents, including the plaintiff, regarding allegedly underpaid commission, and a claim was filed against the defendant. The defendant wanted the plaintiff to abandon its part in these proceedings. As it was contractually entitled to do, the defendant reduced the number of tickets allocated to the plaintiff to sell (a form of refusal to contract). It then offered the plaintiff a new contract restoring the plaintiff's higher allocation of tickets, but on the condition that the plaintiff abandon its part in the legal proceedings. The plaintiff accepted the new contract on this basis. It then sought to maintain proceedings against the defendant for

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39 The Board noted that the defendant's eventual agreement to drop his opposition to the scheme 'did no more than he should have done at the outset, had he acted in good faith rather than in an attempt to avoid responsibility for his conduct of the affairs of [the company]': ibid.

40 *Progress Bulk Carriers Ltd v Tube City IMS LLC* [2012] 2 All ER (Comm) 855 ('*The Cenk*').

41 *Times Travel* (n 2) 145, 147 (Lord Burrows). The case of *The Cenk* involved a contract between the owner of a vessel and a charterer. The owner wished to substitute a different vessel than that for which the parties had contracted. This was a breach of the parties' agreement. The owner promised to compensate the charterer for associated losses. The charterer relied on this assurance, not seeking out a replacement vessel. Delay in delivering the vessel caused the charterer loss. The owner eventually made an alternative vessel available, but only on condition that the charterer accepted less compensation than the actual losses they had sustained, and that they expressly waive their right to further compensation. The charterer agreed to this, but then claimed economic duress: ibid.

42 *Al Nehayan* (n 12).

43 Ibid 277 [188].

44 *Times Travel* (n 2).

allegedly underpaid commission, arguing that the new contract should be set aside because it was procured by lawful act duress. The trial judge found in favour of the plaintiff; this was overturned by the Court of Appeal on the basis of the good faith doctrine.

The Supreme Court affirmed this result, but its reasoning differed materially from the Court of Appeal. Further, two approaches to lawful act duress were evident in the Supreme Court's decision in *Times Travel*, though there was also a large degree of overlap between them. It might be best to start with propositions with which all members of the Court agreed. All agreed that lawful act duress existed, and should exist, in the law.[45] All agreed that three elements were required to be shown in order to successfully bring a claim: (a) a threat (or pressure exerted) by the defendant that is *illegitimate*; (b) the illegitimate threat or pressure *caused* the claimant to enter into the contract; and (at least for claims for economic duress) (c) the claimant must have no alternative other than to accede to the threat.[46] All agreed that a range of factors approach should not be taken to determine whether the claim should succeed.[47] All agreed that a wide principle of good faith dealing should not be utilised,[48] and that general inequality of bargaining power was not sufficient.[49] All agreed that a focus on the nature and justification for the demand, rather than the legality of the threat, was important.[50] All agreed that the scope for the operation of lawful act duress was relatively limited,[51] because the law accepts the pursuit of legitimate self-interest.

The primary difference between the joint reasons and the judgment of Lord Burrows related to how they would determine whether the threat or pressure was

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45 Ibid 110 [1] (Lord Hodge DPSC, Lords Reed PSC, Lloyd-Jones and Kitchin JJSC agreeing), 137 [86] (Lord Burrows).

46 Ibid 110 [1] (Lord Hodge DPSC, Lords Reed PSC, Lloyd-Jones and Kitchin JJSC agreeing), 135 [78]–[79] (Lord Burrows).

47 The range of factors approach to determining the illegitimacy of pressure was taken by Dyson J in *DSND Subsea Ltd v Petroleum Geo-Services ASA* [2000] BLR 530, 545 [131] ('*DSND Subsea*'). The relevant factors included whether the person allegedly exerting the pressure acted in good faith, the existence of reasonable alternatives, whether any protest was made at the time of acquiescence, whether the plaintiff had subsequently affirmed and sought to rely on the contract, and whether there had been an actual or threatened breach of contract. This approach was applied by Cooke J in *The Cenk* (n 40) 865 [33].

48 *Times Travel* (n 2) 118–19 [27] (Lord Hodge DPSC, Lords Reed PSC, Lloyd-Jones and Kitchin JJSC agreeing), 140 [95] (Lord Burrows). Leggatt LJ has been a strong advocate of a generalised concept of good faith dealing: *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] 1 All ER (Comm) 1321 ('*Yam Seng*'). He has brought this approach to the discussion of duress. So for example in *Al Nehayan* (n 12) 276–7 [187] Leggatt LJ stated that in determining whether an action lay in duress it was relevant to consider 'the legitimacy of the demand and … judge the propriety of the defendant's conduct by reference not simply to what is lawful but to basic minimum standards of acceptable behaviour … [T]he enforcement of basic norms of commerce and of fair and honest dealing is an essential function of a system of commercial law'.

49 *Times Travel* (n 2) 118 [26] (Lord Hodge DPSC, Lords Reed PSC, Lloyd-Jones and Kitchin JJSC agreeing).

50 Ibid 110 [1] (Lord Hodge DPSC, Lords Reed PSC, Lloyd-Jones and Kitchin JJSC agreeing), 140 [96] (Lord Burrows).

51 Ibid 119 [28] (Lord Hodge DPSC, Lords Reed PSC, Lloyd-Jones and Kitchin JJSC agreeing), 141 [99] (Lord Burrows).

illegitimate. Essentially the joint reasons favoured the concept of unconscionability; Lord Burrows preferred a narrow type of 'bad faith'.

The joint reasons held that past cases had recognised two types of circumstance where conduct we would now regard as giving rise to lawful act duress existed.[52] The first was a person seeking to exploit knowledge that another had committed criminal activity to obtain an advantage.[53] To be clear, these cases were *not* explicitly decided on the basis of lawful act duress, but the court held they would today be regarded as instances of lawful act duress. At one point, the joint reasons said they were examples of undue influence,[54] but at another point, the joint reasons said they were examples of unconscionable conduct.[55] The joint reasons stated that the other category of case involved the question of whether the defendant had used illegitimate means to manoeuvre the plaintiff into a position of weakness to force them to waive a claim.[56] What united these categories was that the relevant party had acted in a highly reprehensible manner.[57] At least one of these cases had been (effectively) based on a conclusion that the defendant's conduct was unconscionable.[58]

The precise meaning of unconscionability in this context is not entirely clear.[59] The joint reasons did not define it. The joint reasons did refer to the fact that illegitimate pressure and the equitable doctrine of unconscionability were 'closely aligned'.[60] It did explain, in the context of its discussion of lawful act duress, how the equitable doctrine of unconscionable bargains had been applied in a range of cases outside duress.[61] There has been evident confusion in later

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52 Ibid 111 [4].

53 Ibid. These cases were *Williams v Bayley* (1866) LR 1 HL 200; *Kaufman v Gerson* [1904] 1 KB 591 (Court of Appeal); *Mutual Finance Ltd v John Wetton and Sons Ltd* [1937] 2 KB 389.

54 '[T]hose three cases pre-dated the development of the common law doctrine of lawful act duress and can be seen to rely on the equitable doctrine of *undue influence*': *Times Travel* (n 2) 112 [8] (emphasis added).

55 '[T]he three earlier cases … were all cases in which the court treated the attempt by the party to uphold or enforce the contract as being *unconscionable* because of that party's behaviour': ibid 115–16 [17] (emphasis added). It is acknowledged there can be overlap in the application of equitable doctrines. As discussed presently, respectfully at times it is not entirely clear in the judgments the sense in which the Court is referring to unconscionable conduct, whether as some kind of umbrella concept, or limited to the sense in which it is used regarding unconscionable bargaining.

56 Ibid 111 [4]. The joint reasons cited two cases — *Borrelli* (n 35) and *The Cenk* (n 40). As has been noted, it is not clear from the judgment whether the Court would limit lawful duress cases to circumstances of waiver of rights, and there is a cogent argument that lawful duress should not be limited to this context: Sanderson and Cooney, 'A Fall Between Two Stools' (n 23) 551.

57 *Times Travel* (n 2) 111 [4].

58 *Borrelli* (n 35) 1728 [32] (Lord Saville for the Court). On the other hand, although in *CTN Cash* (n 31) Nicholls VC found that the defendant had engaged in unconscionable behaviour, it was not concluded that they had applied illegitimate pressure: at 720.

59 Rex Ahdar, 'Lawful Act Duress After *Times Travel*' (2021) 17(1) *Otago Law Review* 169, 183 says that it means acting in a highly reprehensible manner. In a previous case, Leggatt LJ in *Al Nehayan* (n 12) set a high bar, stating that it meant conduct that was completely indefensible and where the demand made, and threats issued, were contrary to basic norms of honest and fair dealing: at 276–7 [187].

60 *Times Travel* (n 2) 116 [20].

61 Ibid 117–18 [24].

cases regarding what was meant by unconscionability in this context. So in *The Law Debenture Trust Corporation plc v Ukraine* ('*The Law Debenture Trust Corporation*'),[62] Lord Reed PSC, Lord Lloyd-Jones and Lord Kitchin JJSC, with whom Lord Hodge DPSC agreed, quoted the judgment of Lord Hodge in *Times Travel* to the effect that unconscionability is not an overarching criterion to be applied without regard to context.[63] It was noted that equity had taken into account the factual and legal context of a case and identified contexts in which it is justified to intervene to protect weaker parties.[64] The joint reasons in *The Law Debenture Trust Corporation* then added that 'in that regard, reference was made to the body of case law concerned with the equitable doctrines of undue influence and unconscionable bargains'.[65]

A reading of the 'judicial tea leaves' suggests that the joint reasons intended unconscionability in the context of lawful act duress to mean something like unconscionability in the context of unconscionable bargains, given the lack of attempt to distinguish them from the context of duress in *Times Travel*. This appears to be how it was interpreted by the Supreme Court recently in *The Law Debenture Trust Corporation*, in joint reasons featuring the same judges as the joint reasons in *Times Travel*. Logic suggests that, if the joint reasons had intended unconscionability to mean something different in the duress context than it meant in the unconscionable bargain context, Lord Hodge (with whom Lord Reed, Lord Lloyd-Jones and Lord Kitchin agreed) would have so explained (and justified). Their Lordships did not do so. It is thus considered a fair operative presumption that it was intended that the meaning be similar.[66]

The joint reasons noted that, as originally conceived, the (common law) doctrine of duress was sourced in threats of physical violence. However, under the influence of equity, it evolved to include other situations recognised as involving unconscionable behaviour, including economic pressure.[67] On the facts, the joint

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62 [2024] AC 411 ('*The Law Debenture Trust Corporation*').

63 Ibid 471 [141], quoting *Times Travel* (n 2) 117 [23].

64 Ibid.

65 *The Law Debenture Trust Corporation* (n 62) 471 [141].

66 I will consider the practical difficulties with utilising the equitable meaning of unconscionability in the context of duress later. For now, it can be noted that under English law, unconscionability in equity requires that: (a) one party to a contract is at a special disadvantage to the other; (b) this disadvantage is exploited by the stronger party in a morally reprehensible manner, and (c) the resulting transaction is overreaching and oppressive: *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1983] 1 WLR 87, 94–5 (Millett QC, sitting as a Deputy High Court Judge) ('*Alec Lobb*'). It is potentially possible to argue that in a duress situation, the victim's vulnerability means they are at a special disadvantage. The categories of special disadvantage are not closed. The exploitation might occur through the extraction from the victim of a right they otherwise possessed, in a manner the law regards as morally repulsive. There are potential difficulties with the third element, because duress does not typically pay regard to the content of the resulting transaction in determining whether or not the cause of action is made out, yet in the English law of unconscionability (at least), this assessment is necessary.

67 *Times Travel* (n 2) 129 [62] (Lord Burrows). Lord Hodge DPSC (Lords Reed PSC, Lloyd-Jones and Kitchin JJSC agreeing) also noted that English law recognised the doctrine of unconscionable bargains which involved: (a) a situation where one party was at a serious disadvantage compared with another; (b) the party in an advantageous position exploited the other party's weakness in a

reasons found that the defendants had engaged in hard-nosed commercial behaviour which exploited its monopoly position. But there was nothing unconscionable in what they did.[68] Even if a good faith test were applied, the joint reasons found that the defendant did not act in bad faith in making the demand it did of the plaintiff.[69] However, the joint reasons emphatically rejected a good faith test, both as a general fair dealing obligation and in the narrow specific sense utilised by Lord Burrows:

> 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.[70]

Lord Burrows differed from the joint reasons in applying a good faith test to the first requirement of illegitimacy. He indicated that past cases where lawful act duress had been recognised had specifically referred to the question of whether the defendant was acting in good faith or not.[71] Lord Burrows emphasised that he was not advocating for acceptance of a general doctrine of good faith dealing in contracting, which was controversial and could lead to uncertainty.[72] He defined what he meant by good faith in the specific context of lawful act duress claims. The question was whether the threatening party genuinely believed it was entitled to what it claimed, or whether it genuinely believed it had a defence to the claim being made against it. If it did not, its demands would lack good faith.[73]

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morally culpable manner; and (c) the resulting transaction was overreaching and oppressive, not just hard or improvident: at 117–18 [24], citing ibid.

