CONTRACTS, CERTAINTY AND THE SUPREME COURT

Professor Ewan McKendrick KC (Hon)
Professor of Anglo-American Private Law in the University of Leiden

As Lord Hamblen observed, when giving the judgment of the Supreme Court in *JTI Polska sp z oo v Jakubowski* 'certainty and predictability are of particular importance in the context of English commercial law, all the more so given the frequent choice of English law as the governing law in international commercial transactions'. This is not a new refrain on the part of Justices of the Supreme Court, although it would also be true to say that it is a view that has not been universally shared by all of the Justices all of the time. One possible reason for this apparent difference of view is that, as Lord Mance once observed, 'certainty is not the ultimate or wholly achievable aim of the law'. Thus the commitment to the attainment of certainty and predictability, while important, is not absolute and it is generally expressed by the Supreme Court in qualified terms: for example, the aim is to avoid 'unwanted' or 'unnecessary' uncertainty or to foster certainty so far as the court can. The pursuit of certainty and predictability is therefore a very important feature or 'desideratum' of the English law of contract but it is not a legal principle or a legal rule, neither is it the only aim of the law of contract.

It is therefore no surprise to find that the importance attached to certainty appears to vary depending on the identity of the parties to the contract and the nature of the contract into which they have entered. Thus the importance attached to the pursuit and the maintenance of certainty appears to be at its highest when the contract is in written form and has been entered into by commercial parties of roughly equal bargaining power who have the means of access to professional legal advice. Conversely, where the parties are of grossly unequal bargaining power, or the relationship between the parties is characterised by a high degree of informality, the emphasis placed on the importance of certainty may not be as great. This being the case, it is perhaps no surprise to discover that, while it is true to say that examples can be found of clear affirmations by the Supreme Court of the importance of certainty and predictability in English contract law (and greater than that to be found in many other legal systems of the world), a closer study of recent case law demonstrates that the emphasis placed by the Supreme Court on the importance of certainty in contract law does indeed vary depending on the context in which the contract was concluded, the identity of the parties to the contract and the quality of the behaviour of the parties to the contract.

Before proceeding to examine in more detail three recent Supreme Court decisions, a short working definition of what is meant by 'certainty' in this context may be helpful. I use the term to refer to 'legal certainty'. While the term is one that appears not infrequently in the judgments of the Supreme Court, particularly in the context of the principle of legal certainty in EU law, the specific focus in this lecture is on the clarity of the substantive content of the rules of English contract law. Do they provide clear

guidance to contracting parties when drafting a contract, when deciding whether or not to exercise a right that is believed to be contained within the contract and, in the event that disputes arise between the contracting parties, as to the likely outcome of any judicial resolution of that conflict? In the words of Lord Bingham, the vital issue is whether the rules of law are 'accessible, and so far as possible intelligible, clear and predictable' in order to ensure that 'questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion'.

As I have indicated, my particular focus this evening is on the role that certainty and predictability have played in three recent Supreme Court decisions in the field of English contract law, namely *RTI Ltd v MUR Shipping BV* [2024] UKSC 18, [2025] AC 675*, Waller-Edwards v One Saving Bank plc* [2025] UKSC 22, [2025] 2 WLR 1263 and *Times Travel (UK) Ltd v Pakistan International Airlines Corporation* [2021] UKSC 40, [2023] AC 101. The emphasis placed on the importance of certainty is not entirely consistent between these three cases, but they do illustrate the importance which English law attaches to the promotion of legal certainty in a commercial context.

1. *RTI Ltd v MUR Shipping BV*

Our starting point is the decision of the Supreme Court in *RTI Ltd v MUR Shipping BV*. The issue before the court was one that concerned the proper interpretation of a contract of affreightment based on an amended Gencon form voyage charterparty entered into between a Jersey based charterer and a Dutch shipowner. The charterer was obliged under the terms of the contract to make payment to the shipowner in US dollars. However, as a result of sanctions being imposed on the corporate group of which the charterer was a member, it was common ground between the parties that it had become 'highly probable' that there would be 'difficulties' in making timely payment of hire in US dollars and 'that any such payments would have been delayed.'

