

**IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA**

SC 166/2025

BETWEEN JINXING LIU

Appellant

AND HUA WU also known as DANNY WU

Respondent

SUBMISSIONS FOR THE APPELLANT

Dated: 8 June 2026

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TABLE OF CONTENTS

Summary.....	1
Factual and Procedural Background.....	2
<i>The High Court's Findings.....</i>	<i>3</i>
<i>The Court of Appeal's Decision.....</i>	<i>5</i>
This Case Should Be Analysed through the Lens of Duress, Not Illegality.....	7
<i>The Distinction between the Doctrines of Duress and Illegality.....</i>	<i>7</i>
(a) The duress doctrine.....	7
(b) The illegality doctrine.....	8
(c) The difference between the doctrines in practice.....	10
(d) Conclusion on the contours of each doctrine.....	14
<i>The Court of Appeal Erred in Turning Away from Duress and Towards Illegality... </i>	<i>15</i>
(a) High Court's findings support duress, not illegality.....	16
(b) Balance of the record consistent with Lang J's approach.....	19
(c) The Court of Appeal erred in its approach.....	21
Mr Wu Affirmed the Deed.....	23
<i>The Policy of Voidable Contracts and Affirmation.....</i>	<i>23</i>
<i>The Authorities on Affirmation.....</i>	<i>24</i>
<i>Applying Settled Precedent, Mr Wu Affirmed the Deed.....</i>	<i>27</i>
Relief Sought.....	30

MAY IT PLEASE THE COURT:

Summary

1. This case is about the legal consequences of one person applying illegitimate pressure on another person to coerce them to sign a contract. It is also about the legal consequences of the coerced person then failing to avoid the resulting contract for several years, and displaying conduct consistent with a desire to affirm the contract in the meantime.
2. The courts below were split on both issues. In the High Court, Lang J held that where a party enters into an agreement as a result of threats of prosecution, the threats constitute duress and the agreement is voidable at the threatened party's election. His Honour then held that on the facts, a delay of more than three years by the threatened party in avoiding the agreement, coupled with conduct consistent with a desire to maintain it in the interim, amounted to affirmation.
3. The Court of Appeal reversed course. It held that the illegitimate threats the appellant made to induce the respondent into signing the agreement at issue rendered the agreement itself illegal. It did not adopt the High Court's duress approach, despite that approach long being the orthodox one in "*threat of prosecution*" cases all over the Commonwealth. In *obiter dictum*, it also cast doubt on Lang J's conclusions as to affirmation.
4. For the reasons that follow, the appellant's case is that Lang J's approach should be preferred on both issues. On the first, His Honour found as a fact that the threats had induced the agreement at issue. As a consequence, His Honour applied an orthodox restitution analysis to those facts supported by settled authority and was correct to do so.
5. The Court of Appeal misconstrued Lang J's factual conclusion, miscasting a "threat to prosecute" as an "agreement not to prosecute", something Lang J did not – and did not need to – find in the parties' dealings. As a result, the Court's analysis conflated a finding of illegitimate pressure with one of an illegal promise, so misdirected itself as to the applicable doctrinal lens.
6. On the second question, Lang J again assessed the weight of the evidence he had

heard and determined that once the respondent was no longer under coercion, he did not timely avoid the agreement. Instead, His Honour observed the respondent's conduct as being consistent with a desire to affirm it. That factual conclusion again rested on settled, orthodox principles of contractual affirmation.

7. That combination of factual findings and settled precedent is one that an appellate Court again ought to be slow to disturb. Given its findings on illegality, the Court of Appeal did not do so in strict terms. Instead, it confined itself to *obiter* comments that, it is submitted, should not be adopted by this Court on appeal.

Factual and Procedural Background

8. Mr Liu and Mr Wu were previously friends and professional acquaintances. They met in 2015 through Mr Liu's son (**Jackie**), while Mr Wu was working for Jackie's business (**Timber King**).¹ They socialised regularly between 2015 and 2018.²
9. In July 2018, Mr Liu and Mr Wu executed a deed (the **Deed**), which provided that Mr Wu would transfer \$600,000 and a property at 1/185 Buckland Road to Mr Liu.³ Mr Wu duly transferred the money and the property in November 2018 and discharged his obligations under the Deed.⁴ He did so despite having received legal advice that he was subject to unlawful threats compelling him to enter into the Deed, and that signing it would not necessarily remove the threat's potency.⁵
10. For about three-and-a-half years after that, very little happened. Mr Liu and Mr Wu met again once in early June 2019 at Mr Wu's insistence, with Mr Wu commenting that he wished to "*discuss future matters*" with Mr Liu "*sett[ing] the direction*" of their ongoing business dealings.⁶ He attempted to arrange additional meetings with Mr Liu on four further occasions in June 2019, before Mr Liu cut off contact with him by telling Mr Wu to leave him alone and blocking

¹ *Wu v Liu* [2024] NZHC 2903 [[101.0088]] (HC Judgment) at [16] [[101.0092]].

² *J Liu BOE* [[203.0476]] at [30] [[203.0487]].

³ Deed dated 4 July 2018 [[301.2119]].

⁴ HC Judgment at [6] [[101.0090]].

⁵ *McLuskie BOE* [[201.0208]] at [10] [[201.0211]] and [16] [[201.0213]]; *Wan BOE* [[201.0193]] at [15]–[16] [[201.0198]]; emails from *Tompkins Wake* to Mr Wu dated 20 April 2018 [[301.0955]] and 19 June 2018 [[301.1138]]; *McLuskie X XM* [[201.0216]] at 94:3–6 [[201.0220]].

⁶ HC Judgment at [86] [[101.0121]]; Translation of WeChat [[301.0655]] at [[301.0693]] and [[301.0729]].

him on WeChat, their primary means of communication.⁷

11. From there, Mr Wu took no steps in respect of the Deed – and had no further contact with Mr Liu or Jackie – until March 2022. It was then that he sued both Mr Liu and Jackie in the High Court. He claimed restitution of the property transferred on the basis that Mr Liu had been unjustly enriched in receiving it.⁸

The High Court's Findings

12. Lang J determined Mr Wu's claims following a six-day trial in September 2024. Mr Wu's evidence was that he had executed the Deed as a result of threats from Mr Liu that he would report Mr Wu's alleged thefts from Timber King to the Police, Immigration New Zealand and the IRD if the Deed was not signed.⁹
13. Mr Wu testified that the threats made him feel compelled to sign the Deed and make the property transfers.¹⁰ He gave that evidence despite also deposing that he had not in fact committed the thefts that were the subject of the threats.¹¹
14. Lang J made the following factual findings about how the Deed was executed:
 - (a) Mr Wu had "*made the dispositions under the Deed because of pressure placed on [him] by both [Mr Liu] and Jackie*".¹²
 - (b) From the evidence, it was "*not possible to ascertain with any certainty what Jackie and [Mr Liu] told [Mr Wu] they would do if their demands were not met*", only that "*the pressure that Jackie and [Mr Liu] exerted must nevertheless have been very significant*".¹³
 - (c) Although neither Mr Liu nor Jackie could be "*shown to have made any overt threats*" against Mr Wu, His Honour concluded that "*in all likelihood it involved, at the least, threats to report the thefts from Timber King to the police or the immigration authorities*", but was "*not prepared to find*

⁷ HC Judgment at [86] [[101.0121]]; J Liu BOE [[203.0476]] at [137] [[203.0524]], Translation of WeChat [[301.0655]] at [[301.0771]], [[301.0773]], [[301.0775]].

⁸ HC Judgment at [9]–[10] [[101.0090]] and [17], [21] [[101.0093]]–[[101.0094]].

⁹ HC Judgment at [13] [[101.0091]]; Wu BOE [[201.0001]] at [47]–[48], [59] [[201.0033]].

¹⁰ Wu XXM [[201.0145]] at 131:1–3 [[201.0171]].

¹¹ HC Judgment at [61] [[101.0112]]; Wu XXM [[201.0145]] at 105:7–8 [[201.0145]]; 106:12–13 [[201.0146]]; 111:15–16 [[201.0151]]; 113:31–32 [[201.0153]]; 119:25–26 [[201.0159]].

¹² HC Judgment at [65] [[101.0113]].

¹³ HC Judgment at [69] [[101.0114]] and [70] [[101.0115]].

that the pressure involved threats of physical violence”.¹⁴

(d) Based on these findings, Mr Wu “*entered into the Deed under duress as that concept is understood in the authorities*”.¹⁵

15. Lang J then correctly held that this series of factual findings “*meant that the Deed was voidable and not void*”.¹⁶ This saw His Honour undertake the next stage of the analysis properly applicable in duress cases: whether the Deed had been avoided or affirmed by Mr Wu.¹⁷

16. Although Lang J noted that Mr Wu had not sought to avoid the Deed as part of his claim or prior thereto – meaning it “*therefore remain[ed] on foot and binding*” – His Honour found that the fact that Mr Wu had sued meant it “*can be argued*” that he had “*made it clear that he considered the Deed to be void*” from that point.¹⁸

17. However, Lang J concluded that the Deed had nonetheless been affirmed based on the following factual findings:

(a) Mr Wu had “*adamantly denied he had been blackmailed when that possibility was put to him by his own lawyers*”.¹⁹

(b) Mr Wu “*did not take any steps to avoid the Deed during the period between November 2018 and March 2022*”, with the following occurring during that time period that pointed towards affirmation:²⁰

(i) Mr Liu and Mr Wu had “*no WeChat contact during the period between November 2018 and June 2019*”.

(ii) Mr Liu and Mr Wu “*met at a restaurant near [Mr Liu’s] place of work*” on 5 June 2019 and Mr Wu “*attempted to arrange meetings with [Mr Liu] on four further occasions in the following days*”.

(iii) Mr Liu “*blocked [Mr Wu] from sending further WeChat messages*” after the 5 June meeting.

¹⁴ HC Judgment at [68]–[70] [[101.0114]]–[[101.0115]].

¹⁵ HC Judgment at [78] [[101.0117]].

