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IN THE SUPREME COURT OF NEW ZEALAND — SC 166/2025

I TE KŌTI MANA NUI O AOTEAROA — [2026] NZSC Trans 16

BETWEEN **JINXING LIU**
Appellant

AND **HUA WU (AKA DANNY WU)**
Respondent

Hearing: 06 August 2026

Coram: Winkelmann CJ
Ellen France J
Williams J
Kós J
Campbell J

Appearances: A T Grant and D E Archibald for the Appellant
S W B Foote KC, A E Simkiss and F Xie for the Respondent

CIVIL APPEAL

MR GRANT:

Tēnā koutou, e ngā Kaiwhakawā. May it please your Honours, Grant with Ms Archibald for the appellant.

WINKELMANN CJ:

Tēnā kōrua.

MR FOOTE KC:

E ngā Kaiwhakawā, tēnā koutou. Ko Foote tōku ingoa. Kei kōnei mātou ko Simkiss, ko Xie mō te kaiurupare. Counsel's name is Foote, may it please the Court. I appear with Ms Simkiss and Ms Xie for the respondent.

WINKELMANN CJ:

Tēnā koutou. Mr Grant.

MR GRANT:

Thank you, your Honour. Just to deal with a couple of matters of housekeeping to begin with. The appellant filed an outline of oral argument last night. I hope that is received.

WINKELMANN CJ:

We have that, yes.

MR GRANT:

And the other point just in terms of timing, Mr Foote and I have had a discussion. We don't think we'll need the whole day, obviously subject to how things go. I am intending to go through probably until about midday and then Mr Foote will continue through lunch and thereafter.

Your Honours, at its core this case is about the legal consequences that flow from one party applying illegitimate pressure on another in order to procure them to sign a contract. The question arises because the High Court found that the appellant, Mr Liu, applied such pressure on the respondent, Mr Wu, to procure him to enter into a deed in 2018 and to perform is by transferring property to the value of $1.2 million.

It comes before you with the Courts below having diverged on the proper approach that should be taken in response to those facts. In the High Court Justice Lang found that that made the Deed that was entered into and performed voidable at the option of Mr Wu. His Honour then applied the principles of contractual duress and restitution to fashion a remedy.

His Honour then asked what election had been made by Mr Wu by his conduct after he had performed the deed. He assessed the delay that Mr Wu – I'll take your Honours through – the delay that Mr Wu experienced and his conduct in the years that followed in determining that the Deed had been affirmed and therefore that he was disentitled to relief.

The Court of Appeal took a vastly different approach. It determined that the presence of illegitimate pressure in the formation of the Deed rendered the Deed itself illegal. That meant that it was not voidable at Mr Wu's election, that the principles of election and affirmation therefore did not arise and that the Deed was void ab initio and therefore unenforceable. The Court then determined that the property transferred must be transferred back on that basis.

The appellant's case is essentially that the High Court was right and that the Court of Appeal was wrong and that the appeal should be allowed in this Court on that basis.

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I don't propose to traverse in considerable detail the underlying facts, but what I will do is take your Honours to what I consider to be the key factual findings that were made in the High Court in order to inform which direction this case ought to go. I want to start, if I could, at paragraph 68 of the High Court's judgment, which is at 101.0114. Now this is, and I hope it's up on your Honours' screens as well, this is where the analysis in the High Court of what exactly happened to procure this Deed or to induce this Deed and its performance, what exactly happened to make that occur. Your Honours will see there that his Honour says at paragraph 68, that Jinxing, and I should say at the outset and your Honours may have picked this up, the reference to "Jackie" is the reference to the appellant's son who was sort of involved in the behaviour but he's not a party here. He was in the High Court. The Court accepts that "… Jinxing … [cannot] be shown to have made any overt threats against Mr Wu and Crystal," is his ex-wife, "during the negotiations." He then analyses the communications and what, in his Honour's –

KÓS J:
May I just ask one question?

MR GRANT:
Yes.

KÓS J:
The consensual backdrop to this is that a sum of 400,000 has already been paid which is not in issue?

MR GRANT:
Yes.

KÓS J:
But that seems to have been compensatory for defalcation by Mr Wu. There's no suggestion, is there, that the 1.2 million that was then paid was compensatory?

MR GRANT:
No Sir, that's not and I think it's important as I'll come to that Justice Lang did not make a finding that there had in fact been theft for which anything was recompensed, that wasn't part of the High Court judgment. It was alleged theft that was denied and that sort of feeds into the analysis of what exactly the threat was, but no, in short, the 400,000 was separate to what we're talking about here.

KÓS J:

It's pretty hard not to draw an inference of defalcation when the point's not been put in issue.

MR GRANT:

Well, yes.

KÓS J:

Well, the payment hasn't been in issue when the other payment has been.

MR GRANT:

Well, I mean that's an interesting point in itself Sir. Originally the statement of claim in the High Court did plead for return of that $400,000 as well. That was abandoned on the eve of trial, well not on the eve of trial, but when the evidence came in which I agree, strongly suggested that there had, in fact, been theft, but I think it's important for present purposes to understand that that's not part of the High Court's factual matrix that there had, in fact, been a theft. That was just something that was alleged and denied.

WINKELMANN CJ:

Well you didn't argue that this was repayment of money stolen because that wasn't your client's evidence?

MR GRANT:

No, indeed, yes, no that was a sort of a separate but obviously relevant fact or allegation. Then just to return to 101.0114 at paragraph 69, his Honour then says that it's not possible to ascertain with any certainty what the threat actually was, what Jinxing told Mr Wu that he would do if the demand wasn't met, and I just highlight that at the outset because of course that's relevant to the question of whether the parties entered into an illegal bargain. His Honour was not even able to ascertain with certainty what exactly the threat was.

His Honour goes on to say that there was an allegation of a threat of physical violence. His Honour was not prepared to accept that that threat had been

made and then at paragraph 70, if we just scroll down on 101.0115, the Court says, effectively I can't be certain what exactly the threat was but: "The pressure … must nevertheless have been very significant to [have caused] Mr Wu … to part with assets …" So his Honour is making a finding that a threat occurred but he's not willing to say on the evidence exactly what it was. He says: "In all likelihood it involved … threats to report the thefts … to the police or immigration …" and then his Honour concludes that –
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KÓS J:
Isn't that a balance of probabilities finding?

MR GRANT:
Well, yes in the sense that it's sufficient to find that a threat occurred of that nature on the balance of probabilities but, again, the reason I am highlighting that language, Sir, is because when later on we talk about whether a bargain was entered into between the parties to forestall reporting prosecution, as I will come to for this and various other reasons, there simply isn't enough evidence or enough in the factual findings to determine that the parties entered into a bargain whereby, you know, I will not do this if you enter into the Deed, rather than, I will do this if you don't, which is really central to the distinction that I will draw between a threat and duress, rather than a bargain made illegally.

Then down over the page his Honour concludes that: "It follows that I am satisfied that Mr Wu … entered into the Deed as a result of the threats made by … Jinxing," after he discovered the theft of money from Timber King.

Then down 77, over the page, over at the page that follows, this is I suppose the crux of the finding which is that his Honour was satisfied that the Deed was entered into because of pressure applied by Jinxing. His Honour finds that: "The pressure was plainly improper because the threats amounts to blackmail, which is a criminal offence," and so on.

Then at 78: "It follows that I am satisfied Mr Wu … entered into the Deed under duress as that concept is understood in the authorities." So that is the backbone, I suppose, of his Honour's conclusion that, really, this is a duress case, and as his Honour then continues: "However, this meant that the Deed was voidable and not void. To date they ..." and interpose Mr Wu "... have never, formally at least, declared that they consider the Deed to be void or applied for avoidance of it as the Court of Appeal suggested was necessary in ... *Pharmacy Care*," which obviously I will deal with *Pharmacy Care Systems Ltd v Attorney-General* CA198/03, 16 August 2004 in more detail in a moment.

The Court then says the Deed therefore remains on foot and binding on Mr Wu and this would ordinarily preclude a claim based on unjust enrichment.

His Honour then down at 79 and following, that is over at 101.0118, his Honour then found that effectively by conduct in issuing the proceedings in March 2022 Mr Wu had indicated that he, or he desired to avoid the Deed that way. So it is effectively a finding of conduct which no issue is obviously taken on this appeal that that can be a means of signalling avoidance. That is abundantly clear. But, I think important for present purposes is that his Honour found that there was no avoidance before March 2022, well, there was no avoidance between November 2018 when the obligations under the Deed were fully completed, and March 2022 when, by his conduct in issuing the proceeding, Mr Wu indicated a desire to avoid the Deed.

Then if we go down to 79 and pass, just a little bit up actually please, end of 79: "This may be sufficient to prevent his claim being dismissed on a technical basis." But then his Honour signals that an affirmation analysis was engaged when he says: "It is not the end of the inquiry, however, because the delay that occurred between November 2018 and March 2022 brings into play principles relating to affirmation of the Deed."

If we then scroll please at 101.0118, his Honour then undertakes a comprehensive analysis I would suggest of the duress and affirmation authorities. Your Honours will be familiar with the cases but I will address one or two of them later on, *Haines v Carter* [2001] 2 NZLR 167 (CA) is probably the original, and then *Pharmacy Care Systems Ltd v Attorney-General* (2004) 2 NZCCLR 187 (CA) is probably considered the leading case, and then later on there's the authorities in *McIntyre v Nemesis DBK Ltd* [2009] NZCA 329, [2010] 1 NZLR 463 and elsewhere, those are all Court of Appeal authorities, and his Honour marshals those authorities for the proposition that delay may amount to affirmation if that delay is not reasonable after the duress has ceased.

Then down on the page that follows he then analyses –
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KÓS J:
While you are 77, just go back to that for a second, I think there are about four propositions I've marked on that paragraph, but had Justice Lang also found that Jinxing promised not to make a complaint as part of the – on your argument there's a bargain here.

MR GRANT:
There's not an illegal – there's no such promise that I think your Honour was about to –

KÓS J:
Yes. If he had made that promise then your case would be in ruins, wouldn't it, I think?

MR GRANT:
I think that's right, Sir, and that's what – the Court of Appeal found that as a fact and, you know, as I go through this what I am inviting the Court to consider is that there's nothing in here about that illegal promise being made and it's, as I'll come to, a leap that the Court of Appeal has made to say, well, because there were threats of a certain thing being done, it's then a leap to say that there was also a bargain implied or expressed to say if you accede to my threat I'll leave you alone, basically.

KÓS J:

I suppose we have to inquire on the face of that then, having paid $400,000 already, why Mr Wu would then pay another 1.2 million.

MR GRANT:

I think the answer to that, respectfully, Sir, is that was the inquiry for Justice Lang and Justice Lang evidently found that the Deed remained on foot and binding without that illegal quid pro quo and that was the inquiry. He said, well, the Deed remains on foot and binding. He didn't go into why exactly the money was paid and I would suggest he didn't necessarily need to.

KÓS J:

If Mr Wu says it's not a defalcation and he's paid $400,000 already and this is a bargain involving an exchange of promises, help me to understand what the $1.2 million is for, what's the consideration that's been given in this bargain.