In such a situation one might have expected it to be the charterer who wished to rely on the force majeure clause as a defence to any claim brought against it in respect of a failure to make timely payment. After all, it was the party facing the difficulty of making payment in accordance with the terms of the contract. But this was not so. In fact, it was the shipowner, as the recipient of the payment, who was seeking to rely on the force majeure clause in order to justify its decision to suspend performance of the contract and its refusal to nominate vessels under the contract of affreightment.

Rather than seek to walk away from the contract, or to suspend its performance, the charterer sought to find a way to ensure that the shipowner received the payment to which it was entitled under the contract. Thus it offered to make payment to the shipowner, initially in euros and then to pay the cost of immediately converting the euros into US dollars. In this way the shipowner would receive payment in US dollars of the correct amount but it would do so via a two-step process rather than the single stage agreed in the contract. The shipowner, however, declined to accept payment in this form, maintaining that the agreed method of payment was in US dollars, not euros, and that the force majeure clause did not oblige it to accept payment in any other form. In essence, the shipowner's position was that the imposition of sanctions was an event that was beyond the control of the parties that had the effect of preventing payment being made in US dollars as required by the contract and thus amounted to a force majeure event.

The charterer for its part denied that the force majeure clause had the effect for which the shipowner contended, pointing to the fact that one of the elements of the force majeure clause was that the event must be one which 'cannot be overcome by reasonable endeavours from the Party affected'. In its submission 'reasonable endeavours' required the shipowner to accept the offer to make payment in euros which would then be credited to the shipowner in US dollars as soon as the euros were received.

Notwithstanding the simplicity of the fact-pattern, the legal issue that it generated proved to be far from simple to resolve. The case started life in arbitral proceedings from which there was an appeal to the courts. The arbitrators and the majority of the Court of Appeal found for the charterer and held that the shipowner was not entitled to rely on the force majeure clause because of the effect of the 'reasonable endeavours' provision. However, Jacobs J in the Commercial Court, the dissenting judge in the Court of Appeal and a unanimous Supreme Court found for the shipowner and held that it was entitled to rely on the force majeure clause and was not obliged to accept payment in the manner proposed by the charterer.

In giving the judgment of the Supreme Court, Lord Hamblen and Lord Burrows identified 'several principles' which together provided 'good reasons' for accepting the submissions advanced on behalf of the shipowner. The first was that the object of a reasonable endeavours obligation is to 'maintain contractual performance' and it is not 'concerned with the steps that could or should have been taken to secure some different, non-contractual performance'. The second was 'the principle of freedom of contract' which is 'fundamental to the English law of

contract.' This principle was held to include the 'freedom not to contract' which in turn 'includes freedom not to accept the offer of a non-contractual performance'. The third is that 'clear words' are needed to forego valuable contractual rights and the right of the shipowner to be paid in US dollars was found to be such a valuable right.

The fourth, and the reason of greatest interest for present purposes, is the importance of certainty in commercial contracts. Thus the argument advanced on behalf of the shipowner was said to be 'straightforward' while the submissions advanced on behalf of the charterer were said not to be 'anchored in the contract' and were said to beg a number of questions and to give rise to 'considerable legal and factual uncertainty'. This uncertainty was said to be particularly detrimental 'in the context of a clause which requires immediate judgments to be made' and where contracting parties 'need to know with reasonable confidence whether or not a force majeure clause can be relied upon at the relevant time, not after some retrospective inquiry'.

It is important here not to over-state the significance of the importance attached by the Supreme Court to commercial certainty in reaching its decision. It was one of four 'principles' identified by Lord Hamblen and Lord Burrows and it cannot be said with confidence that it played a decisive role in the decision-making process. On the other hand, it is the 'principle' that received the most detailed treatment in the judgment of Lord Hamblen and Lord Burrows and, on that basis, it would seem reasonable to assume that it was a material factor in persuading the Supreme Court to reach the decision which it did. To the extent that it was a material factor, it can be argued that too much weight was attached to its significance. This is so for a number of reasons.