¹⁶ HC Judgment at [78] [[101.0117]].

¹⁷ HC Judgment at [78]–[79] [[101.0117]].

¹⁸ HC Judgment at [78]–[79] [[101.0117]]–[[101.0118]].

¹⁹ HC Judgment at [82] [[101.0119]].

²⁰ HC Judgment at [86] [[101.0121]].

- (iv) There was “no suggestion in any of the messages that passed between [Mr Wu] and [Mr Liu] during this period that [Mr Wu] was seeking to set aside or avoid the Deed”.
 - (v) “[F]rom June 2019”, there was “no further contact at all” between Mr Liu and Mr Wu.
 - (c) As a result of Mr Wu’s delay in bringing the proceeding under those circumstances, his “attempt to avoid the Deed in this proceeding cannot be regarded as timeous”, with the explanation he gave in evidence not “adequate...for the delay that has occurred”.²¹
18. Having found that Mr Wu affirmed the Deed, Lang J dismissed his claim for return of the property transferred under it. Mr Wu appealed.

The Court of Appeal’s Decision

19. The Court of Appeal approached the issues differently. It considered that the threats Lang J found Mr Liu to have made were not properly viewed through the lens of duress. Instead, it concluded that Mr Wu had transferred the property pursuant to an illegal bargain the two had reached, which was unenforceable under the illegality provisions of the Contract and Commercial Law Act 2017 (CCLA).²² The Court’s reasoning is captured in the following passage:²³

[32] We have little hesitation in finding that the true agreement was an illegal agreement. As the Judge noted, blackmail is a criminal offence. It is prohibited by s 237 of the Crimes Act 1961. On that basis alone this was plainly an illegal contract. Further, the threat Mr Liu made was to report Mr Wu to the authorities, given Mr Wu had stolen from his employer, which was a promise not to report an alleged crime to the authorities. This involved the additional dimension of an agreement to prevent the investigation and prosecution of crimes.

20. The Court supported that conclusion by traversing the prior authorities on agreements to stifle prosecution. It cited:
- (a) *Osborne v Worksafe New Zealand* for the proposition that “private bargains to avoid prosecution through payment or provision of other

²¹ HC Judgment at [88] [[101.0121]]–[[101.0122]].

²² *Wu v Liu* [2025] NZCA 560 [[101.0145]] (CA Judgment) at [31]–[32] [[101.0155]] and [50] [[101.0163]].

²³ CA Judgment at [32] [[101.0155]].

benefit are unlawful”.²⁴

(b) *Mall Finance & Investment Co Ltd v Slater* for the proposition that “a contractual promise not to prosecute somebody would be founded on illegal consideration and therefore void”.²⁵

(c) *Polymer Developments Group Ltd v Tilialo* for the proposition that a deed which “included a term that the brother would not be prosecuted” was “an illegal contract because of the term promising not to commence a private prosecution”.²⁶

21. The Court then gave consideration to the question of whether illegality or duress represented the proper way to determine the validity of the Deed. It discussed its decision in *Pharmacy Care*, commenting that the Court applied the law of duress to the contract at issue “notwithstanding that the contract effectively included a term that the plaintiff would not pursue an allegation of offending”.²⁷ It also discussed *Haines v Carter*, in which the Court “dismissed a claim that a relationship property agreement was induced by duress because the plaintiff had threatened to report the defendant’s irregularities to Te Tari Taake [IRD], on the basis that the defendant had affirmed the contract”.²⁸

22. As the Court noted, neither of those cases “involved any consideration of illegality”.²⁹ In respect of *Haines*, the Court reasoned that this was because “there was no term of the agreement to reflect the threat”.³⁰ In respect of *Pharmacy Care*, the Court observed that “the agreement in that case involved a full and final settlement of all issues between the parties, and this might have been interpreted to be an agreement not to pursue alleged offending given that such offending had earlier been raised”.³¹ It said on that basis that “it may be that that case could have been addressed as one of an illegal contract in those

²⁴ *Osborne v Worksafe New Zealand* [2017] NZSC 175, [2018] 1 NZLR 447 (*Osborne*) at [70] [[Appellant’s Bundle of Authorities (BOA), Tab 13, page 234 at page 257]] as cited in CA Judgment at [32] [[101.0155]].

²⁵ *Mall Finance & Investment Co Ltd v Slater* [1976] 2 NZLR 685 (CA) (*Mall Finance*) at 689 per Cooke J [[BOA, Tab 8, pg 170 at 174]], as cited in CA Judgment at [33] [[101.0156]].

²⁶ *Polymer Developments Group Ltd v Tilialo* [2002] 3 NZLR 258 (HC) (*Polymer*) at [77] [[BOA, Tab 17, pg 356 at 371]], as cited in CA Judgment at [34] [[101.0156]].

²⁷ CA Judgment at [46] [[101.0162]].

²⁸ CA Judgment at [46] [[101.0162]].

²⁹ CA Judgment at [46] [[101.0162]].

³⁰ CA Judgment at [48] [[101.0162]].

³¹ CA Judgment at [49] [[101.0162]].

circumstances”, but went no further in reconciling that observation with the fact that the two doctrines lead to different and inconsistent remedies.³²

23. Because the Deed was found to be illegal and therefore void *ab initio*, the Court did not then go on to determine whether Lang J was correct to hold that Mr Wu had affirmed it. It made *obiter* comments on the point but ultimately concluded that it “[g]iven we have upheld Mr Wu’s claims and his appeal on the basis of illegality, we need not take these matters any further, however”.³³

24. This Court granted leave on both the illegality and affirmation questions.

This Case Should Be Analysed through the Lens of Duress, Not Illegality

25. Mr Liu’s core submission is that the Court of Appeal erred in considering the Deed through the lens of illegality and not duress. He submits that whether the Deed was void depends on whether it was avoided or affirmed by Mr Wu.

The Distinction between the Doctrines of Duress and Illegality

26. As the Courts below have identified, the doctrines of duress and illegality are separate and distinct. They must, and do, each respond to different aspects of a contractual bargain, with different legal consequences flowing accordingly.

a) The duress doctrine

27. Duress is concerned with the circumstances under which a bargain was struck. As the Court of Appeal said in *Pharmacy Care*, it calls upon the Court to supervise and regulate parties’ “*behaviour*” in forming a contract, rather than inquiring into the resulting terms themselves as would be appropriate, for example, if the Court were asked to adjudicate on the contract’s “*substantive unfairness*”.³⁴

28. Put another way, the duress doctrine is concerned with the “*quality of assent*” to the agreement and not its terms or performance.³⁵ As with, for example, the doctrine of undue influence, it ensures that a contracting party has the legal

³² CA Judgment at [49] [[101.0162]].

³³ CA Judgment at [54] [[101.0164]].

³⁴ *Pharmacy Care Systems Ltd v Attorney-General* (2004) 2 NZCCLR 187 (CA) (*Pharmacy Care*) at [87] [[BOA, Tab 16, pg 340 at 351]].

³⁵ *Westpac Banking Corporation v Cockerill and Others* (1998) 152 ALR 267 (*Westpac*) at 290:20 [[BOA, Tab 22, pg 416 at 439]]; Paul Vout (ed) *Unconscionable Conduct: The Laws of Australia* (2nd ed, Thomson Reuters, Sydney, 2009) (Vout) at [35.7.20] [[BOA, Tab 32, pg 620 at 622]].

capacity and capability to enter into the bargain struck.³⁶

29. It is settled that if the Court determines as a matter of fact that an agreement was entered into while one party was under duress, the resulting agreement is voidable at that party's option.³⁷ That remedy is deliberately flexible: it allows a party to escape a bargain entered into under an incapacity on the basis that there was no true meeting of the minds, but retains the policy of contractual freedom by also permitting that party to validate the bargain, should they wish to, once the incapacity has ceased.³⁸ Property transferred under an agreement vitiated for duress is subject to restitution as money (or property) had and received.³⁹

b) The illegality doctrine

30. The doctrine of illegality responds to different aspects of an agreement. Section 71 of the CCLA provides the definition of an "illegal contract":

In this subpart, **illegal contract**—

(a) means a contract governed by New Zealand law that is illegal at law or in equity, whether the illegality arises from the creation or the performance of the contract; and

(b) includes a contract that contains an illegal provision, whether that provision is severable or not.

31. The inquiry for the purpose of determining whether a contract is illegal is accordingly whether it is illegal in "*creation or performance*". This echoes the language of both the Illegal Contracts Act which predated the CCLA in governing illegal contracts in New Zealand, and the common law before that.⁴⁰ The Court of Appeal explained "*creation*" and "*performance*" in *Carey v Hastie*:⁴¹

The question of illegality in a contract generally arises in connection with its

³⁶ Vout at [35.7.20] [[BOA, Tab 32, pg 620 at [622](#)]]; *Westpac* at 289 per Kiefel J [[BOA, Tab 22, pg 416 at [438](#)]] and 291 [[BOA, Tab 22, pg 416 at [440](#)]]; *Morley (t/a Morley Estates) v Royal Bank of Scotland plc* [2021] EWCA Civ 338 (*Morley*) at [52] [[BOA, Tab 11, pg 199 at [210](#)]]; *Allcard v Skinner* [1886-90] All ER Rep 90 (*Allcard*) at 102 [[BOA, Tab 1, pg 1 at [11](#)]]; *Pakistan International Airline Corp v Times Travel (UK) Ltd* [2021] UKSC 40 (*Times Travel*) at [2] – [3] and [8] – [9] per Lord Hodge [[BOA, Tab 14, pg 267 at [269](#), [271](#), [272](#)]].

³⁷ *Pharmacy Care* at [97]–[98] [[BOA, Tab 16, pg 340 at [353](#)]]; HC Judgment at [78] [[[101.0117](#)]].

³⁸ Nelson Enonchong *Duress, Undue Influence and Unconscionable Dealing* (4th ed, Sweet & Maxwell, London, 2023) (Enonchong) at [29-002] [[BOA, Tab 28, pg 578 at [581](#)]].

