In the Supreme Court of New Zealand
I Te Kōti Mana Nui o Aotearoa

SC 166/2025
CA 723/2024
CIV 2022-404-447

Between

Jinxing Liu

Appellant

and

Hua Wu (also known as Danny Wu)

Respondent

Submissions for the Respondent

Dated: 29 June 2026

Publication certification: Counsel certify that, to the best of their knowledge, these submissions are suitable for publication and do not contain suppressed information.

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MAY IT PLEASE THE COURT:

Introduction and summary

1. In this appeal, the appellant promotes an outcome whereby he may retain funds obtained by blackmail,[1] masked by means of a "*fictitious story*"[2] documented in a sham Deed,[3] which he says was then affirmed by the respondent through his silence/inaction.

2. The High Court found (**HC Judgment**) that Mr Liu and his son Jackie blackmailed Mr Wu. They threatened to report Mr Wu's alleged theft from Jackie's company to the Police and immigration authorities.[4] This threat compelled a payment of $1.2 million in cash and property by Mr Wu to Mr Liu.[5]

3. Mr Wu and Mr Liu executed a Deed which recorded the transfer of the funds and property as repayment of a loan from Mr Liu to Mr Wu. The High Court found the Deed was a sham; there was no loan. The Deed was intended to mask the real arrangement: payment by Mr Wu under a threat to report an alleged crime.

4. None of these facts are disputed before this Court. But the appellant submits that the threat to report was effective only so far as it induced or coerced Mr Wu to sign the Deed and make the payments. The appellant says there was no finding in the High Court of any promise thereafter to refrain from reporting Mr Wu's alleged wrongdoing to authorities, and therefore the case is one of duress, the Deed is voidable (not void), and Mr Wu affirmed it by his later conduct. Hence, the funds ought to be retained by the blackmailer, Mr Liu.

5. However, the appellant does not explain what agreement was induced by the threat to report. The only possibilities on the facts are:

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[1] *Wu v Liu* [2024] NZHC 2903 (**HC Judgment**) at [77]. [[Case on Appeal (**COA**) 101.01177]]
[2] HC Judgment at [64]. [[COA 101.113]]
[3] HC Judgment at [47]. [[COA 101.0102]]
[4] For ease of reference, where appropriate, these submissions abbreviate a threat to report an alleged crime as "a threat to report" and a promise not to report an alleged crime as "a promise not to report".
[5] For ease of reference, these submissions refer to the payments as "the payment" or "the payments" or "the funds" even though the transfers were part in cash and part in property.

(a) there was no ongoing promise not to report and therefore no resulting agreement, only payments extorted by threats; or

(b) there was an agreement – an ongoing promise not to report in consideration for the payments.

Either way, the appellant cannot succeed.

6. If, as the appellant would have it, Mr Wu paid the money without any quid pro quo promise not to report in the future, then Mr Liu has simply extorted the funds from Mr Wu as surely as if he had demanded payment by a threat of imminent violence. There is no "agreement" coerced by duress in this scenario. Nor can the appellant call on the Deed as an existing agreement which may be affirmed: on the undisputed facts, the Deed is a sham agreement about a non-existent loan. The payments have been extorted by Mr Liu, are therefore involuntary, and are recoverable as money had and received/unjust enrichment.

7. The alternative conclusion is what the Court of Appeal (and, at least by inference, the High Court) found: the appellant coerced payments by Mr Wu in return for an ongoing promise by Mr Liu not to report. This is an illegal contract of no effect pursuant to the illegal contract provisions of the Contract and Commercial Law Act 2017 (**CCLA**)[6] in two ways:

(a) it embodies and enables blackmail; and

(b) it is an agreement to stifle prosecution contrary to public policy.

8. Neither scenario gives rise to a question of affirmation. Nevertheless, for completeness, affirmation is discussed at the end of these submissions.

9. Nor is there any need to consider the jurisprudential relationship between the principles of duress and the law relating to illegal contracts on the facts of this case. On the appellant's case, it is an

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[6] CCLA, s 71. [[Appellant's Bundle of Authorities (**ABOA**) page 443 at 445]]

involuntary payment coerced by a threat, which is not an agreement at all; and on the respondent's case it is an illegal agreement of no effect.

10. The appellant proposes that there is, or ought to be, a bright line separation between duress cases (of which it submits this is one) and illegality cases. While the respondent considers, per above, that this submission does not fall for resolution here, nevertheless it is submitted that the two concepts are different and have different remedies, but there is no reason why overlap in some cases must be avoided. Sometimes, the facts might lend themselves to resolution under either doctrine. The discretion in section 76 of the CCLA permits the Court to fashion an outcome which is consistent despite the different focus of illegality and of duress.

11. In any event, cases where the doctrines overlap will be rare; the illegality provisions of the CCLA will not subsume the law of duress absent a bright line separation as the appellant contends.

Illegal contract/duress issue: either there was no agreement reached, just a taking under illegitimate pressure; or the true agreement was an illegal one pursuant to the CCLA – either way the respondent is entitled to restitution

12. There is a critical lacuna in the appellant's logic: he fails to explain the basis on which the funds were paid to him.

13. There are two possibilities: first, that there is no agreement – the payments were extorted by a threat, which appears to be the logical conclusion of the appellant's case. The other is that the real agreement is an illegal one whereby the payments are made in return for a promise not to report alleged malfeasance by the respondent. Both possibilities reach the same end: restitution of the fund to the respondent. There is no analysis which properly results in the retention of the funds by the blackmailer.

14. These two possibilities are examined in turn below.

A. *If there is no ongoing promise not to report, then there is no agreement and no consideration – the case is simply one of a bald payment achieved by fraud/extortion: the respondent is entitled to restitution*

15. The appellant accepts the High Court Judge's finding that the loan was fictitious and the Deed therefore a sham.[7] The essence of the appellant's case is that while there was a threat to report, there was no ongoing promise not to report if the payment was made.

16. If that is so, what is left is simply a payment procured by extortion or by fraud. There is no agreement; only an involuntary payment. This follows from the fact that the loan was fictitious and the Deed was a sham. The payments were not made to repay the loan documented by the Deed; a sham Deed cannot have any binding effect. The appellant, and the High Court Judge, are wrong to suppose that the Deed somehow survived the conclusion that the loan (and payment of it) while fictitious, nevertheless "*remains on foot and binding on Mr Wu and Crystal*"[8] and could be affirmed.

17. Accordingly, the principles applying to contracts obtained under duress do not apply here: no contract was coerced by duress; there is no contract to affirm. The principles of freedom to contract and contractual certainty which underpin the possibility of affirmation have no application.

18. On the appellant's premise, this is a case of an involuntary payment coerced by a threat of harm to the respondent. Money obtained by threats is not conducive to a contract duress analysis. The situation is analogous to theft of money or valuables at gunpoint. Assets are obtained by the thief, but it is artificial and wrong to analyse that situation as if an agreement has been reached between the thief and the victim for payment to avoid violence, which may later be either affirmed or avoided by the victim for duress.

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[7] As found by the High Court and Court of Appeal: *Wu v Liu* [2025] NZCA 560 (CA Judgment) at [9], [29] and [42]. [[COA 101.0148]] [[COA 101.0155]] [[COA 101.0159]].

[8] HC Judgment at [78] [[COA 101.0117]].

19. Rather, the stolen assets are simply recoverable as money had and received or unjust enrichment on the basis that the thief has no juristic right to the stolen goods. The same analysis applies to money extorted here. There is duress, but it does not lead to a contract which may be binding or affirmed.