First, the Supreme Court's focus on the importance of certainty was essentially confined to its consideration of the term that required that payment be made in US dollars. Yet the legal significance of that term could perhaps have benefited from greater consideration. It would appear that the case before the Supreme Court proceeded on the assumption that, as between the parties, US dollars were both the money of account and the money of payment and that the law applicable to both was the law applicable to the contract and not the law of the place of performance. However this assumption was perhaps open to question, at least at an earlier stage in the proceedings, because the place of payment was the Netherlands (the shipowner being a Dutch company) and Dutch law generally allows payment to be made in euros rather than in any agreed-upon foreign currency. Thus, had Dutch law governed the money of payment then the charterer would have been entitled to make payment in euros and there would

have been no question of any non-performance by the charterer. In many ways it is unfortunate that this point was not pursued in any more detail but, when seeking to analyse the decision of the Supreme Court, one has to proceed on the basis that there was no entitlement on the part of the charterer to make payment in euros and that the tender of payment in euros amounted to a non-contractual performance.

Second, the almost exclusive focus on the obligation to make payment in US dollars had the consequence that little or no attention was paid to the entirety of the contractual relationship between the parties and their aim in securing performance of the contract. Had a broader approach been taken, regard could have been had to the fact that it was the shipowner who was seeking to suspend performance of the contract and who declined to co-operate with the charterer in such a way as to ensure that the intended end-result of the contract, namely that the contract would continue in existence and that the shipowner would be paid in US dollars, was achieved. Lord Hamblen and Lord Burrows approached the case on the basis that it was the shipowner who was 'insisting' on contractual performance rather than viewing the shipowner as the party who wanted to walk away from the transaction and frustrate the achievement of the ultimate purpose of the contract.

Third, and in some ways following on from the second point, the Supreme Court did not attach any weight to the fact that the position of the shipowner could be said to be not entirely meritorious given that the option offered by the charterer would have resulted in it obtaining immediate payment in US dollars. Indeed, Arnold LJ in his dissenting judgment in the Court of Appeal observed that the position of the shipowner had 'no merit'. But this statement was deemed to be 'misplaced' by Lord Hamblen and Lord Burrows because, in their view, it was 'not unmeritorious or unjust to insist on contractual performance, all the more so if being precluded from doing so would introduce uncertainty contrary to the expectations of reasonable business people.' However, it can be argued that the reasonable business person might have expected the contract to be performed by acceptance of the charterer's proposal, given that performance could then be achieved at minimal expense or inconvenience to the shipowner and the contractual relationship between the parties maintained.

Fourth, the concern of Lord Hamblen and Lord Burrows in relation to the dangers of opening the door and accepting that there may be circumstances in which a contracting party may be obliged to accept what would otherwise be a non-contractual performance may be said to be somewhat over-stated. This concern can be seen most clearly in the consideration given to the

question of the identification of a 'detriment or other prejudice' which a party may be required to accept or the extent to which it can be said that the 'non-contractual performance' can be said to 'achieve the same result as performance of the contractual obligation in question.' These are legitimate concerns because, once the door is opened, it is difficult, if not impossible, to close it again. But, on the present facts, it can be said that the strength of the charterer's case was that the shipowner would obtain the performance for which it contracted as a result of the immediate conversion of the payment in euros into US dollars. This was not a case in which what was being offered would result in a different outcome or an altered end result. It was the mechanism to achieve the result that was altered, not the result itself.

Fifth, it is important to recognise that the clause in dispute in the present case was a force majeure clause and the context in which such a clause is intended to operate is one in which performance has been interrupted by an event that is beyond the control of the parties such that performance cannot be carried out according to the original contractual schedule. For example, an interruption in performance caused by adverse weather, a strike or the outbreak of war may lead to the temporary suspension of the contract and delivery at a time other than that set out in the contract. In such a case one would not expect the recipient of the contractual performance to decline it on the basis that it was being tendered at a time other than that set out in the original contractual schedule. However, the present case may be said to be atypical in that it was the recipient of the contractual performance, not the party subject to the obligation to perform, who was seeking to rely on the force majeure clause. But what would have been the position if it had been the charterer who sought to rely on the force majeure clause and the shipowner was the one who came forward with the proposal that the charterer pay in euros and meet the cost of the conversion of that payment into US dollars? In such a case, could the charterer have relied on the force majeure clause as a defence to its non-performance and then maintained that it could not be required to tender performance in a form other than that set out in the contract? If this is so, then it may be that further thought needs to be given to the drafting of force majeure clauses at least in the case where the aim of the clause is not simply to shield a party from liability for its non-performance but to enable performance to be completed in a manner that is as close as possible to the terms of the original contract.