68 *Times Travel* (n 2) 128 [58]. Cf Oliver Jackson, 'Unconscionability, Uncertainty and Lawful Act Duress' [2021] (8) *Journal of Business Law* 701, 708: 'it is hard to see how [the defendant's behaviour] does not meet the standard for unconscionability'.

69 *Times Travel* (n 2) 128 [58].

70 Ibid 126 [52]. The joint reasons argued that a bad faith principle would increase uncertainty in commercial transactions and at least as conceived in the way Lord Burrows did, was not supported by past authority: at 126–7 [53]–[57]. Somewhat confusingly, the joint reasons also appeared to embrace good faith, 'bad faith plays a wider role in lawful act duress than merely the absence of a belief in an entitlement to a pre-existing right or the invalidity of a claim for which (the defendant) seeks a waiver': at 127 [56], citing *Borrelli* (n 35) and *The Cenk* (n 40) where the good faith arguments were not so confined and where in *The Cenk* good faith is not expressly mentioned, extending to other aspects of the defendant's behaviour. In other words, the joint reasons acknowledge that good faith was an important part of previous judgments, utilising their use to decry Lord Burrows' good faith model, but they also then refuse to apply good faith to lawful act duress in the current case. This confusion is noted by Lord Burrows: 'while not supporting a "bad faith" demand requirement, Lord Hodge DPSC also refers at some points to "bad faith" as being relevant … but it is not clear to me what Lord Hodge DPSC means by that and how that approach is consistent with his rejection of a "good faith dealing" principle': at 154 [133].

71 He specifically referred to *CTN Cash* (n 31) 719 where Steyn LJ (Nicholls VC and Farquharson LJ agreeing) noted it was important the defendants had a bona fide belief in their claim, and *Borrelli* (n 35) 1728 [32] (Lord Saville for the Court).

72 *Times Travel* (n 2) 140 [95].

73 Ibid 143 [102]. This is consistent with the Court of Appeal's use of good faith in *CTN Cash* (n 31) where the court considered whether the defendant genuinely believed it was entitled to the claim

This would need to be in the context of existing legal rights and duties between the parties.[74] He added a further requirement for illegitimacy — that 'the threatening party [had] deliberately created, or increased, the threatened party's vulnerability to the demand'.[75] On the facts, Lord Burrows reached the same conclusion as the majority — lawful act duress was not made out. But for Lord Burrows, this was because the defendant honestly believed it had a defence to the claims made against it, including those of the plaintiff. Thus, there was no lack of good faith,[76] although he viewed the defendant's behaviour as involving the use of 'illegitimate means to manoeuvre the claimant into a position of weakness'.[77]

Interestingly, both the joint reasons, which advocated for a test of unconscionability and eschewed good faith, and the reasons of Lord Burrows, which advocated for a test of good faith and eschewed unconscionability, argued that the 'other' test would create commercial uncertainty.[78]

C *Summary of English Position*

The position of lawful act duress in the law of England has been confirmed. However, there has been significant disagreement as to the basis for its application. Unconscionability, lack of good faith, whether the defendant had a reasonable basis for making its demand or was acting improperly, and proportionality have all been considered. A majority of the Supreme Court has now settled upon an unconscionability basis, but it did not define the concept, and it is unclear (see discussion below) as to whether it means the same in this context as elsewhere. It framed the test in terms of waiver of a claim, but it is not clear whether all cases of lawful act duress must involve such waiver, or whether it

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it made: at 719. It is considered materially different from the conception utilised in *Borrelli* (n 35) where the court considered broadly a range of the defendant's actions, not just the claims he made or defences he raised. Lord Burrows added in *Times Travel* (n 2) that a court would not automatically accept a defendant's claims regarding honest belief regarding a claim or a defence. The more unreasonable the belief, the more evidence would be required to satisfy the court that the claim or defence was honestly asserted: at 149 [118]. This is similar to the approach taken to good faith by one of its leading advocates. In *Al Nehayan* (n 12) Leggatt LJ stated that 'there is no reason why, in this context [of economic duress] the availability of relief should depend on the defendant's own perception of whether his conduct was justified': at 274 [181]. He favoured use of a concept of reasonableness to inform consideration of good faith: at 277 [188]. This may be broader than the sense in which Lord Burrows used the term in *Times Travel.*

74 *Times Travel* (n 2) 151 [125].

75 Ibid 147 [112].

76 Ibid 153 [132]. Lord Burrows' position was very similar to that taken by the Court of Appeal in *Times Travel v Pakistan International Airlines Corporation* [2019] 3 WLR 445. David Richards LJ (Moylan and Asplin LLJ agreeing) had concluded: 'in judging the use of lawful acts or threats of lawful acts as commercial pressure, there is a sharp distinction between such use to pursue demands made in good faith and those made in bad faith … [A] lack of good faith on the part of a contracting party is a feature in a number of the grounds on which contracts may be avoided': at 472 [106].

77 *Times Travel* (n 2) 154 [132].

78 Ibid 126 [50] (Lord Hodge DPSC, Lords Reed PSC, Lloyd-Jones and Kitchin JJSC agreeing), 154 [135] (Lord Burrows).

could apply to other situations. Lord Burrows favours instead a good faith-based principle. He defined it narrowly, primarily based on honesty, but with a realistic eye that might embrace aspects of reasonableness; in other words, an objective standard might be applied to assess behaviour.[79] Each side accuses the other of creating uncertainty in the law. It is clear, however, that on either approach mere inequality of bargaining power is not sufficient, and that parties are generally free to pursue legitimate self-interest.

III Australian Position on the Existence of Lawful Act Duress

The Australian case law has, of course, engaged with the United Kingdom developments to some extent. However, the *Times Travel* decision is recent, and it is not known whether Australian law will follow this approach. As will be seen, that approach is similar to that taken by some Australian cases, but other cases have taken a different approach, and commentators have suggested another option based on proportionality which has been accepted in some cases. I turn now to discuss the Australian developments to date.

A Smith v William Charlick *(A Potential Example)*

The first *potential* example of a duress claim occurred in *Smith v William Charlick Ltd*,[80] though there is no express reference to lawful (or unlawful) act duress as the basis of the claim, merely a brief reference by the dissenting judge to the pressure being 'illegitimate',[81] language which today at least is associated with a claim for lawful act duress. There, the claimant had purchased wheat from the Wheat Harvest Board. After he took delivery of the wheat, the Board demanded from the claimant an extra amount. It intimated to him that, unless he paid the extra amount, they would not supply any further wheat to him. The Board was not legally entitled to make such a demand. Thus, the case could be seen as an example of *unlawful* act duress. The claimant was not entitled to purchase from anyone other than the Board and, if he did not obtain further supplies, would not have been able to continue in business. He paid the amount under protest. A majority of the Court found the claim was voluntary, and the claimant could not recover it.[82]

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79 Ibid 149 [118]. 'The more unreasonable that belief [that the defendant had], the more will be required … before a court will accept that the defendant did genuinely have that belief' (in the context of the meaning of good faith).

80 (1924) 34 CLR 38.

81 Ibid 66 (Higgins J).

82 It has been argued the decision would be decided differently today, particularly if a proportionality approach were taken to claims of lawful act duress: see Bigwood, 'Coercion in Contract' (n 28) 235.

B *Lower Court Authorities*

In *Crescendo Management Pty Ltd v Westpac Banking Corporation* ('*Crescendo Management*'),[83] McHugh JA stated that lawful act duress applied in respect of cases where illegitimate pressure had been placed on the plaintiff by the defendant. His Honour tied the concept of illegitimacy to notions of unconscionability.[84] The possibility of a claim for lawful act duress was confirmed by Kiefel J in *Westpac Banking Corporation v Cockerill* ('*Cockerill*').[85] In that case, Kiefel J apparently confirmed the approach of McHugh JA in *Crescendo Management* connecting lawful act duress with unconscionability.[86] As explained below, however, there is a question regarding the meaning of 'unconscionability' in this context. One judge in that case expressly left open the question of whether the two were so connected.[87]

However, when the matter was considered by the New South Wales Court of Appeal in *Australia and New Zealand Banking Group Ltd v Karam* ('*Karam*'),[88] a different position was taken. There, the unanimous Court of Appeal effectively rejected the existence of lawful act duress:

> The vagueness inherent in the terms 'economic duress' and 'illegitimate pressure' can be avoided by treating the concept of 'duress' as limited to threatened or actual unlawful conduct … [I]f the conduct or threat is not unlawful, the resulting agreement may nevertheless be set aside where the weaker party establishes undue influence … or unconscionable conduct based on an unconscientious taking advantage of his or her special disability or special disadvantage in the sense identified in *Commercial Bank of Australia Ltd v Amadio*.[89]

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83 (1988) 19 NSWLR 40 ('*Crescendo Management*').

84 Ibid 46. 'Pressure will be illegitimate if it consists of unlawful threats or amounts to unconscionable conduct'. Kirby J had taken a similar position: see *Equiticorp Finance Ltd (in liq) v Bank of New Zealand* (1993) 32 NSWLR 50, 107. This position is supported by Rick Bigwood, *Exploitative Contracts* (Oxford University Press, 2003) 309 (stating it is not illegitimate for the purposes of lawful act duress if the defendant acts for a legitimate purpose and does not extract an advantage from the plaintiff that is unconscionable or exploitative); Bigwood, 'Coercion in Contract' (n 28) 217. This approach was applied in *Re Michelides; Ex Parte Chin* [2008] WASC 256, [126] (Hasluck J) and approved of in *Cox v Esanda Finance* [2000] NSWSC 502, [146] (Hunter J).

85 (1998) 152 ALR 267, 289 (Northrop J agreeing at 276) ('*Cockerill*'). Lindgren J took a similar view: at 277.

86 Ibid 288-9 (Northrop J agreeing at 276).

87 Ibid 278 (Lindgren J).

88 *Karam* (n 17).

89 Ibid 168 [66] (Beazley, Ipp and Basten JJA). A similar view was taken in obiter in *Electricity Generation Corporation v Woodside Energy Ltd* [2013] WASCA 36, [159] (Murphy JA) ('*Woodside Energy*'); *Parras Holdings Pty Ltd v Commonwealth Bank of Australia* [1999] FCA 391, [127]–[128] (Spender, Hill and Merkel JJ); *Atkins v iinet Pty Ltd* [2019] SASC 83, [25] (Bampton J). Rick Bigwood, 'Throwing the Baby Out With the Bathwater? Four Questions on the Demise of Lawful Act Duress in New South Wales' (2008) 27(2) *University of Queensland Law Journal* 41, 78 ('Throwing the Baby Out With the Bathwater?'): 'all successful lawful-act duress claims are also (extreme) cases of 'unconscionable conduct' in the *Amadio* sense, but they are … best adjudicated under the duress doctrine rather than unconscionable dealing, since judges under the former doctrine are … forced to focus on the analytical features of a coercion situation/claim'.

Of course, the reference to special disability or special disadvantage is a reference to the Australian conception of the general equitable principle of unconscionable dealing.[90] The Court of Appeal in *Karam* made it very clear that this was the sense in which it used the word 'unconscionability' in relation to cases in which others might utilise lawful act duress.[91] The Court of Appeal was essentially saying that lawful act duress was unnecessary, because the concept of unconscionability, as defined in equity, was effectively the equivalent. Australian statute law also provides for unconscionable conduct.[92] On both points, English law differs. The English conception of unconscionable conduct differs from the Australian,[93] and there are significant differences in the reach of statutory unconscionability in the two jurisdictions.[94] The *Karam* approach may be considered artificial in that the threat itself creates the disadvantage; until it was made, the disadvantage may not have existed. In the alternative, if the disadvantage arises in another way, for example illiteracy, the threat is redundant. And, with great respect, it is arguably nonsense to suggest that the unconscionable bargain doctrine is related

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90 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 459 (Gibbs CJ), 461 (Mason J), 474 (Deane J, Wilson J agreeing at 468), 489 (Dawson J) ('*Amadio*'); *Blomley v Ryan* (1956) 99 CLR 362, 415 (Kitto J).

91 *Karam* (n 17) 168 [66] (Beazley, Ipp and Basten JJA): 'the vagueness inherent in the terms "economic duress" and "illegitimate pressure" can be avoided by treating the concept of "duress" as limited to threatened or actual unlawful conduct. The threat or conduct in question need not be directed to the person or property of the victim … but can be to the legitimate commercial and financial interests of the party. Secondly, if the conduct or threat is not unlawful, the resulting agreement may nevertheless be set aside where the weaker party establishes undue influence (actual or presumptive) or unconscionable conduct based on an unconscientious taking advantage of his or her special disability or special disadvantage, in the sense identified in *Commercial Bank of Australia Ltd v Amadio*'.

92 See, eg, *Competition and Consumer Act 2010* (Cth) sch 2 ss 20–1 ('*Australian Consumer Law*'). Section 22 permits the court to have regard to various factors in determining whether unconscionable conduct exists on the facts. As the Court in *Karam* (n 17) noted of an equivalent predecessor provision, one relevant factor concerns the extent to which the defendant required the plaintiff to comply with obligations that were not reasonably necessary to protect the defendant's legitimate business interests: at 168–9 [67] (Beazley, Ipp and Basten JJA).