20. It is well established that a payment under duress is recoverable under orthodox principles of restitution.[9] To the extent these principles now sit under the organising concept of unjust enrichment, the test is satisfied: (1) there was an enrichment to Mr Liu; (2) the enrichment was at the expense of Mr Wu; (3) the enrichment was unjust because it was obtained under duress.[10]

21. Cases specifically about recovery of funds paid to a blackmailer are rare. One is the nineteenth century case *The Duke de Cadaval v Collins*.[11] The plaintiff, a Portuguese aristocrat, was arrested in England on a writ of debt procured by the defendant. The defendant knew the plaintiff was not liable for the debt, but procured from him a payment to compromise the debt and secure his release. The plaintiff paid the money rather than remain incarcerated, and then sued to recover the money.

22. But *Cadaval* was not a contract case; it was simply a payment procured by duress. The action for money had and received was successful and the money restored to the Duke. Per Lord Denman CJ in the Court of Appeal:[12]

> *Is it still the plaintiff's [the Duke's] money? How is it shewn not to be so? Why, by striving to give effect to a fraud. That is the finding of the jury: the*

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[9] Money had and received appears to be the claim in most cases: see cases discussed further below including *Moses v Macferlan* (1760) 2 Burr 1005 at 1012; [1558–1774] All ER Rep 581 at 585 [[RBOA page 223 at 227]]; *Banks v Cheltenham Co-operative Dairy Co. Ltd.* (1910) 29 NZLR 979 (SC) [[RBOA page 004]]; *Dandoroff v Rogozinoff* [1988] 2 NZLR 588 (HC) [[RBOA page 014]], which relied on *Halsbury's Laws of England* (2024, online ed) vol 100 Unjust Enrichment at 660 [[RBOA page 550 at 554]]. Newer commentary and cases do not always make a distinction between money had and received and unjust enrichment more broadly. See Charles Mitchell, Paul Mitchell and Stephen Watterson (eds) *Goff and Jones: The Law of Unjust Enrichment* (10th ed, Sweet & Maxwell, London, 2023) at [10.01] [[RBOA page 533 at 537]]; Peter Twist et al, The Laws of New Zealand (online ed) "Restitution," LexisNexis 2026 at 31 [[RBOA page 556 at 566]].

[10] *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd* [1999] 2 NZLR 211 (CA) at 215 per Henry J and at 226 per Thomas J [[RBOA page 059 at 063 and 074]]; *Goff and Jones*, above n 9 at [1.09]. [[RBOA page 533 at 535]].

[11] *De Cadaval v Collins* (1836) 4 Ad & E 858, 111 ER 1006 (KB) [[ABOA page 30]]. This case is cited by the appellant (at [43] of his submission [[Appellant's Submission (**AS**) at p 12]]), but with respect it does not stand for the proposition that duress is the correct jurisprudential approach to the fact situation.

[12] *De Cadaval v Collins*, above n 11, at 1009. [[ABOA page 30 at 33]]

> *arrest was fraudulent; and the money was parted with under the arrest to get rid of the pressure. …*
>
> *We cannot prevent the plaintiff from recovering back his money as money had and received.*

23. Patteson J reasoned: "*the jury, therefore, concluded that the defendant knew that the debt did not exist, and that he used the process [of a writ of arrest for a debt] colourably. To say that money obtained by such extortion cannot be recovered back, would be monstrous.*" And Coleridge J: *"if an undue advantage be taken of a person's situation, and money obtained from him by compulsion, such money may be recovered in an action for money had and received."*

24. The same analysis applies here: the loan did not exist; the money was parted with to avoid the threat to report the respondent's alleged malfeasance to the authorities. The money has been obtained by extortion, and may be recovered in an action for money had and received.

25. These are foundational principles. In *Woolwich Building Society,*[13] the Court of Appeal of England and Wales referred to a well-known passage from Lord Mansfield CJ in *Moses v Macferlan*,[14] which describes the basis of the action for money had and received, i.e. for restitution:

> *… it lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition, (express, or implied) or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word, the gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.*

26. That a payment made under duress is involuntary, and recoverable as money had and received, was confirmed in New Zealand in *Dandoroff v Rogozinoff*.[15] That case is also close to the present. Dandoroff was extorted by his erstwhile business partner, Rogozinoff, of $16,000 in

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[13] *Woolwich Equitable Building Society v Inland Revenue Commissioners (No 2)* [1993] AC 70 (CA). [[RBOA page 334]]

[14] *Moses v Macferlan,* above n 9 at 585 [[RBOA page 223 at 227]]. Cited with approval by the New Zealand Court of Appeal in *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd,* above n 10. [[RBOA page 059 at 063 and 074]]

[15] *Dandoroff v Rogozinoff,* above n 9. [[RBOA 9 page 014]]

cash and forced to sign a sham share sale agreement to falsely mask the payment. Despite the existence of the sham agreement, this was not a contract case. It was simply payment made under circumstances where it must have been involuntary and consequently was recoverable as money had and received.[16]

27. The most straightforward resolution of this case, apparent on the appellant's argument, is that the payment was not voluntary, no agreement (legal or illegal) was concluded, and restitution follows. If that is so, there is no need to discuss the distinction between duress and illegality, nor affirmation.

B. Alternatively, the true agreement is payment for a promise not to report: an illegal contract

28. Alternatively, the threat to report led to an agreement: i.e. the payment of funds by Mr Wu to Mr Liu in exchange for something. It was not repayment of a fictitious loan. The only possible quid pro quo for the payment was an ongoing promise not to report Mr Wu's alleged theft to the authorities (be it the Police or immigration). There is no dispute such an agreement is illegal.

29. The appellant's contention that there was no *ongoing* promise[17] not to report is an unlikely one: it effectively means the funds are paid for nothing. It offends common sense to suppose, as the appellant must, that the payment was made in the absence of such a promise. Removal of the immediate threat to report by payment of the funds has no value to Mr Wu if Mr Liu was then free to report Mr Wu to the authorities immediately once payment was made.

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[16] *Dandoroff v Rogozinoff,* above n 9, at 595, lines 23-26. [[RBOA page 014 at 021]]

[17] Appellant's submissions at [71] say that there was no testimony that there was a promise [[AS at p 20]]. Mr Wu's evidence, extracted in the HC Judgment at [13] [[COA 101.0091]] was:
"… I was blackmailed and threatened by Jinxing and Jackie ("the blackmail"). Fundamentally, they believed or claimed, as above, that I had committed various sorts of fraud against Timber King, totalling about $400,000. They threatened to go to the Police, to Inland Revenue and to Immigration New Zealand and report me if I did not comply with their demands."

Xuan (Crystal) Wang said (brief of evidence): "*Jinxing Liu and Jackie Liu repeatedly sent WeChat messages, demanding money from us, threatening that we would be in trouble if we didn't comply*." [[COA 202.0278]]

30. The High Court Judge did not conduct an illegal contract analysis; it was not an argument before his Honour. Lang J's inquiry initially focussed on whether the loan documented by the Deed actually existed. Having dismissed that explanation for the payments, His Honour found that the payments must have been made because of "*very significant"* pressure placed on Mr Wu.[18]

31. The Judge directly considered the issue of "*what Jackie and Jinxing told Mr Wu and Crystal they would do* ***if their demands were not met***."[19] (Emphasis added.) The payments were made, the Judge concluded, due to the pressure of "*significant reputational and criminal risk for [Mr Wu]*" being "*threats to report the [alleged] thefts from Timber King to the police or immigration authorities*".[20]

32. This situation, the Judge held, "*was plainly improper because the threats amounted to blackmail …".*[21] His Honour observed that the value of the assets transferred demonstrates the seriousness with which Mr Wu and Crystal viewed the pressure applied by the appellant and his son.[22]

33. While that discussion approached the facts through the lens of pre-agreement duress, nevertheless, the existence of an agreement with ongoing obligations for both parties (i.e. money for silence) is an almost inescapable conclusion from the Judge's findings.