MR GRANT:

I mean, Sir, it's not found on the facts. There's no factual finding as to it. His Honour simply came to the view, as these paragraphs demonstrate, that there was a payment that was made and that that created – well, sorry, there was a deed that was signed that created a binding obligation. Performance was made thereunder, and then the remedy in that situation must be a contractual, well, a duress and therefore restitutionary remedy subject to affirmation.

KÓS J:

So you're relying on the mystery of the consideration, essentially. I mean he's bound to ask. There's an elephant floating around in the room up here as to what the 1.2 million was paid for.

MR GRANT:

Well, of course. I mean, I'm not trying to sort of escape that question.

KÓS J:

Yes.

MR GRANT:

But the reality is that these are the factual findings that are before the Court and, in my submission, it’s not for this Court or for the Court of Appeal to then go behind what those factual findings were to make further factual findings. Justice Lang heard the evidence over the course of a six-day trial and evidently determined that this was a valid, although voidable, deed that remained on foot and binding on this individual, and it’s not as if, of course, he didn’t have a remedy for that. The remedy was that the contract was voidable, and there’s some suggestion perhaps that that remedy is not a good one because, of course, he lost in the High Court, but the reality is that that deal having been done or that transaction or that payment having been made, that remedy was always available to him. That’s the remedy that the law gives. So in some ways, and I know it’s not necessarily a satisfactory answer, but the fact that his Honour did not feel it necessary to go into exactly what those facts were and what the consideration or otherwise was, it’s not necessary for this Court to do so, in my submission.

KÓS J:

I suppose the question is whether Justice Lang erred in not actually fully finding the facts.

MR GRANT:

Sorry, say that again, Sir?

KÓS J:

Whether Justice Lang erred in not fully finding the facts, but you’ll explore that point.

MR GRANT:

Well, indeed, and I suppose what I’d say on that is that the Court of Appeal, actually by the respondent, was invited to effectively reopen some of those factual findings and it declined to do so. There’s no suggestion, I would submit, in anything the respondent said, that the facts should be re-examined.

The points of leave on which leave has been granted are, first of all, was this an illegal contract, second of all, whether it was affirmed, and I would suggest that that provides a satisfactory basis for the Court to decide the case, because, of course, there is an option whereby – and, of course, I'm inviting your Honours not to do this – but where your Honours say, well, this hasn't been affirmed, it is still voidable, and that's the route we're going to go down. This is a contractual duress case, but we're not prepared to find affirmation and therefore he recovers that way. There's no need, in my submission, to go any further into the facts to determine whether there was another bargain and what that bargain was. That's simply not necessary and I would respectfully suggest not really open to this Court on a second appeal.
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WINKELMANN CJ:
So, Mr Grant, can I just ask you to clarify, so at paragraph 77, it says: "The pressure was," the Judge found: "The pressure was plainly improper because the threats amounted to blackmail, which is a criminal offence."

MR GRANT:
Yes.

WINKELMANN CJ:
So on your case, what is that threat that is being made?

MR GRANT:
Well, that was the paragraphs before your Honour, where the Court said: "In all likelihood it involved … threats to report …" to the IRD or to the police for alleged stealing as against his employer, Timber King.

WINKELMANN CJ:
Unless he entered into this Deed?

MR GRANT:

Yes, so that's where the pressure, you do this or I will, is, and I don't think there's any dispute that that's blackmail, that is blackmail.

WINKELMANN CJ:

And you say what the Court of Appeal found which was not found by Justice Lang was that there was flying the other way a promise that if you enter into this Deed, we won't go to the police.

MR GRANT:

Yes, exactly.

WINKELMANN CJ:

And make the payments, we won't go to the police.

MR GRANT:

Exactly and you know, there's some suggestion in the respondent's case that that's sort of dancing, a distinction without a difference or dancing on the head of a pin, but I think it demonstrates quite sharply as I will come to in a bit more detail the difference between duress which is to do with the competence and the quality of assent of a party and illegality which is really dealing with the terms of the agreement that results on the basis that both parties had the capacity to enter into them.

ELLEN FRANCE J:

So at some point will you explain why you say the Court of Appeal couldn't make the finding that it did?

MR GRANT:

Yes, your Honour.

ELLEN FRANCE J:

That is, there has to be some explanation in they look at the evidence in relation to that?

MR GRANT:

Of course and my intention just so your Honour is aware is to orientate with the High Court judgment and flip to the Court of Appeal judgment and say why they're so different and indeed, that really is, well paragraph 78 talks about the "voidable and not void". I'll come to the law in a bit more detail. Then down at paragraph 79.

CAMPBELL J:

Sorry Mr Grant, while we're on the paragraph 78, one of the sentences you've emphasised is the penultimate one: "The Deed therefore remains on foot and binding …" Can you help me understand how, which is as much as anything a legal conclusion, can you help me understand how that statement or finding squares with his Honour's earlier finding that the loan that is recorded in the Deed did not actually take place?

MR GRANT:

Yes, well, first of all that's not, that's obviously no longer in dispute that that is the case. But, in my submission, the way that those two propositions square is that the fact of the loan was merely an explanation offered by the appellant, by Mr Liu, for why this money was paid. His Honour rejected it. His Honour said that that's not really a part of this contract but his Honour then left open that well, we have in front of us a Deed that requires an individual to pay money to another individual and even leaving aside the loan part, which was only really the explanation for the payment, that document still "remains on foot and binding" so it's the fact of the loan doesn't wipe out the Deed entirely, it just removes the explanation that the appellant had advanced for why the money was paid.

WINKELMANN CJ:

Can you take us to the finding of "sham"?

MR GRANT:

Well, there is no finding of "sham" in the High Court judgment.

WINKELMANN CJ:

So, the Judge uses the word “sham”, doesn’t he or is that in my imagination?

MR GRANT:

He doesn’t refer to the contract being a sham, that’s something the Court of Appeal –

WINKELMANN CJ:

But does he use the word “sham”?

MR GRANT:

Not to my recollection, no and that was obviously a point –

CAMPBELL J:

No.

KÓS J:

He does call it a “fictitious loan”.

MR GRANT:

But I suppose that’s point, is that he says it’s –

WINKELMANN CJ:

Can you take us to that page?

MR GRANT:

Yes, indeed.

KÓS J:

Paragraph 65.

WINKELMANN CJ:

Paragraph 65.

MR GRANT:

Paragraph 65, please. The tech has been working well so far, I hope that continues. There is the finding –

KÓS J:

And paragraph 64.

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MR GRANT:

Yes, so sham, I mean "sham" in my submission was a slightly unhelpful word that the Court of Appeal introduced, and they referred to the entire agreement being a sham or "… the Deed being a sham". As I've indicated to Justice Campbell, the finding was that the loan, as in the justification for the payment, was not true. I mean that was a factual contest that took up a lot of the trial as to whether this loan existed or not. The High Court said it didn't but that's, in my submission, a difference between saying that the Deed itself is a sham and therefore invalid. His Honour was clearly able to square the loan explanation as being false with the fact that the Deed still required payment and payment was still made, and therefore it was on foot and binding, subject to a voidability analysis which he then undertook.

WINKELMANN CJ:

So, your point is that the Deed wasn't a sham because it was intended to take effect in accordance with the terms of its content and the loan was just background to it.

MR GRANT:

Indeed. It was the explanation offered, and obviously, you know, again I'm not going to shy away from the fact that that's a finding of some relevance but it doesn't – as I think your Honour has pointed out, the fact that at paragraph 78 his Honour then says, well that doesn't detract from the underlying force of the Deed, indicates that his Honour did not think that the entire deed was invalid merely because the explanation – he didn't believe the explanation.

CAMPBELL J:

So, on that basis, what's the bargain that you say Mr Wu affirmed?

MR GRANT:

Well he affirmed the payment of the money under the Deed, Sir. I mean on the High Court's findings that's about as far as I think I can take it.

WILLIAMS J:

Your point is really the Judge chose not to go there?

MR GRANT:

Yes.

WILLIAMS J:

And that was a judgement call on the basis of the evidence?

MR GRANT:

Yes, yes.

WILLIAMS J:

He was not prepared to take the next step?

MR GRANT:

Yes.

WILLIAMS J:

He didn't think the evidence got him there?

MR GRANT:

And he didn't really need to, Sir, because as I say there was a voidability analysis open to him. So yes indeed, and I appreciate that there's a certain unsatisfactoriness about that but that is the findings that were made by the High Court and, in my submission, it's not appropriate therefore for an appellate court having not seen that evidence to fill in the gaps or fill in the vacuum factually.

WINKELMANN CJ:

So your argument, it's a deed and we don't have to go thinking that there's something flying back the other way? It's a deed setting out obligations.

MR GRANT:

That's right.

WILLIAMS J:

This must hang on the idea that the gap is intentional, not an error.

MR GRANT:

Yes, and again I suppose the best I can offer on that is this is a judgment where his Honour very carefully went through the evidence and was not willing to make a finding that was – would have – I mean I can't say whether it was on his mind or not really but, you know, the judgment is the judgment and the facts are as he found them, and again it's not as if Mr Wu was left without a remedy, that was, I would say, certainly deliberate on Justice Lang's part. He evidently considered that there was a remedy available because he found that there were threats that made the Deed, whatever its consideration, voidable, and that was the proper analysis for him to undertake.

KÓS J:

In fairness to Justice Lang –

MR GRANT:

Yes, I feel like I'm being a little unfair to Justice Lang, I don't mean to.

KÓS J:

Well, I think we're probably being even more unfair, but so in fairness to him, it wasn't argued on a legality basis in the High Court –

MR GRANT:

No.

KÓS J:

– it was argued on a duress basis.

MR GRANT:

No.

KÓS J:

What I want to ask you is whether illegality is outside the scope of pleading? It's a pretty bare restitutionary claim.

MR GRANT:

Yes, well, yes.

KÓS J:

We call – unjust enrichment, say, you know, bit of an amorphous pleading.

MR GRANT:

Yes, well I mean the answer to that, your Honour will be aware this was argued in the Court of Appeal and the pleadings were described as, I think, sparse, in the Court of Appeal and –

KÓS J:

Well they were sparse in one sense and all-encompassing in another.

MR GRANT:

Well that's right, which left us in a slight sort of void in terms of what actually was being argued. Because I mean your Honour would be alive to the fact that pleading unjust enrichment, and this was something that was grappled with at the trial and I think appears in the judgment, pleading unjust enrichment is not a helpful, in some ways, thing to plead because you need to plead what the underlying cause of action is that creates the unjust enrichment and the Court of Appeal found that that could include illegality – my submission there and my submission here is, as you'll see in my submission, they're two distinct doctrines that respond to two distinct situations.

KÓS J:

Duress and illegality?

MR GRANT:

Yes, I mean illegality, and perhaps I'll dive into it now that –

KÓS J:

Well just the pleading point first?

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MR GRANT:

Yes, well, the pleading point is that no, illegality was certainly not pleaded. I mean, obviously, it doesn't appear expressly in the pleading and at all times, the – and in fact we can go to the statement of claim if that's helpful and the unjust enrichment pleading. So this is the unjust enrichment pleading and you'll see nothing, in my submission, in the nature of an unlawful bargain is even really gone near. It's just that a transfer was made that was unjust, well rather: "The first defendant," who is the appellant here, "has been enriched by the receipt of a benefit," and, I mean, I think it's important, "namely the receipts and transfers from the plaintiff's compliance." That is compliance with signing the Deed and performing the terms of it. Now, in my submission, that's the language of duress, that's complying with threats that are made to induce a bargain. That's not the language of, for example, agreeing to forestall a prosecution in return for consideration, which is obviously what illegality would be.