93 In Australia, unconscionability involves two elements: (a) the existence of a special disadvantage or disability on the part of one party to the contract, and (b) the other party to the contract taking advantage of that disadvantage in an unconscientious manner: *Amadio* (n 90) 459 (Gibbs CJ), 461 (Mason J), 474 (Deane J, Wilson J agreeing at 468), 489 (Dawson J). In the United Kingdom, unconscionability involves three elements: (a) one party is at a serious disadvantage compared to the other contracting party; (b) the complainant's disadvantage was exploited by the stronger party in a manner regarded as morally culpable; and (c) the resulting transaction is overreaching and oppressive, not merely hard or improvident: *Times Travel* (n 2) 117 [24] (Lord Hodge DPSC, Lords Reed PSC, Lloyd-Jones and Kitchin JJSC agreeing), citing *Alec Lobb* (n 66) 94–5 (Millett QC, sitting as a Deputy High Court Judge).

94 *Australian Consumer Law* (n 92) s 20 enshrines the common law of unconscionability into legislation; s 21 states a general prohibition on unconscionability in relation to the supply of goods or services to a 'consumer'; s 22 contains a broad range of factors which courts might utilise in determining unconscionability. These expand beyond the common law concept of unconscionability. Sections 23–5 deal with relief from unfair terms. These provisions may also apply in an unconscionability setting, because the unconscionability may result in a contract containing one or more unfair terms. The *Consumer Rights Act 2015* (UK) similarly makes provision for unfair terms: see s 62, sch 2 pt 1. Again, these are related to unconscionability because, as a consequence of unconscionable behaviour, the terms of the parties' agreement may be unfair.

to the context of threats. Many cases in which courts have recognised the existence of an unconscionable bargain do not involve a threat.

There is other lower court authority that contradicts the position taken in *Karam*. The existence of lawful act duress was confirmed by the Victorian Court of Appeal,[95] and the Western Australian Court of Appeal.[96]

C *High Court of Australia*

The High Court mentioned this issue in passing in *Thorne v Kennedy* ('*Thorne*'),[97] but duress was not the basis of the decision there. The joint reasons expressly left open whether lawful act duress should exist in the law,[98] and if it should, whether it should have an unconscionability basis.[99] Nettle J squarely addressed the issue in obiter dicta. He questioned whether the position taken by the New South Wales Court of Appeal in *Karam* was 'doctrinally valid'.[100] He took issue with the claim in *Karam* that subsuming the doctrine of lawful act duress within unconscionability and/or undue influence would improve certainty in the law;[101] he indicated these doctrines were also to some extent beset by uncertainty.[102] Nettle J said that *Karam* was a significant departure from then prevailing Australian authority. His Honour opined that a better doctrinal basis for lawful act duress was proportionality. Specifically, that the test of illegitimacy of pressure would consider whether the pressure went beyond what was reasonably necessary for the protection of legitimate interests.[103] If it did, duress would be recognised, and the transaction tainted by it would be voidable.

D *Summary of the Australian Position*

The Australian position regarding the status of lawful act duress in our law is uncertain. On one view, it does exist, and it is connected with notions of

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95 *Beerens v Bluescope Distributions Pty Ltd* (2012) 39 VR 1, 11 [46] (Nettle JA, Tate JA agreeing at 22), [90]; *Doggett v Commonwealth Bank of Australia* (2015) 47 VR 302, 321–2 [73] (Whelan JA, Garde AJA agreeing at 353–4 [218]), quoting *Woodside Energy* (n 89) [24]–[26] (McLure P).

96 *Woodside Energy* (n 89) [25] (McLure P, Newnes JA agreeing at [44]).

97 *Thorne* (n 5).

98 Ibid 98–9 [29] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

99 Ibid 99 [29].

100 Ibid 114 [71].

101 *Karam* (n 17) 168 [66] (Beazley, Ipp and Basten JJA).

102 *Thorne* (n 5) 115 [72]. See also *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1, 57 [147] (Nettle and Gordon JJ). Tinker v Revenue and Customs Commissioners [2022] AC 886, 902 [28] (Lord Burrows JSC, Lord Hodge DPSC, Lady Arden JSC and Lady Rose JSC agreeing) described the concept as vague

103 *Thorne* (n 5) 114 [71], citing Edelman and Bant (n 15) 211–12, 215–16. The seventh justice, Gordon J, did not consider the matter. A similar view was taken in *Woodside Energy* (n 89) [25] (McLure P, Newnes JA agreeing): 'if the pressure is lawful, it may be illegitimate if there is no reasonable or justifiable connection between the pressure being applied and the demand which that pressure supports'.

unconscionability.[104] The precise meaning of unconscionability in this context is open to question. On another view, it does not exist, and cases which raise this type of matter should simply be brought under general *Amadio* unconscionability principles.[105] On a third view, it does exist, but is better connected with notions of proportionality than unconscionability.[106] There is a real need for High Court clarification of the correct principles to be applied.

I turn now to consider whether legal principles such as unconscionability, proportionality or good faith are well-placed to underpin cases of lawful act duress, whether a range of factors approach should be taken, or whether the doctrine of lawful act duress is really redundant.

IV Legal Approaches to Cases of Lawful Act Duress

A *Unconscionability*

As demonstrated above, the joint reasons in the United Kingdom Supreme Court decision in *Times Travel*, and the judgment of McHugh JA in *Crescendo Management*, both utilise the principle of unconscionability in the context of a lawful act duress claim.

Dimarco and de Maurier have criticised the use of unconscionability in this context:

> Not all contracts that should be voidable for economic duress should be regarded as having been procured by (*Amadio*-type) unconscionable conduct or actual undue influence. In a case like *The Cenk* … where the threatened party was in a position of economic vulnerability because it had to ensure the scrap metal arrived at a certain time to meet its contractual obligations owed to a third party, the relevant vulnerability, being economic in nature, was not a special disability or disadvantage in the sense necessary to enliven the doctrine of unconscionability in Australia. Inequality of bargaining power does not amount to a special disability or disadvantage. Nor could the threatened party's will have been described as having been overborne when it yielded to the demand under protest in the sense necessary to rely on the doctrine of undue influence to avoid the new agreement.[107]

Others have noted that United Kingdom case law prior to *Times Travel* does not support the equating of illegitimate pressure and reprehensible and

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104 *Crescendo Management* (n 83) 46 (McHugh J).

105 *Karam* (n 17).

106 *Thorne* (n 5) 97 [27] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

107 Michael Dimarco and Alexander du Maurier, 'Lawful Act Duress: Is It Time to Travel Away from *Karam*?' (2022) 96(12) *Australian Law Journal* 906, 918. See also Branford and Gardner (n 16) 653: 'merging unconscionability concepts into lawful act duress will add further confusion to an already unclear area of law'. Edelman and Bant (n 15) 228: 'illegitimate pressure does not require unconscionable conduct, although [it] may assist to show that pressure in a commercial context is illegitimate'.

unconscionable conduct.[108] The factual scenarios in some cases where unconscionability has been established in relation to threats do not meet the requirements of illegitimacy in terms of lawful act duress.[109]

The explanation given by the Court in *Karam* for abandoning lawful act duress in favour of unconscionability was that the former relied on concepts that were inherently uncertain.[110] However, the obvious response is that the Court favours the use of doctrines that are hardly any more certain.[111]

It might be prudent to consider the meaning that the general law has given to unconscionability. These are in contexts unrelated to duress claims. There is a live debate as to whether unconscionability would or should mean the same thing in the context of duress, and in the context of the general law. Both the general law and statute law in Australia make provision for unconscionability. I do not assume here that they will or should have the same meaning, but it is certainly considered possible that they might be held to have the same meaning in order to avoid (any more) confusion. The literature is divided on this point.[112] As noted, one

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108 Jackson (n 68) 704.

109 Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (Sweet & Maxwell, 4th ed, 2023) 297, citing *Dusik v Newton* (1985) 62 BCLR 1 (threats by defendant were not illegitimate but held to be exploitative of the plaintiff's weakened position and unconscionable); *Proof v Hines* (1735) Cases T Talbot 111; 25 ER 690 (unconscionable exploitation of an elderly debtor's weakened position, though the demands made were not illegitimate).

110 *Karam* (n 17) 168 [66] (Beazley, Ipp and Basten JJA).

111 Bigwood, 'Throwing the Baby Out With the Bathwater?' (n 89) 43; Branford and Gardner (n 16) 650; Bigwood and Dietrich (n 33) 76–7. Sanderson and Cooney, 'A Fall Between Two Stools' (n 23) 552: 'the judgment does not provide a more certain definition of unconscionability, or outline which factual patterns will give rise to such a finding. Ambiguity surrounding the meaning of 'unconscionable' pressure has already led to incoherence within English law'. 'The Court has doused the fires of uncertainty with petrol. [The majority's] test, resting as it does upon an imprecise conception of unconscionability, raises more questions than it answers': at 555. Henry Cooney and Harry Sanderson, 'Illegitimate Pressure in the Law of Duress' [2022] *Lloyd's Maritime and Commercial Law Quarterly* 496, 507 ('Illegitimate Pressure in the Law of Duress'): 'the language of unconscionability should be avoided. It is needlessly confusing and distracts attention from the individual factors that determine whether otherwise lawful pressure is illegitimate'.

112 Ross McKeand, 'Economic Duress: Wearing the Clothes of Unconscionable Conduct' (2001) 17(1) *Journal of Contract Law* 1 operates on the basis the meaning is the same. The judgement in *Karam* (n 17) 168 [66] (Beazley, Ipp and Basten JJA) also operates on this basis: 'if the conduct or threat is not unlawful, the resulting agreement may nevertheless be set aside where the weaker party establishes … unconscionable conduct based on an unconscientious taking advantage of his or her special disability or special disadvantage, *in the sense identified* in *Commercial Bank of Australia Ltd v Amadio*' (emphasis added). So do Alexander Loke and Ivan Sin, 'Constructing Lawful Act Duress — Times Travel (UK) Ltd v Pakistan International Airlines Corp' [2022] (March) *Singapore Journal of Legal Studies* 239, 248; Branford and Gardner (n 16) 650–3. On the other hand, Bigwood, 'Throwing the Baby Out With the Bathwater?' (n 89) 63 states: 'although some authors and courts … have taken the reference there [by McHugh JA in *Crescendo Management*] to unconscionable conduct to denote narrowly conduct that constitutes "unconscionable dealing" in the *Amadio* sense, and which is regulated by the doctrine of the same name, there is actually nothing in McHugh JA's statement of the duress doctrine in *Crescendo* [*Manangement*] that requires such a circumscribed interpretation. "Unconscionable conduct" might just as easily refer here to conduct that fails to meet the special, and highly contextual, demands of equity more broadly, which would be consistent with the American Law Institute's formulation of the lawful-act duress phenomenon captured in the capacious criteria of §176(2) of the *Restatement*'. American Law Institute, *Restatement (Second) of Contracts* (1981) § 176(2) ('*Restatement (Second)*

reading of the fact that the United Kingdom Supreme Court in *Times Travel* declined to define unconscionability in the context of lawful act duress might be that it intended it to have the same meaning here as in relation to unconscionable bargains. Others disagree.[113]

It must also be acknowledged that there are some substantive differences between how unconscionability has been conceived in English law and Australian law, though it is important not to exaggerate these differences.[114] It is not considered that these differences are material for the purposes of the current context. Specifically, the fact that unconscionability may be considered more narrowly in the United Kingdom than it is in Australia is not considered to be material in determining the question of whether unconscionability should be utilised in relation to the law of duress, the crux of the current discussion.

On the assumption that the concepts would be held to have the same meaning in the general law and the context of the law of duress, it becomes important to consider how Australian courts have interpreted unconscionable dealing. In essence, they have considered three elements: (a) one party is at a special disadvantage to the other in a contracting environment; (b) the other

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of Contracts') refers to the question of 'improper' threats as where an exchange is not fair, the threatened act would harm the recipient and not significantly benefit the party making it, the threat is made more effective by past unfair dealing by the threatening party, and what is threatened is otherwise a use of power for illegitimate ends. Carr (n 15) 315–16 also maintains the word means something different in the context of duress as compared with its use in equity. Carr states this as 'conduct that fails to meet the special, and highly contextual, demands of equity more broadly': at 316, citing *Cockerill* (n 85) 289 (Kiefel J). Kiefel J opined that McHugh JA was not intending to mean 'unconscionable' in the *Amadio* context in his judgment in *Crescendo Management*: *Cockerill* (n 85) 289. Respectfully, no evidence is provided to support this assertion. Similarly in *Parras Holdings Pty Ltd v Commonwealth Bank of Australia* [1999] FCA 391 the Full Federal Court indicated that unconscionability in the law of equity meant something different from its application in duress: at [66] (Spender, Hill and Merkel JJ). On the other hand, with respect, the explanation of the difference was not as clear as it might have been. The Court stated that in the former case, the focus was on disability and special disadvantage, whereas in the latter case it was on the nature of the pressure exercised and whether it was legitimate. Somewhat confusingly, the Full Court then stated that, *for the same reasons* as its conclusion that no claim in equity based on unconscionable conduct existed, no claim for duress existed: at [66]. In *AHG WA (2015) Pty Ltd v Mercedes-Benz Australia Pacific Pty Ltd* (2023) 303 FCR 479 Beach J equated unconscionability in the context of duress with unconscionability in other areas of the law: at 570 [3368].