34. However, the Judge then proceeded on the basis that the Deed was procured by duress and "*remains on foot and binding on both Mr Wu and Crystal*." As explained above, it makes no sense to construe the Deed as having any legal or factual significance once it was determined that there was no loan to repay. It was a farce. But a deal of some sort remained – that is essentially what the Judge accepted by

[18] HC Judgment at [70]. [[COA 101.0115]]
[19] HC Judgment at [69]. [[COA 101.114]]
[20] HC Judgment at [70] and [74]. [[COA 101.0115]] and [[COA 101.0116]]
[21] HC Judgment at [77]. [[COA 101.0117]]
[22] HC Judgment at [70]. [[COA 101.0115]]

supposing that the Deed remained binding. In other words, a deal remained on foot, but it could not be the deal recorded in the Deed.

35. If there was a deal, what was that deal? There is only one sensible conclusion from the Judge's findings about the nature and seriousness of the pressure on the respondent. If the payment was for silence only up to the point payment was made, then there is no good consideration; there is no deal. For an obligation not to report malfeasance to have any value in these circumstances, it had to have been an ongoing obligation; a quid pro quo for the payment.

36. The appellant's submission[23] appears to be that the Court of Appeal's finding conflates the coercive act with the bargain struck. But the threat is inseparable from the bargain struck as a result of it, because, unlike other cases, in this case blackmail is all there is to the true agreement of the parties. In these circumstances, the appellant's submission that there is a meaningful distinction between *"I will report your criminal behaviour if you do not sign and pay"* and "*I promise not to report your criminal behaviour if you sign and pay*"[24] is dancing on the head of a pin.

37. This reality was recognised by the Court of Appeal. It is trite to observe that all appeals are by way of rehearing and the Court of Appeal may draw inferences of fact.[25] Additionally, a court must act on its own initiative where illegality is apparent.[26] Agreements to stifle prosecution have long been held to be unlawful. Such arrangements may be express or implied,[27] indeed the inference of such a bargain is common because "*from their very nature [they are] seldom set out on paper*" but rather, have to be *"inferred from the conduct of the parties after a survey of the whole circumstances*."[28] Further, inference of an

23 Appellant's submission at [71]. [[AS at p 20]]
24 Appellant's submissions at [39]. [[AS at p 10]]
25 Court of Appeal (Civil) Rules 2005, r 48(3). [[RBOA page 001 at 002]]
26 CA Judgment at [25] [[COA 101.0153]]. As the Court of Appeal noted, there is case law to the effect that even if a party does not raise illegality, where it presents on the facts a Court is bound to take it up: *Duncan v McDonald* CA 223/96, 11 August 1997; [1997] 3 NZLR 669 at 676. [[RBOA page 028 at 035]]
27 *Osbourne v Worksafe New Zealand* [2017] NZSC 175, [2018] 1 NZLR 447 at [70] [[ABOA page 234 at 257]]; CA Judgment at [32] [[COA 101.0155]].
28 *Osbourne v Worksafe New Zealand*, above n 27 at [81] [[ABOA page 234 at 261]], citing Lord Atkin in *Bhowanipur Banking Corporation Ltd v Dasi* [1941] UKPC 24. [[RBOA page 171]]

illegal term may be approached with less reluctance given the discretion in section 76 of the CCLA to grant relief from the consequences of illegality.[29]

38. To the extent that the High Court did not directly address the terms of the bargain that remained after the Deed was put to one side, it was appropriate for the Court of Appeal to draw conclusions from the evidence about the nature of that bargain.

39. The Court of Appeal considered the "*true agreement*" to be an illegal one on two related but distinct bases: first, that it encapsulated blackmail, a crime prohibited by s 237 of the Crimes Act 1961; secondly that a promise not to report is contrary to public policy in that it seeks to prevent the investigation and prosecution of crimes.[30]

40. In respect of the first basis, the appellant challenged the High Court Judge's blackmail finding before the Court of Appeal. He does not do so before this Court. The true agreement embodies the crime of blackmail: it is an agreement for payment in return for forbearance of reporting of alleged criminal activity. There are no other terms.

41. Whether the period of silence (agreement not to report) bargained for is limited to the period before the payment is made, and/or continues thereafter, is nothing to the point. There can be no legal agreement to blackmail. Both parties' lawyers advised them (correctly) in that regard.[31] As such the illegality arises from "*the creation … of the contract*" per section 71(1)(a) of the CCLA.

42. The second basis identified by the Court of Appeal is the more natural interpretation of the facts in this case: the agreement is an ongoing promise not to report in exchange for payment. If so, the agreement is

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[29] *Mall Finance & Investment Co Ltd v Slater* [1976] 2 NZLR 685 (CA) at 689 per Cooke J [[ABOA page 170 at 174]], as cited in CA Judgment at [33] [[COA 101.0156]]. The liberal approach to inference is supported by *Polymer Developments Group Ltd v Tilialo* [2002] 3 NZLR 258 (HC) at [38] [[ABOA page 356 at 364]]. Glazebrook J observed that the "public policy considerations involved" justified a "more liberal approach to implying terms into contracts made against a background of the possibility of criminal proceedings" and endorsed Cooke J's observation in *Mall Finance* at [70]. [[ABOA page 356 at 371]]

[30] CA Judgment at [32]. [[COA 101.0155]]

[31] CA Judgment at [42(c)] [[COA 101.0160]]. The transcript of a recorded meeting between Mr Lu and Mr Wu demonstrate that Mr Liu understood that the written agreement could not contain a term that Mr Liu would not continue to threaten or carry out his threat: see the extract in the HC Judgment from [59]. [[COA 101.0106]]

illegal in its creation and performance and its terms per section 71(1)(a) and (b).

43. That the promise is ongoing flows from the point made at the outset of this section: that a payment without the quid pro quo promise not to report in future is a worthless agreement from the respondent's perspective. Further, the Court of Appeal notes WeChat messages between the parties which are forward looking: "*Ms Wang [Mr Wu's ex-wife, Crystal] asks what would happen a few years later if Mr Liu was to 'go after us again'".* Mr Liu's response was that this was "*impossible*" but such an agreement could not be recorded in writing because the "*law does not allow us to do this*".[32] The Court of Appeal drew the sensible conclusion that the payments are related to "*preventing Mr Liu reporting Mr Wu's misconduct*" – the word "preventing" connotes an active and ongoing promise.[33]

44. If this Court accepts the proposition that the true agreement was the payment of funds by Mr Wu in return for a promise by Mr Liu not to report Mr Wu's alleged theft, then the application of this second basis for illegality appears uncontroversial. The agreement is void and affirmation is moot.

C. The principles of duress and illegality fit well with one another and do not require a bright line separation

45. The appellant's submission is that this case is a duress case, and a duress case only: and a bright line must be drawn between duress cases and illegal contracts. If so, and the provisions of the CCLA with respect to illegal contracts are inapplicable, then the contract is valid unless avoided and affirmation becomes an issue.