CAMPBELL J:

Just pausing there Mr Grant. The document that's shown is the original statement of claim not the amended version.

MR GRANT:

I suppose I can assure the Court that the updated one was the same on this point, but perhaps for completeness let's go to that as well, 101.0027.

KÓS J:

101.0038.

MR GRANT:

Yes. Mr Foote was trying to be helpful, but I think led us to the wrong page, but we're now there. So that's the updated pleading.

Again, you'll see that the language is very much enriched by a benefit that has been procured by compliance. Now that is, in my submission, again the language of contractual duress, that he has been put under pressure to enter into a bargain and that has unjustly enriched the first defendant.

WINKELMANN CJ:

The Court of Appeal said that this was wide enough to encompass illegality.

MR GRANT:

Yes.

WINKELMANN CJ:

Illegality is not actually one of the forms of action that are usually encompassed under unjust enrichment, is it, because it's a vitiating factor?

MR GRANT:

No, indeed, your Honour. Well, it's a statutory remedy that's completely separate from the common law concept of duress.

KÓS J:

Well, that's not pleaded either.

MR GRANT:

No, well, I mean, his Honour, you know, I think fairly converted unjust enrichment broadly into a duress claim because, of course, duress is one of the ways you can –

KÓS J:
Well, that's what was argued.

MR GRANT:
Yes, but I mean, it's really not, it's not, it's sort of pleaded in the factual sense but it's, you know, it doesn't say, cause of action: duress, for example, which wouldn't have been appropriate.

KÓS J:
Well it's not a cause of action.

WINKELMANN CJ:
It's an action for money had and received, isn't it?

MR GRANT:
Well, indeed, yes, sorry, to be more accurate. Yes, it's money had and received on the basis of duress and unjust enrichment is the consequence that follows.

WINKELMANN CJ:
The question is, was it a vitiating factor.

MR GRANT:
Yes.

WINKELMANN CJ:
It was proceeded with in the High Court on the basis it was duress, which is a voidable contract, and then the Court of Appeal dealt with it on the basis that the vitiating factor was illegality, which avoids it.

MR GRANT:
Yes, ab initio without the parties having any say in it and could we then go to what the Court of Appeal actually said, which is at paragraph 32 of the judgment. It's at the bottom of the page. Now it's at paragraph 32: "[The Court had] little hesitation in finding that the true agreement was an illegal agreement." Then I just want to pause on the next few sentences because I think they reveal

the first error. "As the Judge noted, blackmail is a criminal offence." There's no dispute about that. "It is prohibited by … the Crimes Act …" No dispute about that. Then the Court says and, in my submission, wrongly: "On that basis alone this was plainly an illegal contract." Now, in my submission, what that is effectively saying is that the circumstances of the formation, as in the pressure that was put on Mr Wu, infects the resulting agreement just by virtue of the conduct.
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Now it's conflating, in my submission, the conduct that creates the pressure with the resulting terms itself, and so is the first example, I would suggest, of the Court of Appeal basically taking that leap away from inquiry into the behaviour of the parties and into what that behaviour resulted in.

Then at the sentence starting –

KÓS J:
Can I – lots of people have dealt with this and I have in practice where you have a defalcating employee and you know that the settlement agreement that you establish can provide for compensation. You're very careful to ensure the consideration doesn't go beyond compensation and you know that you steer away from any kind of promise as to what will be done. I mean otherwise what's to be done? It's not necessarily the case that anyone wants to report the employee but obviously the employer wants their money back.

MR GRANT:
Well, I think –

KÓS J:
So it has to be possible to settle an issue like that.

MR GRANT:
I agree. I mean –

KÓS J:

The question is how far you go within the scope of the agreement.

MR GRANT:

Yes.

KÓS J:

If the consideration is excessive or if there's a promise, express promise, or there's an implied promise because the consideration is excessive you're in trouble.

MR GRANT:

Right, indeed. I mean all these cases I think sort of demonstrate that point, your Honour. *Pharmacy Care* is a good example where a government agency basically says we've found evidence that you have been overcharging and engaging in illegal behaviour, this health company, this pharmaceutical company, enter into this settlement agreement and pay us $80,000 or we're going to the cops, basically, and I'll come to *Pharmacy Care* in a bit more detail because I think it is important, but as a snapshot of that being the leading case. There's no suggestion in that case that that converts itself to an illegal bargain. That is simply the Court saying, well, that is undue pressure, and it may well be that the result of that contract means that in that case the government agency does not pursue criminal responsibility against the provider. But that's a very different question from it being a term either implied or express of the agreement. That's just a result.

KÓS J:

Well, the problem is "or we'll go to the cops". As soon as you say those words you're in trouble.

MR GRANT:

Well, no, well, that's blackmail, that's certainly blackmail.

KÓS J:
Correct.

MR GRANT:
But that's – and again there's a suggestion in the respondent's submission that it's dancing on the head of a pin, but it isn't because "or I will do something" is different from saying "if you accede, I will not do something". That's an important distinction. It may well be that those two are very close and can overlap, but there's no agreement in the first case where you say do this or I will, but if you accede I am not going to. I know that's quite a few …

KÓS J:
Pretty dangerous to use the second expression. It's fatal to use the first. Or I'll go to the cops. If you pay I won't go to the cops.

MR GRANT:
The second one is certainly an illegal bargain and that's what the Court of Appeal found has happened here. But, as I've just taken you through, that's not what Justice Lang – Justice Lang didn't go that far to say, well, the payment was in satisfaction of, you know, not – well, was in satisfaction of an obligat – well, perhaps, you know, the right he assumed was that Mr Liu would not go to the police or the Inland Revenue. That wasn't suggested.

WINKELMANN CJ:
The difficulty you have though, and perhaps this is also not a difficulty, is that the whole – the evidence is extremely un – confused about what people were doing and no one's narrative is particularly clear, but your client's narrative about what was actually going on was completely rejected. So I suppose you can say that's why Justice Lang drove the judgment bus down this narrow highway leaving a factual uncertainty. Your point is it was a deliberate finding, not just an omission on his part?

MR GRANT:

Yes, because I mean there's signs in the judgment that he is considering the matter of the stolen funds. Of course he is. That was a fact that was debated at trial. But he evidently was not willing to go as far as to say, well, this was effectively hush money, I suppose, to not go to the police. He wasn't willing to say that, and in my submission it's just not for this Court or the Court of Appeal to make that leap over to an illegal bargain.

WILLIAMS J:

It's quite a small step in that it's not really a leap.

1040

MR GRANT:

Well, even that small step I would say is inappropriate, is not one that is open on a second appeal having not heard the evidence, or even on a first appeal.

ELLEN FRANCE J:

Well, that's the part I'm unclear about, apart from the factual aspects, why you say based on the current approach to appeals, why the Court of Appeal, why it wasn't open to them, I mean, you might say it's not open on the facts, that's one thing but are you saying it wasn't open to them as a matter of law to –

MR GRANT:

No, the factual question and I think it's in front of us, the sentence that begins: "Further, the threat …" "Further, the threat Mr Liu made was to report Mr Wu to the authorities," so far so good, and then the Court says: "… which was a promise not to report an alleged crime to the authorities." Now in my submission, those two propositions don't follow when we look at what Justice Lang determined, and I accept Justice Williams' point that it may not be as big a leap as I'm putting it, but it is an important difference to say there was a threat to do something and then the Court of Appeal has done something that Justice Lang did not do by saying, well that constituted a promise not to do something and then says, well, and I suppose the following sentence demonstrates that, how they treat the evidence: "This involved the additional dimension of an agreement to prevent the investigation and prosecution of crimes."

KÓS J:

Your argument would be much stronger I suspect if no money other than the original $400,000 had changed hands, but the 1.2 million keeps floating around like that elephant's in this spacious courtroom, begging the question, well, what was it for, and doesn't that imply such an extravagant sum, doesn't that imply a promise that meets Court of Appeal's terms which was a "promise not to report" if such an extravagant sum was paid?

MR GRANT:

I think that was an inference open on the facts to – or it could've been a route that Justice Lang took, I mean, undoubtedly.

KÓS J:

If he could of, surely the Court of Appeal could too?

MR GRANT:

No because that would be an additional factual finding about agreement was made and that would require the Court of Appeal to inquire into the facts in a way that I would suggest is –

WINKELMANN CJ:

Is your point that they weren't purporting to make an additional factual finding. They were proceeding on the basis that Justice Lang had made that finding.

MR GRANT:

Yes, indeed.

ELLEN FRANCE J:

Well, you have to look at that in light of paragraph 42, don't you?

MR GRANT:

Paragraph 42 of the Court of Appeal's judgment?

ELLEN FRANCE J:
Yes.

MR GRANT:
Well, again I'd suggest to your Honour that the sentence that starts: "We consider that the conclusion …" is not a conclusion that Justice Lang made and misinterprets how far he went by saying "the payment was made to prevent to Mr Liu reporting Mr Wu's earlier theft to the authorities" and says, well it was "correctly drawn" by Justice Lang. I mean, the passages that I've taken you to, in my submission, don't say that. They stop at a threat was made and money was paid, and I accept that, you know, the $1.2 million and the open question is certainly relevant, of course. But that was a matter for the trial Judge and, in my submission, not a matter, a factual matter, that an appellate court should be taking, and particularly here, the Court of Appeal appears to be not making a factual finding even of its own but misinterpreting the factual finding that Justice Lang had made in the Court below.

KÓS J:
Well, you can make the point certainly in paragraph 32 and the beginning of paragraph 42, but don't the subparagraphs in paragraph 42, I think this is the point that Justice France is putting to you, don't those subparagraphs make that factual finding independently by the CA?
1045

MR GRANT:
Sorry, if you mind I'll just consider them –

KÓS J:
Of course, of course.

MR GRANT:
Well, again, what these are, in my submission, are recitations of what the High Court had found, but they result in the making of a further factual finding that the High Court just did not make which was that not only were there threats,

there was a concluded bargain, there was an agreement, a meeting of the minds between the parties that a certain thing would not happen if money was paid and I submit that that's just a long way from the conclusion Justice Lang came to, and again I'd suggest that that was somewhat deliberate because as the Chief Justice has said the facts were quite muddled, and so his Honour was prepared to find that a threat had been made, that's a sufficient finding for the disposition of the case, and therefore it's not for the Court of Appeal I again say respectfully to go further than that.

WINKELMANN CJ:
Can I ask you about the second sentence in paragraph 42: "Mr Grant did not seek to challenge the findings that the Deed was sham."

MR GRANT:
Again I – the respondent, and your Honours would've seen this in the Court of Appeal judgment, the respondent sought to challenge the way in which the conclusions were arrived at, largely on the basis that, you know, saying for example that something in all likelihood happened, particularly where it's such a serious matter, I mean, you know, *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1; [2008] NZSC 55 and all of those authorities say well it's a very serious matter so you've got to be very sure, was basically the argument and that was rejected, but there was never any suggestion, as I think your Honours have already picked up on, there was never any suggestion in the High Court that the Deed was a sham. It doesn't appear in the High Court judgment.

WINKELMANN CJ:
I'm just really asking you, were you conducting your argument on the basis that the Deed was a sham?