113 Sanderson and Cooney, 'A Fall Between Two Stools' (n 23) 552: 'in light of … [*Times Travel*] it will be important for future decisions to clarify the relationship between unconscionable pressure and other notions of unconscionability throughout the law … [T]he term 'unconscionable' itself only signifies pressure prohibited in equity. Without further elaboration the concept of unconscionability does not provide a "test" of illegitimate pressure'.

114 Specifically, the English law of unconscionable bargains has required, in addition to serious disadvantage, that the defendant has acted in a morally culpable manner, and in an oppressive and overreaching way: *Times Travel* (n 2) 117 [24] (Lord Hodge DPSC, Lords Reed PSC, Lloyd-Jones and Kitchin JJSC agreeing). The second two requirements are not necessary in Australia for a claim to set aside a bargain on the basis of *Amadio* unconscionability. However, the United Kingdom Supreme Court referred to Australian High Court authority in *Times Travel* in framing its doctrine of unconscionable bargains: at 117 (Lord Hodge DPSC). Some difference in the meaning of unconscionability between the two jurisdictions may be acknowledged, but it should not be exaggerated. Most importantly, those differences are not regarded as material for the purposes of the current context.

party knows of the disadvantage; and (c) unconscientiously takes advantage of the situation to obtain a benefit at the expense of the party at the disadvantage.[115] Mere inequality of bargaining power is insufficient.[116] The High Court has given numerous examples of what might cause special disadvantage.[117] It has identified that common among these is the lack of ability of the weaker party to make a judgment as to their own best interests.[118] Typically, at common law (at least in Australia), the focus was on procedural unconscionability, focussed on the circumstances surrounding the formation of the contract,[119] but statutory provision has expanded the focus to include reference to the terms of the contract.[120]

An interesting case brought on the basis of unconscionability, but with hypothetical links to lawful act duress, is *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd*.[121] A dispute arose between the lessor and lessees in a shopping centre regarding alleged overpayments. While the dispute remained unresolved, the lease of one of the lessees was nearly at an end. The lease did not contain an express right of renewal. These lessees sold their business by a contract expressed to be subject to a satisfactory transfer of the lease to the purchaser. The lessor knew of the lessee's desire to sell the business. During negotiations for a new lease, the lessor required the inclusion of a clause providing that the lessee and their assignees agreed not to pursue the matters in dispute. The lessees claimed that the lessor had engaged in unconscionable conduct. They were successful before the trial judge, but this was overturned by the Full Federal Court. A majority of the High Court rejected an appeal. The case was not apparently argued on the basis of lawful act duress.

Members of the High Court continued to emphasise, in the context of unconscionability, whether the party claiming relief was able to judge what was in their best interests.[122] Actionable unconscionability occurs when a party at a

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115 *Stubbings v Jams 2 Pty Ltd* (2022) 276 CLR 1, 20 [39] (Kiefel CJ, Keane and Gleeson JJ) ('*Stubbings*'), citing *Amadio* (n 90) 459–60 (Gibbs CJ), 461 (Mason J), 474 (Deane J).

116 *Amadio* (n 90) 459 (Gibbs CJ), 462 (Mason J).

117 For example, poverty or need, illness, age, gender, mental or physical infirmity, drunkenness, illiteracy or lack of education, or lack of access to advice or assistance: *Blomley v Ryan* (1956) 99 CLR 362, 405 (Fullagar J), 415 (Kitto J).

118 Ibid 392 (McTiernan J), 415 (Kitto J); *Amadio* (n 90) 459 (Gibbs CJ), 462 (Mason J), 476 (Deane J, Wilson J agreeing at 468); *Thorne* (n 5) 103 [38] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

119 *Amadio* (n 90) 459 (Gibbs CJ), 461–2 (Mason J), 474–5 (Deane J, Wilson J agreeing at 468), 489 (Dawson J); Enonchong (n 109) 258: 'substantive unfairness is not a pre-requisite for relief under [the] unconscionability doctrine of Australia'.

120 *Australian Consumer Law* (n 92) ss 21(4)(c), 22(1)(j)(ii)–(k), 22(2)(j)(ii)–(k); *Karam* (n 17) 168 [66] (Beazley, Ipp and Basten JJA). In other jurisdictions unconscionability at common law seems to embrace substantive aspects: Hamish Stewart, 'A Formal Approach to Contractual Duress' (1997) 47(2) *University of Toronto Law Journal* 175, 177.

121 (2003) 214 CLR 51.

122 *Stubbings* (n 115) 21 [40] (Kiefel CJ, Keane and Gleeson JJ); *Thorne* (n 5) 103 [38] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ); *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392, 398 [6] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ); *Australian Securities and Investments Commission v Kobelt* (2019) 267 CLR 1, 36 [81] (Gageler J), 57 [146] (Nettle and Gordon JJ), 95 [282] (Edelman J).

special disadvantage is not able to judge what is in their best interests. This makes it difficult to assimilate duress into unconscionable conduct. This is because cases in which duress might be established typically do not involve the plaintiff being unable to judge what was in their best interests. More likely, it is that they feel constrained as to their choices. They may have to make a choice they know is not in their best interests, because of the illegitimate pressure placed on them by the defendant.

At least as currently interpreted, illegitimate pressure does not map easily onto unconscionable dealing in the *Amadio* sense.[123] In *Cockerill*, Kiefel J expressly distinguished duress from unconscionability, denying that McHugh JA in *Crescendo Management* had intended his assimilation of lawful act duress into unconscionability to mean unconscionability in the *Amadio* sense. She did so by stating that duress, like undue influence, was focussed on the quality of the consent of the plaintiff. On the other hand, unconscionable dealing focussed on the quality of the conduct of the defendant.[124]

It is submitted, with great respect, that although what Kiefel J stated is partly true, it does not provide the complete picture, which is messier than what the judgment might suggest. The current action for lawful act duress does, as Kiefel J states, focus on the quality of the consent. However, it does also focus on the quality of the defendant's behaviour.[125] It considers whether the pressure it exerted was 'illegitimate', and some argue that this has a moral component.[126] Furthermore, unconscionable dealing does not focus exclusively on the quality of the defendant's conduct. It focusses on the plaintiff to the extent of identifying whether they are at a special or serious disadvantage vis a vis the other party. This is not an easy test to satisfy. If this test is not met, an unconscionable dealing action cannot lie. Thus, it is submitted to be better to take the position that McHugh JA did not expressly state the sense in which he used the concept of unconscionability. It is suggested that the default position might be that he meant it in the *Amadio* sense, and that if McHugh JA intended it to mean something different, he might have so indicated. More importantly, while there are some

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123 Bigwood, 'Throwing the Baby Out With the Bathwater?' (n 89) 48: 'merely being impeded by "financial difficulties" or "pressure" from pursuing one's best interests does not alone amount to a special disadvantage, hence cannot alone suffice to establish unconscionable conduct on the part of the stronger party who is aware of those weaknesses'. Branford and Gardner (n 16) 651.

124 *Cockerill* (n 85) 289 (Northrop J agreeing at 276). This is partially supported by *Thorne* (n 5) 97 [26] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ): 'the vitiating factor of duress focuses upon the effect of a particular type of pressure on the person seeking to set aside the transaction'.

125 Stephen A Smith, 'Contracting Under Pressure: A Theory of Duress' (1997) 56(2) *Cambridge Law Journal* 343 theorises that duress involves two conceptually distinct matters — wrongdoing and lack of consent: at 344. Clearly 'wrongdoing' focusses on the defendant's behaviour. Cooney and Sanderson, 'Illegitimate Pressure in the Law of Duress' (n 111): 'the effect of the defendant's pressure upon the plaintiff's will forms only part of the enquiry. It is also necessary to decide whether the pressure was illegitimate. It is in the context of this latter enquiry that duress, despite being plaintiff-centric, often "focusses more upon the conduct of the alleged perpetrator than the attributes and/or perceptions of the alleged victim"': at 506, quoting *Rodolico v Rodolico* [2020] VSC 535, [53] (Daly AsJ).

126 *CTN Cash* (n 31) 719 [16] (Steyn LJ).

conceptual differences between duress and unconscionability, as highlighted by Kiefel J in *Cockerill*,[127] there is also substantial doctrinal overlap.[128]

The 'special disadvantage' requirement of unconscionability is particularly difficult to map. Typically, special disadvantage is concerned with situations where a party has impaired judgment due to their personal characteristics. Though these categories are not closed, they have not (at least yet) been interpreted to include cases where someone is in an economically precarious position.[129] Loke and Sin criticise the adoption in *Times Travel* of the concept of unconscionability to assess the viability of a claim for lawful act duress.[130] One of their arguments is that the facts in two previous cases where lawful act duress was found to exist, *Borrelli* and *The Cenk*, do not lend themselves to a finding of unconscionability. This is because there was nothing in the inherent attributes or characteristics of the claimants that would attract the application of general *Amadio* unconscionability; in other words, it was not a constitutional disadvantage they suffered, but a situational disadvantage. They point out that United Kingdom law generally only recognises the first as grounding unconscionability; this may also be the position in Australia.[131] In so doing, they apparently presume (understandably and defensibly, in the absence of indication otherwise in the judgment in *Times Travel*) that unconscionability in the context of duress means the same as in the context of unconscionable bargains.

Further difficulties are provided by the statement of a unanimous High Court in *Kakavas v Crown Melbourne Ltd* that unconscionable conduct involves a 'predatory' state of mind by the party accused of it, involving 'victimisation or exploitation'.[132] There is no real equivalent in the law of duress — a finding of illegitimate pressure being applied does not necessarily reflect on the state of mind of the one accused of it, in contrast with concepts such as 'predatory' behaviour.

Further difficulties appear with applying the English law regarding unconscionability to duress. As noted above, the third of the requirements is that the resulting transaction be overreaching and oppressive.[133] This requires there to

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127 (1998) 152 ALR 267, 289 (Northrop J agreeing at 276).

128 Bigwood, 'Throwing the Baby Out With the Bathwater?' (n 89) 44; Anthony Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 (April) *Law Quarterly Review* 238, 249.

129 Carr (n 15) 307:'financial need per se is unlikely to constitute a special disadvantage and mere "commercial vulnerability" will not "elevate disadvantage into special disadvantage"'.

130 Loke and Sin (n 112) 248.

131 *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 215 CLR 51. There, Gleeson CJ distinguished between constitutional disadvantage (a person's inherent features such as age, education, poverty or lack of experience) and situational disadvantage (the relationship between actors in the transaction): at 63 [9]. He indicated that situational disadvantage was 'far beyond' the common law of unconscionability: at 63–4 [10]; Cf French J in *Australian Competition and Consumer Commission v Samton Holdings Pty Ltd* (2002) 117 FCR 301, 318 [48] who suggested both situations could be recognised as unconscionable.

132 (2013) 250 CLR 392, 439–40 [161] (French CJ, Hayne, Crennan, Kiefel, Bell, Gageler and Keane JJ).

133 See above n 66; *Alec Lobb* (n 66) 95 (Millett QC, sitting as a Deputy High Court Judge).

be substantive unfairness.[134] This has been said to set a very high bar which few claimants can meet, and very few successful claims have been brought.[135] In describing the English law regarding unconscionable conduct, the Court has focussed on the terms of the contract as one important factor indicating unconscionability.[136] This is quite distinct from duress analysis, which does not focus on the terms of the contract but rather the circumstances leading to its formation. In this way, it has more affinity with procedural unconscionability, which is the focus of Australian law, rather than the English position, which includes substantive unconscionability.[137]

There is also the point that if lawful act duress is to be effectively equated with the equitable concept of unconscionable dealing, arguably there would be no point in recognising the duress doctrine, because any case that met the unconscionability criteria for the purposes of lawful act duress would also meet it in the context of the *Amadio* unconscionability. The plaintiff would gain nothing by bringing their claim in duress because the remedy would be the same. Thus, if the general *Amadio* sense of unconscionable dealing is what is meant by unconscionability in the context of duress, duress is redundant.

Of course, it may be that unconscionability means something different in the context of lawful act duress than it does in the general *Amadio* context. But it is not clear that this is the case; there is very little evidence that this is the position. If unconscionability in the context of duress does mean something different than unconscionability in the law of equity more generally, firstly this is not explained in *Times Travel*, as might have been expected. And secondly, it would need to be explained precisely what it does mean in the context of duress — something which does not appear in *Times Travel* either. With great respect, it is unsatisfactory to suggest that unconscionability simply means behaviour that does not meet the general standards of equity.[138] In *Al Nehayan,* Leggatt LJ thought it meant behaviour that was completely indefensible, unreasonable, and contrary to standards of fair dealing.[139] In *CTN Cash*, the Court referred to conduct that was 'morally or socially unacceptable'.[140] Thus, if the general equitable meaning of unconscionability is not what is meant by unconscionability in the context of duress, it is not clear precisely what is. Aspects of the existing law of

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134 Enonchong (n 109) 306–7. It has been suggested this might include procuring agreement by 'unfair means': *Multiservice Bookbinding Ltd v Marden* [1979] Ch 84, 110 (Browne-Wilkinson J). It is possible that the exertion of illegitimate pressure on a plaintiff might involve unfair means.