³⁹ Charles Mitchell, Paul Mitchell and Stephen Watterson (eds) *Goff and Jones: The Law of Unjust Enrichment* (10th Ed, 1st Supp, Sweet & Maxwell, London, 2025) (*Goff and Jones*) at [10-01] [[BOA, Tab 29, pg 583 at [585](#)]]; See also HC Judgment at [75] [[[101.0116](#)]].

⁴⁰ Contract and Commercial Law Act 2017, s 71 [[BOA, Tab 23, pg 443 at [444](#)]]; Illegal Contracts Act 1970, s 3 [[BOA, Tab 24, pg 446 at [446](#)]]; see also Brian Coote *Coote on the New Zealand Contract Statutes* (Thomson Reuters, Wellington, 2017) at [2.1.3] [[BOA, Tab 27, pg 575 at [576](#)]].

⁴¹ *Carey v Hastie* [1968] NZLR 276 (CA) at 279:31 per North P [[BOA, Tab 2, pg 15 at [18](#)]], citing *Anderson Ltd v Daniel* [1924] 1 KB 138 (CA) at 149 per Atkin LJ.

formation, but it may also arise, as it does here, in connection with its performance. In the former case, where the parties have agreed to something which is prohibited by Act of Parliament, it is indisputable that the contract is unenforceable by either party. And I think that it is equally unenforceable by the offending party where the illegality arises from the fact that the mode of performance adopted by the party performing it is in violation of some statute, even though the contract as agreed upon between the parties was capable of being performed in a perfectly legal manner.

32. In *Carey*, a builder entered into an agreement to do work on a building. A bylaw required the builder to obtain a permit for the work that he did not obtain. The Court found that although the agreement was not illegal in “*creation*” because its terms contravened no statute, it was illegal in “*performance*” because the builder carried out the work contrary to the bylaw.⁴²
33. Applied to the current statutory scheme, the language of s 71 means that the statutory scheme governing illegality in the CCLA applies only to two scenarios: first, where the terms of a contract are themselves illegal; or second, where the terms of the contract are legal, but the way in which they are carried out is illegal. In respect of the “*creation*” limb, a further statutory overlay is important: the section provides that a contract will be illegal if it *contains* an illegal provision, whether or not it is severable from an otherwise lawful agreement.⁴³
34. Nowhere in that well-settled illegality inquiry is there room for an assessment of a party’s capacity to enter into the contract as a result of the other party’s illegitimate pressure. As Palles CB said long ago in *Rourke v Mealy*, a plea of duress based on pressure “*is in no sense a plea of illegality*” because in respect of duress, “*the gist of it is (that which in a plea of illegality is immaterial) the effect produced upon the mind of the promisor by the circumstances relied on*”.⁴⁴
35. As *Carey* shows, an analysis of whether an agreement is illegal in “*creation*” calls for an examination of the terms the parties have reached, not *how* they were reached. Illegality in “*performance*” examines how those terms are carried out, not the state of mind of the performing parties. Neither calls for an inquiry into a party’s competence or capacity in either stage of their contractual relationship.
36. Indeed, for the Court to undertake such a capacity inquiry as part of an illegality

⁴² *Carey v Hastie* [1968] NZLR 276 (CA) at 279 per North P [[BOA, Tab 2, pg 15 at [18](#)]].

⁴³ CCLA, s 71(b) [[BOA, Tab 23, pg 443 at [445](#)]]; see also CA Judgment at [49] [[[101.0162](#)]].

⁴⁴ *Rourke v Mealy* (1878) 4 LR Ir 166 (*Rourke*) at 172 [[BOA, Tab 19, pg 397 at [403](#)]].

analysis would cut across the policy of the doctrine in two key respects:

- (a) First, the Court's assessment of whether the terms of a particular bargain are contrary to public policy must proceed on the foundational assumption that a bargain exists in the first place. If one party lacked capacity at the time of contracting, the parties were not *ad idem* and no such public policy analysis of the resulting terms can properly be undertaken. There is no freely-concluded contract arising in that scenario that may offend the public conscience.
- (b) Second, an assessment of each party's capacity to contract as part of an illegality analysis is inconsistent with the established assumption that parties to an illegal contract are *in pari delicto*.⁴⁵ A party found to be incompetent is excused from responsibility for the terms of the bargain struck during the incapacity. It cannot follow from that conclusion that they bear equal blame as their counterparty if the contract is found to be illegal, as is the ordinary position where illegality is found.

c) The difference between the doctrines in practice

- 37. The two doctrines are accordingly distinct. To repeat, duress is concerned with the circumstances under which a contract was formed. Illegality assumes capacity is not at issue, and looks at the terms and performance of the resulting bargain.
- 38. The doctrines often raise similar fact scenarios but are invariably considered separately. Where threats – for example, of prosecution or regulatory reporting – are alleged, courts correctly apply the lens of duress because it is the competence or capacity of a contracting party that is at issue. Where unlawful promises – for example, a promise not to prosecute in return for consideration – are alleged, courts apply the lens of illegality because it is the terms of the resulting agreement themselves that are at issue and not the capacity of either party in entering into them.
- 39. In simple terms, the distinction is accordingly between a threat to take an action that applies illegitimate pressure (*"I will report your criminal behaviour if you do*

⁴⁵ See, e.g., *Unwin v Leaper* (1840) 1 Man & G 747 [[BOA, Tab 21, pg [412](#)]] at 535, citing *Williams v Hedley* (1807) 8 East 378 [[BOA, Tab 21, pg [414](#)]].

not sign and pay”), and a promise not to take an action if the agreement is concluded where no such pressure is present (“I promise not to report your criminal behaviour if you sign and pay”). The former gives no certainty to the coerced party that the threatened conduct will be forestalled, so does not engage the illegality rules because it is not a contract containing an objectionable term. The latter does contain such a term, so is incompatible with public policy.

40. The authorities bear this out, starting with the New Zealand cases:

- (a) In *Pharmacy Care*, the appellant sought to set aside a deed of settlement under which it had paid \$80,000, after the respondent’s manager allegedly threatened it with criminal prosecution if it did not enter into the settlement.⁴⁶ The Court analysed the claim as one of duress alone, assessing the effect of the threat of prosecution on the quality of the appellant’s assent.⁴⁷ Despite referencing a line of US authority in which such circumstances were held to be contrary to public policy,⁴⁸ the Court did not consider that the threat of prosecution engaged illegality.
- (b) In *Haines*, the appellant sought to avoid a settlement agreement for duress, alleging that the respondent had threatened to report his tax irregularities to the IRD unless he settled.⁴⁹ The Court of Appeal accepted that such threats – to report a person’s conduct to the authorities unless they submit to a bargain – could amount to blackmail and so be illegitimate, yet analysed the claim solely as one of duress.⁵⁰ As in *Pharmacy Care*, the threat was to take action if no agreement was reached, not a concluded promise not to take it, making it a duress case.⁵¹
- (c) In *Hobbs v Gilbert*, the plaintiff sought to set aside a settlement of his proceeding against the defendant for duress, alleging he had been threatened that unless he settled, he would “be floating in the

⁴⁶ *Pharmacy Care* at [50]–[59] [[BOA, Tab 16, pg 340 at [346](#), [347](#)]].

⁴⁷ *Pharmacy Care* at [104]–[105] [[BOA, Tab 16, pg 340 at [353](#)]].

⁴⁸ *Pharmacy Care* at [92]–[94] [[BOA, Tab 16, pg 340 at [352](#)]].

⁴⁹ *Haines v Carter* [2001] 2 NZLR 167 (CA) (*Haines*) at [49], [51] [[BOA, Tab 6, pg 103 at [114](#), [115](#)]].

⁵⁰ *Haines* at [49] [[BOA, Tab 6, pg 103 at [114](#)]].

⁵¹ *Haines* at [51] [[BOA, Tab 6, pg 103 at [115](#)]]; *Pharmacy Care* at [104] [[BOA, Tab 16, pg 340 at [353](#)]].

harbour”.⁵² Wild J analysed the claim as one of duress, asking whether the alleged threat had coerced the plaintiff's will.⁵³ As in *Pharmacy Care* and *Haines*, the alleged pressure was plainly criminal, but was a threat and not a promise not to carry out the acts if the plaintiff acceded.⁵⁴ The Court assessed the resulting contract through the lens of duress.

41. Cases from around the Commonwealth further demonstrate the point. In *Pakistan International Airline Corp v Times Travel (UK) Ltd*, for example, a plaintiff travel agent was dependent on the defendant airline's tickets for its economic survival.⁵⁵ The plaintiff was pressured into signing a new agreement with the defendant on worse terms after the defendant lawfully terminated its existing agreement and cut the plaintiff's allocation of tickets.⁵⁶ The plaintiff sought to rescind the substantially worse agreement on the basis of economic (or “lawful act”) duress.⁵⁷
42. In dismissing the claim, the UK Supreme Court confirmed that the illegitimacy of a lawful threat turns on the justification for the demand it supports and not the legality of the threat itself.⁵⁸ Lords Hodge and Burrows both accordingly placed the “threat to prosecute” cases squarely within the “lawful act” duress category: a threat to report criminal behaviour is not unlawful in itself but may nonetheless render a contract voidable if it amounts to illegitimate pressure (and, incidentally, blackmail).⁵⁹ Despite accepting that proposition, the Court's analysis at no stage turned to whether such conduct made the resulting contract illegal. Duress remained the correct lens through which to analyse that class of conduct.
43. Older English authority is consistent with this, even in cases where duress and illegality come closer to overlapping. For example:

(a) In *De Cadaval v Collins*,⁶⁰ the plaintiff was arrested over a debt the

⁵² *Hobbs v Gilbert* HC Nelson CIV-1999-442-002, 21 September 2004 (*Hobbs*) at [26] [[BOA, Tab 7, pg 133 at [138](#)]].

⁵³ *Hobbs* at [104], [112] [[BOA, Tab 7, pg 133 at [159](#)]] and [[BOA, Tab 7, pg 133 at [161](#)]].