MR GRANT:
No, I mean I doubt I would've used the word "sham" in the Court of Appeal. That's clearly a conclusion that's been drawn and so, I mean, to the extent that

it's at issue in this Court, it's not accepted that the Deed is a sham and it wasn't accepted in that Court that the Deed was a sham either.

CAMPBELL J:

Well, given Justice Lang's factual finding that the reason for the payments recorded in the Deed was a fictitious one, how was the Deed not a sham?

MR GRANT:

Well the reason for the payment was found to be fictitious but, as Justice Lang said when he said it remained on foot and binding, the underlying deed and the payment thereunder remained valid. That was the conclusion he came to. It wasn't that the entire agreement was a sham, it was merely that that aspect of it, the justification for the payment he found to be fictitious and I think that's where the sham language obviously comes from.

WILLIAMS J:

So the wink wink, nod nod in the transcript of conversations between Mr Liu and Mr Wu and Crystal, because there is nothing that says the thing was being pled expressly, was the reason that the Judge would not go further because the record showed wink wink, nod nod and nothing more.

MR GRANT:

Yes, and evidently the Judge was willing to find that that evidence was sufficient to support a threat had been made, but he wasn't willing to go further and say that that resulted in a concluded illegal bargain which is obviously an entirely different analysis under the Contract and Commercial Law Act 2017 rather than...

KÓS J:

Well, the question I suppose, that is why we talked about the pleadings before, if illegality is within the scope of the pleadings, and I'd say I think it probably is even though it's – I mean, duress isn't formally expressed in the pleadings, neither is illegality, but if it is within the scope of the pleadings then the question

is whether the Judge – the Judge chose the duress route because that's what was put to him.
1050

MR GRANT:
Yes.

KOS J:
But it doesn't necessarily cut off the Court of Appeal if it has a factual basis for reaching a view and it's open on the pleadings to do so to go to illegality, does it?

MR GRANT:
Well, no, but I would suggest that it's a factual, they would've needed, the Court of Appeal would've needed a factual finding from Justice Lang to say that there was an implied or express agreement, I mean, that's a factual finding.

KÓS J:
Well it's an appeal by way of rehearing so they, of course, can make that conclusion themselves if there's an evidential basis for it. They're not stuck with what Justice Lang's done. They're stuck with evidence. That's quite a different thing.

MR GRANT:
Yes. Well, I mean, yes, although I mean the fact that Justice Lang was not willing to do it, I mean, with respect, it doesn't seem like a satisfactory answer to say, well –

KÓS J:
I know, but he didn't have to because of the way it's been argued in front of him.

MR GRANT:
Yes, although I mean, it's –

KÓS J:

Duress just doesn't take you there. It doesn't need to.

WINKELMANN CJ:

So, can I ask you, your argument is that this Deed is not a sham because it's intended to take effect in accordance with its terms.

MR GRANT:

Yes.

WINKELMANN CJ:

So, if you said it was a sham and put in place the real agreement, it'd be just the thing that was there.

MR GRANT:

Yes.

WINKELMANN CJ:

So, can you take us to the Deed?

MR GRANT:

Yes. Just go to the front page and we'll start there.

WINKELMANN CJ:

What is the document number for that?

MR GRANT:

Sorry, it's –

WINKELMANN CJ:

That's all right.

MR GRANT:

Could you just scroll – 301.2119.

KÓS J:

There seem to be several copies of it. The one I printed out is a different one, but do they differ?

MR GRANT:

No, they should all be the same.

KÓS J:

Right.

MR GRANT:

Yes, Sir, they are all the same. I just don't want to lead you astray on that. All right, we'll perhaps go to page 1. Obviously the first thing that stands out is that there is the reference to the repayment of a debt and your Honour is right that that was found to not reflect the payment of a debt.

WINKELMANN CJ:

Well, that's in the background but then it does flow into the "Operative Provisions".

MR GRANT:

Yes.

WINKELMANN CJ:

So what do you say is the true agreement between the parties now that you accept there's no debt?

MR GRANT:

Well, I mean, that's, again is a, that's not something on which Justice Lang found and, in some ways, as unsatisfactory as it is, that's not a finding that was come to in the High Court and I would suggest is left open and deliberately left open because his Honour was not willing to find what the true nature of it was.

KÓS J:

Isn't the full, isn't the true nature of the agreement really a settlement agreement in 3.1? I mean if we drop away the debt, then it must be something to do with a dispute, because it's about, and perhaps it's characterised as a dispute about the debt so that's settled by paying the debt back. Well, there isn't a debt.

MR GRANT:

If you take away the debt. Well, indeed, you may be –

KÓS J:

Take away the debt and you've got a settlement of a dispute.

MR GRANT:

You may be settling something else and again that's left open in terms of that, but again, what Justice Lang was not willing to say was that what it was settling was what Mr Liu might otherwise do which is to report theft to the police. I mean, it may well be and, again, I'm going into speculation that's not in the facts, so I'm not going to push it too hard but, you know, as your Honour has pointed out, if to the extent that there was a theft, in settlement of that theft, I mean, that's a different thing to saying, I'm not going to report you to the police. That's a private matter that isn't illegal in any event.

KÓS J:

I suppose so, although wouldn't you get the comfort that this is in full and final settlement of all claims that we have against each other. It gives you some comfort that you're not going to walk down the road to the police station after receiving the 1.2 million, which in any event, would be rather problematical for Mr Liu because he knew perfectly well, as we see from the WeChat – no, from the audio evidence, which I think is in the –
1055

MR GRANT:

It's in the bundle, yes.

KÓS J:

Yes, well it's also in one of the judgments.

MR GRANT:

Oh, indeed, yes, sorry, yes.

KÓS J:

That he knew that he couldn't go, couldn't express this as being a settlement of the – explicitly as a settlement of the theft.

MR GRANT:

But I mean in terms of the full and final settlement point, Sir, I mean the cases are frequently dealing with that kind of situation.

KÓS J:

Absolutely.

MR GRANT:

Pharmacy Care is the one I keep coming back to where, yes, it's a sign this settlement deed or else, is effectively what's said.

WINKELMANN CJ:

Can I ask you, so you objected to the legal contract analysis, new analysis. It raises different factual issues I suppose. Is that a point you will continue to pursue on appeal that a legal contract shouldn't have been addressed by the Court of Appeal?

MR GRANT:

Well, in the Court of Appeal the fundamental point I raised was that it wasn't pleaded and I mean that's, I suppose, the sorts of discussions with Justice Kós which is, you know, what do the pleadings encapsulate.

WINKELMANN CJ:

So you didn't argue evidential prejudice?

MR GRANT:

Oh, well, yes, indeed we did which is that there was no evidence led on whether or not there had been an agreement or not because it simply wasn't raised. You know, it wasn't put to Mr Liu, for example, did you or did you not agree that if Mr Wu paid you the money you wouldn't report him to the police, was that something that you agreed or not? I mean, yes, that was certainly pursued and that was rejected in the Court of Appeal.

KÓS J:

Well we probably need to think about that a bit further because if there is a point of prejudice you may just have put your foot on a rock, a good rock.

MR GRANT:

I was wondering which type of rock your Honour was referring to. Well indeed and I mean the familiar *Blueskin Bay Forest Heights Ltd v Paterson Pitts Partners Ltd* [2014] NZCA 268 case law and so forth was fulsomely argued that it was never, on either side, suggested that there was an express or implied agreement. I mean, yes, your Honour's right, that all that evidence in the WeChats and so forth was in the record but it was never a point that was put for example in cross-examination to either witness about what did they intend to do and so yes, I mean that was argued spiritedly in the Court of Appeal but the Court of Appeal ultimately came to the view, as you'll see in the judgment, but it didn't really matter because the facts were the facts and the facts were capable of encapsulating in a legal contract but again in terms of evidential prejudice there was no – you won't see anywhere in the cross-examination any mention of whether there was an agreement of an illegal nature and that being put to the witnesses.

CAMPBELL J:

Am I right that in seeking leave from this Court you didn't raise the pleading point as one of the issues that you wished to pursue in the proposed appeal? And it's not addressed, as I recall, in your written submissions.

MR GRANT:

Well, in seeking leave to appeal, the submission was that this was not in a legal contract which, in my view, would encapsulate an argument about that.

WINKELMANN CJ:

In your submission.

MR GRANT:

In my submission, yes. But no, I mean your Honour is right, in a strict sense, no. Yes.

WINKELMANN CJ:

So you say that if it had been clearly at issue then evidence might've been – the point might've been tested in some way?

MR GRANT:

Well I think it ought fairly have been put to Mr Liu for example. Did you enter into a contract whereby you wouldn't report Mr Wu to the police if he paid you money? Was that the true nature of this agreement? And I mean that was argued in the Court of Appeal, relying again on the Court of Appeal's decision in *Blueskin Bay*.

KÓS J:

Well the threats were obviously explored in cross-examination.

MR GRANT:

Yes, indeed, because it was a threat, it was a threat case, if I can put it that way. It was a case to determine the degree to which he was put under unlawful pressure which involved threats. It was never a case about what was the true bargain between the parties, which is again the second step that I keep coming back to.

1100

CAMPBELL J:

Well, it was in a way though, wasn't it, because your client's case was that the true bargain was that $1.2 million had been lent in 2008 and this was simply repayment.

MR GRANT:

Yes, but I mean that, respectfully Sir, seems to be a different proposition in terms of putting it to a witness to say, it's not that, to then saying, well, what actually happened was this. What actually happened was that this was a hush money payment that was never obviously put to my witness, and it wasn't put to Mr Wu either and Mr Wu didn't, there's nothing in Mr Wu's evidence either that says this, which is I would suggest why or may explain why that finding wasn't made because he never said it. Because, of course, the slightly strange thing about all this is that Mr Wu denied that he ever stole any money in the first place. So for him to, it was an interesting tightrope, I suppose, for him to walk along, to say, I was put under pressure to sign this agreement, but the pressure would have had no potent, well, you know if he had have carried out his threat, it would have no potency because, I never stole any money.

CAMPBELL J:

Well, most people don't, would prefer not to be charged or investigated.

MR GRANT:

No, but I'm just saying that was the interesting, yes, that was the interesting kind of dichotomy or disconnect between, in his evidence, and so he never said, and it was never suggested to him, that he saw the agreement as effectively a way to forestall or to protect himself from being prosecuted. That wasn't something that was put to any witness. So, yes, I mean, that's why there was obviously an objection to the amendment of the pleadings in the Court of Appeal.

KÓS J:

But the threats were to prosecute.

MR GRANT:

Yes. Well, the Court said "in all likelihood" the threats were to prosecute, yes.

KÓS J:

Well, that's right and that's what, presumably they must have done that on the basis that, I mean I haven't gone through the record of the evidence, but presumably they did that on that basis that Mr Wu had said that in evidence, that he received those threats, or they'd found them in the record.

MR GRANT:

Yes, but again, the fact that he was also saying, well, I didn't, you know, that what they were threatening to do or report me for, I hadn't done, cuts against there having been, it even being suggested that there was a bargain not to prosecute, because Mr Wu is saying, well, even if they had of, you know, effectively he's saying, if they had reported me to the police, nothing would have happened, because I didn't steal any money. So there couldn't have been a bargain.