135 Enonchong (n 109) 308.

136 *Alec Lobb* (n 66) 94 (Millett QC, sitting as a Deputy High Court Judge): '[unconscionability] seems to relate both to the terms of the bargain and to the behaviour of the stronger party'. '[T]here must … be some impropriety, both in the conduct of the stronger party and in the terms of the transaction itself': at 95. See also *Credit Lyonnais Bank Nederland NV v Burch* [1997] 1 All ER 144, 152–3 (Millett LJ).

137 Enonchong (n 109) 306–8.

138 Bigwood, 'Throwing the Baby Out With the Bathwater?' (n 89) 63.

139 *Al Nehayan* (n 12) 276–7 [187]–[188].

140 *CTN Cash* (n 31) 719 (Steyn LJ, Farquharson LJ agreeing) (although he did not refer specifically to unconscionability).

unconscionability as applied in Australia and England are clearly inappropriate to the context of duress. For these reasons, the use of unconscionability in applying lawful act duress is inappropriate.

B *No Need for Lawful Act Duress*

This is the position taken by the New South Wales Court of Appeal in *Karam*. It was stated there that cases which might otherwise have been argued to involve lawful act duress could be dealt with using existing equitable principles, rendering the doctrine superfluous. Cooney argues that in every case in which lawful act duress has been established, the acts complained of were independently unlawful.[141] Thus, there is no need for the doctrine. Further, he argues that there is no need to tie the doctrine to existing principles such as unconscionability, good faith, proportionality, or any other legal principle.[142] Davies and Day have also called for courts to abandon the concept of lawful act duress entirely.[143] Morgan seems to incline to this position.[144] A couple of Australian decisions also seem to limit duress to cases involving unlawful conduct.[145]

Certainly, if unconscionability in the duress context means the same as that under general *Amadio* unconscionability principles, as discussed above there is a strong argument that it is superfluous and could be abandoned. The difficulties that emerge if the position is that it means something different in the duress context have also already been canvassed above.

The question whether good faith is to be recognised in Australian contract law remains an unresolved question at High Court level,[146] although it has support

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141 Henry Cooney, 'The Lawful Act Duress Myth' (2023) 17(1) *Journal of Equity* 31, 34. See also Keith Mason, John W Carter and Greg J Tolhurst, *Mason and Carter's Restitution Law in Australia* (LexisNexis Butterworths, 4th ed, 2021) 234: '"Illegitimate pressure" in this context should be understood and confined to conduct which is unlawful or wrongful, by reference to some external legal standard'.

142 Cooney (n 142) 34: 'In every example of lawful act duress, the pressure was illegitimate because it was independently unlawful. The legitimacy of pressure in cases of lawful act duress has never been assessed according to a standard of "unconscionability", "disproportionality", "good faith" or any other notion of equal uncertainty. The law of duress is parasitic upon the standards of unlawfulness created by the general and statutory law. It is these standards that determine whether pressure is legitimate, regardless of whether the case is one of lawful act or unlawful act duress'.

143 Davies and Day (n 33) 8. See also Daniel Tan, 'Grounds of Economic Duress: Further Clarification or Further Confusion? *Sharon Global Solutions Pte Ltd v LG International (Singapore) Pte Ltd*' [2001] (December) *Singapore Journal of Legal Studies* 268, 271–2. On the other hand, Bigwood, 'Throwing the Baby Out With the Bathwater?' (n 89) 84 concludes there would be 'little if anything to be gained' by refusing to recognise lawful act duress as actionable.

144 Jonathan Morgan, 'The Thin End of the Wedge: Morality, Contract Law and Lawful Act Duress' (2022) 81(1) *Cambridge Law Journal* 17, 17: 'the law faces a binary choice between full-fat moralism if lawful act duress is retained, and its outright abolition'.

145 *Nalbandian v Commonwealth* [2017] FCA 45, [57] (Burley J); *Aretzis Properties Pty Ltd v Creative Cooks Pty Ltd* [2020] SADC 119, [61] (Judge Bochner).

146 *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169, 195–6 [42] (French CJ, Bell and Keane JJ) ('*Barker*').

at state and federal levels.[147] If good faith were recognised as a general organising principle of the law of contract in Australia, as has occurred in Canada,[148] then on one view there would be no need to recognise lawful act duress, because the behaviour would in any event be measured against a good faith standard.[149] I will consider good faith further below.

Nevertheless, all members of the United Kingdom Supreme Court in *Times Travel* accepted the existence of lawful act duress.[150] They accepted the validity of previous authorities recognising a jurisdiction to intervene in situations where a threat was made to do a lawful act. In the High Court of Australia, the one judge who reached a view in *Thorne* held that lawful act duress existed.[151] Thus, this article assumes the continued viability of the doctrine of lawful act duress.

C *Proportionality*

Some advocate a proportionality approach, comparing the lawful threat made with the defendant's legitimate interest in the related demand.[152] This was supported in dicta comments by Nettle J in *Thorne*.[153] Leading scholar Rick Bigwood seems to favour a proportionality approach to duress claims:

> If one were to attempt to encapsulate the common thread that emerges from successful lawful-act duress claims in the past ... it would be that, in each case, there was a seriously disjunctive relationship between the *end* that was being sought (the demand) and the *means* that was being employed to achieve it (the application of "lawful" pressure).[154]

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147 See, eg, *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 ('*Renard Constructions*'); *Burger King Corporation v Hungry Jack's Pty Ltd* (2001) 69 NSWLR 558 ('*Burger King*'). Further references appear below.

148 *Bhasin v Hrynew* [2014] 3 SCR 494, 514–5 [33] (Cromwell J for the Court) ('*Bhasin*').

149 It is not considered necessary for current purposes to discuss separately the question of good faith in contract negotiation and good faith in contract enforcement, although the United Kingdom has clearly set itself against the former (see *Walford v Miles* [1992] 2 AC 128, 140) but has been more accepting of the latter (see *British Telecommunications plc v Telefonica O2 UK Ltd* [2014] 4 All ER 907, 923 ('*Telefonica*')).

150 *Times Travel* (n 2) 110 [1] (Lord Hodge DPSC, Lords Reed PSC, Lloyd-Jones and Kitchin JJSC agreeing), 137–8 [86]–[89] (Lord Burrows).

151 *Thorne* (n 5) 114 [71] (Nettle J). Lawful act duress was also accepted by the Western Australian Court of Appeal in *Woodside Energy* (n 89) [25] (McLure P, Newnes JA agreeing at [44]).

152 Edelman and Bant (n 15) 212.

153 *Thorne* (n 5) 114 [71]: 'it would better accord with equitable principle, and better align with English and American authority, if the test of illegitimate pressure were whether the pressure goes beyond what is reasonably necessary for the protection of legitimate interests'.

154 Bigwood, 'Throwing the Baby Out With the Bathwater?' (n 89) 60. See also Bigwood, 'Coercion in Contract' (n 28) 217.

It is also the position taken in the leading textbook by Edelman and Bant,[155] and by other commentators.[156] Edelman and Bant's approach is partly based on comments made by the Privy Council in *R v Attorney-General of England and Wales* ('*R v Attorney-General*').[157] There, the Board considered whether the demand made by the relevant party and supported by the threat could be justified.[158] It also referred to it being reasonable.[159] Some have equated this to a kind of proportionality test, though, to be clear, the Privy Council did not itself use that language. It has the support of two members of the Western Australian Court of Appeal,[160] two members of the Victorian Court of Appeal,[161] and other judicial support.[162] If relevant, it is also adopted in pertinent legislation,[163] though the relevance of the context of statute in stating common law doctrine is, of course, a matter of conjecture. The relationship between statute and the common law, and the extent to which development in the former should guide development in the latter, is contentious.[164]

Lord Burrows rejected the use of proportionality in this context on the basis that it was not clear how it would work, and that it would likely lead to greater uncertainty.[165] Others say it is clear that proportionality was not the basis of many of the decisions where lawful act duress was recognised.[166] Others claim it places too much emphasis on only one aspect — namely, the threat and the ultimate

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155 Edelman and Bant (n 15) 212: 'the requirement of disproportionality between (i) the lawful threat and (ii) the defendant's legitimate interest in the demand it supports underlies all cases of lawful, but illegitimate pressure'. Cf Mason, Carter and Tolhurst (n 142) who express disagreement with this approach: at 234.

156 Carr (n 15) 310.

157 [2004] 1 LRC 132 ('*R v Attorney-General*').

158 Ibid 507 [18] (Lord Hoffman for the Court).

159 Ibid 507 [20].

160 *Woodside Energy* (n 89) [25] (McLure P, Newnes JA agreeing at [44]): 'if the pressure is lawful, it may be illegitimate if there is no reasonable or justifiable connection between the pressure being applied and the demand which that pressure supports'. But these were dicta comments. Murphy J did not discuss the matter.

161 *Doggett v Commonwealth Bank of Australia* (2015) 47 VR 302, 321–2 [73] (Whelan JA, Garde AJA agreeing at 353–4 [218]), quoting ibid [24]–[26] (McLure P).

162 *Morgan Stanley Wealth Management Australia Pty Ltd v Detata [No 3]* [2018] WASC 32, [409] (Banks-Smith J); *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 267 IR 130, 180–1 [152] (Reeves J): 'disproportionality between a lawful threat of action, or the lawful action itself, and the legitimate interest in the demand the threat, or action, supports is the appropriate legal standard to be applied to determine whether the threat of action, or actual action, is illegitimate'.

163 *Australian Consumer Law* (n 92) s 22(1)(b); *Contracts Review Act 1980* (NSW) s 9(2)(d).

164 Paul Finn, 'Statutes and the Common Law' (1992) 22(1) *University of Western Australia Law Review* 7; Roscoe Pound, 'Common Law and Legislation' (1908) 21(6) *Harvard Law Review* 383; Jack Beatson, 'The Role of Statute in the Development of Common Law Doctrine' (2001) 117 (April) *Law Quarterly Review* 247. In a very different context, the decision in *Voth v Manildra Flour Mills Pty Ltd* (1990) 171 CLR 538 represents an example where the High Court did not take into account statutory development in determining the correct common law principle. On the other hand, in *Andrews v Australia and New Zealand Banking Group Ltd* (2012) 247 CLR 205, the High Court suggested that the development of the common law may be guided by statutory development: at 215–16 (French CJ, Gummow, Crennan, Kiefel and Bell JJ).

165 *Times Travel* (n 2) 152 [129].

166 Cooney and Sanderson, 'Illegitimate Pressure in the Law of Duress' (n 111) 508.

arrangements made — ignoring the context of the underlying relationship between the parties and the circumstances leading up to the threat. It is argued that it is only by examining the full history — for example, in *The Cenk* the refusal to provide the vessel; in *Borrelli* the refusal to co-operate with liquidators and the suggested voting irregularities; in *Times Travel* the alleged underpayment of commission — that one can properly assess the nature of the pressure exerted. It is said that a mere comparison between the threat made and the extent (if any) of the threatening party's legitimate interest does not provide the complete picture which is necessary to properly assess the situation.[167]

It must be acknowledged that courts have utilised proportionality elsewhere in the realm of contract law. Obviously, the United Kingdom Supreme Court did accept the utility of proportionality in the context of the question whether a particular contractual clause amounted to a penalty, asking whether the content of the clause went beyond what was reasonably necessary to give effect to the legitimate interests of the party seeking to rely on it.[168] And the High Court of Australia has utilised it in determining whether or not a restraint of trade clause is enforceable.[169]

However, it is important to bear in mind the significant difference in context. In relation to the question whether a contractual clause amounts to a penalty, the Supreme Court sought to rationalise a longstanding principle of the law. It sought to justify the intervention of the Court into a contractual agreement. It did so by stating that, to the extent that the clause as it operated was out of all proportion to the legitimate interest of the innocent party in enforcing the primary obligation, it was a penalty and could not be enforced.[170] The Court considered whether the objects sought to be achieved by the clause could be achieved in other ways.[171] The context was a consideration of a clause in an agreement, and whether it could be enforced or not. It was a question of remedies.[172] As the High Court of Australia noted, the context is the legal policy against punishing individuals for breaching their contracts, limiting remedies to those that are compensatory in nature. The concept of legitimate interests was utilised to distinguish penal clauses from other types of clause that were designed to be compensatory in

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167 This argument is made in William Garske, 'The Test for Lawful But Illegitimate Pressure' (2026) *UNSW Law Journal* (forthcoming). Garske rejects the apparent position of Edelman and Bant that good faith (which includes the background behaviour of both parties) can be utilised in the context of a disproportionality test. Cf Edelman and Bant (n 15) 215–16.

168 *Cavendish Square Holdings BV v Makdessi* [2016] AC 1172, 1192–3 (Lord Neuberger of Abbotsbury PSC and Lord Sumpton JSC, Lord Carnwath JSC agreeing); *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 258 CLR 525, 547 [29] (Kiefel J, French CJ agreeing at 536 [2]) ('*Paciocco High Court*').

169 *Ringrow Pty Ltd v BP Australia Pty Ltd* (2005) 224 CLR 656, 667 [27] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

170 *Cavendish Square Holdings BV v Makdessi* [2016] AC 1172, 1204 [32] (Lords Neuberger and Sumption, Lord Carnwath agreeing).