⁵⁴ *Hobbs* at [111] [[BOA, Tab 7, pg 133 at [161](#)]].

⁵⁵ *Times Travel* at [63]–[67] per Lord Burrows [[BOA, Tab 14, pg 267 at [291](#), [293](#)]].

⁵⁶ *Times Travel* at [70]–[71] per Lord Burrows [[BOA, Tab 14, pg 267 at [294](#)]].

⁵⁷ *Times Travel* at [76] per Lord Burrows [[BOA, Tab 14, pg 267 at [297](#)]].

⁵⁸ *Times Travel* at [3]–[5] per Lord Hodge [[BOA, Tab 14, pg 267 at [269](#), [270](#)]].

⁵⁹ *Times Travel* at [5]–[9] per Lord Hodge [[BOA, Tab 14, pg 267 at [270](#), [272](#)]] and [82]–[92] per Lord Burrows [[BOA, Tab 14, pg 267 at [299](#) - [305](#)]].

⁶⁰ *De Cadaval v Collins* (1836) 4 Ad & E 858, 111 ER 1006 (*De Cadaval*) [[BOA, Tab 4, pg [30](#)]].

defendant knew was not owed, paid the defendant to secure his release, then sued to recover the money. The Court treated the payment as obtained by pressure, with the sham debt used merely as a tool to apply it, making a duress analysis appropriate and not an illegality one.

- (b) In *Seear v Cohen*,⁶¹ the defendants signed promissory notes after being threatened with unsubstantiated criminal charges against a relative, then relied on those threats to resist the plaintiff's claim on the notes. The Court accepted that despite the threatened prosecution being baseless, the threats nonetheless meant restitution for duress was available because that test looks at the effect on the signer's mind, not at whether the threatened charges were sound.⁶²
- (c) In *McClatchie v Haslam*,⁶³ the plaintiff gave security to relieve her husband from a threatened prosecution by the defendant, then sought to set the security aside. The Court held she could not do so without proving one of two distinct circumstances: an actual agreement not to prosecute (illegality), or pressure and undue influence (duress). In the result, the mere fact that the security had the effect of "stifling a prosecution" was not enough: heading off a prosecution as a side-effect does not engage illegality unless that is found to be a term of the bargain.

44. New Zealand and American academic commentary underscores the distinction further. Writing in 1980, Sir William Young surveyed the existing Commonwealth case law on duress and lawful threats and concluded as follows, highlighting the distinction between a *threat* and an *illegal promise* in procuring a contract:⁶⁴

It does seem to be established that relief on grounds of duress is available even though there has been no promise express or implied to stifle a prosecution.

45. In the American context, Bill Prewett long ago observed the need for an additional evidentiary step for a finding of illegality:⁶⁵

If only duress is present, the contract is merely voidable; but in a case of

⁶¹ *Seear v Cohen* (1881) 45 LT 589 (QBD) [[BOA, Tab 20, pg 409]].

⁶² *Seear v Cohen* (1881) 45 LT 589 (QBD) at 590–591 [[BOA, Tab 20, pg 409 at 410]].

⁶³ *McClatchie v Haslam* (1891) 65 LT 691 (CA) at 691–692 [[BOA, Tab 9, pg 175 at 175]].

⁶⁴ William Young "Duress and Threats of Lawful Action" (1980) 1 Cant L Rev 55 at 61 [[BOA, Tab 33, pg 628 at 634]].

⁶⁵ Bill Prewett "Threat of Litigation as Duress" (1952) 6 Ark L Rev 472 at 477 [[BOA, Tab 30, pg 587 at 592]].

compounding a crime, the contract or agreement is void. The paucity of decisions is explained, to some extent, by the fact that an agreement, to be void, must actually bargain for the stifling of a prosecution.

d) Conclusion on the contours of each doctrine

46. It is accordingly well-settled that the contours of the duress and illegality doctrines are separate. The above authorities show that the circumstances in which each arises are not the same and a plaintiff seeking to vitiate a contract must show different things for each to apply.
47. Restitution for duress is a remedy available to a party whose will in entering into an agreement has been overborne by an illegitimate threat. That is the case whether that threat is to do something legal or illegal, whether it could be carried out in reality, and whether or not the contract is effective in warding off the threat.
48. The Court's inquiry is complete on a finding that such a threat existed and had a coercive effect. At that point, the coerced party is afforded a choice whether to avoid or affirm the agreement in remedying the wrong. It affords the coerced party the opportunity to choose their remedy once competent to do so.
49. Illegality, by contrast, features no such inquiry into a contracting party's capacity. That inquiry would be incompatible with the scheme of the CCLA's illegality rules, which proceed on the basis that the Court must assess the public policy ramifications of terms which are considered otherwise to have been freely created and performed. Had Parliament intended further scrutiny of party competence as part of the CCLA's illegality inquiry, it would have said so.
50. Instead, illegality requires a court to consider whether, as an evidentiary matter, a bargain has been concluded containing one or more terms which is contrary to public policy and therefore unenforceable. In the context of the "prosecution" cases, that requires an evidentiary analysis of whether the parties were *ad idem* in coming to a binding agreement whereby one party would refrain from taking steps towards prosecution of the other in return for consideration.
51. As the above cases (*Pharmacy Care*, *Haines* and the older English authorities on threats of prosecution) make clear, evidence of a threat to prosecute does not suffice to show the existence of a concluded, illegal bargain *not* to prosecute in

return for consideration. A further evidentiary step is required.

52. The mischief in intermingling the two doctrines is principally that each results in a distinct remedy that responds to the policy lying beneath it. As noted, duress preserves contractual autonomy by protecting a coerced party's right to elect once the coercion has ceased. Illegality renders void a bargain that offends public policy, with the result that neither party can ordinarily recover on it.
53. The clear difference in these remedies recognises that in the ordinary case, a party subject to duress – i.e. one who is subject to illegitimate threats – is not legally to blame for the bargain struck. The Court's policy is accordingly to do justice by offering the "pre-bargain" state to that party once the coercion has ceased, or to allow the party to choose that the bargain continue.⁶⁶
54. By contrast, the illegality rules ordinarily assume that the parties have, while of sound mind, come to an agreement that offends the public conscience and so are *in pari delicto*. In most cases, that finding reflects a lesser result for the party who has parted with monetary consideration in return for an illegal benefit, as neither party can recover on the bargain reached.
55. Given the inconsistency of those remedies, and the harm each doctrine is designed to prevent, the doctrines should not be seen to overlap. They must respond to different situations, involving different levels of culpability and competence by each contracting party. Any other conclusion washes away restitution for duress entirely, as illegality would intervene to make all such bargains void *ab initio* and risk penalising blameless parties subject to coercion in the process.

The Court of Appeal Erred in Turning Away from Duress and Towards Illegality

56. With the above analysis in mind, Mr Liu submits that the Court of Appeal's conclusion that the Deed represented an illegal contract was in error. The factual record demonstrates that the proper course is for this Court to restore the High Court's conclusion that the Deed was entered into under duress, and so to move to an analysis of whether it was avoided or affirmed.

⁶⁶ See *Unwin v Leaper* (1840) 1 Man & G 747 [[BOA, Tab 21, pg 412]] at 535, citing *Williams v Hedley* (1807) 8 East 378 [[BOA, Tab 21, pg 414]] for a discussion of the culpability of parties to an illegal agreement and the *in pari delicto* principle, in the context of a party alleging duress by threat of prosecution.

a) High Court's findings support duress, not illegality

57. The starting point in developing that submission must be the conclusions that Lang J arrived at having heard the evidence at trial. To recall, His Honour found that:

- (a) Mr Wu had “*made the dispositions under the Deed because of pressure placed on [him] by both [Mr Liu] and Jackie*”.⁶⁷
- (b) From the evidence, it was “*not possible to ascertain with any certainty what Jackie and [Mr Liu] told [Mr Wu] they would do if their demands were not met*”, only that “*the pressure that Jackie and [Mr Liu] exerted must nevertheless have been very significant*”.⁶⁸
- (c) Although neither Mr Liu nor Jackie could be “*shown to have made any overt threats*” against Mr Wu, His Honour concluded that “*in all likelihood it involved, at the least, threats to report the thefts from Timber King to the police or the immigration authorities*”.⁶⁹
- (d) Based on these findings, Mr Wu “*entered into the Deed under duress as that concept is understood in the authorities*”.⁷⁰

58. Importantly, Lang J’s careful examination of the evidence as to Mr Liu’s contact with Mr Wu did not lead him to conclude that the two had formed a contract – whether express or by way of an implied term in the *BP Refinery* sense – whereby Mr Liu agreed not to report Mr Wu’s conduct to the relevant authorities in exchange for consideration.⁷¹ Such a finding of fact appears nowhere in His Honour’s judgment, despite extensive treatment being given to the reasons for Mr Wu having made the dispositions he did.⁷²

59. Rather, Lang J’s conclusion, having assessed the evidence, was simply that Mr Wu entered into and performed the Deed “*because of pressure placed on [him]*” which took the form of “*threats to report the thefts from Timber King to the police or the immigration authorities*”.⁷³ This is captured in His Honour’s observation that

⁶⁷ HC Judgment at [65] [[101.0113]].

⁶⁸ HC Judgment at [69] [[101.0114]] and [70] [[101.0115]].

⁶⁹ HC Judgment at [68]–[70] [[101.0114]]–[[101.0115]].

⁷⁰ HC Judgment at [78] [[101.0117]].

⁷¹ HC Judgment at [65]–[74] [[101.0113]]–[[101.0115]].

⁷² HC Judgment at [65]–[74] [[101.0113]]–[[101.0115]].

⁷³ HC Judgment at [65] [[101.0113]] and [70] [[101.0115]].

although it was “*not possible to ascertain with any certainty what Jackie and [Mr Liu] told [Mr Wu] they would do if their demands were not met*”, the pressure exerted “*must nevertheless have been very significant*”.⁷⁴ There was a threat to act if the Deed was not executed, not a promise not to act if it was.