KÓS J:

I suppose so, back to the floating elephant though. On the other hand, the fact that he paid $1.2 million rather suggests to the contrary, doesn't it.

MR GRANT:

Well, but again, that wasn't a finding, again, Justice Lang was not willing to make that finding, because I don't think he needed to. All he needed to do was find that a threat of some potency, for whatever reason, I mean, I suppose you could consider that even if somebody hadn't done anything wrong, the threat of being reported to the police or the IRD maybe something that would have potency, I suppose. I mean, I think that's probably where Justice Lang landed, frankly, if you look at the record, if you look at the judgment.

KÓS J:

Probably not $1.2 million worth of potency.

MR GRANT:

Well, I don't think there was any, again there was no evidence as to that, Sir, in terms of he thought it was worth $1.2 million to stop that happening.

KÓS J:

Well, he was clearly struggling to find it, I mean, read the conversations: "We don't have that money."

MR GRANT:

Okay but again, I come back to, could we just actually, if I could just take you to *Pharmacy Care* just to sort of anchor this to an authority. At paragraph 97, it's at page 340 of our authorities. So, as I've said, the basic facts here and I think it probably still remains the leading case, there's not really a decision of this Court about duress and affirmation in the same way, the facts here were that a pharmaceutical provider, Pharmacy Care Systems, who I suppose has an analogy here to Mr Wu, has allegedly been found to be overcharging in a way that would expose them to criminal prosecution and North Health, which was the Government regulator who found out about it, had a dispute with them and said, well, you'd better enter into this settlement agreement and pay us $80,000 or else, and, in my submission, that's analogous to what we have here rather than the resulting bargain being a settlement that included an agreement not to prosecute. That's not something that the Court of Appeal found there. It's not something Justice Lang found here, and the case was satisfactorily decided on the basis of duress alone.

1105

I just want to take your Honours to one part of *Pharmacy Care*. It's actually up on 92 which hopefully will assist. Actually, 94, sorry, 94. The Court did consider expressly whether the existence of a threat in the circumstances I've just described does engage public policy considerations, as in make the resulting agreement illegal, and it considered a case, an American case, decided by Justice Cardozo, where it said threats to instigate a criminal prosecution has generally been regarded as an improper means of inducement. "There are some common law courts which have held that the resulting agreement is against public policy. The result then is that neither party can recover on it, or obtain restitution. This was the view taken by … Justice Cardozo in … *Union Exchange National Bank* … On that view, such a threat 'is improper even if the person who makes it honestly believes that the one whose prosecution is threatened is guilty, and even if that person is in fact guilty'."

Now the reason I draw the Court's attention to that passage is evidently the Court of Appeal in *Pharmacy Care* when considering facts pretty similar to these ones has thought about whether an illegality analysis is engaged simply by virtue of an unlawful threat, and I would suggest the same elephant was in the room which is that there was an $80,000 payment for nothing, effectively. Obviously, here we have a $1.2 million payment. I accept that the numbers are a little different. But the Court, I would suggest, would have had on its mind that there appeared to be a payment that responded to a threat and the Court there considered whether that meant that the parties had sort of ipso facto entered into an illegal arrangement that offended public policy, and obviously that had been the route that had been taken in prior cases in other jurisdictions, and, indeed, by Justice Cardozo, so, you know, by a Judge of some repute.

KÓS J:
But that's just the pari delicto principle in operation. The $80,000 here had some basis for being viewed as compensatory, did it not? It wasn't paid for nothing.

MR GRANT:
No, but the fact that it was paid in the colour of criminal process, or the threat of criminal process, is the analogy that I draw, because, you know, you could view, and certainly the Court of Appeal, I would suggest, did view, you could view that as effectively impugning the underlying agreement into something illegal because it has the flavour, I suppose, of blackmail in that – in this case, and so public policy should intervene, and I'd suggest that, when I took the call before to paragraph 32 of the Court of Appeal's judgment, where it said, well, it was induced by blackmail which is a criminal offence, therefore it's illegal, that I would suggest is exactly what *Pharmacy Care* has considered to be the case

here and rejected. So the mere presence of the threat does not convert or provide an implied term of the resulting agreement that's illegal.

I'd suggest, and this is a point I made in my submissions, to find to the contrary would effectively be to wash away the duress option altogether because – or certainly the threat subcategory of the duress option – because in that situation every unlawful threat that induced an agreement would have in it a resulting illegal term to forestall prosecution or forestall threats to kill.

KÓS J:
Well, only if it was that sort of threat.

MR GRANT:
But I mean –

KÓS J:
There are lots of economic duress cases which come in the context of contract but you still deal with them as a duress case.

MR GRANT:
Yes, well, indeed. I suppose I'm talking – I mean the criminal prosecution cases probably stand on their own in that sense, but also when we're talking about unlawful act duress, I mean these are all lawful act duress cases because you're not threatening to do something illegal, but you have cases like *Hobbs v Gilbert* HC Nelson CIV-1999-442-002, 21 September 2004, which I've referred to which is a High Court decision of Justice Wild, with threats to kill, and there was never any suggestion when the allegation was enter into this agreement or I will harm you, that the resulting agreement included a term that said, if you – you know, because you've entered into this agreement I will not harm you. That's a very different set of circumstances and I would suggest that if it were decided on the basis that those kind of situations were illegal then you would just not have a duress doctrine of that kind because all those contracts would be illegal.

1110

KÓS J:

If they result in a contract. I mean the –

MR GRANT:

Yes, indeed. Yes, no, so there's non-contract – yes –

KÓS J:

The street corner stick-up is not a contract, obviously.

MR GRANT:

Yes, yes, no that would be a different scenario. Although, I mean, you know, to I suppose slightly challenge the proposition, if that was viewed as a bargain, you know, pay me the money, I mean it's certainly under duress but it's also illegal because you're saying well, don't kill me and I'll give you money, basically.

KÓS J:

What is the mischief though in having – I mean there are lots of situations in which two courses of action run side-by-side with the same facts. What's the problem?

MR GRANT:

Well, yes, I think the fundamental mischief is that it's conflating behaviour in capacity in entering into an agreement with the terms of resulting agreement, so the policy of an illegal contract regime is, as your Honour says in pari delicto, that two parties had willingly entered into an illegal bargain and therefore the public policy should intervene to prevent that but that, in my submission, can't be the case when one party is under an incapacity. It's simply a different scenario, so they have to exist separately.

I'd accept there's situations where it can be both but that's not what was found in my submission on the facts here, but for present purposes to say that one must follow the other in a sense that if you take a threat and convert it into a term of the bargain, that's always going to mean that in those kind of duress cases and – I would actually suggest even in the street corner stick-up cases you would still be entering unbelievably into an illegal bargain.

So while I'm on *Pharmacy Care* if I could just follow the analysis through of the Court of Appeal, because I did place quite a lot of emphasis on this case, and down to 97 where it just reiterates the principles and I think the principles do need to be reiterated and I think it's again worth orientating the Court that this has all been said and it's in the scenario that I've talked about where threat of criminal prosecution has been raised and I should say actually to be fair on the facts that this was obiter because the underlying duress was not established but nonetheless the Court gave a fairly forceful recitation of the principles, and at 98 it gives what is often seen as the best or the leading recitation of those seven principles and this is something that I think I'll be coming to now after the adjournment, or maybe slightly before, which is the question of affirmation.

In the event that your Honours are with me that this is properly a duress case rather than an illegality one, as in the Court of Appeal went too far in converting the threat that Justice Lang found into a term of the bargain and therefore making it an illegal one, the submission will then be that Justice Lang was also correct in how he analysed whether the bargain, well the Deed that resulted, was affirmed and that's a matter of the doctrine of affirmation which is obviously a familiar one and I won't go too deeply into it.

KÓS J:

Well it's familiar to me as a contract lawyer. It's not quite so familiar to me in the context of duress. I mean we'd usually talk about affirmation or acquiescence. I should say we usually talk about acquiescence or election.

MR GRANT:

Yes, acquiescence or laches or something, yes.

KÓS J:

Yes, exactly.

MR GRANT:

Well, indeed, and I mean *Pharmacy Care* again I think provides the grounding and so does, you know, *McIntyre* and *Haines v Carter* where you are dealing with a contractual situation and affirmation being the proper – I mean I should say that acquiescence or laches or whatever may be a parallel way to get to the same place I think in these cases because you're –

1115

KÓS J:

Well, they are. There's an important difference though. If you're eschewing bargain and saying this is a pure duress case, then acquiescence normally has an estoppel element to it.

MR GRANT:

A what sorry?

KÓS J:

An estoppel element.

MR GRANT:

Indeed, yes.

KÓS J:

So it's parallel to promissory estoppel and it usually requires there to be some change of position on the part of the other party.

MR GRANT:

Well, that's right and again, this comes up in my further submissions, this case has always been pleaded and decided on the basis of contractual duress as in under the Deed, payments made under the Deed, and on that basis, at trial the focus was that and so therefore change of position didn't arise in the same way. It was more focusing, leading evidence on the delay and the conduct of the coerced party after the Deed had been performed.

WINKELMANN CJ:
So it's not a defence to a restitutory claim, they're not traditional defence to restitutory claim which requires evidence of change of position, detrimental change of position?

MR GRANT:
No, because we're advancing this on effectively a contractual basis as Justice Lang did in his judgment.

WINKELMANN CJ:
So can you take us to the relevant bit.

MR GRANT:
Of?

WINKELMANN CJ:
Where they've expressed the conception of affirmation in this context or is that it?

MR GRANT:
In *Pharmacy Care* or in Justice Lang's?

WINKELMANN CJ:
Yes, *Pharmacy Care*.

MR GRANT:
Yes, sorry that's at paragraph 105 onwards, I think or perhaps a little bit further along, sorry. "Failure to take steps" there we go. So, actually, sorry, could you go back up to paragraph 98, sorry.

WINKELMANN CJ:
That's all right.

MR GRANT:

I do just want to emphasise before I go to how it expressly went to affirmation. The bit that I think is important is: "Sixthly," onwards, "duress renders the resulting agreement voidable at the instance of the victim. This may be addressed either by raising duress as a defence to an action, or affirmatively, by applying," and timeously is the word I just wanted to emphasise, "timeously to a Court for avoidance of the agreement." And then: "Seventhly," which I think ties in for present purposes to the sixth point, "the victim may be precluded from avoiding the agreement by affirmation."

WINKELMANN CJ:

Is there an implication in the finding that this has been affirmed that the duress is no longer operative?

MR GRANT:

Yes. Justice Lang's, so in terms of the chronology, I suppose your Honours, there's a Deed that's entered into in July 2018, there's then performance of the obligations under it by the payment of money and transfer of property that end in November 2018. As I'll take you through, there is then a series of WeChat messages from Mr Wu wanting to meet with Mr Liu, an actual meeting between the two, and then they cut off contact all together. In Justice Lang's, the basis of Justice Lang's determination about the delay and whether it was time – timely when the –

WINKELMANN CJ:

That's a better way of saying it.

MR GRANT:

Yeah, I don't even know what I'm saying, timeously is correct to be fair, but –

WILLIAMS J:

I think it's timeous.

MR GRANT:

Is it? Okay.

WILLIAMS J:

Apparently.

MR GRANT:

I'll say timely, if that is okay.

WILLIAMS J:

It's much better.