46. The Court of Appeal acknowledged that contractual duress principles can be applied to this case. Because a threat to report led to the payments, that must be correct if an agreement is concluded as a result of the threat. But it is submitted that the Court of Appeal was

[32] CA Judgment at [42]. [[COA 101.0159]]
[33] CA Judgment at [42(b)]. [[COA 101.0159]]

right to find that the application of a duress analysis does not exclude the operation of the CCLA illegal contract provisions. The statute cannot be ignored.[34] The two concepts are distinct, but not necessarily mutually exclusive. One or the other may apply to a certain fact scenario, equally both doctrines may be applicable.

47. The appellant seeks support for the submission of separability by reference to the domestic cases *Pharmacy Care*, *Haines v Carter*, and *Hobbs v Gilbert*. An important difference between these cases and the present case is that all three cases concerned agreements which, if unimpeached by duress, were otherwise substantive and legal: *Pharmacy Care* and *Hobbs* concerned settlements of a genuine commercial disputes; *Haines* the enforcement of a relationship property agreement. Accordingly, the agreements allegedly coerced by duress were apparent, as opposed to the present case which involves duress leading to a sham agreement, wherein the true agreement must be inferred.

48. While all three cases were approached by application of the principles of duress, none were presented as illegal contract cases. None of the judgments discuss illegality at all, let alone consider whether duress is the only way in which the fact scenarios can be analysed. They are not authority for a clear separation of duress cases from illegal bargains, nor that certain types of threat constitute duress only and necessarily exclude an illegal contract analysis.

49. In addition, other features of these cases militate against their utility in drawing conclusions about the boundaries between duress and illegal contracts:

(a) *Haines v Carter* was an application for summary judgment on a relationship property agreement. The defendant husband pleaded duress on the basis that the wife threatened to report the husband's tax irregularities to the IRD if the agreement was not signed. He sought to avoid the agreement. The Court

[34] Court of Appeal (Civil) Rules 2005, r 48(3). [[RBOA page 001 at 002]]

assessed whether that defence was tenable. The duress alleged was assumed, not proven,[35] although the Court of Appeal concluded that the duress alleged involved "*a comparatively low level of actual coerciveness*".[36] Both Courts were content to deal with the case on the basis that Mr Haines had affirmed it.[37] While the Court of Appeal acknowledged that, if proven, such threats could amount to blackmail and duress,[38] there was no attempt to discuss the implication of any illegal term in the agreement, nor reason to address whether a duress approach or illegal contract approach were distinct or overlapping.

(b) *Pharmacy Care*: in this case, the Court found no duress on the facts. The threats alleged were not made: "*what occurred in this case was that the parties compromised … a genuine dispute … which had arisen between them, by the deed of settlement*."[39] While the Court of Appeal buttressed this finding by considering in any event whether the settlement agreement was affirmed by the plaintiff, given the finding that there was no duress, there could be no basis for implying an illegal term in the settlement agreement either. This was not a case where, unbidden, the Court should have also undertaken an illegality analysis and determined the best jurisprudential approach.

(c) *Hobbs:* again, no duress was found to have occurred. What is more, even if the "*floating in the harbour*" threat had been made, the Judge found that it did not influence Mr Hobbs' decision to agree the settlement.[40] The possible implication of an illegal term in the settlement contract does not arise on these factual findings.

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[35] *Haines v Carter* [2001] 2 NZLR 167 at [116], [117], and [119]. [[ABOA page 103 at 127, 128, and 129]]
[36] *Haines v Carter*, above n 35, at [117.3]. [[ABOA page 103 at 127]]
[37] *Haines v Carter*, above n 35, at [114]-[115]. [[ABOA page 103 at 126]]
[38] *Haines v Carter*, above n 35, at [108]-[109]. [[ABOA page 103 at 125]]
[39] *Pharmacy Care Systems Ltd v Attorney-General* (2004) 2 NZCCLR 187 (CA) at [50]-[51], [53], [57], and [101]-[105]. [[ABOA page 340 at 346, 347, and 353]]
[40] *Hobbs v Gilbert* HC Nelson CIV-1999-442-002, 21 September 2004 at [80] and [109]-[111]. [[ABOA page 133 at 152 and 161]].

50. Quite apart from the fact that illegality was not pleaded in these cases, that the respective Judges did not consider the prospect of the application of illegal contract principles is explicable because there were no circumstances which might justify the implication of an illegal term in an otherwise legal agreement. The cases are not therefore authority that threats which induce contracts are always to be analysed as duress cases to the exclusion of the principles relating to illegal contracts.

51. Neither do the English authorities cited by the appellant establish that agreements to stifle prosecutions are properly analysed only by contractual duress principles. The fact that many of the English cases which involve threats and agreements to stifle prosecution focus on duress is explained by a fundamental difference in the English common law approach to illegal contracts compared with the New Zealand legislation.

52. At common law, the parties to an illegal contract are deemed to be *in pari delicto* (in equal fault). Equity will not permit a party who actively participated in a wrongful or illegal contract from recovering damages under it, unless they also prove duress.[41] Goff and Jones explain: "*in most cases where the courts have held the agreement to be illegal, they have also held there was duress. The coerced party may then recover the benefits transferred under the [illegal] agreement; he is not* in pari delicto *and the benefit has been conferred in consequence of a wrongful threat.*"[42]

53. Accordingly, the focus of the UK cases is on duress because a finding that a contract is illegal (without more) voids the contract, but leaves the parties in the position they find themselves at the time of the action.

54. *Jones v Merionethshire Building Society* is an example.[43] The relatives of a man who had embezzled funds from the Building Society gave

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[41] *Jones v Merionethshire Permanent Benefit Building Society* [1892] 1 Ch 173 [[RBOA page 182]]*; Goff and Jones,* above n 9, at [10-27]. [[RBOA page 533 at 548]]

[42] *Goff and Jones,* above n 9, at [10-27]. [[RBOA page 533 at 548]]

[43] *Jones v Merionethshire Permanent Benefit Building Society,* above n 41 [[RBOA page 182]]. Also see *Seear v Cohen* (1881) 45 LT 589 (QBD) at 590 per Denman J. [[ABOA page 409 at 410]]

securities to the Society to meet what the man had stolen. There was no duress, but it was an implied term of the arrangement that no prosecution would ensue. That was an illegal bargain and the Society's action to enforce the instruments was unsuccessful. Lindley LJ explained how duress and illegal contract principles interact:

> *A plaintiff is not entitled to relief in a Court of Equity on the ground of the illegality of his own conduct. In order to obtain relief in Equity he must prove not only that the transaction is illegal, but something more: he must prove either pressure or undue influence. If all that he proves is an illegal agreement he is not entitled to relief. If, on the other hand, he can go further and shew pressure or undue influence, so as to bring himself within the doctrine applicable to transactions of that kind, then he is entitled to relief in equity, although the transaction may be illegal upon the ground that it is meant to stifle a prosecution.*

55. So in *Jones,* the issuers of the securities were relieved from their operation. Illegality was successful as a defence. But had they paid money to avoid prosecution, rather than provide security, they would not have been able to recover that money unless they could show the agreement was induced by illegitimate pressure, for which equity provides a restitutionary remedy.