60. Lang J’s findings sit comfortably with the duress cases and uncomfortably with the illegality ones. In New Zealand, the Court of Appeal in *Pharmacy Care* characterised the question before it as whether there existed “*improper threats of criminal prosecution if a deed was not entered into*”, and expressly viewed that question not as one engaging “*public policy*” but as one properly viewed through the lens of duress.⁷⁵ There was no suggestion in the Court’s analysis that merely because such a threat was alleged, it followed that the threat amounted to an illegal term of the resulting bargain. The threats alleged there mirror those Lang J found occurred as a matter of fact here. The cases should be dealt with alike.
61. So too in *Haines*, which saw the Court of Appeal deal with alleged threats of criminal process analogous to those Lang J found were made here.⁷⁶ Again, the *Haines* Court saw no basis to treat those threats as forming part of the resulting bargain so as to engage an illegality analysis. It approached the question as one of duress only. The *Haines* Court’s treatment of the alleged facts was analogous to Lang J’s here, so the same doctrinal lens should be adopted.
62. The same pattern is observed in other Senior Court authorities dealing with illegitimate threats: *Hobbs*, *McIntyre v Nemesis DBK Ltd*, *Foster v Phillips* being examples.⁷⁷ In all cases, the alleged threat was treated as distinct to a promise – submission to the alleged threat gave no certainty in each case that it would not be carried out anyway, and the further evidentiary showings required for an illegal promise were not made out. With good reason, no Court in any of those cases went further than a duress inquiry by unduly intermingling it with illegality.
63. The English cases run consistently with that analysis. Even in circumstances where threats of process are made in order to exert leverage in a manner that may

⁷⁴ HC Judgment at [69] [[101.0114]] and [70] [[101.0115]].

⁷⁵ *Pharmacy Care* at [87] [[BOA, Tab 16, pg 340 at 351]] and [104] [[BOA, Tab 16, pg 340 at 353]].

⁷⁶ *Haines* at [49], [51] [[BOA, Tab 6, pg 103 at 114, 115]].

⁷⁷ *Hobbs* at [104] [[BOA, Tab 7, pg 133 at 159]]; *McIntyre v Nemesis DBK Ltd* [2009] NZCA 329, [2010] 1 NZLR 463 (*McIntyre*) at [68] [[BOA, Tab 10, pg 179 at 192]]; *Foster v Phillips* HC Auckland CP2845/89, 5 September 1990 (*Foster*) at 23 [[BOA, Tab 5, pg 35 at 57]].

amount to blackmail – *Seear*, *Unwin*, and *McClatchie* for example –⁷⁸ no court faced with those facts has gone a step further to convert that finding of fact to an implied term of the impugned bargain and conducted an illegality analysis in reliance on it. Even where it has been found that the threatened party has relieved itself of the threatened outcome after submitting to the threat, the Court has not treated that as evidence of a concluded, illegal bargain.

64. On the other hand, Lang J's findings are disanalogous with the illegality cases:

- (a) In *Osborne*, it was well-established on the evidence that a bargain had been entered into whereby Worksafe would not undertake a prosecution in return for the payment of money.⁷⁹ No threat was involved: the agreement was clearly a compact to forestall prosecution and therefore illegal.⁸⁰ No such facts were established before Lang J.
- (b) In *Mall Finance*, it was similarly established that having had money stolen from it by its director, the plaintiff company entered into an agreement not to prosecute the director with his wife, in return for her granting a mortgage to the company over a property.⁸¹ It was that promise, not any antecedent threat, that founded the illegality.⁸² No analogy exists here.
- (c) In *Polymer*, it was established by way of a written contract that having had money stolen from it by an employee, the plaintiff company entered into an agreement with the employee's brother not to pursue criminal proceedings against the employee in return for repayment of the stolen funds.⁸³ Glazebrook J held that the agreement reached, though entered into freely and without illegitimate pressure, was illegal because of the company's promise not to prosecute the employee.⁸⁴ Again, those facts are a far cry from what was established by Lang J following trial here.

65. When held up against the facts as Lang J found them to be, these authorities are

⁷⁸ *Seear v Cohen* (1881) 45 LT 589 (QBD) [[BOA, Tab 20, pg 409]]; *Unwin v Leaper* (1840) 1 Man & G 747 [[BOA, Tab 21, pg 412]]; *McClatchie v Haslam* (1891) 65 LT 691 (CA) [[BOA, Tab 9, pg 175]].

⁷⁹ *Osborne* at [92]–[95] [[BOA, Tab 13, pg 234 at 262, 263]].

⁸⁰ *Osborne* at [70] [[BOA, Tab 13, pg 234 at 257]] [101] [[BOA, Tab 13, pg 234 at 265]] and [104] [[BOA, Tab 13, pg 234 at 266]].

⁸¹ *Mall Finance* at 686 [[BOA, Tab 8, pg 170 at 171]].

⁸² *Mall Finance* at 689 per Cooke J [[BOA, Tab 8, pg 170 at 174]].

⁸³ *Polymer* at [5]–[22] [[BOA, Tab 17, pg 356 at 358, 361]].

⁸⁴ *Polymer* at [77] [[BOA, Tab 17, pg 356 at 371]].

accordingly of no moment to the present case. They should be put to one side.

b) Balance of the record consistent with Lang J's approach

66. Mr Liu submits that the above is sufficient to dispose of the submission that illegality impugns the Deed. Lang J's judgment is clear as to what factual findings were and were not made after His Honour had assessed the evidence at trial. What occurred was a threat by Mr Liu to subject Mr Wu to regulatory jeopardy that compelled him to sign the Deed. No finding was made suggesting that Mr Liu had promised not to undertake that conduct if Mr Wu did what was demanded.
67. Neither this Court nor the Court of Appeal should seek to look behind or reopen that factual record. Indeed, this does not appear to be what the Court of Appeal did – rather, it misapplied Lang J's findings as reproduced above by holding that they amounted to an illegal bargain when this was not the case. Nonetheless, two other features of the record before Lang J are appropriately drawn to this Court's attention in reinforcing the proposition that this is a case properly about a *threat* and not an *illegal promise*.
68. First, although it was alleged by Mr Liu that Mr Wu had stolen money from Timber King – and this appears to form a part of the Court of Appeal's analysis as to Mr Liu's alleged promise not to report that conduct⁸⁵ – no such theft finding was made by Lang J. Mr Wu firmly denied that he had engaged in any such conduct at trial, even when it was put to him in cross-examination.⁸⁶ He explained that he felt pressure from Mr Liu's threats to report him to the authorities, despite there being no jeopardy to him had Mr Liu followed through.
69. Because Lang J correctly identified the relevant inquiry as being simply whether a threat was made that had a coercive effect, His Honour did not need to determine as a matter of fact whether the conduct in respect of which the threat was made – Mr Wu's alleged thefts – had actually occurred.⁸⁷ The point was left open and accordingly does not form part of the factual matrix before this Court.

⁸⁵ CA Judgment at [29], [32] [[101.0155]] and [50] [[101.0163]].

⁸⁶ Wu X XM [[201.0061]] at 54:2 [[201.0109]]; at 57:8–9 [[201.0112]]; at 106:12–14 [[201.0146]]; at 111:16–17 [[201.0151]]; at 113:20–21 [[201.0153]]; at 113:31–34 [[201.0153]]; at 119:25–26 [[201.0159]]. See also, HC Judgment at [61] [[101.0112]].

⁸⁷ See, for example, the HC Judgment's characterisation of the evidence of “alleged irregularities” in Timber King's accounts at [3] [[101.0089]], and of Mr Wu's denial of theft at [61] [[101.0112]].

70. In that context, it is submitted that the older English authorities set out above assume still-further relevance. As *Seear* and *De Cadaval* show, a threatened prosecution based on unsubstantiated unlawful conduct by the threatened party may still form the basis of a duress claim because that inquiry focuses on the effect the threat has on the coerced party's will.⁸⁸ But the absence of actual wrongdoing by the threatened party cannot also support an illegality finding: There can be no agreement not to prosecute that offends public policy if, because of an absence of underlying wrongdoing, the prosecution could not proceed anyway – there is no public interest in a baseless prosecution for the illegality rules to protect.⁸⁹
71. Second, an examination of the broader record does not support a finding of an illegal bargain between the parties. Just as Lang J evidently identified, there is no testimony from any witness – including either Mr Wu or his wife – suggesting that Mr Liu promised not to report Mr Wu's alleged conduct if the Deed was signed.
72. All that is contained in the documentary record are documents identified by Lang J as showing pressure rather than a bargain. Indeed, some of those documents, such as legal advice over which Mr Wu waived privilege, demonstrate the *opposite* of a concluded bargain. An example is an email from Mr Wu's lawyers at Tompkins Wake, which they confirmed at trial reflected the advice given to Mr Wu:⁹⁰

[Mr Wu] needs to know that this agreement gives him no certainty that they will not bring proceedings against him for the money that he took. Instead they're trying to make out this is a loan by him – which it clearly was not and that the document is full and final settlement relating to the 'debt'.

73. The thrust of this evidence is clear: pressure was being applied on Mr Wu to sign the Deed based on his alleged prior wrongdoing, but there existed no contractual guarantee that he would no longer be in jeopardy if he acceded to that pressure. *Osborne, Mall Finance* and *Polymer* are all distinguishable for that reason.

c) The Court of Appeal erred in its approach

74. Tying the above threads together, Mr Liu submits that the Court of Appeal erred in concluding that Lang J's factual findings on the conduct of Mr Liu and Mr Wu

⁸⁸ *Seear v Cohen* (1881) 45 LT 589 (QBD) at 590 [[BOA, Tab 20, pg 409 at [410](#)]]; *De Cadaval* [[BOA, Tab 4, pg [30](#)]].

⁸⁹ See the discussion regarding there being no public interest in a baseless prosecution in *Rourke* at 174 [[BOA, Tab 19, pg 397 at [405](#)]].