171 Ibid 1195 [10].

172 Ibid 1195–6 [11]–13].

nature.[173] Similarly, in the restraint of trade area, the focus is on the enforceability of a particular clause in the contract, rather than the circumstances leading to its formation.

Its suggested use in the context of duress clearly differs. Unlike in the context of penal clauses, no particular clause of the contract is being considered here. Duress is concerned to some extent with consent to the demand made and to a greater extent with the circumstances leading up to the making of it, not the content of the agreement itself.[174] It is focussed on the defendant's behaviour, and whether it was reprehensible, involving the placement of illegitimate pressure to manoeuvre the plaintiff into a vulnerable position.[175] It does not consider the content of the agreement itself. Alternatively, for Lord Burrows it concerns whether the defendant acted honestly — whether they genuinely believed they had a defence or were entitled to make the claim they did. This is materially different from proportionality analysis, comparing the threat made with the legitimate interest (if any) relating to it.

In summary, I do not support the use of notions of proportionality in the context of a lawful act duress claim. This is because it does not explain prior cases of lawful act duress, is too focussed on the pressure and the legitimate interest (if any) sought to be thus furthered, and ignores many other aspects of the parties' relationship, and because although it is utilised in limited contexts elsewhere in contract law, these situations are significantly different from a duress context.

D *Range of Factors Approach*

All members of the United Kingdom Supreme Court in *Times Travel* rejected an approach whereby a range of factors would be considered in determining whether or not lawful act duress existed.[176] It has been noted elsewhere that a majority of the Court instead opted for an unconscionability analysis. This would, though, also involve consideration of a range of factors.[177] However, Cooney and Sanderson have developed a model under which the legitimacy of pressure would be judged by four factors: (a) the reasonableness of the defendant's demand; (b) the reasonableness of the defendant's threat; (c) whether the defendant acted in good faith; and (d) whether the defendant exploited a vulnerable plaintiff.[178] The reasonableness of the demand would be interpreted having regard to general

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173 *Paciocco High Court* (n 169) 552–3 [51]–[53] (Kiefel J, French CJ agreeing at 536 [2]).
174 Garske (n 168).
175 *Times Travel* (n 2) 111 [4] (Lord Hodge DPSC, Lords Reed PSC, Lloyd-Jones and Kitchin JJSC agreeing).
176 Ibid 110 [1] (Lord Hodge DPSC, Lords Reed PSC, Lloyd-Jones and Kitchin JJSC agreeing), 140 [94] (Lord Burrows).
177 Jackson (n 68) 704.
178 Cooney and Sanderson, 'Illegitimate Pressure in the Law of Duress' (n 111) 497. See also Cooney (n 142). Garske (n 168) criticises this approach on the basis that it does not provide an overarching standard by which the relevant factors can be applied.

freedom of contract principles, and would recognise that the one making the demand may have legitimate interests in doing so. They would determine the reasonableness of the threat having regard to whether there is proportionality between what was threatened and the legitimate business interests of the party making it. They would also consider the extent of the connection between the threat and the legitimate business interest. The more closely aligned they were, the more likely the threat would be considered reasonable.[179] And the question of vulnerability would be particularly important where something the defendant did caused or exacerbated the plaintiff's vulnerability. The mere fact that the plaintiff was vulnerable for reasons other than those related to the defendant would not be relevant.[180]

Given that I favour good faith as a general organising principle of the law of contract,[181] including in relation to cases currently seen by some to reflect lawful act duress, there is no need to use these factors in relation to lawful act duress. They would or may be relevant to the broader question of whether the defendant has acted in good faith.

E *Good Faith*

There is some support for connecting good faith with a lawful act duress claim in Australia,[182] as well as in the United Kingdom.[183] One difficulty is that the law does not generally require that a party negotiate a contract in good faith.[184] The argument might then be that if this is not required at the formation stage, there is no reason to expect it in relation to the making of demands involving parties in an existing contractual arrangement. On the other hand, although the position in *Walford v Miles*[185] — that good faith does not apply during the contract formation stage —remains good law, the United Kingdom Supreme Court has found that

179 Cooney and Sanderson, 'Illegitimate Pressure in the Law of Duress' (n 111) 514–16.

180 Ibid 522–5.

181 See Anthony Gray, *Good Faith and Relational Contracts: Theory, Practice and Future Developments* (Hart Publishing, 2024); Anthony Gray, *Good Faith and Relational Contracts: Application to Specific Principles* (Hart Publishing, 2025).

182 *Morgan Stanley Wealth Management Australia Pty Ltd v Detata [No 3]* [2018] WASC 32, [410] (Banks-Smith J); *Denmeade v Stingray Boats* [2003] FCAFC 215, [17] (Whitlam, Kiefel and Dowsett JJ); *Mitchell v Pacific Dawn Pty Ltd* [2011] QCA 98, [52] (Fraser JA, Chesterman JA agreeing at [60], Ann Lyons J agreeing at [61]); Bigwood, 'Coercion in Contract' (n 28) 237–8. It is conceded that we would need to clarify the precise meaning of good faith in this context. Elsewhere I have favoured a concept of good faith that includes reasonableness and which reflects the reasonable expectations of business people: Gray, *Good Faith and Relational Contracts: Theory, Practice and Future Developments* (n 182) ch 6.

183 Apart from the judgment of Burrows J in *Times Travel* (n 2), good faith was specifically referred to in *CTN Cash* (n 31) 719 (Steyn LJ, with Farquharson LJ and Sir Nicholls VC agreeing); *Borrelli* (n 35) [28], [32]; *The Flying Music Co Ltd v Theater Entertainment SA* [2017] EWHC 3192 (QB), [87] (Griffiths QC, sitting as a Deputy High Court Judge). See also the obiter comments made by Dyson J in *DSND Subsea* (n 47) 545-546 [131]–[134].

184 *Walford v Miles* [1992] 2 AC 128, 138 (Lord Ackner).

185 Ibid.

good faith obligations can attend contracts, in particular to the exercise of a contractual discretion,[186] and with suggestions of potentially broader application being accepted in some cases.[187] Good faith has been accepted as a generally applicable contract law principle by numerous Australian courts at the state level[188] and in the Federal Court.[189] Good faith is well accepted as a general organising principle of contract law in Canada,[190] in the United States,[191] and in international contract law instruments,[192] as well as being prevalent in Europe.[193] There is some suggestion that this should occur in Australia.[194]

It must be conceded that the United Kingdom Supreme Court continues to deny that good faith is a general organising principle of the law of contract.[195] The Australian High Court has expressly left the matter open to date.[196] I have already published articles suggesting that Australian contract law should accept good faith as a general organising principle.[197] It is not considered necessary to go over

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186 *Telefonica* (n 149) 923 [37] (Lord Sumption for the Court).

187 See, eg, *Yam Seng* (n 48); Justice Leggatt, 'Contractual Duties of Good Faith' (Speech, Commercial Bar Association, 18 October 2016); *Socimer International Bank Ltd (in liq) v Standard Bank London Ltd* [2008] Bus LR 1304; *Globe Motors Inc v TRW Lucas Varity Electric Steering Ltd* [2017] 1 All ER (Comm) 601.

188 *Renard Constructions* (n 147) 268 (Priestley JA, Handley JA agreeing); *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* [2005] VSCA 228, [3] (Warren CJ), [28] (Buchanan J); *Far Horizons Pty Ltd v McDonald's Australia* [2000] VSC 310, [120] (Byrne J); *Burger King* (n 148) 570 [169] (Sheller, Beazley and Stein JJA); *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* (2010) 383 ALR 577, 584 [15] (Allsop P), 639 [150] (Hodgson JA, Macfarlan JA agreeing); *Automasters Australia Pty Ltd v Bruness Pty Ltd* [2002] WASC 286, [388](Hasluck J)*Overlook Management BV v Foxtel Management Pty Ltd* [2002] NSWSC 17, [62] (Barrett J).

189 *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151, 191–2 (Finn J); *South Sydney District Rugby League Football Club Ltd v News Ltd* (2000) 177 ALR 611, 696 [394] (Finn J); *Pacific Brands Sport & Leisure Pty Ltd v Underworks Pty Ltd* [2005] FCA 288, [64] (Finkelstein J); *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199, 273 [288] (Allsop CJ, Besanko and Middleton JJ agreeing) ('*Paciocco Full Federal Court*').

190 See, eg, *Bhasin* (n 148); *CM Callow Inc v Zollinger* [2020] 3 SCR 908; *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District* [2021] 1 SCR 32.

191 *Railroad Company v Howard*, 74 US 392, 413 (Clifford J for the Court) (1868); *Restatement (Second) of Contracts* (n 112) § 205; *Uniform Commercial Code* § 1–304 (2011).

192 International Institute for the Unification of Private Law, *UNIDROIT Principles of International Commercial Contracts* (2016) art 1.7; *United Nations Convention on Contracts for the International Sale of Goods*, opened for signature 11 April 1980, 1489 UNTS 59 (entered into force 1 January 1988) art 7.

193 See, eg, *Bürgerliches Gesetzbuch* [Civil Code] (Germany) § 242; *Code Civil* [Civil Code] (France) art 1104.

194 *Hughes Aircraft Systems International v Airservices Australia* (1997) 76 FCR 151, 192–3 (Finn J); PD Finn, 'Equity and Contract' in PD Finn (ed), *Essays on Contract* (Lawbook, 1987) 104. See also Andrew Phang, 'Tenders, Implied Terms and Fairness in the Law of Contract' (1998) 13(2) *Journal of Contract Law* 126.

195 *Times Travel* (n 2) 118–19 [27] (Lord Hodge DPSC, Lords Reed PSC, Lloyd-Jones and Kitchin JJSC agreeing): 'English law has never recognised a general principle of good faith in contracting'.

196 *Barker* (n 147) 195–6 [42] (French CJ, Bell and Keane JJ). Some argue the High Court will accept the concept: Warren Swain, 'The Steaming Lungs of a Pigeon: Predicting the Direction of Australian Contract Law in the Next Twenty-Five Years' in Kit Barker, Karen Fairweather and Ross Grantham (eds), *Private Law in the 21st Century* (Hart Publishing, 2017) 96.

197 Anthony Gray, 'Good Faith in Contract Law After Barker' (2015) 43(5) *Australian Business Law Review* 358; Anthony Gray, 'Development of Good Faith in Canada, Australia and Great Britain' (2015) 57(1) *Canadian Business Law Journal* 84.

that ground once more here. But this traditional general attitude of wariness and ambivalence from the common law regarding good faith is noteworthy, and continues to some extent to feature in our law. At present, its status in Australian law is somewhat uncertain. Though it has been accepted by some state courts and by the Federal Court, this has only been in limited instances.[198] It has not yet been accepted as a general organising principle of Australian contract law, and it may never be.

There are also criticisms that good faith is unstable and of uncertain meaning and scope.[199] This clearly influenced the joint judgment in *Times Travel* to reject Lord Burrows's good faith basis of lawful act duress.[200] However, somewhat confusingly, the joint judgment later alluded to good faith as being useful in lawful act duress,[201] an apparent contradiction which Lord Burrows himself professed to be puzzling.[202] The joint reasons also suggested that a difficulty with adopting good faith in this context would be that it would be impossible to distinguish actual cases of lawful act duress from mere demands by a party to pre-contractual negotiations that the other pay them an amount of money as a pre-condition of entry into the contract.[203] This is well answered by Lord Burrows, who points out that his use of good faith in this context would be limited to cases involving pre-existing legal rights and duties.[204] Thus, he was not suggesting its use in the context of pre-contractual negotiations, where by definition no pre-existing legal rights and duties would exist between the parties.

There is understandable criticism that if good faith were applied in a subjective manner, a party could effectively become the arbiter of whether their conduct amounted to lawful act duress. On this view, as long as the party clearly believed that they possessed the legal right to which the demand attached — even if, in fact, they did not — that would be sufficient to meet the good faith standard.[205] Lord Burrows was alive to this possibility in his judgment in *Times Travel*, incorporating at least a basic kind of objectivity into his conception of good

198 In *Burger King* (n 148) 569 [163]–[164] the New South Wales Court of Appeal found that good faith was a term implied by law to a limited category of cases.

199 Davies and Day (n 33) 9. Cf *Yam Seng* (n 48) 1349 where Leggatt J denies it is unduly vague or uncertain.

200 *Times Travel* (n 2) 126–7 [53] (Lord Hodge DPSC, Lords Reed PSC, Lloyd-Jones and Kitchin JJSC agreeing).

201 Ibid 127 [56]: 'Bad faith plays a wider role in lawful act duress than merely the absence of belief in an entitlement to a pre-existing right or in the invalidity of a claim for which [the defendant] seeks a waiver … [B]ad faith is potentially relevant both to the content of the demand and to the context in which [the defendant] makes its demand'.

202 Ibid 154 [133]: 'While not supporting a "bad faith demand" requirement, Lord Hodge DPSC also refers at some points to "bad faith" as being relevant … but it is not clear to me what Lord Hodge DPSC means by that and how that approach is consistent with his rejection of a "good faith dealing" principle'.