56. A pre-Illegal Contracts Act 1970 example in New Zealand is the 1910 judgment in *Banks v The Cheltenham Cooperative Dairy Company*.[44] The plaintiffs' relative stole from the defendant Cooperative Company. His relatives reimbursed the Co-op. The Court implied a term that the agreement was an illegal contract to stifle prosecution of the relative. Chapman J found that if the parties were *in pari delicto* for that illegal bargain, the Court could not assist, but where the paying party was oppressed by the recipient party (i.e. duress), equity could intervene to compel repayment.[45]

57. The limitations of relief at common law where an illegal contract exists absent duress, inevitably leads to focus on oppressive conduct/duress/undue influence in the common law cases concerning agreements to stifle a prosecution. Accordingly, these cases are not

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[44] *Banks v Cheltenham Co-operative Dairy Co. Ltd,* above n 9. [[RBOA page 004]]
[45] *Banks v Cheltenham Co-operative Dairy Co. Ltd,* above n 9, at 985 - 987. [[RBOA page 004 at 010-012]]

indicative of a rule that agreements to stifle prosecutions are ordinarily dealt with by application of the principles of duress rather than illegality.

58. The specific cases relied on by the appellant take the appellant's submission no further:

(a) *Times Travel (UK) Ltd v Pakistan International Airline Corporation*:[46] this is a case about economic duress, not an illegal contract. Although duress was not found on the facts, the UK Supreme Court observed as a matter of principle that a threat to do something lawful can nevertheless amount to duress if the circumstances in which the threat is made are unconscionable. An uncontroversial example is a threat to report criminal behaviour; to so report is not illegal, but it may amount to duress if used to extract payment. This case did not involve an illegal contract to stifle prosecution, nor is it authority for the proposition that, because a threat to prosecute may amount to duress, threat to report cases are only to be analysed pursuant to duress principles.

(b) *The Duke de Cadaval*:[47] as explained above, this is not a case of duress leading to a contract, legal or illegal. It is a pure extortion case, arguably like the present.

(c) *Seear v Cohen*:[48] the plaintiffs sued to enforce a promissory note given by the defendants to prevent prosecution of a relative. The Court held that the defendants were unfairly coerced to enter the agreement by the threat of prosecution. Accordingly, the Court declined to enforce the note on the grounds of duress. An illegal contract analysis could have provided the same result (as per *Jones*), but there is nothing in the case which says that the two concepts cannot co-exist, nor that duress is the primary or only way to approach such facts.

46 *Pakistan International Airline Corp v Times Travel (UK) Ltd* [2021] UKSC 40. [[ABOA page 267]]
47 *De Cadaval v Collins*, above n 11. [[ABOA page 30]].
48 *Seear v Cohen*, above n 43. The Court found "*It is not to be looked at as a voluntary act, but as a kind of extortion*." [[ABOA page 409 at 410]]

(d) *McClatchie v Haslam*:[49] here a wife gave a mortgage to secure repayment of her husband's criminal expropriations from a Building Society of which he was treasurer. She sued to have the security set aside on the basis of duress and undue influence. It was held there was no agreement not to prosecute. The Court found that duress was not established on the facts either. The case is not illuminating as to the present one, except for the comment by Lindley LJ, with reference to his Lordship's decision in *Jones,* that transactions of this kind may be invalidated by proving either an agreement not to prosecute, or pressure/undue influence.[50] They are not mutually exclusive; neither is one approach preferred: it depends on the facts.

59. In 2010, the United Kingdom Law Commission described the state of the common law as to illegal contracts as follows:[51]

> *1.2 This area of law purports to be governed by strict rules, which often appear arbitrary. Very early on, the case law established that the illegality doctrine is not there to find a just resolution to the dispute between the claimant and the defendant; rather it is based on "general principles of policy" that might arbitrarily apply to the advantage of the defendant. As the Chancery Bar Association noted in its response to our 2009 consultative report, "the result is a forensic lottery depending on the accidents of litigation or the manoeuvrings of the parties".*

60. These issues were the primary reason for the codification of the Illegal Contracts Act in New Zealand some 40-45 years earlier.[52]

61. More recent cases, principally the UK Supreme Court decision in *Patel v Mirza*,[53] have re-visited illegality principles in the common law to achieve greater flexibility of outcomes, but the common law approach is still markedly divergent from the New Zealand legislation.

62. For these reasons, it is submitted that an analysis of domestic or foreign authority does not illustrate that cases of stifling prosecutions

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[49] *McClatchie v Haslam* (1891) 65 LT 691 (CA). [[ABOA page 175]]
[50] *McClatchie v Haslam*, above n 49, at 693. [[ABOA page 175 at 177]]
[51] United Kingdom Law Commission *The Illegality Defence* (LAW COM No 320, 2010) [[RBOA page 577]]. Less diplomatically, Lord Sumption described the state of this area of the law at end of the 20th century as "*encrusted with an incoherent mass of inconsistent authority*": *Bilta (UK) Ltd v Nazir (No 2)* [2016] 1 AC 1 at 61 (not included in the RBOA).
[52] Contract and Commercial Law Reform Committee *Report on Illegal Contracts* (1969) at [6]. [[RBOA page 514, at 519]]. A helpful discussion of the reasons for the reform is found in *Harding v Coburn* [1976] 2 NZLR 577 at 581-583 [[RBOA page 047, at 051-053]].
[53] *Patel v Mirza* [2016] UKSC 42; [2017] 1 AC 467 at [120]. [[RBOA page 229, at 226]].

are necessarily to be approached through the "lens of duress",[54] nor the principles relating to illegal contracts.

63. The appellant is concerned to impress upon the Court that there must be a bright line separation between the concepts of duress and illegality in New Zealand, otherwise the illegal contract provisions in the CCLA will subsume the law of duress: each threat amounting to duress will become an illegal implied term in the resulting agreement. All such agreements will be void as opposed to voidable, which in turn will undermine the part affirmation plays in upholding the principles of freedom to contract and certainty of contract.

64. The respondent submits that:

(a) as the Court of Appeal recognised, the statutory principles in the CCLA must be applied according to their terms;

(b) which set of principles applies in any case is fact dependent, and in any event, it is of no concern if duress and illegal contract principles overlap in some cases; and

(c) the proposition that the statutory illegal contract provisions in the CCLA will largely subsume the law of duress is overstated – it is only in cases of threats not to report/prosecute an offence where the concepts may (but will not always) overlap.

65. Taking those points in turn, it must be right, as the Court of Appeal pointed out, that the statutory provisions cannot be ignored.[55] As explained below, that does not result in undue complication, tension, or unjust outcomes, nor does the statute subsume the place of duress principles in contract cases.

66. The analytical exercise is fact dependent. The New Zealand and English cases demonstrate a variety of factual scenarios, some which better fit a duress approach, others an illegality analysis, and yet others

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[54] Appellant's submissions from [25] and particularly [37]-[55]. [[AS at pp 7 and 10-15]]
[55] CA Judgment at [25]. [[COA 101.0153]]

which may be approached either way. Where both are applicable to a certain factual scenario, that does not appear to have caused unjust or illogical outcomes.

67. To take cases which involve a threat and/or promise not to report an alleged crime:

(a) Some cases are approached as duress cases because on the facts there is no agreement to stifle a prosecution in return for payment: e.g. *McClatchie* (discussed above – Lindley LJ found there was "*no trace of any agreement not to prosecute*"[56]) and *Flower v Sadler*[57] where security for a commission genuinely owed was provided on threat of a prosecution, but on the facts there was no agreement to forbear from prosecution in the future.