⁹⁰ Email from Karina McLuskie (Tompkins Wake) to Carlo Wan dated 19 June 2018 [[[301.1138](#)]]; as set out in Wan BOE [[[201.0193](#)]] at [15] [[[201.0198](#)]] and McLuskie BOE [[[201.0208](#)]] at [16] [[[201.0213](#)]]-[[[201.0214](#)]].

supported the finding of illegality. There is no factual support for that proposition, and the case is properly viewed through a duress lens and a duress lens only.

75. The problem with the Court of Appeal's approach is evident from a close examination of its relevant findings. To repeat, the Court said this:⁹¹

We have little hesitation in finding that the true agreement was an illegal agreement. As the Judge noted, blackmail is a criminal offence. It is prohibited by s 237 of the Crimes Act 1961. On that basis alone this was plainly an illegal contract. Further, the threat Mr Liu made was to report Mr Wu to the authorities, given Mr Wu had stolen from his employer, which was a promise not to report an alleged crime to the authorities. This involved the additional dimension of an agreement to prevent the investigation and prosecution of crimes.

76. First, the fact that blackmail is made out, and is a criminal offence, does not mean an illegal agreement exists. As set out above, a threat to take a lawful action (such as regulatory reporting) in order to obtain an illegitimate contractual benefit is a regular feature of duress cases.⁹² Although it may in some instances amount to the criminal act of blackmail, no court considering that course of conduct has transposed a party's illegal behaviour in formation into an illegal contract. To do so conflates the underlying coercive act with the bargain struck as a result of it.
77. Perhaps better demonstrating this point are cases involving duress by *unlawful* acts, such as the alleged threats of violence in *Hobbs*. Even there, the alleged threat of an obviously illegal act by one party to induce the contract has never itself made the resulting contract illegal. The illegality lies in the resulting terms being contrary to public policy, not in how those terms were arrived at. Illegal (even criminal) conduct in forming a bargain factors only into a duress analysis.
78. Second, the Court of Appeal's misapplication of a "threat to prosecute" as evidence of an "agreement not to prosecute" is borne out on its face in the passage above. To repeat, the Court reasoned that "*further, the threat Mr Liu made was to report Mr Wu to the authorities, given Mr Wu had stolen from his employer, which was a promise not to report an alleged crime to the authorities*".
79. In light of the above authorities, and Lang J's findings, it does not follow as a matter of fact or law that "*the threat Mr Liu made...to report Mr Wu to the authorities*"

⁹¹ CA Judgment at [32] [[101.0155]] – [[101.0156]].

⁹² *Pharmacy Care* at [104] [[BOA, Tab 16, pg 340 at 353]]; *Haines* at [49], [51] [[BOA, Tab 6, pg 103 at 114, 115]].

was “a promise not to report an alleged crime to the authorities”. The Court was wrong to treat a “threat to report” as a “promise not to report”. Those are two different things, and the cases examined earlier make clear that the former cannot itself provide the evidentiary foundation for the latter.

80. To reiterate the factual analysis above, Lang J’s conclusions support the existence only of an unlawful threat. Neither His Honour’s findings – nor the surrounding record – support the separate conclusion that Mr Liu also agreed expressly or impliedly not to report Mr Wu to the authorities. In its reasoning above, the Court of Appeal collapsed that distinction in the above passage and accordingly collapsed the two doctrines in its conclusion.
81. Third, the Court of Appeal conflated the finding by Lang J that Mr Liu’s contrary explanation for the Deed – that it settled a loan obligation – was a “sham”, with a finding that the Deed was illegal. Those two propositions do not follow from one another. Again, in rejecting Mr Liu’s explanation as to the Deed, Lang J did not then make a further finding that the true bargain was one in which Mr Liu agreed to refrain from reporting Mr Wu to the authorities.
82. Given the paucity of evidence to support that conclusion, His Honour was right to do so: there was an insufficient factual basis to find either an express or implied contractual term in which Mr Liu promised not to report Mr Wu. His Honour’s approach was entirely orthodox.
83. It was not for the Court of Appeal – nor is it for this Court – to fill the factual vacuum created by the fact that Mr Liu’s explanation for the Deed was not believed. Just as in other cases where “sham” arrangements have formed the basis for a duress analysis and not an illegality one,⁹³ this Court should not engage in appellate fact-finding about the nature of a bargain which the trial Judge declined to undertake at first instance following live witness testimony. It should take the more doctrinally consistent route that does not require such an exercise, and decide this case solely on the basis of duress, particularly in light of the suggestion in cases like *Rourke* that insufficient or non-existent consideration is in

⁹³ *Seear v Cohen* (1881) 45 LT 589 (QBD) at 591 [[BOA, Tab 20, pg 409 at [411](#)]]; *De Cadaval* [[BOA, Tab 4, pg [30](#)]]; *Rourke v Mealy* (1878) 4 LR Ir 166 at 171 [[BOA, Tab 19, pg 397 at [402](#)]].

any event consistent with duress and not with illegality.⁹⁴

Mr Wu Affirmed the Deed

84. For these reasons, Mr Liu submits that this is properly a case not about illegality but about whether Mr Wu is entitled to restitution for duress of the property transferred under the Deed. That finding then requires an analysis of whether, the duress on Mr Wu having rendered the Deed voidable, he nonetheless affirmed the Deed by his subsequent conduct and so is not entitled now to restitution.

The Policy of Voidable Contracts and Affirmation

85. As noted, an agreement entered into under duress is voidable at the election of the party to whom the duress was applied.⁹⁵ The avoiding party is ordinarily entitled to restitution of property disposed of under the invalidated agreement.⁹⁶

86. The policy of those principles is well-established. Courts recognise that the terms of an otherwise-valid agreement may be invalidated by a lack of consent by one party, but that the question of validation should be left in the hands of that party.⁹⁷ Contractual freedom is preserved by giving a party whose consent was earlier impeded an election between avoiding the resulting agreement or affirming it.

87. Two important features – both recognised by Lang J –⁹⁸ emerge from that right of election. The first is that a party electing to avoid a voidable agreement need not do so formally, but may communicate avoidance by words or conduct. The second is that an election to avoid an agreement must be made timeously. If a party has latitude in how they exercise their rights, they must not sleep on them.

88. The policy behind the “timeliness” requirement is familiar: parties must be able to conduct their affairs with contractual certainty.⁹⁹ If an agreement is to be avoided, it must be done expeditiously so as not to undermine that policy. The law

⁹⁴ *Rourke v Mealy* (1878) 4 LR Ir 166 at 171 [[BOA, Tab 19, pg 397 at [402](#)]].

⁹⁵ *Pharmacy Care* at [97]–[98] [[BOA, Tab 16, pg 340 at [353](#)]]; HC Judgment at [78] [[[101.0117](#)]]; Enonchong at [29-002] [[BOA, Tab 28, pg 578 at [581](#)]].

⁹⁶ *Goff and Jones* at [10-01] [[BOA, Tab 29, pg 583 at [585](#)]].

⁹⁷ Rick Bigwood “Fine-Tuning Affirmation of a Contract by Election (Part 1)” [2010] NZ L Rev 37 (Bigwood Part 1) at 82 [[BOA, Tab 25, pg 448 at [493](#)]]; *Pharmacy Care* at [114] [[BOA, Tab 16, pg 340 at [355](#)]].

⁹⁸ HC Judgment at [78]–[79] [[[101.0117](#)]]–[[[101.0118](#)]] and [88] [[[101.0121](#)]].

⁹⁹ Bigwood Part 1 [[BOA, Tab 25, pg 448 at [493](#)]]; Nathan Tamblyn *The Law of Duress and Necessity* (Routledge, Abingdon, 2018) at 22 [[BOA, Tab 31, pg 599 at [618](#)]].

accordingly recognises that inaction or delay can amount to affirmation, especially if that party's conduct subsequent to the agreement is consistent with them seeking to uphold its terms or if opportunities to avoid were not taken.¹⁰⁰

89. The doctrine shares similarities with that of acquiescence (or, alternatively, to laches) in equity.¹⁰¹ Both doctrines recognise that a plaintiff's knowledge of their rights and failure to prosecute them in a timely manner results in their forfeiture. Each has its foundation in the principle that a right of election must be balanced against the need for contractual certainty: a counterparty must as far as possible be able to conduct their business on the faith of a concluded agreement.

The Authorities on Affirmation

90. A consistent line of New Zealand authority demonstrates the policy. The leading case remains *Pharmacy Care*, a similar "threat of prosecution" case.¹⁰² The Court held that even if that duress were established, the plaintiff would have affirmed the deed because "*there were no timeous steps taken... to avoid the deed*" for a period of three-and-a-half years.¹⁰³ It reasoned:¹⁰⁴

It was not until some three and a half years later (in March 2000), and without reference to the deed of settlement, that Pharmacy Care issued summary judgment proceedings against North Health. Somewhat unsurprisingly, the deed was raised as a defence. That ultimately led to the present proceedings. In our view it must be wrong, as a matter of principle, for a party seeking to disaffirm a deed to wait that period of time when no good and sufficient cause has been shown (and perhaps even if it has, after that period of time) to endeavour to have the deed set aside. The reason for this is that once a deed of settlement is entered into, the parties go about their business in the belief that the deed can be relied upon and the parties will act in reliance on it, as they did here.

91. The next instructive case is *Hobbs* where, as set out earlier, the plaintiff alleged that he had been coerced into entering into a settlement by threats of physical violence to him and his family.¹⁰⁵ Wild J held that even if that conduct rendered the resulting settlement deed voidable, the plaintiff had nonetheless affirmed it. The Court considered the period of approximately 15 months between settlement

¹⁰⁰ Enonchong at [29-005] [[BOA, Tab 28, pg 578 at [582](#)]]; Bigwood Part 1 at 83 [[BOA, Tab 25, pg 448 at [494](#)]]; Rick Bigwood "Fine-Tuning Affirmation of a Contract by Election (Part 2)" [2010] NZ L Rev 617 at 620 [[BOA, Tab 26, pg 503 at [506](#)]]; *Allcard* at 102 [[BOA, Tab 1, pg 1 at [11](#)]].