203 Ibid 127 [54] (Lord Hodge DPSC, Lords Reed PSC, Lloyd-Jones and Kitchin JJSC agreeing).

204 Ibid 154 [135].

205 Nathan Tamblyn, 'Causation and Bad Faith in Economic Duress' (2011) 27(2) *Journal of Contract Law* 140, 151.

faith.[206] Lord Leggatt, a leading advocate of good faith in contracting more generally,[207] has referred to concepts such as reasonableness and whether conduct was improper.[208] This was not in the context of describing illegitimacy regarding lawful act duress, but given his strong support of good faith in contracting more generally, it might be suggested that he would view these concepts as equivalent to a good faith standard in the context of duress claims. Reasonableness has been utilised in describing an obligation of good faith in many English cases.[209] Reasonableness, as well as good faith, was applied in the context of duress in *DSND Subsea Ltd v Petroleum Geo-Services ASA*.[210] *R v Attorney-General* is a case where the reasonableness of the defendant's demand was relevant in determining a lawful act duress case.[211] It is one of the factors which Cooney and Sanderson advocate as relevant.[212] Enonchong says that *Times Travel* effectively leaves open whether the reasonableness of the demand made will be relevant to questions of illegitimacy.[213]

In the good faith case law and literature more generally, there is also an indication that it is connected with notions of reasonable behaviour in Australia[214]

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206 *Times Travel* (n 2) 149 [118]: 'the more unreasonable that belief, the more will be required … before a court will accept that the defendant did genuinely have that belief'. The reference to unreasonableness here is taken to refer to an objective standard.

207 See *Yam Seng* (n 48).

208 *Astor Management AG v Atalaya Mining plc* [2017] Bus LR 1634, 1659 [98].

209 *Bristol Groundschool Ltd v Intelligent Data Capture Ltd* [2014] EWHC 2145 (Ch), [174] (Spearmen QC sitting as a Deputy Judge of the Chancery Division); *Essay County Council v UBB Waste (Essex) Ltd [No 2]* [2020] EWHC 1581 (TCC), [116] (Pepperall LJ): 'whether the conduct would be regarded as "commercially acceptable" by reasonable and honest people'; *Amey Birmingham Highways Ltd v Birmingham City Council* [2018] BLR 225, 239 [93] (Jackson LJ, Moylan LJ and Sir Stephen Tomlinson agreeing); *Faulkner v Vollin Holdings Ltd* [2022] EWCA Civ 1371, [241] (Snowden LJ, Carr and Newey LJJ agreeing); Johan Steyn, 'Contract Law: Fulfilling the Reasonable Expectations of Honest Men' (1997) 113 (July) *Law Quarterly Review* 433, 439: 'there is not a world of difference between the objective requirement of good faith and the reasonable expectations of parties'.

210 Dyson J links illegitimate pressure with reasonable behaviour: *DSND Subsea* (n 47) 546 [134].

211 *R v Attorney-General* (n 158) 141 [20] (Lord Hoffmann, Lords Bingham, Steyn and Millett agreeing).

212 Cooney and Sanderson, 'Illegitimate Pressure in the Law of Duress' (n 111) 497.

213 Enonchong (n 109) 22–3. He particular has regard to the statement of Lord Hodge (Lords Reed PSC, Lloyd-Jones and Kitchin JJSC agreeing) in *Times Travel* (n 2) 110 [1] that the behaviour of the threatening party 'among other things' would be relevant in assessing the legitimacy of the demand.

214 *Renard Constructions* (n 148) 263 (Priestley JA, Handley JA agreeing); *Esso Australia Resources Pty Ltd v Southern Pacific Petroleum NL* [2005] VSCA 228, [3] (Warren CJ), [28] (Buchanan J, Osborn AJA agreeing at [32]); *Burger King* (n 148) 570 [169] (Sheller, Beazley and Stein JJA); *South Sydney District Rugby League Football Club Ltd v News Ltd* (2000) 177 ALR 611, 696 [394] (Finn J); *Paciocco Full Federal Court* (n 189) 273 [288] (Allsop CJ, Besanko and Middleton JJ agreeing); *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* (2010) 383 ALR 577, 584 [15] (Allsop P), 639 [150] (Hodgson JA, Macfarlan JA agreeing); *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd* (2013) 29 BCL 329, 354–5 [145] (Bathurst CJ, Macfarlan and Meagher JJA agreeing); *Barker* (n 146) 213–14 [104]–[107] (Kiefel J); Anthony Mason, 'Contract, Good Faith and Equitable Standards in Fair Dealing' (2000) 116 (January) *Law Quarterly Review* 66. There are also suggestions that the Australian law should limit good faith to an obligation of honesty: *United Group Rail Services Ltd v Rail Corporation New South Wales* (2009) 74 NSWLR 618, 637 [70] (Allsop P, Ipp and Macfarlan JJ agreeing); Elisabeth Peden, 'When Common Law Trumps Equity: The Rise of Good Faith and Reasonableness and the Demise of Unconscionability' (2005) 21(3)

and the United Kingdom,[215] and notions of fair dealing in both jurisdictions.[216] This mirrors developments elsewhere in the common law world.[217] On the facts in *CTN Cash*, it was entirely reasonable for the defendant to refuse to supply further credit to the plaintiff unless a previous invoice was paid.[218]

There is support for the view of Lord Burrows:

> It is … regrettable that the other members of the court did not agree with the judgment of Lord Burrows [and in particular that] … the enquiry as to whether it is it illegitimate should focus on the justification for the accompanying demand … Lord Burrows' is … an admirable and principled judgment. The bad faith demand requirement is grounded in a principle of dishonesty and sets out a well-defined boundary for what constitutes an unjustified demand and hence illegitimate pressure … [B]y crystallising the two discrete elements that need to be present for commercial pressure to be condemned as illegitimate, it minimises uncertainty and provides a clear test to be applied in future cases.[219]

Lord Burrows' conception of good faith can seem narrower than some of the above sentiments, confined as it is on honesty. It is conceded that some of the literature on good faith more generally in the contract context also focusses on

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Journal of Contract Law 226, 236: 'to equate an obligation of reasonableness and one of good faith is misconceived'; John Carter and Elisabeth Peden, 'Good Faith in Australian Contract Law' (2003) 19(2) *Journal of Contract Law* 155, 157.

215 *Telefonica* (n 150) 923 [37] (Lord Sumption for the Court); *Abu Dhabi National Tanker Co v Product Star Shipping Ltd [No 2]* [1993] 1 Lloyd's Rep 397, 404 (Leggatt LJ, Balcombe and Mann LJJ agreeing); *Yam Seng* (n 48) 1351–2 [138], 1353 [144] (Leggatt J) ('whether regarded as commercially unacceptable by reasonable and honest people'); *Bristol Groundschool Ltd v Intelligent Data Capture Ltd* [2014] EWHC 2145 (Ch), [196] (Spearman QC, sitting as a Deputy High Court Judge of the Chancery Division).

216 *Renard Constructions* (n 148) 268 (Priestley JA, Handley JA agreeing); *Unwin v Bond* [2020] EWHC 1768 (Comm), [230] (Judge Klein); Justice Steyn, 'The Role of Good Faith and Fair Dealing in English Contract Law: A Hairshirt Philosophy?' (1991) 6(1) *Denning Law Journal* 131, 131; Steyn (n 210) 439.

217 United States commercial law embraces 'good faith and fair dealing': *Railroad Company v Howard*, 74 US 392, 413 (Clifford J for the Court) (1868); *Restatement (Second) of Contracts* (n 112) § 205; *Uniform Commercial Code* § 1–304 (2011); Robert S Summers, 'Good Faith in General Contract Law and the Sales Provisions of the Uniform Commercial Code' (1968) 54(2) *Virginia Law Review* 195; E Allan Farnsworth 'Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code' (1963) 30(4) *University of Chicago Law Review* 666, 672; *Bhasin* (n 149) 528 [63] (Cromwell J for the Court); *CM Callow Inc v Zollinger* [2020] 3 SCR 908, 940–1 [47] (Kasirer J for Wagner CJ, Abella, Karakatsanis, Martin and Kasirer JJ); *Wastech Services Ltd v Greater Vancouver Sewerage and Drainage District* [2021] 1 SCR 32, 43–4 [4]–[5] (Kasirer J for Wagner CJ, Abella, Moldaver, Karakatsanis, Martin and Kasirer JJ), 93 [129] (Brown and Rowe JJ for Côté, Brown and Rowe JJ). Roscoe Pound noted that historically good faith had included reasonableness: Roscoe Pound, *Jurisprudence Volume 1* (West Publishing, 1959) 414. As did Atiyah (n 4) 761–2. Historical case examples I have found expressly connecting good faith with reasonableness include: *The Apothecaries' Co v Harrison* (1840) 12 Ad & E 642, 644; 113 ER 958, 959 (Lord Denman CJ for the Court); *R v Nunneley* (1858) El Bl & El 852, 860; 120 ER 728, 731 (Coleridge J); *Pease v Chaytor* (1861) 1 B & S 658, 672; 121 ER 859, 864 (Wightman J, Blackburn J agreeing at 865); *Kendall v Alken* (1834) 10 Bing 438, 440; 131 ER 974, 975 (Tindal CJ).

218 *CTN Cash* (n 31). Of course, they were also acting honestly, believing that they were entitled to be paid the prior invoice.

219 Jackson (n 68) 706–7.

honesty,[220] although some of this literature defines honesty in such a broad manner as to effectively embrace some kind of reasonableness analysis.[221] Relatedly, Lord Burrows in *Times Travel* also found that the more unreasonable the defendant's behaviour, the more likely a finding that they would be held to have acted dishonestly and with a lack of good faith.[222] There are legitimate criticisms of the confinement of good faith to honesty:

> The major problem with a standard of honesty is not only the evidentiary challenge … of proving dishonesty but also that it will not capture many forms of bad faith which are characterised by honest behaviour yet which nevertheless impact negatively and significantly upon the legitimate interests or expectations of the other.[223]

If we were to apply a reasonableness standard as part of a good faith analysis of lawful act duress, as much literature suggests, the focus would be on the defendant's behaviour in making the demand, given the history of the parties' relationship and all of the circumstances leading up to the making of the demand, and on the demand compared with the legitimate interest (if any) to which it relates. It would differ from *Amadio* unconscionability because it would not require a finding of special disability or disadvantage. It would differ from proportionality analysis, but incorporate some aspects of it. This approach would focus on the entirety of the parties' relationship and dealings, rather than merely on the demand and the legitimate interest (if any) to which it relates, as proportionality does.

There is a voluminous literature on the typically 'relational' nature of contracting.[224] In essence, this theory posits that the reality of contracting

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220 JW Carter and Andrew Stewart, 'Interpretation, Good Faith and the True Meaning of Contracts: The Royal Botanic Decision' (2002) 18(2) Journal of Contract Law 182, 192; Elisabeth Peden, 'The Meaning of Contractual "Good Faith"' (2002) 22(3) *Australian Bar Review* 235; Richard Hooley, 'Controlling Contractual Discretion' (2013) 72(1) *Cambridge Law Journal* 65, 74.

221 Carter and Peden (n 214) state that their meaning of 'honesty' in the context of a good faith definition includes lack of arbitrariness and/or capriciousness, whether a party has acted consistently and for a proper purpose; with due respect for the intent of the bargain, due consideration for the interests of the other party, and cooperation with the other party: at 157. With respect, this is considered to be an extremely broad definition that embraces far more than most would traditionally regard as being encompassed by the notion of honesty. It is considered to effectively embrace reasonableness, though the learned authors expressly deny this.

222 *Times Travel* (n 2) 149 (Lord Burrows JSC).

223 Andrew Terry and Cary Di Lernia, 'Franchising and the Quest for the Holy Grail: Good Faith or Good Intentions?' (2009) 33(2) *Melbourne University Law Review* 542, 558.