MR GRANT:

Yes. The basis for Justice Lang's analysis of whether avoidance was timely, was that November 2018 when the Deed had been performed and therefore the obligations have been discharged, was when the duress ceased. So we were talking about a period from November 2018 when the duress ceased to March 2022 when these proceedings were issued. So his Honour was analysing whether a delay of three years and five or six months was beyond what was reasonable and not timely and therefore precluded relief.

WINKELMANN CJ:

I suppose –

WILLIAMS J:

I find that – sorry.

WINKELMANN CJ:

I was just going to say, that does raise the question as to whether that's evidence that the bargain was completed so he paid the price for them not to go to the police.

MR GRANT:

Well, I think, obviously the evidentiary record shows that they never did go to the police but that's a factual finding that might support an inference that Justice Lang was not willing to draw.

WILLIAMS J:

But the record does show that Mr Wu and Crystal wanted a clause in the agreement so that he didn't come back. That, of course, Mr Liu refused to do that on the basis of advice, but they were obviously on the record worried about someone coming back later and carrying out the earlier threat. I really don't understand why the Judge considered that had gone away, given that it was so prominent in the intercepts.

1120

MR GRANT:

I mean again I suppose, and it may be seen as somewhat unsatisfactory, but, you know, the Judge saw the witnesses, that is a factual, in my submission, a factual finding that he made having seen and assessed the evidence of the witnesses as to when exactly Mr Wu felt as if he was free from the duress. He did offer in his evidence an alternative, or his explanation about why he delayed and it was that there was an amalgam of complex circumstances that developed over the time that had prevented him from doing that. His Honour just, in his judgment, basically rejected that that was valid. So what I'm saying I suppose is that it was clear that his Honour considered Mr Wu's perspective –

WILLIAMS J:

Yes, well perhaps it might've been that Mr Wu was subsequently trying to do business with Mr Liu and that relations might've normalised by then.

MR GRANT:

I think that played into it, yes. Yes, well I think it – and I'll take you to that but, yes, in summary, after November 2018 there's a consistent flow of communication from Mr Wu to Mr Liu to the effect of I want to continue doing business with you, I want to meet with you. He asks him to meet over the course of early 2019 a number of times and then in June 2019 they do actually meet, and Justice Lang in his judgment emphasised that as being consistent with him no longer being fearful of what Mr Liu might do. He met with him at his insistence and –

KÓS J:
Why is it? Why is it consistent with that? I mean –

MR GRANT:
Well he was clearly no, well, indeed, but the –

KÓS J:
I mean if it's not about physical threats –

MR GRANT:
No.

KÓS J:
– then how does meeting tell you anything?

MR GRANT:
Well just that the WeChats, the messages that surround that meeting are all about I want to do business with you, I want to meet with you to discuss future opportunities and all that sort of thing. So the Judge, I suppose, drew the inference that having met on that footing that he was basically meeting to do business in a way that he clearly wasn't afraid that he would provoke Mr Liu into, you know, taking the threatened steps anymore.

Thereafter, so after June 2019, Mr Liu blocks Mr Wu altogether, blocks off any further contact and effectively nothing really happens between June 2019 and then when proceedings are issued and again Justice Lang places a great deal of emphasis on that as being consistent with Mr Wu no longer being under the threat of the duress or the effect –

CAMPBELL J:

Well I'm reading those paragraphs again and my reading of it is that the Judge doesn't make any explicit finding that the threats cease at any time at all, but he does go on and refer to a three-year delay from which it is necessarily implicit that he considers that the threats had lost their potency but...

MR GRANT:

Yes, yes, no I accept that and I don't know mean to be seen to be in any way critical but yes there isn't an express stepping through but, evidently, you know, by making the affirmation finding yes there is, there must've been some analysis by his Honour as to the threat losing its potency, and yes, as your Honour says it's three years which I suppose would land at probably in the June 2019 meeting, or sometime between November 2018 and June 2019 but again it's not clear. But I don't think, with the greatest respect, that that detracts from his Honour's analysis. That's not something that this Court should be substituting its own conclusions as to the potency of that threat into, that's just simply a finding that perhaps could've been a little bit more expressed.

ELLEN FRANCE J:

Could I just go back. In terms of the pleadings and possible prejudice, could I check, you're not saying Mr Wu didn't give evidence of being threatened.

MR GRANT:

No.

ELLEN FRANCE J:

Is your point simply there was no associative evidence of a promise. Is that the point?

1125

MR GRANT:

That's right, yes, yes, and the importance of that of course is that for illegality you by definition need to find the existence of a term of a meeting of the minds, but there was never any discussion of that in the High Court. There was discussion of, yes I've been threatened, I felt coerced, I felt scared, all these sort of things, but that again is a distinct evidentiary inquiry to then say, well, did you make an agreement, express or implied, that you wouldn't go to the police if he complied.

KÓS J:
So the threats here are to pay, sorry, are to go to the police or immigration.

MR GRANT:
Yes.

KÓS J:
The bargain has a payment of $1.2 million. Isn't there an available inference on the facts that there must have been, that payment must have been for something and the something would be responsive to the threat, that is, that the threat would not be performed? I mean, what other inference could you draw, Mr Grant?

MR GRANT:
Well, I don't have a satisfactory alternative answer for you, Sir, but I think that's the point, is that that was, that factual inference to be drawn was an inference to be drawn by Justice Lang and he wasn't willing to do it.

KÓS J:
Well, he didn't need to do it on the theory that he was, well actually the plaintiff and he were working on.

MR GRANT:
Well, indeed and I suppose that goes back to Justice France's evidentiary point, which is that perhaps he didn't draw that, and again I'm now sort of getting into speculation so, but didn't draw that inference.

KÓS J:

No, and we've got the evidence and the only thing I think might worry us a wee bit here is prejudice but I'm not certain I can see what the prejudice is because it seems to me that it's almost impossible to draw any other inference.

MR GRANT:

Yes, well indeed, but I think the fact that your Honour is talking about inferences that might have been drawn demonstrates the issue because that question was never – there's no evidence before you of either of those witnesses giving that evidence or denying that evidence. It's simply an inference that you would be taking from other evidence that's just not been put to witnesses.

KÓS J:

Sure but I mean a lot of fact finding is inference based.

MR GRANT:

Of course.

KÓS J:

So are you giving another inference from the facts that competes with my one?

MR GRANT:

Well, I can't Sir and I'm, you know, I'm not –

KÓS J:

It's probably a pretty strong inference then.

WINKELMANN CJ:

Your difficulty might be your client's evidence because if it had been put to them, they would be answering within the context of their narrative that was a deal to repay a loan.

WILLIAMS J:

Perhaps the point is that –

WINKELMANN CJ:

Could he – just see if Mr Grant has any answer to that, although it may not be a kindness.

MR GRANT:

Well, sorry –

WILLIAMS J:

He nodded.

MR GRANT:

– could you ask the question again.

WILLIAMS J:

He nodded.

WINKELMANN CJ:

You have no answer to that.

MR GRANT:

I'm sorry, could I have the question again, your Honour.

WINKELMANN CJ:

So the difficulty for you maybe your client's evidence which is that, you know, their evidence was of a narrative which was rejected by the Judge. So if the question had been put to them, they would have to have been answering within that narrative which they would deny that, but that would be because they would be denying the underlying truth –

MR GRANT:

Indeed.

WINKELMANN CJ:

– that the Judge found.

MR GRANT:

Well no, because, yes, and that's what happened, but to, you know, in terms of the pleading point, there was never any supplementary exploration with the witnesses about, well, was the true bargain to forestall a prosecution, and that wasn't put to Mr Wu either. Again, as I've developed before, to the extent that it was touched upon, he denied, of course not, because I never stole any money, so why would there be an agreement to forestall prosecution. So it's very difficult in a scenario where no witness has said that there was a bargain of that kind to draw that inference, in my submission, you know, and I think that demonstrates the prejudice as well because it just wasn't explored at trial.

WILLIAMS J:

Perhaps he just thought that he made it very clear that he thought both witnesses were unreliable and unsatisfactory and therefore, he relied on the written record and so forth, such that he could not be sure what the Deed was for. It could've been for an entirely different matter.

MR GRANT:

Yes, and he wasn't willing to say –

WILLIAMS J:

But it didn't matter because the Deed was the Deed. He didn't say any of that though.

MR GRANT:

But I think in some ways it's the fact that he analysed it and then didn't say it and I think your Honour's right that he did look at the written record as, you know, this Court is saying, well, is it available to us to look at the written record. He clearly did and that was the conclusion he came to, and I would submit that that shouldn't be reopened.

Your Honour, I'm just conscious, is that a good moment?

WINKELMANN CJ:
Yes, I'll take the morning adjournment.

MR GRANT:
Yes, thank you.

COURT ADJOURNS: 11.30 AM

COURT RESUMES: 11.48 AM

WINKELMANN CJ:
Mr Grant.

MR GRANT:
Thank you, your Honours. What I would just propose to do from here, is just to round off the sort of illegality duress discussion and then perhaps just address the affirmation point a little bit more deeply and then I think really that's the extent of my submissions.

But just to perhaps address a little bit more fully the question that was put to me by Justice Kós. The inference point, in my submission, is not one that given Justice Lang didn't take it that this Court should be taking. All of these cases that I have referred to, the *Pharmacy Care* authority, *Haines v Carter*, *McIntyre*, et cetera, are all cases in which the highest the Court is willing to put it and I would suggest the highest that Justice Lang was willing to put it here, was that the entry into the bargain, or rather the contract, was in the hope that, by the coerced party, that no reporting in this case would be undertaken.
1150

Now, that's a very different scenario from the conclusion of an agreement and that's really the crux, I suppose, of the distinction that I am drawing. There simply isn't enough on the evidence, as Justice Lang found it, for him to say that the parties were ad idem for anything else, and obviously the core reason for that might be that his Honour didn't need to because there's a remedy in duress and that leads us into affirmation.

The delay point I suppose is the first one and I don't think there's really any contest that the case law establishes that delay can amount to affirmation. Of course the first thing to establish is when the duress ceased, and I think we've discussed that. But then the second question is, well how long is too long, and obviously I'm not suggesting that it's a simple arithmetical exercise in every case, but of course the prior cases on affirmation do assist in terms of what the Court considers reasonable to have this issue outstanding before it becomes too long and the parties sort of need to move on with their lives.

I've referred to *Pharmacy Care* which is about the same length of delay, and what I would submit are not dissimilar circumstances in terms of the duress that was at issue. *Haines v Carter* is also an earlier authority of the Court of Appeal involving a relationship property agreement that the husband then said was induced by the wife threatening to report his tax misdeeds to the IRD and to the banks and the Court there said that again it was obiter because the duress wasn't found to be improper or wasn't made out on the facts, but the Court said that a delay between March and May of the same year would have been sufficient to find affirmation. Those, to be fair, were in circumstances where the allegedly coerced party was complying with the agreement in the meantime.

There is then a number of other cases, and I won't traverse them laboriously –

KÓS J:
Are these ones where there's counter-performance or reliance? I mean I can understand that – but otherwise I mean the ordinary operating principle is the statute of limitations exists to protect a defendant in that situation so...