This leads on to the final point which is that the maintenance of the contractual relationship under altered terms may have been the aim of the 'reasonable endeavours' provision in the force majeure clause which could be said to evidence not only a desire to achieve performance as close as possible to that set out in the original contract but to demonstrate that the parties did

place a value on flexibility, notwithstanding the uncertainty that such flexibility may entail. The existence of a degree of uncertainty in the clause was acknowledged by Lord Hamblen and Lord Burrows in so far as they recognised that a reasonable endeavours obligation 'imports an evaluative judgment and therefore some element of uncertainty.' However, their response was that such evaluation was 'geared towards achieving contractual performance' and that the construction favoured by the charterer created 'needless additional uncertainty' in so far as it 'departed from the standard provided by the terms of the contract'. While the proposal made by the charterer did involve a departure from the standard provided by the terms of the contract, the imposition of sanctions already had that inevitable consequence, and the merit of the proposal made by the charterers was that it was designed to achieve an outcome that was as close as possible in the changed circumstances to that standard.

Notwithstanding these criticisms of the decision of the Supreme Court, there is much that is of value in the decision, particularly its confirmation of the fact that a force majeure clause will generally be interpreted as being applicable only 'if the party invoking it can show that the event or state of affairs was beyond its reasonable control' and that the event or state of affairs must be such as 'could not be avoided by the taking of reasonable steps.' The essence of my criticism is that the decision gives too much weight to the need for certainty and exact contractual performance in a context where performance is no longer possible in accordance with the original contractual timetable and it does not encourage parties to seek to obtain a contractual performance that is as close as possible to that originally agreed.

2. *Waller-Edwards v One Saving Bank plc*

The second case is the decision of the Supreme Court in *Waller-Edwards v One Saving Bank plc*. This case may be said to be a less obvious one to consider in this context because it concerns a contract between a consumer and a bank, rather than a contract between two commercial parties, and it has no international component, in that the parties to the transaction were based in England and so it did not raise the concerns expressed by Lord Hamblen in relation to the choice by international parties of English law as the law to govern their contract. Nevertheless, the case does illustrate the concern of the Supreme Court to find a clear rule which can assist a commercial party in its business and thereby promote certainty in transactions.

The issue before the Supreme Court was one that concerned the circumstances in which a bank is put on inquiry in relation to the risk that undue influence has been exerted over a non-commercial party to whom money has been advanced by way of a loan from the bank. The particular issue which led to an appeal to the Supreme Court was that the loan took what was referred to as a 'hybrid' form, that is to say, most of the £384,000 advanced by the bank was, on its face, for the benefit of the defendant and her then partner but £39,500 of it was to be used to pay off her partner's debts. Thus this was neither a 'classic' surety case where the bank would be put on notice, nor was it a case where the advance was entirely for the joint non-commercial purposes of both borrowers, in which case the bank would not be put on notice.

The Supreme Court, in a judgment delivered by Lady Simler, rejected a fact-sensitive approach to the question of whether the bank was put on notice in such hybrid cases, preferring a binary approach according to which 'either there is, on the face of the non-commercial transaction, a surety element giving rise to a heightened risk of undue influence or there is not'. If there is such a surety element, the bank is put on notice. The test adopted by the Supreme Court was expressed in the following terms:

> 'a creditor is put on inquiry in any non-commercial hybrid transaction where, on the face of the transaction, there is a more than de minimis element of borrowing which serves to discharge the debts of one of the borrowers and so might not be to the financial advantage of the other.'

Although the de minimis exception may introduce a degree of uncertainty into what was repeatedly said to be a 'bright line' test, the exception was believed to be of 'such long standing' that it would not be a 'source of unworkable uncertainty' and on the facts of the case a surety component of £39,500 could not be regarded as de minimis. The advantage of a 'bright line' approach over a more fact-sensitive approach was said to be that it was 'clear, promotes certainty, and most significantly, it is easy to apply effectively in all non-commercial hybrid transactions.'

In adopting this 'bright line' approach the Supreme Court viewed the transaction through the lens of the bank, noting that it was the bank's perception of the nature of the transaction that was 'critical'. Viewed from this perspective the primary interest of the bank was seen to lie in establishing a clear and workable rule which had as its focus what was 'on the face of the transaction', even if that rule resulted in the bank being put on notice in a wider range of circumstances than might have been the case had a more nuanced, fact-sensitive approach been adopted. In approaching the case in this way one can see the importance which the Supreme

Court attached to the importance of the provision of certainty and predictability to commercial parties.