(b) Others where there is an illegal agreement to refrain from reporting or prosecution, but no duress: e.g. *Osbourne* (where both sides voluntarily drafted an agreement which provided for payments to victims in lieu of prosecution under health and safety legislation, therefore only illegality principles applied)*;* *Polymer Developments v Tilialo* (as discussed by the Court of Appeal, the defendant sought to pay back money his brother stole from his employer in return for an express promise not to initiate civil or criminal proceedings – there was no duress, but the agreement was illegal);[58] and *Jones v Merionethshire* (discussed above – no duress, but an implied term of the arrangement was that no prosecution would ensue).[59]

(c) Equally there are cases where both analyses may apply: e.g. *Williams v Bayly; Seear v Cohen; Banks*; *Haines; Pharmacy Care;* and *Hobbs*. All these cases except *Williams v Bayly* have been discussed above. They either did bear, or could have

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[56] *McClatchie v Haslam*, above n 49, at 692. [[ABOA page 175 at 176]]
[57] *Flower v Sadler* (1882) 9 QBD 83 at 87. [[RBOA page 176 at 180]]
[58] *Polymer Developments Group Ltd v Tilialo* [2002] 3 NZLR 258 (HC) at [77] [[ABOA page 356 at 371]], as cited in CA Judgment at [34]. [[COA 101.0156]]
[59] *Jones v Merionethshire Permanent Benefit Building Society,* above n 41. [[RBOA page 182]]

borne, analysis by way of both duress and illegal contract principles. The choice of approach is often dictated by the way in which the case is presented and/or the jurisprudential route which offers the most just outcome in the circumstances.

68. *Williams v Bayly* expressly conducts an analysis by both routes.[60] A father saved his son from prosecution by a bank from which the son had obtained money by forgery by taking on liability for the resulting debt. Lord Cransworth took an illegality approach. His Lordship discussed the pressure the father was under in the circumstances, but decided the case on the basis that the agreement to forbear from a prosecution was illegal and unenforceable, whether it was a result of pressure from the bankers, or proposed as a resolution by the father.[61] Lord Chelmsford took a duress approach to view the agreement as one which equity will set aside on the basis that the bank coerced the agreement of the father by unfair advantage and undue influence.[62] Lord Westbury identified both routes and found for the father on both grounds:[63]

> *There are two aspects of this case, or rather two points of view, in which it may be regarded. One of them is; was the Plaintiff a free and voluntary agent, or did he give the security and question under undue pressure exerted by the Defendants? That regards to the case with respect to the Plaintiff [father] alone. The second question in regards to the case with reference to the Defendants [bankers] alone. Was the transaction, taken independently of the question of pressure, an illegal one, as being contrary to the settled rules and principles of law?*

69. Having found duress in respect of the first aspect, Lord Westbury went on to consider whether the transaction, independent of pressure, was an illegal one:[64]

> *If men were permitted to trade upon the knowledge of a crime, and to convert their privity of that crime into an occasion of advantage, no doubt a great legal and a great moral offence would be committed …*
>
> *This is a transaction which must necessarily for the purposes of public utility, be stamped with invalidity…. if such transactions existed to any considerable*

[60] *Williams v Bayly* (1866) LR 1 HL 200. [[RBOA page 311]]
[61] *Williams v Bayly,* above n 60, at 212-213. [[RBOA page 323-324]]
[62] *Williams v Bayly,* above n 60, at 216. [[RBOA page 327]]
[63] *Williams v Bayly,* above n 60, at 216. [[RBOA page 327]]
[64] *Williams v Bayly,* above n 60, at 219 – 221. [[RBOA page 330 - 332]]

> *extent, would be found productive of great injury and mischief to the community.*

70. Commentators have recognised the close relationship between the concepts. Goff and Jones opine that, "*whether an agreement to stifle prosecution is illegal, and whether it is voidable for dress, shade into one another. In most cases where the courts have held the agreement to be illegal, they have also held there was duress.*"[65]

71. In New Zealand, the overlay of the statutory provisions regarding illegal contracts enables the comfortable co-existence of the two doctrines because the discretion as to relief removes the possibility of arbitrarily unjust outcomes. Sir William Young's article identifies without criticism "*a close relationship*" between the two "*analogous principles*" of duress and illegality where cases of threats of prosecution are concerned.[66]

72. As illustrated by the cases and commentary discussed above, the co-existence, and occasional overlap of duress and illegal contract principles does not appear to cause any practical or jurisprudential difficulty. There does not seem to be a principled reason to object to a situation where a contract may be voidable if one party is unfairly coerced to enter it, and also be illegal because of the nature of the deal so coerced.

73. Finally, the appellant submits that if a threat to report an alleged crime leading to a payment necessarily implies a term not to report into the resulting agreement, then all agreements induced by threats will be illegal and void in the same way. A duress analysis would be redundant. The coerced party will not then have the opportunity to elect to affirm the agreement, which undermines the principles of freedom to, and certainty of, contract.

74. For reasons already articulated, the point is moot in the circumstances of the present case: one cannot affirm a loan payment for a non-existent loan. But more generally also, the concern is overstated. It is

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65 *Goff and Jones*, above n 9 at [10-26]. [[RBOA page 533 at 547]]

66 W G G A Young "Duress and Threats of Lawful Action" (1980) 1 Canterbury L Rev 55 at 61. [[ABOA page 628 at 634]]

only in stifling of prosecution cases that the overlap exists, because threats of other kinds of harm do not, if implied as a term of the resulting coerced agreement, engage statutory illegal contract provisions. To explain:

(a) a threat of violence if an agreement is not executed is a duress case only – any related implied promise in the coerced agreement is a promise *not* to do violence, which is not an illegal promise;[67] equally

(b) a threat to reputation (e.g. by publication of misdeeds) may amount to duress, but a resulting promise not to damage reputation is not illegal; but

(c) a threat to report or prosecute may be duress, but the resulting promise not to report is also illegal because it constitutes a forbearance contrary to public policy.

75. So, it is only in cases where there is both a threat to report and an agreement to stifle prosecution that the concepts of contractual duress and illegal contracts overlap.

76. It is submitted that there is no fundamental issue of principle which compels consideration of duress cases as always and only duress cases.

D. Conclusion on illegal contract/duress issue

77. In this case no genuine debt or other reason for payment existed. The appellant procured the payments by blackmail: a threat to report unless payment was made. The proper legal responses to this situation are, either:

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[67] Most illegitimate threats which induce a contract do not, by their nature, become an illegal term of the resulting contract. For example, an otherwise legal agreement (say a sale of shares) coerced by a threat to kill is a duress case, not an illegal contract case; an ongoing promise not to kill in the contract resulting from the threat is not an illegal promise. Those were the facts in *Barton v Armstrong* [1975] All ER 465 (PC) [[RBOA page 148]].

(a) there is no contract, merely an extorted (involuntary) payment. The respondent can recover by an action in money had and received/unjust enrichment; or

(b) a finding that the "consideration" for the payments was a promise by the appellant not to report the respondent to the authorities: a void illegal contract pursuant to Subpart 5 of the CCLA, under which no property passed.

78. In either scenario, the funds obtained by the appellant must be returned to the respondent and no question of affirmation arises.

79. There is nothing in how the doctrines of duress and illegal contracts interact in New Zealand or overseas that ought to give rise to concern that any particular case must be one or the other, but not both. Ultimately the approach must be fact dependent, but in any event the potential overlap is confined to agreements to stifle prosecution cases. No case illustrates any injustice (especially in the New Zealand context) which arises from the potential for overlap of the two doctrines.