MR GRANT:
Yes, I mean the statute of limitation point's obviously an interesting one in that sense but, evidently, the Courts around the Commonwealth have determined that this is not a statute of limitations question because you're dealing with

effectively, in most cases, commercial certainty where parties need to be able to conduct – and the same is of course true with the policy of acquiescence and laches and all the rest of it. The parties need to be able to conduct their affairs and that's not a six-year limitation period question, it's separate and courts generally have, and again it's – I don't mean to sort of say well there's an arithmetic to be done and if you're over this time you're out, it's obviously case by case, but the general proposition seems to be that a three-year delay as we have here has been found to be in these cases too long.

There's cases from around the Commonwealth as well that support that. There's an old English case called The Atlantic Baron, *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* (The Atlantic Baron) [1979] QB 705, [1978] 3 All ER 1170, where a nine-month delay in raising a problem with a contract and seeking to avoid it was seen to be too long. There's a pattern, it's all in my submissions and I don't propose to traverse it any more fully than that, but the submission is that delay can amount to affirmation, the authorities say that, and indeed the secondary sources say that that I have mentioned, the authoritative texts on duress and restitution say that, and the delay – we are in a vicinity I would submit, and Justice Lang evidently thought so, where this delay was too long.

But then there's sort of, there's a related but separate enquiry which in my submission augments the finding of affirmation on the basis of delay and that's the conduct we talked about before, the post-performance conduct. Courts generally enquire into what exactly the party who had been coerced did, after performance. There's a, you know, to use sort of perhaps slightly trite or flippant examples, *Hobbs v Gilbert* is a situation where the allegedly coerced party continued doing business with his coercer after the alleged coercion, sent his wife flowers and, you know, continued to talk to him and all of these sort of factual things that point towards a party being content to be bound to the bargain they were forced into by coercion.

1155

WILLIAMS J:

These are all factual questions.

MR GRANT:

Of course and to some degree, Sir, I would – my submission again, would be that this is a question that Justice Lang assessed, having seen the evidence, he assessed that affirmation was appropriate on the facts and to some degree I would submit that it's really the province of a trial judge to assess the delay, its length, its quality and all the surrounding facts that go with it, in coming to a view of whether a contract has been affirmed or not.

So, really, as Justice Williams says, I don't propose to invite the Court to reopen that enquiry, really, except to say that Justice Lang undertook that analysis. He referred to the leading authorities, he went through the record and he ultimately concluded that this deed had been affirmed and Mr Wu was disentitled to relief and, in my submission, there is no reason for this Court to depart from the findings that he made.

WINKELMANN CJ:

It does seem like a strange application of the law as a matter of principle, though, doesn't it? Because there's no bilateral deal here, it's on the facts as found. It's entered into by the respondent because he's been threatened, he's been blackmailed and then he's handed over these assets and he's getting nothing back. Why shouldn't he be able to walk away from it, when the blackmail – when the duress no longer is operating on his mind?

MR GRANT:

Well, indeed, and that, I suppose, is the policy of the voidable contracts regime, that you do have that option as soon as you are free from the duress but that can't go on forever, is effectively what Justice Lang is saying. There needs to be, as a matter of policy, commercial certainty associated with this kind of thing and the cases are clear that, as Justice Kós raised, that's not a statute of limitations question, that's an independent enquiry of whether it was reasonable for an individual to take that long and whether they were content to be bound.

WINKELMANN CJ:

I was thinking that maybe in a case like this where there isn't bilateral flow of goods, of promises, that maybe the Limitation Act 2010 is the appropriate frame, as opposed to affirmation, because he's not affirming by allowing the other side to perform in some way, he's simply affirming by not pursuing relief for what was obviously a wrongful bargain.

KÓS J:

That's because the contract is fully executed by the time or within the period of the duress.

WINKELMANN CJ:

Yes.

KÓS J:

Yes, so there's nothing there for anyone to do.

MR GRANT:

Exactly.

KÓS J:

Except sit on the money.

MR GRANT:

Exactly, so it was open to him, on our case at least, and in Justice Lang's findings, to on – whatever it was – 7 November onwards, or perhaps at the very latest June 2019 when Mr Liu cut off contact and said I want nothing more to do with you and stop trying to call me, it was open to him to indicate in some way and it doesn't need to be in a formalistic way, the cases are very clear about that. It was open to him to say – to raise some objection, to raise some protest to the bargain that he was being placed under and Justice Lang found that he simply did not do that and that that lack of protest can't, as a matter of policy, go on forever, effectively, and it's not a statute of limitations question and I'd suggest that the nature of the bargain is not necessarily relevant, given that the has found that the payments were made under the Deed.

Unless I can be of further assistance, I think I've, in a very roundabout way, reached the end of my oral outline. Perhaps I'll leave it there.

WINKELMANN CJ:
Excellent. Well, thank you very much, Mr Grant.

MR FOOTE KC:
Yes, may it please your Honours. With your Honours' leave, I will deal with the arguments concerning duress and illegality and my learned friend Ms Simkiss will address you on any remaining aspects of the affirmation argument that haven't been covered during the course of our discussion.
1200

The fine point I suppose of the respondent's submission will be that there is ample evidence for an inference about what the true agreement was between Mr Liu and Mr Wu, indeed, such an inference the respondent says must be almost irresistible that the transfers or the payments must've been in exchange for forbearance on the part of Mr Liu from going to the authorities about the alleged malfeasance or theft of money from Timber King.

My learned – just to clear one point up about the 400,000 at the outset, there was I think every reason for Mr Wu to be concerned about exposure in that regard. As my learned friend Mr Grant explained at the outset of his submissions, Mr Wu's claim for that 400,000 that was initially in the pleadings was dropped well before trial after the evidence had come out that, I can't remember my learned friend's exact words but it was that it was pretty compelling that indeed there had been defalcations or theft from Timber King by Mr Wu. So there was every reason for him to have a real fear about investigation, but also conviction, if the matter was taken to the authorities, or difficulties with his immigration status. We don't have to make the case that far that he was guilty and would have been convicted. Justice Campbell's point is that it is enough that an investigation is an unwanted thing in most people's lives. It certainly was here.

But perhaps, if I may, I can begin by just for a moment taking a wider lens on the issues that this case raises by talking about contracts to stifle or avoid prosecutions and why they are accepted as illegal or unlawful. Now I know this isn't particularly controversial, in fact I don't believe it's controversial at all, but it is worth reminding ourselves with respect as to what the policy is behind the rule that such contracts are unlawful.

Now, if your Honours need a reference point for these policy reasons they are well set out in this Court's decision in *Osborne v Worksafe New Zealand* [2017] NZSC 175, [2018] 1 NZLR 447, Chief Justice Elias' opinion at paragraphs 1 and 70, and also in the *Polymer Developments Group Ltd v Tilialo* [2002] 3 NZLR 258 (HC) case, Justice Glazebrook's decision in the High Court at paragraph 67, but why is such a contract illegal? It's not part of the criminal law, there's no duty to report a crime, there's nothing wrong with not reporting a crime –

WINKELMANN CJ:
This is an agreement not to prosecute though as opposed to not report a crime.

MR FOOTE KC:
Well yes it's, I think the way it's put in most of the decisions is an agreement to stifle which includes an agreement not to report when you know of a crime.

WINKELMANN CJ:
I mean because there are different considerations, the agreement not to prosecute, rule of law considerations.

MR FOOTE KC:
Yes.

WINKELMANN CJ:

For a prosecutor.

MR FOOTE KC:

That's right, yes, absolutely your Honour. Well I think the considerations, and this is on my feet, are the same but they are far more pertinent if you are the actual prosecutor making the decision but –

1205

WINKELMANN CJ:

Well, that's probably the superset prosecutors. There will be a subset with the same issues for not to, agreement not to go to the police.

MR FOOTE KC:

Not to report in the first place, yes. But agreements not to report or to stifle prosecutions, do have those rule of law consequences because equality before the law is compromised "… if accountability and punishment for public wrongs turns on the means of the defendant." If the defendant can pay someone to prevent reporting or of course could pay a prosecutor to prevent a prosecution, then those who can afford to settle the private injury might be able to escape punishment for breach of public law and that ought not be the case. That's at *Osborne* paragraph 73.

There is also the policy that must be right, that public prosecution and the impact of the criminal law ought not to be made the subject of a "private bargain" and Justice Elias mentions that at *Osborne* paragraphs 71 and 75. It was put another way by Lord Westbury in *Williams v Bayly* (1866) LR 1 HL 200 which we'll come to later when his Lordship said: "… that [one] shall not make a trade of a felony. If you are aware that a crime has been committed, you shall not convert that crime into a source of profit or benefit to yourself." And finally, if such bargains were permitted, then they could act to encourage extortion and that's a point that was made by Justice France in the *Osborne* case in her Honour's concurring opinion, that's at paragraph 105. The same considerations put slightly differently were made, as I said, by Justice Glazebrook in the *Polymer* decision and that's at paragraph 67.

So the next question is, how does a court divine whether such an unlawful bargain to stifle a prosecution exists in any particular case. It is well recognised that from the very nature of such agreements, they are seldom set out expressly in writing. That point was made very well by the Privy Council in the case *The Bhowanipur Banking Corp Ltd v Dasi* [1941] UKPC 24 at paragraph 411 and that was cited by the Supreme Court in *Osborne* at paragraph 81. In both those cases, the Courts said, well, look it depends on the facts of the case. The words and the conduct of the parties have to be examined to determine the nature and substance of the agreement and effectively, well not just effectively, but that is what this case is about also.

It has been observed in New Zealand that the Courts have not been averse to implying a term that a prosecution would not ensue into arrangements that are entered into against the background of possible criminal proceedings. Both in New Zealand and overseas or particularly in the United Kingdom, the Courts have taken quite a liberal approach to what is often called implying a term that there will be no reporting. Now I'm not sure entirely whether "implying a term" is exactly the right terminology and I say that because it tends to suggest that the Court should be employing a sort of *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 type test to a situation where this isn't about two rational commercial people making an agreement and making it work. What it's really doing, what the exercise really is when it comes to agreements like this that are unlawful and seldom written is to identify what the contract is. Now I know that essentially –

KÓS J:
Well it's really saying, what's the nod, what's the wink.

MR FOOTE KC:
Yes, Sir.

WINKELMANN CJ:

So Mr Foote, we’re giving you the 20 minutes, but for my part I can indicate, I’m very interested to hear about the fact that this was a duress case in the High Court and then it became an illegal contracts case in the Court of Appeal which is a different legal framework. You can deal with that when you like, I’m just saying, just as an indication.

1210

MR FOOTE KC:

Yes, well, let me say and I think that where I’m at begins to answer that question and that is that in a number of cases and I’ll take you to a few in a moment, there is little if any distinction between a duress analysis and an illegality analysis in cases that involve agreements to stifle a prosecution.

Maybe to put that better, there is a distinction, there is a difference, but most courts or many courts have used both analyses and there hasn’t been, as far as I can find, any great issue with the utilisation or the employment of both doctrines to look at what amounts to the same set of facts.

As I just said –

WINKELMANN CJ:

Can I just ask you a point of clarification.

MR FOOTE KC:

Yes.

WINKELMANN CJ:

You say agreements to stifle prosecution, are you using that loosely? Because, of course, this is on no account is this an agreement to stifle a prosecution. On your case, it's an agreement not to complain to the police.

MR FOOTE KC:

Perhaps agreement to stifle a prosecution is somewhat antiquated wording, but if you agree not to go to the police –

WINKELMANN CJ:

And that's treated –

MR FOOTE KC:

– then you are agreeing to keep a possible prosecution under wraps, if you like, you are agreeing to stifle it.