However, it is important to note that the focus on certainty was largely, if not exclusively, confined to the position of the bank. Matters were otherwise in relation to the position of the defendant borrower. While she did have an interest in the adoption of a clear rule, in the sense that all citizens have an interest in knowing their rights with a degree of certainty, she was looking primarily to the court for protection, not certainty. This interest was acknowledged by Lady Simler when she observed that the Supreme Court's approach would, in addition to providing certainty, 'afford a broad scope of protection by putting a bank "on inquiry" in every non-commercial case where a wife offers to stand surety for a loan used to pay off her husband's debts to a more than de minimis extent.' Lady Simler also acknowledged that the 'prevalence of economic abuse between women and their spouses or intimate partners' has not reduced and that 'as many as one in six women in the UK has experienced financial abuse by a current or former intimate partner'. The Supreme Court did not therefore make the mistake of assuming that certainty was the only interest that was worthy of protection. There was a concern to protect the vulnerable from abuse, although it may be doubted whether a dispassionate explanation of the proposed transaction under the *Etridge* protocol will suffice to free a vulnerable person from the undue influence of a partner such that entry into the transaction can be said to be a genuine exercise of autonomy. The adequacy of the *Etridge* protocol is not, however, my immediate concern. It suffices to note that a concern to promote certainty and predictability need not be at the expense of a desire to protect the vulnerable from exploitation. Rather, the task of the court is to strike a balance between these often competing interests, although the weight that is attached to the promotion of certainty and predictability by English law is probably greater than that to be found in many other legal systems of the world.

3. *Pakistan International Airlines Corporation v Times Travel (UK) Ltd*

The third and final case is the decision of the Supreme Court in *Pakistan International Airlines Corporation v Times Travel (UK) Ltd.* Here the claimant travel agents sought to set aside an agreement into which it had entered with the defendant airline company on the ground of economic duress. The agreement was entered into between the parties after the defendant gave notice lawfully to terminate its existing contract with the claimant and offered the claimant a

new contract on terms that included a waiver by the claimant of any existing right which it had against the defendant in respect of unpaid commission under the contract which had been terminated. The defendant's case was that such conduct could not amount to the application of illegitimate pressure because the steps it had taken were entirely lawful, namely the termination of an existing contract by the giving of notice and the offer of a new contract on different terms. The issue before the Supreme Court was therefore whether or not English law recognised a doctrine of lawful act duress which entitled the claimant to set aside the agreement. The Supreme Court held unanimously that English law does recognise a doctrine of lawful act duress but that the claimant was not entitled to invoke it on the facts of the case.

In reaching this conclusion the importance of certainty in commercial transactions weighed heavily with the Supreme Court. Thus Lord Burrows stated

> 'within the realm of commercial contracts, with which we are here concerned, English law has a long-standing reputation for certainty and clarity and there is a significant danger that that reputation will be lost if the law on lawful act economic duress is stated too widely or with insufficient precision.'

However, had the sole aim of the Supreme Court been to produce a clear and certain rule the easiest way to achieve that would have been to conclude that English law does not recognise a doctrine of lawful act duress. Instead, the aim of the court was to avoid 'unwanted uncertainty' or 'unacceptable uncertainty.' So why was the Supreme Court willing to accept a degree of uncertainty rather than shut the door completely on the recognition of lawful act duress?

Lord Burrows gave three reasons in support of the conclusion that English law does recognise a doctrine of lawful act duress. The first is that the line drawn by the law when considering whether the pressure is of such a nature as potentially to amount to the application of economic duress is between 'illegitimate' and 'legitimate' pressure, not between 'unlawful' and 'lawful' pressure. The second is that the crime of blackmail 'clearly includes threats of lawful action' and it would be 'very odd for the civil law of duress not to include threats of lawful acts when the criminal law does so.' Third, there is a long-established line of authority in which threats of lawful action have entitled the threatened party to rescind a contract or to have restitution of non-contractual payments, the classic example being illegitimate threats to prosecute the claimant or a member of the claimant's family, to which can be added a number of more recent cases in which it has been accepted that lawful act economic duress can act as a ground for the avoidance of a contract or a ground for restitution.