¹⁰¹ See, for e.g., *Allcard* at 102 [[BOA, Tab 1, pg 1 at [12](#)]]; Vout at [35.8.1240] [[BOA, Tab 32, pg 620 at [625](#)]].

¹⁰² *Pharmacy Care* at [104], [114] [[BOA, Tab 16, pg 340 at [353](#), [355](#)]].

¹⁰³ *Pharmacy Care* at [112] [[BOA, Tab 16, pg 340 at [354](#)]].

¹⁰⁴ *Pharmacy Care* at [114] [[BOA, Tab 16, pg 340 at [355](#)]].

¹⁰⁵ *Hobbs* at [26], [52] [[BOA, Tab 7, pg 133 at [138](#), [143](#)]].

and the plaintiff's allegation of duress in his statement of claim constituted "*a delay in lodging protest for a considerable period of time*".¹⁰⁶ It also considered that the plaintiff's "*completion of the obligations imposed by the agreement entered into under duress, without protest*" to point towards affirmation.¹⁰⁷

92. *Hobbs* illustrates the relevance both of delay and of a plaintiff's wider pattern of post-agreement conduct. In addition to completing the terms of the settlement deed, Wild J observed that the plaintiff was advised by his solicitor not to continue with the settlement because of the threats, but elected to do so anyway and not to report the threats to Police.¹⁰⁸ He also continued to interact professionally and socially with his alleged coercer, thus demonstrating conduct more consistent with an intent to affirm the settlement deed than to avoid it.¹⁰⁹
93. A third case of direct application here is *Haines*. There, the relevant settlement agreement was entered into in March 1999. The plaintiff first raised the alleged threat of regulatory reporting in June 1999.¹¹⁰ The Court held that the plaintiff's failure to avoid the agreement in those three months amounted to affirmation.¹¹¹
94. What is instructive about all three of these cases is that, like here, they all involve conduct broadly described as blackmail, coercion or unlawful threats to place the plaintiff in jeopardy. Yet the Court approaches affirmation on the same basis in each, and the same as it does in all types of duress cases. This case is accordingly not in a special category removed from the prior authorities, so should be approached in the same way.
95. Other New Zealand cases are instructive on the length of delay said to amount to affirmation. In *Foster*, the High Court considered a nine-month delay between an agreement and a claim of duress to constitute affirmation where the plaintiff had performed the agreement in the interim.¹¹² Similarly in *McIntyre*, the Court of Appeal held that a period of four years and two months in which the plaintiff failed

¹⁰⁶ *Hobbs* at [115](a) [[BOA, Tab 7, pg 133 at [165](#)]].

¹⁰⁷ *Hobbs* at [115](b) [[BOA, Tab 7, pg 133 at [165](#)]]; see also *Haines* at [118] [[BOA, Tab 6, pg 103 at [129](#)]].

¹⁰⁸ *Hobbs* at [111(a)] [[BOA, Tab 7, pg 133 at [161](#)]]; [111(d)]–[111(e)] [[BOA, Tab 7, pg 133 at [163](#)]]; see also *Public Trust v Ottow* (2009) 10 NZCPR 879 (HC) at [57] [[BOA, Tab 18, pg 378 at [392](#)]].

¹⁰⁹ *Hobbs* at [70] [[BOA, Tab 7, pg 133 at [150](#)]] and [111(g)] [[BOA, Tab 7, pg 133 at [164](#)]].

¹¹⁰ *Haines* at [41] [[BOA, Tab 6, pg 103 at [113](#)]].

¹¹¹ *Haines* at [118]–[119] [[BOA, Tab 6, pg 103 at [129](#)]].

¹¹² *Foster* at 23 [[BOA, Tab 5, pg 35 at [57](#)]].

to take “timely steps” to avoid the agreement, complied with its terms and did “not at any stage [protest]”, constituted affirmation.¹¹³

96. Overseas cases also assist. In *The Atlantic Baron*, the English High Court held that an eight-month delay on the part of a plaintiff allegedly subject to duress in “putting forward their claim” amounted to an affirmation.¹¹⁴ More recently in *Morley Estates v Royal Bank of Scotland*, the English Court of Appeal concluded that a plaintiff who claimed duress by a bank had affirmed his agreement with it by failing to indicate an intention to avoid it for five years.¹¹⁵ The classic English authority *Clough v London & NW Railway* goes as far as to say that “lapse of time without rescinding will furnish evidence that [a party] has determined to affirm the contract; and when the lapse of time is great, it probably would in practice be treated as conclusive evidence to show that he has so determined”.¹¹⁶
97. Finally, authoritative commentary emphasises the importance of delay in an affirmation analysis. In this country, Rick Bigwood has observed repeatedly that delay, inaction and failure to protest may constitute an election to affirm under New Zealand law.¹¹⁷ In doing so, he emphasises the familiar policy above: delay may either evidence an intention to affirm or lead to a presumed intention based on the need for commercial efficacy and certainty.¹¹⁸
98. In the English context, too, Tamblyn notes that a party seeking late rescission for duress “may be taken to have affirmed the contract, despite any initial duress, even simply by the passage of time since the duress wore off”.¹¹⁹ Enonchong similarly observes that affirming conduct “need not be by way of positive action” and that “inaction and delay could be held to amount to affirmation”.¹²⁰ In the Australian context, the *Laws of Australia* notes that “a failure to impeach the transaction within a reasonable time after the influence has ceased allows the court to find that the party subject to the influence has elected to ratify the

¹¹³ McIntyre at [99] [[BOA, Tab 10, pg 179 at [196](#)]].

¹¹⁴ *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd (The Atlantic Baron)* [1979] QB 705, [1978] 3 All ER 1170 (*The Atlantic Baron*) at 1184 [[BOA, Tab 12, pg 219 at [233](#)]].

¹¹⁵ *Morley* at [55] [[BOA, Tab 11, pg 199 at [211](#)]].

¹¹⁶ *Clough v London and North Western Railway Co* [1861-73] All ER Rep 646 (*Clough*) at 651 [[BOA, Tab 3, pg 23 at [28](#)]], as cited in Bigwood Part 1 at 83 [[BOA, Tab 25, pg 448 at [494](#)]].

¹¹⁷ Bigwood Part 1 at 83 [[BOA, Tab 25, pg 448 at [494](#)]], 84 [[BOA, Tab 25, pg 448 at [495](#)]].

¹¹⁸ Bigwood Part 1 at 82-83 [[BOA, Tab 25, pg 448 at [493](#)]].

¹¹⁹ Tamblyn *The Law of Duress and Necessity* (Routledge, 2018) at 22 [[BOA, Tab 31, pg 599 at [618](#)]].

¹²⁰ Enonchong at [29-005] [[BOA, Tab 28, pg 578 at [582](#)]].

transaction”.¹²¹

Applying Settled Precedent, Mr Wu Affirmed the Deed

99. Turning to this case, it is submitted for several reasons that the heavy weight of authority leads to the conclusion that Mr Wu affirmed the Deed.

100. First, the length of Mr Wu’s delay in seeking to set the Deed aside points firmly towards affirmation. To recall, it was (in round terms):¹²²

- (a) Three years, 10 months between Mr Wu executing the Deed and commencing proceedings to set it aside (July 2018-March 2022).
- (b) Three years, five months between Mr Wu complying with the terms of the Deed and commencing proceedings (November 2018-March 2022).
- (c) Two years, nine months between Mr Liu cutting off contact with Mr Wu and Mr Wu commencing proceedings (June 2019-March 2022).

101. The three years, 10 months Mr Wu waited after signing the Deed is longer than:

- (a) *Pharmacy Care*, where the Court would have found a deed to have been affirmed after three-and-a-half years of delay and similar threats.
- (b) *Hobbs*, where the Court would have found a deed to have been affirmed following 15 months of delay and alleged threats to kill.
- (c) *Haines*, where the Court found a deed was affirmed following only two months of delay and similar alleged threats.
- (d) *The Atlantic Baron and Foster*, where the Court found agreements to have been affirmed after delays of eight and nine months respectively.

102. Even if the Court adopts either of the two later dates above from which Mr Wu could have affirmed the Deed, the same analysis applies. At the outer limit of June 2019 when Mr Liu ceased contact with Mr Wu, the two years and nine months that elapsed is still longer than all of the above cases except *Pharmacy Care*.

103. As Lang J recognised, the conclusion that Mr Wu affirmed the Deed based on the

¹²¹ Vout at [35.8.1240] [[BOA, Tab 32, pg 620 at [625](#)]].

¹²² HC Judgment at [4]–[6] [[[101.0089](#)]]–[[[101.0090](#)]], [9] [[[101.0090](#)]] and [86] [[[101.0121](#)]].

length of his delay is accordingly in step with the weight of authority on duress and affirmation.¹²³ To disturb that conclusion would render this case an outlier. In light of the precedential value of this Court's judgment, it would fundamentally shift the policy related to contractual affirmation away from the promotion of contractual certainty. Mr Liu submits that such a shift should not be encouraged.

104. Second, Mr Wu's conduct subsequent to the alleged duress and the Deed in any event takes the analysis beyond a "delay only" case. Not only did Mr Wu take no steps in the period after the Deed to indicate an intention to avoid it, but his positive conduct also points firmly towards an intention to affirm. Together with the magnitude of delay, this conduct fortifies Lang J's conclusion.
105. In setting that conduct out next, it bears emphasising again that Lang J heard the evidence of this conduct at trial. Having considered that evidence, His Honour made a factual assessment that Mr Wu had become free of Mr Liu's coercion in time then to affirm the Deed by his subsequent delay and conduct. This Court should be slow to revisit the conclusions Lang J reached on when Mr Wu was and was not under coercion, which His Honour was best placed as trial judge to reach.
106. The first pattern of conduct is Mr Wu's repeated receipt of legal advice (in English and Mandarin) that clearly put to him the possibility that he was being placed under illegitimate duress, together with what Lang J referred to as "*the options that were open to him*" in respect of that pressure.¹²⁴ As Lang J also found, "*notwithstanding this advice, and subsequent advice to the same effect by a litigation lawyer at Tompkins Wake, Mr Wu insisted on proceeding with the settlement arrangement*".¹²⁵ Mr Wu was well-advised of the legal position and the options available when he entered into the Deed and afterwards.
107. That pattern of conduct recalls *Hobbs*, where a plaintiff who had been advised by a solicitor to report alleged threats to the Police, and not to go through with the settlement agreement, would have been found to have affirmed the agreement after ignoring the advice.¹²⁶ It also echoes several other New Zealand and overseas

¹²³ HC Judgment at [88]–[89] [[[101.0121](#)]]; see also *Morley* [[BOA, Tab 11, pg [199](#)]]; *Clough* [[BOA, Tab 3, pg [23](#)]].