224 See, eg, Stewart Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28(1) *American Sociological Review* 55; Stewart Macaulay, 'The Real and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules' (2003) 66(1) *Modern Law Review* 44; Stewart Macaulay, 'Relational Contracts: Floating on a Sea of Custom? Thoughts About the Ideas of Ian Macneil and Lisa Bernstein' (2000) 94(3) *Northwestern University Law Review* 775; Ian R Macneil, 'The Many Futures of Contracts' (1974) 47(3) *Southern California Law Review* 691; Ian R Macneil, 'Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical and Relational Contract Law' (1978) 72(6) *Northwestern University Law Review* 854 ('Contracts: Adjustment of Long-Term Economic Relations'); Ian R Macneil, 'Relational Contract: What We Do and Do Not Know' [1985] (3) *Wisconsin Law Review* 483; Ian R Macneil, 'Relational Contract Theory: Challenges and Queries' (2000) 94(3) *Northwestern University Law Review* 877; Ian R Macneil, *The New Social Contract: An Inquiry Into Modern*

typically involves parties in a long-term relationship. Not all of the parties' expectations of the other are documented. The parties value the relationship. They are not focussed, or focussed solely, on the written terms. The argument is that traditional contract law doctrine is too narrowly focussed and based on unrealistic assumptions. It assumes parties are rational utility maximisers involved in discrete contracts. The reality is that parties do not always choose what is in their best interests, will often value relationships over immediate contractual remedies, and often have contracted over a longer-term time frame, in relationships characterised by high degrees of communication, cooperation, and trust and confidence.[225] Good faith is inherently tied in with a relational view of contracting.[226]

It is not necessary for current purposes to explain and evaluate the relational nature of contracting and, in any event, I have done this elsewhere.[227] Suffice it to say for current purposes that a relational view of contracting is thought to have much to commend it, reflecting a more realistic appraisal of parties' attitudes towards, and approaches to, their contracts. If a relational view of contracting is accepted, it would suggest a holistic view of the entirety of the parties' relationship in determining whether the defendant's conduct in a particular instance amounted to lawful act duress.[228] It would not simply focus on the proportionality of the demand to the defendant's legitimate interest. This would

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Contractual Relations (Yale University Press, 1980); Hugh Collins, *Regulating Contracts* (Oxford University Press, 1999); Robert Scott, 'A Relational Theory of Default Rules for Commercial Contracts' (1990) 19(2) *Journal of Legal Studies* 597; David Campbell, Hugh Collins and John Wightman (eds), *Implicit Dimensions of Contract: Discrete, Relational and Network Contracts* (Hart Publishing, 2003); Jay Feinman, 'Relational Contract Theory in Context' (2000) 94(3) *Northwestern University Law Review* 737; Catherine Mitchell, 'Contracts and Contract Law: Challenging the Distinction Between the "Real" and the "Paper" Deal' (2009) 29(4) *Oxford Journal of Legal Studies* 675; Catherine Mitchell, *Contract Law and Contract Practice: Bridging the Gap Between Legal Reasoning and Commercial Expectation* (Hart Publishing, 2013) ('*Contract Law and Contract Practice*'); Charles Goetz and Robert Scott, 'Principles of Relational Contracts' (1981) 67(6) *Virginia Law Review* 1089; Dori Kimel, 'The Choice of Paradigm for Theory of Contract: Reflections on the Relational Model' (2007) 27(2) *Oxford Journal of Legal Studies* 233; David Campbell, Linda Mulcahy and Sally Wheeler (eds) *Changing Concepts of Contract: Essays in Honour of Ian Macneil* (Palgrave Macmillan, 2013); Melvin A Eisenberg, 'Why is There No Law of Relational Contracts?' (2000) 94(3) *Northwestern University Law Review* 805; Gidon Gottlieb, 'Relationism: Legal Theory for a Relational Society' (1983) 50(2) *University of Chicago Law Review* 567.

225 *Yam Seng* (n 48) 1352–3 [142] (Leggatt J).

226 Macneil, 'Contracts: Adjustment of Long-Term Economic Relations' (n 225) 885: 'the burgeoning concept of good faith … is another largely anti-presentiating, and very much anti-discrete concept'. Relational contracts are anti-presentiating and anti-discrete in nature. Hugh Collins, 'Employment as a Relational Contract' (2021) 137 (July) *Law Quarterly Review* 426, 428; Marvin A Eisenberg, 'Relational Contracts' in Jack Beatson and Daniel Friedmann (eds), *Good Faith and Fault in Contract Law* (Clarendon Press, 1995) 291, 298–9.

227 See Anthony Gray, *Good Faith and Relational Contracts: Theory, Practice and Future Developments* (Hart Publishing, 2024); Anthony Gray, *Good Faith and Relational Contracts: Application to Specific Principles* (Hart Publishing, 2025).

228 In *Yam Seng* (n 48) Leggatt J noted that good faith contemplated consideration of features of the particular contractual relationship between the parties: at 1351 [134]; and was sensitive to context: at 1352 [141].

be too narrow a focus and reflect more of the discrete, rather than a relational, view of contracts.[229] It would be too narrowly focused on one particular incident, rather than the broader context of the parties' relationship. In contrast, a relational view of contracting would consider the parties' relationship in its entirety and then consider whether the defendant's eventual demands were consistent with good faith and with the generally relational nature of contracts. This does not require parties to subvert their own commercial interests,[230] but it does preclude them from exploiting the other party, or from acting contrary to the parties' reasonably held expectations of the behaviour of the other, and/or beyond what is necessary to protect legitimate commercial interests. My preference is that this approach be adopted as a general organising principle of the law of contract in Australia, including situations currently sometimes seen as reflecting lawful act duress, but with general application.

Specifically, the behaviour complained of in *Borrelli* would meet a requirement of lack of good faith. If it could have been shown that the demand in *Times Travel* was made knowing or believing that it was not justified, this would meet the requirement of good faith. Bad faith would be satisfied by the dishonest making of a contractual claim. It would also be satisfied by an unreasonable, but honest demand. If the demand made went beyond that which the demander was reasonably entitled to make, given their legitimate interests in the contractual relationship between the parties, it would be seen to contravene the relational nature of the parties' relationship and be regarded as lawful act duress. The demand could concern a broad range of matters, including the payment of money, the charging of exorbitant interest, or insisting that the demandee comply with a particularly onerous or impossible requirement etc. It would also be important to consider the entirety of the parties' relationship in making this assessment. For example, where the parties had a longstanding exclusive contract relationship, a threat to terminate that relationship unless an exorbitant amount was paid might be viewed very differently from a situation where the parties were negotiating an agreement for the first time, and one of the parties in the course of that negotiation made extreme demands or threats.[231] What might otherwise appear to be an outrageous threat might also make more sense if there had been numerous previous occasions where the party threatened had not kept contractual promises. In other words, the full context of the relationship between the parties should be considered.

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229 Macneil, 'Contracts: Adjustment of Long-Term Economic Relations' (n 225) 890; Mitchell, *Contract Law and Contract Practice* (n 223) stated that a central insight of relational theory was that context was important in relation to contracts: at 199.

230 In *Yam Seng* (n 48) Leggatt J confirmed that good faith did not prohibit parties from pursuing their own commercial interests: at 1354 [148].

231 It is acknowledged that Lord Burrows in *Times Travel* (n 2) used good faith in a narrower sense, confining it to conduct within an established relationship rather than parties negotiating a contract on the first occasion.

Further specific examples, apart from honesty and reasonableness, may be given of how good faith may be useful in the lawful act duress analysis. Good faith is typically said to require that, in a case where a party to a contract must give their consent in order for the other party to gain an advantage, that consent must not be withheld in an arbitrary or capricious manner.[232] So, if a contracting party used that consent power to extract a benefit from the other party, on the basis that the party required to give consent would not provide it unless that benefit were provided, this might be considered to amount to lawful act duress. It can be seen that principles developed in the context of good faith could be of use here. Again, this behaviour would likely not be captured by an 'unconscionability' or disproportionality test.

Good faith is also said to require that contracting parties cooperate for their mutual benefit, not undermine the bargain or the substance of that for which the parties have bargained, and act consistently with the provisions, aims and purposes of the contract.[233] When one party makes unreasonable demands of the other, accompanied by threats in order to extract a benefit not already provided for in the contract, this would contradict that cooperative spirit in which the parties engaged. It would undermine the substance of that for which the parties have bargained. It would not be consistent with the provisions, aims and purposes of the contract. It would undermine the trust that inherently exists (and should exist) between contracting parties.[234] So again in *Borrelli*, one of the reasons for a finding of a lack of good faith on the facts was that the defendant sought to use their power for improper purposes.[235] This does not mean they acted 'unconscionably' or disproportionately to their legitimate interest (if any).

Good faith is also said to require that a party not engage in behaviour that is calculated to destroy the position of the other party.[236] The making of illegitimate threats might be argued to destroy, or at least significantly harm, the position of the other party in a manner that ought not to be countenanced if a contract were imbued with a good faith obligation. This may not meet the definition of unconscionable conduct, and may not involve disproportionality, yet still amount to conduct that the law should not permit. For example, in *The Cenk*, on one view this is what the owner of the vessel did. They lulled the charterer into believing they would be fully compensated for losses associated with the delay. This placed the charterer in a weakened position. They did not pursue alternative suppliers. The passage of time placed further pressure on the charterer. Eventually, when the owner did offer to compensate their losses, the compensation was much less

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232 *Telefonica* (n 149) 923 [37] (Lord Sumption for the Court).

233 *Yam Seng* (n 48) 1354 [148] (Leggatt J); *Paciocco Full Federal Court* (n 190) 273 [288] (Allsop CJ, Besanko and Middleton JJ agreeing).

234 *Paciocco Full Federal Court* (n 190) 274 [293] (Allsop CJ, Besanko and Middleton JJ agreeing).

235 The joint reasons in *Times Travel* (n 2) identified the behaviour in *Borrelli* as amounting to bad faith: at 127 [56] (Lord Hodge DPSC, Lords Reed PSC, Lloyd-Jones and Kitchin JJSC agreeing).

236 *Overlook Management BV v Foxtel Management Pty Ltd* (2002) Aust Contract Reports ¶90–143, 91,971 [73] (Barrett J).

than the actual loss they sustained. However, due to the weak position into which the owner had manoeuvred them, they believed they had no commercial choice other than to accept the reduced amount and agree to waive their right to further compensation. On one view, this was behaviour by the owner calculated to destroy or seriously weaken the contractual position of the charterer. Again, such behaviour might not be viewed as 'disproportionate', nor may it meet an unconscionability test, particularly of the *Amadio* variety. But it might indicate a lack of good faith, as the joint reasons in *Times Travel* noted.[237]

It might be argued that, if good faith were to be utilised to explain and justify the application of lawful act duress, redundancy would occur. The argument would run that a party subject to this kind of behaviour would already have a remedy under good faith principles, so there is no need to utilise good faith principles in the context of a lawful act duress claim. My answer to this is that Australian law and United Kingdom law have not, as least as yet, generally accepted the principle of good faith as a general organising principle of the law of contract,[238] as has occurred in Canada.[239] Currently, United Kingdom law recognises the application of good faith to only a limited range of contracts. Some subnational courts in Australia have accepted good faith, at least to some extent, but the High Court of Australia has not at the time of writing reached a decision one way or the other.[240] Yet both jurisdictions recognise a lawful act duress doctrine. Thus, the argument is that applying good faith principles to a lawful act duress claim is not, at least at present, redundant, because the context of the lawful act duress claim might be a kind of case where the court does not presently recognise that a general good faith obligation exists. Of course, if and when the day came that the United Kingdom and Australia did accept good faith as a general organising principle of the law of contract, it could be cogently argued that the lawful act duress claim was redundant, if premised on good faith as I argue here. But that day has not yet arrived, and may never do so.

This section has demonstrated that good faith encompasses values of honesty, reasonableness, not withholding consent for arbitrary or capricious reasons, general cooperation with the other contracting party for the mutual benefit of both, acting consistently with the purposes of the contract, and not engaging in behaviour calculated to damage or undermine the other party to the contract. This concept is broader than *Amadio* unconscionability and proportionality. I have demonstrated above, with specific examples, of the type of conduct to which it would apply. This is in circumstances where the alternative concepts would not necessarily apply. It would make a substantive difference if

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237 *Times Travel* (n 2) 127 [56] (Lord Hodge DPSC, Lords Reed PSC, Lloyd-Jones and Kitchin JJSC agreeing).

238 Ibid 110–11 [3], 118–19 [27] (Lord Hodge DPSC, Lords Reed PSC, Lloyd-Jones and Kitchin JJSC agreeing), 140 [95] (Lord Burrows).

239 *Bhasin* (n 149) 514–15 [33] (Cromwell J for the Court).

240 *Barker* (n 147) 195–6 [42] (French CJ, Bell and Keane JJ), 214 [107] (Kiefel J).

good faith were applied to lawful act duress claims. Good faith generally relates to a relational view of contracting. This would encourage the court, in considering a claim for lawful act duress, to consider the totality of the parties' relationship and the claimed act of duress in that context, rather than in isolation. Most especially, viewing lawful act duress through a good faith lens would mean that the United Kingdom Supreme Court's apparent green light to bad faith conduct[241] between contracting parties would come to an end. It is very difficult to accept a superior court apparently condoning or countenancing bad faith behaviour, which includes dishonesty and unreasonable conduct.

V Conclusion

It is not clear how the High Court of Australia would respond to a claim for lawful act duress. Specifically, there is no authority at that level regarding whether it exists in Australian law, and if it does, what its doctrinal basis should be. The United Kingdom perspective is valuable in this regard, though that jurisdiction's Supreme Court has landed upon an unconscionability basis of duress. This article has argued that cases falling within lawful act duress should be dealt with under a good faith standard. This standard would embrace aspects of some of the other approaches, but it would not suffer from their weaknesses, or at least not to the same extent. It would provide a remedy for behaviour that the others would not. Unconscionability is not favoured. It is not clear what it would mean in the context of a lawful act duress claim, and difficulties would attend an attempted application of the existing structure of the law of unconscionability to a duress claim. If it does mean something different in this context, it has not been explained what it is. Proportionality is not favoured because it is too narrowly focussed, and its use elsewhere in contract law is in a very different context. This article has found that the best approach is to treat cases of lawful act duress as potentially part of the broader doctrine of good faith in relation to contracting. A party who seeks to exercise contractual rights in a manner that can be described as involving 'illegitimate pressure' (in the language of duress) can effectively be seen to have breached their contractual obligation to act in good faith. Some of the matters pertinent to unconscionability, proportionality, and those found in the suggested range of factors approach would be relevant to consideration of good faith, but it is broader than that.

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241 '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': *Times Travel* (n 2) 126 [52] (Lord Hodge DPSC, Lords Reed PSC, Lloyd-Jones and Kitchin JJSC agreeing).