Having decided to recognise the existence of a doctrine of lawful act duress, the next question to consider is the scope of the doctrine. On this issue the Supreme Court divided, with the majority judgment being given by Lord Hodge and the minority judgment by Lord Burrows. The intention of the Supreme Court was clearly to recognise a doctrine of very limited application and this has been followed in subsequent cases. There are presently two identified circumstances in which it can be invoked. The first is 'where a defendant uses his knowledge of criminal activity by the claimant or a member of the claimant's close family to obtain a personal benefit from the claimant by the express or implicit threat to report the crime or initiate a prosecution.' To the extent that such a threat involves the commission of the crime of blackmail it should not give rise to difficulty in practice given that a commercial party might be expected to recognise that a contract entered into as a result of the threatened commission of a crime should be set aside by the court. More difficulty, however, is likely to arise from the other circumstance in which the majority of the Supreme Court recognised that lawful act duress may exist, namely where 'a defendant, having exposed himself to a civil claim by the claimant, for example, for damages for breach of contract, deliberately manoeuvres the claimant into a position of vulnerability by means which the law regards as illegitimate and thereby forces the claimant to waive his claim.' The element which Lord Hodge identified as common to these two circumstances is that the defendant has 'behaved in a highly reprehensible way which the courts have treated as amounting to illegitimate pressure.'

However, the scope of these exceptional circumstances, in particular the second one recognised by the majority, requires an evaluative assessment which inevitably brings with it a degree of uncertainty. This point was noted by Lord Burrows who observed that, 'on the face of it,' the conduct of the defendant on the facts of *Times Travel* seemed to 'fall within' the second of Lord Hodge's two categories in so far as the defendant used illegitimate means to manoeuvre the claimant into a position of weakness in order to force it to waive its claims in respect of the unpaid commission. Lord Hodge did not, however, share this view. In his judgment, based on the findings made at trial, the conduct of the defendant entailed 'hard-nosed commercial negotiation' that exploited the position of the defendant as 'a monopoly supplier' but did not involve 'the reprehensible means of applying pressure' that was evident in the case law in which economic duress had been found to exist. He also noted that there no finding that the defendant had acted in bad faith in making its demands. The line thus drawn by Lord Hodge between legitimate hard-nosed commercial negotiation and reprehensible and therefore

illegitimate means of applying pressure is not one that will strike all observers as being self-evident.

At this point it may be helpful to delve a little more fully into the facts of *Times Travel.* While the finding that no reprehensible means were used by the defendant seems clear if the giving of notice to terminate the original contract and the offer of new terms are viewed in isolation, the picture begins to change somewhat when account is taken of the context for these actions, namely the dispute under the original contract in relation to the payment of commission to the claimant. Unfortunately, the analysis of the true state of play in relation to the obligations of the parties under the original contract was not conclusively established by Warren J at trial. While Warren J devoted over 200 paragraphs to an account of the facts, the section of his judgment in which the doctrine of economic duress is applied to these facts consists of three paragraphs. That said, there are some points on which there is clarity in relation to the findings made. So, for example, it is clear that the claims brought by the claimant were 'all genuine and arguable.' But other points are less clear. Thus, the question whether the defendant had acted in good faith or bad faith was stated to be 'moot' because the claimant had not established that the defendant had acted in bad faith, while the defendant had not established that it had acted in good faith. Further, there were elements of the claim to recover unpaid commission that were described as 'very strong indeed' and where a summary judgment application would have been 'bound to succeed' but there were other aspects of the claim where the outcome was found to be 'less clear' or the claim was, on the evidence available, 'rejected.' Notwithstanding these uncertainties, it is important to note that Warren J stated that it was 'clear' to him that 'the whole basis' of the strategy adopted by the defendant was to ensure that the claimant would lose its claims to 'accrued rights in a situation where some of those rights…were clear.' While the value of these lost rights does not emerge from the judgment with any clarity, it seems reasonable to proceed on the basis that the defendant did breach the terms of the original contract with the claimant and the strategy that it adopted was designed to eliminate any liability in respect of these breaches.