Affirmation issue: assuming a duress analysis, this is not a case of affirmation by silence

80. Assuming that the Deed was voidable for duress, not void for illegality, the appellant's case is (in summary) that, as found by the High Court, Mr Wu affirmed the Deed because he:

(a) took no steps between November 2018-March 2022 (when he commenced this litigation); and

(b) had other engagements with the appellant after the Deed was signed.

81. The respondent says that the Deed was not affirmed, because there was no unequivocal election by the respondent to affirm.

A. Law and policy of election/affirmation

82. The doctrine of election/affirmation arises in the law of contract whenever one party has a right to cancel, rescind, or treat a contract as void. Its essence is that, whether the choice arises from duress, fraud, repudiation or otherwise, the wronged party must at some point irrevocably choose to stick with the bargain, or not. As the authors of Burrows, Finn and Todd explain, affirmation "*rests on the underlying notion that an aggrieved person must elect between fundamentally inconsistent rights*."[68]

83. Because affirmation extinguishes the right to avoid, equivocal or indecisive conduct will not suffice; evidence of affirmation must be clear.[69]

84. Policy considerations underlying the doctrine of election include protection of the vulnerable party and commercial certainty: it is unfair to require one party to stand ready to perform, while the other makes up its mind whether it will continue to be bound by the contract.[70]

85. It is submitted the relevant policy considerations are not engaged on the facts of this case, because:

    (a) The Deed is a sham. No value of commercial certainty is engaged by sham agreements.

    (b) The real deal is not commercial or even mutual. It is extraction of payments under threat – blackmail. It is not reasonable for a party who knows an agreement was procured by coercion to assume it is immune from challenge or to act in reliance upon it.

    (c) Freedom of contract may be engaged by giving the wronged party a choice to affirm, or avoid. However, the argument here

[68] Stephen Todd and Matthew Barber *Burrows, Finn and Todd on the Law of Contract in New Zealand* (7th edition, LexisNexis, Wellington, 2022) at [18.3.2]. [[RBOA page 571 at 575]]
[69] *Burrows, Finn and Todd*, above n 68. [[RBOA page 571 at 575]]
[70] Rick Bigwood "Fine-Tuning Affirmation of a Contract by Election (Part 1)" [2010] NZ L Rev 37 at 40-44. [[ABOA page 448 at 451-455]]

is not that Mr Wu made a choice, it is about whether a choice should be imputed to him.

B. *Imputed election in duress cases*

86. An actual election would require that the wronged party knew the relevant facts and of their right to affirm (or not), and communicated their choice to the other party explicitly. This is not that situation, and there was no such communication. The appellant's argument is that an election to affirm must be "imputed"[71] from Mr Wu's conduct.

87. The test for an imputed, rather than actual, affirmation is fact specific and objective. It turns on whether, viewed in context, an "objective assessment of the party's actions" reveals a clear election to affirm.[72] That election may be expressed through words or conduct, but it must be inconsistent with any intention to avoid.[73]

88. Performance by the wronged party may be evidence of affirmation. Delay or inaction is also likely to be relevant, but delay alone is rarely enough.[74] Inaction as affirmation where the obligations under the contract have been performed is inherently equivocal.

89. *Mir Abdul Rehman v Mir Heena*[75] is a good illustration. A woman transferred a half-share in her flat to her partner under threat of violence. Her obligations under the deed of gift were complete upon execution. She took no immediate steps to set the deed aside and remained silent. The Hong Kong Court of Appeal held that her inaction did not amount to affirmation. "*Mere inaction on the part of a victim of duress*" it said, "*cannot necessarily be taken as an unequivocal affirmation of the contract. Much will depend on the nature of the contract and the obligations that arise to be performed under it*."[76]

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[71] As discussed at length by Rick Bigwood in "Fine-Tuning Affirmation of a Contract by Election (Part 2)" [2010] NZ L Rev 617 from 621. [[ABOA page 503 at 507]]
[72] *Burrows, Finn and Todd*, above n 68. [[RBOA page 571 at 575]]
[73] As Burrows, Finn and Todd observe, "to find that a contracting party has debarred himself or herself from cancelling is a final step, and the courts are unwilling to take it unless the evidence is clear". *Burrows, Finn and Todd*, above n 68. [[RBOA page 571 at 575]]
[74] *Burrows, Finn and Todd*, above n 68, at [18.3.2]: *"delay alone does not amount to affirmation, although delay in conjunction with other circumstances may sometimes do so."* [[RBOA page 571 at 575]]
[75] *Mir Abdul Rehman v Mir Heena* [2013] HKCA 144. [[RBOA page 134]]
[76] *Mir Abdul Rehman v Mir Heena,* above n 75, at [77]. [[RBOA page 134 at 144]]

90. Contrary to the appellant's submission, there is no requirement in New Zealand law that election be made "timeously," nor is there a rule as to how much delay is too much.[77] As the Court of Appeal noted, timeliness is "*more appropriately addressed by the limitation period*."[78] Whether a party's delay in exercising a right means they may objectively be taken to have elected not to exercise it, is fact specific, not subject to an arbitrary time period. The cases and texts relied on by the appellant are not authority that a delay, of any particular length, is enough. The comments in *Clough*,[79] in *Pharmacy Care*,[80] in *Morley*,[81] in *Haines*,[82] in *Foster*,[83] and in *Hobbs*[84] were obiter.

91. Further, the analysis in the duress cases tend to suggest that a delay coupled with other affirming conduct is usually required.

92. In the *Atlantic Baron*,[85] for example, the Court held "*One cannot dismiss this delay as of no significance, **although I would not consider it conclusive by itself***." (Emphasis added.) Affirmation was found on the basis of the delay and the plaintiff's "*overt acts*"[86] being the making of four payments, the final of which was expressed as being "'in full and final settlement,"[87] and accepted delivery, all without protest.[88] .

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[77] Delay is likely to be highly relevant to a defence of laches and acquiescence. But those are not at issue in this case.

[78] CA Judgment at [52] [[COA 101.0163]].

[79] *Clough v London and North Western Railway Co* [1861-73] All ER Rep 646 at 651. [[ABOA page 23 at 28]].

[80] *Pharmacy Care Systems Ltd v Attorney-General*, above n 39 at [87]. [[ABOA page 340 at 351]]. As noted in the CA Judgment at [52]. [[COA 101.0163]]

[81] *Morley (t/a Morley Estates) v Royal Bank of Scotland plc* [2021] EWCA Civ 338 at [54]. [[ABOA page 199 at 211]]

[82] *Haines v Carter*, above n 35. [[ABOA page 103 at 127]]

[83] *Foster v Phillips* HC Auckland CP2845/89, 5 September 1990. [[ABOA page 035 at 056]]

[84] *Hobbs v Gilbert,* above n 40 at [26]. [[ABOA page 133 at 164]]

[85] *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. [[ABOA page 219 at 232]]

[86] *The Atlantic Baron*, above n 85. [[ABOA page 219 at 233]]

[87] *The Atlantic Baron*, above n 85. [[ABOA page 219 at 225]]

[88] *The Atlantic Baron*, above n 85 [[ABOA page 219 at 233]]. Notably, this is the case relied on in the texts referred to by the appellant at paragraph 98 of his submissions [[AS at p 26]]: Nathan Tamblyn *The Law of Duress and Necessity* (Routledge, Abingdon, 2018) at 22, footnote 90 [[ABOA page 599 at 618]], Nelson Enonchong, *Duress, Undue Influence and Unconscionable Dealing* (4th ed, Sweet & Maxwell, London, 2023) at [29-005], footnote 21 [[ABOA page 578 at 582]], and Paul Vout (ed) *Unconscionable Conduct: The Laws of Australia* (2nd ed, Thomson Reuters, Sydney, 2009), which is also relied on, says in relation to delay: "*Delay without more is not a bar to permanent relief unless a statutory limitation period applies*…" at [35.8.1240] [[ABOA page 620 at 626]].