¹²⁴ HC Judgment at [53] [[[101.0105](#)]].

¹²⁵ HC Judgment at [53] [[[101.0105](#)]].

¹²⁶ *Hobbs* at [111(a)] [[BOA, Tab 7, pg 133 at [161](#)]], [111(d)]–[111(e)] [[BOA, Tab 7, pg 133 at [163](#)]], [114] – [115] [[BOA, Tab 7, pg 133 at [165](#)]].

authorities emphasising that a party receiving and ignoring competent advice is a strong indicator of affirmation.¹²⁷ Those cases should be applied.

108. The second pattern of conduct is how Mr Wu acted towards Mr Liu after the Deed had been signed and performed:

- (a) After signing the Deed in July 2018, Mr Wu performed its terms over a six-month period during which he or his wife asked to meet Mr Liu on five occasions, met with him on eight occasions, and sent him hundreds of WeChat messages.¹²⁸ At no time during any of this did Mr Wu indicate a desire to avoid the Deed or “protest” that he was being coerced.¹²⁹
- (b) Having signed the Deed, Mr Wu commented to Mr Liu on numerous occasions that he wished to continue doing business with him, with Mr Liu “*setting the direction*”.¹³⁰ This echoes *Hobbs*, where the Court would have affirmed a deed entered into by a plaintiff who continued working with his alleged coercer for a period after the deed had been executed.¹³¹
- (c) From November 2018, when he had completed his obligations under the Deed, Mr Wu continued to seek meetings with Mr Liu, attempt to do business with him, and send him dozens more messages on WeChat.¹³² He met with Mr Liu in June 2019, and sought further meetings until Mr Liu blocked him on WeChat to cut off contact.¹³³

109. At no time during any of that contact is there any evidence that Mr Wu sought to avoid the Deed or considered himself still to be under coercion. To the contrary, his focus appeared to be maintaining and advancing his relationship with Mr Liu.¹³⁴ Lang J concluded that these findings of fact were consistent with affirmation

¹²⁷ See *Public Trust v Ottow* (2009) 10 NZCPR 879 (HC) at [57] [[BOA, Tab 18, pg 378 at 392]]; *Allcard* at 104 [[BOA, Tab 1, pg 1 at 14]]; *Pao On v Lau Yiu Long* (PC, 9 April 1979, PC Appeal No 13 of 1977) at 12 [[BOA, Tab 15, pg 326 at 337]].

¹²⁸ J Liu BOE [[203.0476]] at [111] [[203.0515]], [116] [[203.0517]], [117] [[203.0517]] and [118]–[119] [[203.0517]]–[[203.0518]]; Translation of WeChat [[301.0655]] at [[301.0728]]–[[301.0762]], [[301.0729]], [[301.0729]]–[[301.0730]], [[301.0730]]–[[301.0732]] and [[301.0761]]–[[301.0762]].

¹²⁹ HC Judgment at [86] [[101.0121]].

¹³⁰ J Liu BOE [[203.0476]] at [111] [[203.0515]]; Translation of WeChat [[301.0655]] at [[301.0693]]. See also the project documents Mr Wu sent Mr Liu at [[301.0768]]–[[301.0769]].

¹³¹ *Hobbs* at [111(g)] [[BOA, Tab 7, pg 133 at 164]].

¹³² Translation of WeChat [[301.0655]] at [[301.0763]]–[[301.0778]] (Mr Wu’s WeChat messages to Mr Liu in June 2019), including the project documents he sent Mr Liu at [[301.0768]]–[[301.0769]].

¹³³ HC Judgment at [86] [[101.0121]].

¹³⁴ J Liu BOE [[203.0476]] at [111] [[203.0515]]; Translation of WeChat [[301.0655]] at [[301.0693]]. See also the project documents Mr Wu sent Mr Liu at [[301.0768]]–[[301.0769]]. See also *Hobbs* at [111(g)] [[BOA, Tab 7, pg 133 at 164]].

and fortified the affirming effect of Mr Wu's outsized delay.

110. His Honour was amply justified in doing so. These patterns of conduct highlight the fact that during the entire period relevant to this appeal, Mr Wu had the information and the ability to avoid the Deed if he wished but chose not to. Even after he had performed his obligations under the Deed, Mr Wu elected not to tell anyone about that coercion or invalidate the Deed for several more years.
111. Instead, Mr Wu willingly engaged with his coercer and sought to do further business with him. Except for one meeting which he himself organised, Mr Wu was rebuffed by Mr Liu who made clear he wanted no part of Mr Wu's life from 2019 onwards. Mr Wu then did effectively nothing for several more years, until undergoing a rapid change in approach in March 2022 for which Lang J held there was no reasonable explanation on the evidence.
112. In coming to that view, Lang J evidently did not consider to be a reasonable explanation Mr Wu's evidence that the delay was due to an "*amalgam of complex circumstances*" that unfolded over time.¹³⁵ There was ample room for His Honour to so find: Mr Wu's bald assertion does little to explain his later delay or conduct.

Relief Sought

113. For the above reasons, the appeal should be allowed. The Court of Appeal's judgment should be set aside and Lang J's judgments (both as to the dismissal of Mr Wu's claims¹³⁶ and as to costs¹³⁷) should be restored. Mr Liu also seeks costs and reasonable disbursements for this appeal.

Dated: 8 June 2026

A T Grant / D E Archibald
Counsel for the Appellant

¹³⁵ HC Judgment at [87]–[89] [\[\[101.0121\]\]](#)–[\[\[101.0122\]\]](#).

¹³⁶ HC Judgment at [90], [101] [\[\[101.0122\]\]](#), [\[\[101.0125\]\]](#).

¹³⁷ *Wu v Liu* [2024] NZHC 3821 [\[\[101.0138\]\]](#).

Appellant's List of Authorities

Cases

1. *Allcard v Skinner* (1887) 36 Ch D 145 (CA)
2. *Carey v Hastie* [1968] NZLR 276 (CA)
3. *Clough v London and North Western Railway Co* [1861-73] All ER Rep 646 (Ex Ch)
4. *De Cadaval v Collins* (1836) 4 Ad & E 858, 111 ER 1006 (KB)
5. *Foster v Phillips* HC Auckland CP2845/89, 5 September 1990
6. *Haines v Carter* [2001] 2 NZLR 167 (CA)
7. *Hobbs v Gilbert* HC Nelson CIV-1999-442-002, 21 September 2004
8. *Mall Finance & Investment Co Ltd v Slater* [1976] 2 NZLR 685 (CA)
9. *McClatchie v Haslam* (1891) 65 LT 691 (CA)
10. *McIntyre v Nemesis DBK Ltd* [2009] NZCA 329, [2010] 1 NZLR 463
11. *Morley (t/a Morley Estates) v Royal Bank of Scotland plc* [2021] EWCA Civ 338
12. *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd (The Atlantic Baron)* [1979] QB 705, [1978] 3 All ER 1170
13. *Osborne v Worksafe New Zealand* [2017] NZSC 175, [2018] 1 NZLR 447
14. *Pakistan International Airline Corporation v Times Travel (UK) Ltd* [2021] UKSC 40
15. *Pao On v Lau Yiu Long* [1980] AC 614 (PC)
16. *Pharmacy Care Systems Ltd v Attorney-General* (2004) 2 NZCCLR 187 (CA)
17. *Polymer Developments Group Ltd v Tilialo* [2002] 3 NZLR 258 (HC)
18. *Public Trust v Ottow* (2009) 10 NZCPR 879 (HC)
19. *Rourke v Mealy* (1878) 4 LR Ir 166 (Ex Div)
20. *Seear v Cohen* (1881) 45 LT 589 (QBD)
21. *Unwin v Leaper* (1840) 1 Man & G 747 (CP)
22. *Westpac Banking Corporation v Cockerill* (1998) 152 ALR 267 (FCAFC)

Legislation

- 23. Contract and Commercial Law Act 2017, s 71
- 24. Illegal Contracts Act 1970, s 3

Secondary Materials

- 25. Rick Bigwood "Fine-Tuning Affirmation of a Contract by Election (Part 1)" [2010] NZ L Rev 37
- 26. Rick Bigwood "Fine-Tuning Affirmation of a Contract by Election (Part 2)" [2010] NZ L Rev 617
- 27. Brian Coote Coote on the New Zealand Contract Statutes (Thomson Reuters, Wellington, 2017)
- 28. Nelson Enonchong Duress, Undue Influence and Unconscionable Dealing (4th ed, Sweet & Maxwell, London, 2023)
- 29. Charles Mitchell, Paul Mitchell and Stephen Watterson (eds) Goff and Jones: The Law of Unjust Enrichment (10th ed, Sweet & Maxwell, London, 2023)
- 30. Bill Prewett "Threat of Litigation as Duress" (1952) 6 Ark L Rev 472
- 31. Nathan Tamblyn The Law of Duress and Necessity (Routledge, Abingdon, 2018)
- 32. Paul Vout (ed) Unconscionable Conduct: The Laws of Australia (2nd ed, Thomson Reuters, Sydney, 2009)
- 33. W G G A Young "Duress and Threats of Lawful Action" (1980) 1 Canterbury L Rev 55