It has been argued by Iona Branford and Jodi Gardner that these findings should have been sufficient to make out a case of economic duress on the basis that the lawful threats made by the defendant were, in their words, 'directly related' to the defendant's previous unlawful conduct (in the form of their breach or breaches of contract) and so should constitute the application of illegitimate pressure. This claim is said to be rooted in the principle that a

contracting party should not be 'allowed to escape the consequences of their prior unlawful conduct.' This view was not, however, one shared by the Supreme Court who seemed to focus on the lawful pressure applied by the defendant without attaching any significant weight to the factors which led to that pressure being applied. This compartmentalisation is most apparent in the judgment of Lord Hodge who, in the critical two paragraphs in which the law is applied to the facts of the case, made passing reference to the fact that the defendant was demanding 'a waiver of a claim that it was in breach of contract,' but otherwise focused on the lawful conduct of the defendant in reducing the claimant's ticket allocation and the 'take it or leave it' option which the defendant gave to the claimant. But this is to view a subset of the defendant's actions divorced from the strategy which it had adopted to eliminate its potential liability to pay the commission that was due under its contract with the claimant. While the threats which directly induced the contract were lawful, they were nevertheless a central part of the defendant's strategy to avoid any liability in respect of its breach or breaches of contract and these breaches should not be swept aside as if they were causally irrelevant.

On the other hand, it can be argued that the fact that the defendant was in breach of contract in failing to pay commission to the claimant should not of itself suffice to lead to the conclusion that the pressure applied by the defendant was illegitimate. It was, perhaps, for this reason that Lord Burrows insisted that there must be a 'bad faith demand' before lawful act economic duress can be established. Thus, for Lord Burrows, the critical factor which persuaded him to conclude that lawful act duress was not established was that, on the facts as found by Warren J, the claimant had not established that the defendant did not genuinely believe that it was not entitled to withhold the commission that was claimed by the claimant. Thus the past breaches of contract by the defendant were not enough of themselves to turn the case into one of lawful act economic duress. It was necessary to go further and prove that the defendant genuinely believed that it not entitled to withhold the unpaid commission. Of course this was not the approach adopted by the majority. For them a bad faith demand did not, 'without more' lead to a finding of lawful act economic duress because the doctrine of lawful act economic duress is 'more limited in the context of commercial relations.' In their judgment it was necessary to go further and establish that the defendant had 'behaved in a highly reprehensible way' and that the claimant could not do.

While there are clearly uncertainties about the exact scope of the doctrine of lawful act duress that was recognised by the majority of the Supreme Court, does the decision have the likely

consequence that English law will lose what Lord Burrows referred to as its 'long-standing reputation for certainty and clarity'? It is suggested that it will not. As Lord Burrows observed, lawful act duress is 'controversial' and it is an issue on which reasonable minds can differ and where certainty is accordingly more difficult to establish. Had the only concern of the Supreme Court been to lay down a clear and predictable rule, that would best have been done by shutting the door entirely on the recognition of lawful act duress. But, had it done so, it would have left the door open to powerful contracting parties to devise strategies that involved the use of lawful threats to persuade a weaker party to waive its valuable contractual rights without fear of judicial oversight. In this context there is a legitimate interest in upholding standards of conduct in the negotiation and re-negotiation of a contract and the fact that the stance adopted by the defendant is technically lawful should not render it immune from scrutiny by the courts. In other words, the interest in certainty has to be balanced against the legitimate interest of the law in laying down minimal standards with which parties are expected to adhere in a contractual context. Thus it is worth noting that, what the Supreme Court wished to avoid, was not uncertainty per se but 'unwanted' or 'unacceptable' uncertainty. While there is some force in the submission that the majority of the Supreme Court could have done more to lay down a clear rule that would establish the limits of lawful act economic duress, it is unlikely to impair the reputation of English law for certainty and clarity, particularly when account is taken of the limited scope of the doctrine that has been recognised and the concern to ensure that highly reprehensible conduct is not encouraged.