93. In *Hobbs*, the judgment explicitly refers to conduct that was consistent with affirmation, in addition to the delay.[89] This conduct included taking advantage of the other party's performance of the agreement.[90]

94. In *Haines*, the Court found "*Mr Haines, by his insistence on performance of those aspects of the agreement of 11 March 1999 which suited him while, at the same time, declining to comply with his financial obligations under that agreement to Ms Carter, must be treated as having affirmed the contract*."[91]

95. In *Morley*,[92] a property developer sought to set aside a debt restructuring agreement with his bank for economic duress. The trial judge found no duress and held that the developer had in any case affirmed the agreement through his continued dealings with the bank, and correspondence with other banks in which he described the agreement as a "*consensual deal*".[93]

96. In *Foster*, the conduct found to be affirming included that "*the Defendant affirmed the settlement by ultimately executing the mortgage…. He has also made substantial payments totalling $5.5 million, which must also amount to affirmation and acquiescence*."[94]

C. Relevant facts and context: commencement of delay and other potentially relevant conduct

97. Mr Wu's obligations under the Deed were complete on the transfer of the cash and property. The Court of Appeal correctly held in the present case that affirmation may only arise once the duress is no longer operative.[95] The High Court found duress was still operative

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89 *Hobbs v Gilbert,* above n 40 at [115]. [[ABOA page 133 at 165-166]]
90 *Hobbs v Gilbert,* above n 40 at 111(g). [[ABOA page 133 at 164]].
91 *Haines v Carter*, above n 35, at [19]. [[ABOA page 103 at 129]]
92 *Morley (t/a Morley Estates) v Royal Bank of Scotland plc*, above n 81. [[ABOA page 199]]
93 *Morley (t/a Morley Estates) v Royal Bank of Scotland plc*, above n 81, at [56]. [[ABOA page 199 at 211-212]]
94 *Foster v Phillips*, above n 83, at 23. [[ABOA page 035 at 057]]
95 CA Judgment at [52] [[COA 101.0163]] citing *Haines v Carter*, above n 35, at [116] [[ABOA page 103 at 127]]. This is not disputed. See appellant's submission at [29], [52], [53] and [98] [[AS at pp 8, 15, and 26]]. The respondent does not agree that this rule is related to capacity. However, to the extent the autonomy and freedom of contract of the wronged party is relevant to election (see the appellant's submission at [86] [[AS at p 23]]), it is engaged only after the duress has ceased: it cannot be a free choice otherwise.

when the last transfer was made on 28 November 2018.[96] Conduct before 28 November 2018 is therefore irrelevant.[97]

98. Neither the High Court nor the Court of Appeal found that the duress ended on any particular date. The High Court found that "*the threats and intimidation by Jinxing and Jackie lost their potency*" over time[98] rather than immediately following the completion of the transfers in November 2018. The Court of Appeal considered it likely that Mr Wu was in fear even when he met with Mr Liu in 2019.[99] It follows that the Court should treat even post-November 2018 conduct with caution.

99. There is nothing to suggest that Mr Liu was prejudiced by Mr Wu not taking immediate steps to void the Deed, or still less that Mr Wu was aware of any prejudice.

100. Other than delay, the only other potentially relevant conduct is:

(a) On 4 June 2019, Mr Liu asked to meet Mr Wu,[100] and he agreed. They met on 6 June and did not discuss anything related to the Deed.

(b) Between 11 June 2019 and 9 July 2019 there were sporadic WeChat messages, in which Mr Wu asked Mr Liu to discuss "Xiaobai" and "Help Xiaobai get his residency." This was about the immigration status of a third party.[101] The Deed was not mentioned.

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[96] *"I accept that Mr Wu and Crystal complied with their obligations under the Deed in November 2018 because Jinxing was continuing to apply pressure on them to do so at that time":* HC Judgment at [83] [[COA 101.00121]].

[97] This means the period between signing the Deed and the payments made is irrelevant. To the extent the relationship between Mr Liu and Mr Wu before the blackmail may be material to context, it is not conceded they were "friends" (Appellant's submission at [8] [[AS at p 2]]. Mr Wu's evidence was "Our relationship was commonplace and not close." [[COA 201.0001]]

[98] HC Judgment at [87] [[COA 101.0092]].

[99] CA Judgment at [53]. [[COA 101.0164]]

[100] This was not, as the Appellant submits "at Mr Wu's insistence" (the appellant's submission at [10] [[AS at p 2]] but at Mr Liu's invitation. This is shown in the translated WeChat messages [[COA 301.1700]] (Mr Liu's messages are in white on the left). Mr Liu's evidence from his brief was that he arranged the meeting: [[COA 301.1659]].

[101] Mr Wu said under re-examination it was about immigration: "That is because they were helping other people to apply for the permanent residency, they received the money and they didn't do it for them, I then go and told them." [[COA 201.0191]]

D. Application to the facts: no clear affirmation apparent

101. The nature of the wrongdoing in this case – blackmail – calls for particular caution: a blackmailer is contending that his victim has, freely and consciously after the threats have lost their potency, agreed to be extorted for $1.2M in cash and property.

102. The more unlikely the event, the stronger the evidence must be before the court can be satisfied it occurred.[102] From the perspective of the victim, silence may not indicate acceptance of the contract by which they were blackmailed, but because they are intimidated, ashamed, or lack means.[103] A victim's silence or inaction in the aftermath of coercion should not readily be taken as proof of affirmation, as the risk of misinterpretation is high.

103. Conversely, from the blackmailer's point of view, the principle that no one should profit from their own wrong requires a cautious approach to affirmation that permits that profit.

104. The payments were made by Mr Wu at a time when he was still under the influence of the duress. There were no ongoing obligations on Mr Wu under the Deed. Mr Wu's contact with Mr Liu in 2019 is not evidence of a "clear election." Mr Liu initiated the contact. They did not discuss the Deed. The respondent submits that the Court of Appeal was correct that, given the impact of the threat, Mr Wu remained fearful of Mr Liu during this period.[104] But even if that is not the case, it is very far short of conduct that, objectively, is compatible with a clear election to affirm the contract.

E. Conclusion on affirmation issue

105. That a person who was extorted would decide to confirm they are bound by the blackmail deal (or to pay for a loan that never happened) is highly improbable. Even if the inaction in this case is somewhat

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[102] *Z v Dental Complaints Assessment Committee* [2008] NZSC 55; [2009] 1 NZLR 1 at [100]. [[RBOA page 082 at 120]

[103] Mr Wu gave evidence that his inaction was due to *"an amalgam of complex circumstances"*, including the lingering effects of duress and his inability to fund High Court proceedings until 2022. HC Judgment at [87] [[COA 101.0092]].

[104] CA Judgment at [53]. [[COA 101.0164]]

longer than the examples put forward by the appellant, it should not be confused for affirmation in circumstances that to so find would allow affirmation of an agreement procured by blackmail.

106. It is highly relevant that there was nothing more for Mr Wu to do under the purported Deed after the payments in November 2018. His relevant inaction begins only once the effect of the duress has ended, which is not clear, and in any event nothing about the contact in 2019 can objectively and reasonably be construed as unequivocal affirmation of the Deed.

DATED at Auckland this 29th day of June 2026

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