4. Conclusion

Two final points can be noted by way of conclusion and both relate to aspects of the decision in *Times Travel.* The first is that Lord Hodge affirmed that English law has never recognised a 'general principle of good faith in contracting,' although it has developed 'piecemeal solutions in response to demonstrated problems of unfairness.' One of the objections to the recognition of such a general principle is the uncertainty that it would likely generate and that uncertainty may be a price that is not worth paying. That said, it seems unlikely that the debate over the role of good faith in English contract law will go away. In so far as contracting parties choose to draft their contracts making express use of the language of good faith in the performance of their contact, effect will be given by the courts to these terms, albeit there is a level of uncertainty as to what good faith means in any particular contractual context. More difficult is the implication of a term requiring the parties to act in good faith, but such an

implication seems unlikely in the context of a commercial contract negotiated at arm's length and, even if such a term were to be implied, its demands are not likely to be extensive. The stance of English law on this issue may seem open to question when seen in the context of the many legal systems in the world where good faith is a core contractual doctrine out of which the parties cannot contract. But it is one thing to work with a doctrine that is well-established and well-understood in a particular legal system. It is another to introduce it as a latecomer into a well-established legal system where its introduction has the potential to generate uncertainty as to the continued validity of recognised rules of English contract law. The caution of the judiciary in relation to any possible recognition of a general principle of good faith in contracting is understandable given the preference of the common law for incremental rather than radical developments, in particular when account is taken of the uncertainty which radical change, such as the introduction of a general principle of good faith in contracting, may bring.

The final point concerns the statement by Lord Hodge in *Times Travel* that English law recognises no doctrine of inequality of bargaining power. This is perhaps a fitting point on which to conclude this Denning lecture given that it was Lord Denning himself who is most closely associated with the claim that English law recognises such a general principle or doctrine. I refer here of course to his judgment in *Lloyds Bank v Bundy* where he famously stated that

> 'English law gives relief to one who, without independent advice, enters into a contract upon terms which are very unfair or transfers property for a consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other.'

It would be fair to say that Lord Denning's general principle has not been well received either by the House of Lords or by the Supreme Court. But it may be that some of these criticisms miss the mark. When careful account is taken of the various components which must be satisfied in order to bring the doctrine into play (substantive unfairness, lack of independent advice or weakness and advantage-taking), it can be seen that this is no easy test to satisfy. Further, sight should not be lost of the fact that Lord Denning was seeking to identify the general principle or the 'single thread' which united pockets of case law which had hitherto each been seen as 'a separate category'. The stance which English law has chosen to take is to reject the general principle but, as *Times Travel* itself demonstrates, to continue to recognise

a range of individual instances where, exceptionally, English law has chosen to intervene to set aside 'unconscionable' or 'extortionate' bargains.

The continued existence of these disparate jurisdictions is not conducive to the cause of certainty. But that is not their function. Their function is to protect the vulnerable from exploitation. And that takes us back to the point on which we started, namely that the pursuit of certainty is not the only or even the ultimate aim of the English law of contract and that its importance does depend on the context in which the contract was concluded, the identity of the parties to the contract and the quality of their behaviour. Thus the promotion of certainty was at its strongest in *RTI Ltd v MUR Shipping BV* where the issue was one that concerned the interpretation of a commercial contract concluded between a Dutch company and a Jersey company who had chosen English law as the law to govern their contract. In *Waller-Edwards v One Saving Bank plc* its role was more nuanced, being directed towards providing clarity to the commercial party to the transaction, while seeking at the same time to provide an appropriate level of protection for the vulnerable party to the transaction. Finally, in *Times Travel (UK) Ltd v Pakistan International Airlines Corporation*, the aim of the Supreme Court was not to avoid uncertainty per se but rather to avoid unnecessary or unwanted uncertainty by creating an exceptional jurisdiction to set aside a contract where the more powerful party has acted lawfully in making the threats which it made but has nevertheless behaved in a highly reprehensible manner which can be described as the application of illegitimate pressure.

The importance attached to certainty in English contract law is greater than that to be found in many other legal systems in the world, and at times may be greater than some of us would consider to be desirable, but it is not absolute and, as the cases discussed in this lecture demonstrate, the Supreme Court's pursuit of legal certainty is moderated by a desire to ensure that a minimum level of protection is provided to vulnerable parties and it displays a willingness, exceptionally, to find the existence of lawful act economic duress in the context of a commercial negotiation where pressure has been applied in a highly reprehensible way. The balance thus struck, while not appealing to everyone in every respect, appears a reasonable one for the courts to strike and it will not place in jeopardy the reputation of English commercial law for the promotion of certainty and predictability.