WINKELMANN CJ:

So I'm asking you, is that the language that is used where it's simply an agreement not to go to, not to complain to the police?

MR FOOTE KC:

It is.

WINKELMANN CJ:

Do they refer to that as an agreement not to – an agreement to stifle a prosecution?

MR FOOTE KC:

Yes, so in the English cases like *Williams v Bayly*, for example, and *Jones v Merionethshire Permanent Benefit Building Society* [1892] 1 Ch. 173 which was followed in the *Osborne* case, those are cases where reparations are made for genuine debts by relatives of people who have been found to be stealing from their employer and the Courts have examined whether or not there is a threat, there has been a threat by the employer to prosecute if the debt is not paid and whether or not any agreement or any payment of the debt involves an agreement to stifle a prosecution, and that is the phraseology that is used.

But essentially, the agreement is the relatives pay the debt of the employee who has stolen the money and the employer promises not to report the crime to the authorities, or because some of the English cases are old where private individuals often began their own prosecutions, they agree not to prosecute.

But, so excuse me, I use the stifle the prosecution. In reality and in this case it is an agreement not to report the matter to the relevant authorities.

So, I've made – so let's –

KÓS J:
I don't, for my part, don't have any issue with the idea that you can analyse these cases under either a duress in or out of contract basis, or an illegality basis.

MR FOOTE KC:
Yes.

KÓS J:
I think what we are particularly interested in isn't at that higher level of authority, for my part anyway. I'm interested in the pleadings and the evidence and whether there's prejudice to the appellant by where this case – how this case ran.

MR FOOTE KC:
Well, frankly, the pleadings in this case and I can say this safely, not being counsel in the High Court, were a mess and they barely articulated the cause of action.

Essentially, they said, well, look, there's been some unjust enrichment, that's unjust for some reason that isn't articulated. Duress isn't mentioned. Illegality is not mentioned. The way in which the case was argued before the Judge was as a duress case and plainly the Judge was answering that in the judgment.

But as to prejudice –

KÓS J:

Well, before that, is illegality within the scope of the pleading?

1215

MR FOOTE KC:

Well, yes, I believe it is for the reasons that the Court of Appeal set out and that was – so that point was taken at the Court of Appeal but certainly I did not understand that it was a question that was still live in this Court. Now, I didn't appreciate the scope of the questions for which leave was given to encompass that the illegality argument was not permitted or not properly brought in the Court of Appeal. That argument was had and decided.

WINKELMANN CJ:

Well we might take the view it's inevitably, because of where there is proper basis on the facts or there is a safe basis on the facts. I mean you can say there wasn't but – there was, rather, but –

MR FOOTE KC:

Yes, Chief Justice, I accept that and of course you can. I only mention that to say, well look, of course your Honours can raise prejudice but it's not something that has been put up in lights by the other side before this Court, so it's difficult –

KÓS J:

Well and everyone's violently agreeing on the proposition that we've got a contract here of some sort.

MR FOOTE KC:

Yes, yes.

KÓS J:

Mr Grant's furiously arguing that his sham deed is still alive in some form.

MR FOOTE KC:

Yes.

KÓS J:

And if there is a contract then we've got to ask ourselves first of all what is the status of that contract.

MR FOOTE KC:

Yes, well and –

WINKELMANN CJ:

And what were its terms.

KÓS J:

And what were its terms, yes.

MR FOOTE KC:

And what were its terms, and I'm certainly coming to that. But while we're on prejudice and whether or not the Court of Appeal was right to allow the illegality cause of action to be brought at the appeal stage, my first reaction to my learned friend's point was, with respect, the Chief Justice's one. But if any apparent prejudice is more apparent than real, because if Mr Liu was asked, well didn't you enter an agreement whereby you wouldn't go to police in return for the money, he would've said, no, this was a loan that I was being repaid. That was his whole narrative at trial. Why on earth would he step away from that and say, well you've got me, that's absolutely what the real deal was. He would've stuck to I didn't make any threats at all. I mean that was Mr Liu's position, I didn't threaten Mr Wu with going to the police, and the payment of the 1.2 million was about repayment of the loan that I made him in 2008 from China.

WINKELMANN CJ:

But that doesn't necessarily relieve you of your cross-examination, which was not your obligation –

MR FOOTE KC:

No.

WINKELMANN CJ:

– cross-examination obligations in the High Court because I mean you might say, well, the appellant was giving an account which was rejected by the Judge but he was never given an opportunity to comment on the counternarrative which you're now putting forward, being put forward in the Court of Appeal, and there's a fairness aspect there.

MR FOOTE KC:

Well the counternarrative though was, no, no, you Mr Liu made these threats, you wanted money so as not to report this to the authorities. That's what the threat was. That was put to him in cross-examination. That was Mr Wu's evidence.

KÓS J:

Perhaps after lunch you could show us where that is to be found.

MR FOOTE KC:

Well I will do that, the best I can, but it is quite apparent with respect simply from Justice Lang's findings and –

WINKELMANN CJ:

Well not so totally apparent given the evidential mess he was having to deal with because he was finding both sides not worthy of belief on many issues and then trying to steer a path.

MR FOOTE KC:

Yes, yes, but –

KÓS J:

I mean all that is needed here is that the point is put. Is there…

MR FOOTE KC:

Yes, well, I hope I can find –

KÓS J:

We don't have to have an agreeing to it.

MR FOOTE KC:

I hope I can find the particular question which deals with the matter.

KÓS J:

Yes, well so do I.

MR FOOTE KC:

But if it wasn't put then that would've been a failure of Mr Liu's team because Mr Wu and his wife Crystal quite plainly said to the Judge that they were threatened in order to make these payments. The Judge decides that they overemphasised or exaggerated the threats because they included threats to their family and physically, but decides that what the threats – but he believed them so far as the threats were to go to the police and I think that's –

1220

WINKELMANN CJ:

Well, it rather misconceives the burden of proof, doesn't it? Because isn't it for your client to make out that it's an element of the offence – an element of their, sorry, contract? It's a condition of the contract, or the Deed, that they would not go to the police and it could be put to them, well, you made the threat and obviously the other side of that deal was if you pay the money we won't go, that could be put? But it's not for the appellants to rebut that, it's for your side to prove it.

KÓS J:

Yes, the ruling that *Browne v Dunn* (1893) 6 R 67 (HL) doesn't work in an anticipatory fashion.

MR FOOTE KC:

Right, well, I suppose I agree with my learned friend to the point that we have to – we are stuck with the evidence, obviously, before Justice Lang and that the evidence from Mr Wu and Crystal was, we were threatened that Mr Liu would go to the police if we didn't pay $1.2 million. It is an inference that the Court of Appeal has drawn that, essentially, that the quid pro quo for the payment was an ongoing promise. That that was the true agreement in the – that was the true agreement between Mr Liu and Mr Wu and I say –

KÓS J:

If that was Mr Wu's evidence, this case can't have been such a mess that the point wasn't put to Mr Liu and really, Mr Foote, you are going to have to take us to the evidence.

MR FOOTE KC:

All right, okay. Well –

KÓS J:

But that might be after lunch.

MR FOOTE KC:

Right.

ELLEN FRANCE J:

Just in terms of the argument not being put in lights, I think was your terminology, Mr Foote. The illegality point, you can draw some comfort from the lead decision which does – it's in a slightly different context because it's dealing with the Limitation Act argument.

MR FOOTE KC:

Yes.

ELLEN FRANCE J:

But the leave Panel does in the leave judgment –

MR FOOTE KC:

Yes, well, that was the –

ELLEN FRANCE J:

– talk about: "... the original pleading [being] broad enough to accommodate both duress and illegality ...", not that we are bound by that, but I'm just saying in terms of your not being aware that that was an issue now.

MR FOOTE KC:

That's correct, with respect, and that's one I referred to in saying that the Court of Appeal dealt with that issue. They said that the submission that the Court should always turn its mind to illegality if it is plainly on the matters before it, is another reason that even if it wasn't on the pleadings the Court should consider those circumstances. And the Court of Appeal went on to say that, if necessary, they would have allowed an amendment to the pleadings to include an express illegality pleading.

WINKELMANN CJ:

Yes, but I'm rather not raising the pleading point with you, Mr Foote, because the appellant very much does take the point that there is not – that there was no proper evidential basis for the Court of Appeal to proceed. Firstly, that they were just assuming that Justice Lang had made that decision, had made the findings. Mr Grant took us to the parts where they, he says – which you can respond to – that the Court of Appeal is proceeding upon the basis that there are findings made by Justice Lang that aren't. And the second part of his argument was that there was no proper evidential basis.

So, it flows out of that, really. If there the proposition is not put, then the question is whether it is proper for the Court of Appeal to then go on, if they did, in fact, and make that finding.

MR FOOTE KC:

Yes, well...

WINKELMANN CJ:

But you can look at that over lunch.

MR FOOTE KC:

Yes, I'll look at that over lunch, thank you.

1225

As I said at the outset, a fine point at the end of the day for the respondent is that it was appropriate for the Court of Appeal to draw the inference as to the nature of the true agreement to being payment, I'll just refer to in short-hand, you know, for silence or to avoid prosecution, and perhaps what I could usefully do now is take the Court to some similar decisions that show that where there is pressure and threats of a criminal prosecution, or a criminal prosecution is in the background of the deal that is done, then it is very readily accepted that a payment to pay back what has been stolen will involve an agreement, an implied or inferred agreement, to avoid a prosecution.

KÓS J:

Well that's okay as far as it goes but if it's repaying what's been stolen that's equally consistent with pure compensation. I would've thought the much stronger point for you here is the extravagant nature of the payment which seems to have nothing to do with the compensation, in which case it's kind of hard to work out, that's why I've said to Mr Grant before who, in his excellent argument response, couldn't actually put his finger on an alternative inference and it was the only moment at which he didn't have an answer. I know it's your best point, what other inference could there be? We don't need cases to show that. It's the facts that matter here.

CAMPBELL J:

If I may just add one thing to maybe extend Justice Kós' question, the other fact that appears to be in your favour is that the parties went to a lot of bother to construct a fictitious basis for the transfer of the $1.2 million.

MR FOOTE KC:

Yes, yes, thank you both. Perhaps I was approaching the matter too delicately but the reason that I mentioned these, well, I call them the reparation cases where relatives have stepped in to pay money to employers that has been stolen by their relatives, the reason that I mention those cases is because, as your Honour Justice Kós mentioned, in those cases there could well be a real genuine reason for that claimant that does not involve avoiding prosecution, ie, simply to repay the civil debt that is plainly owed by the relative. So there is a good reason for payments in those cases. *Williams v Bayly* for example, the father steps in to pay his son's debt to the bank that had been, that the son has drawn by forgeries. There's the *Jones* case –

WINKELMANN CJ:
I don't think there's any issue with that so Justice Kós' point assumes that and makes a point that it's –

MR FOOTE KC:
Yes, all right, so in this case we are, even we are far further on the spectrum where we can draw an inference that the payments were in fact for the suppression or avoidance of a prosecution because in those cases even where, say the *Banks v Cheltenham Cooperative Dairy Company Ltd* (1910) 29 NZLR 979 (SC) case in New Zealand, even where the solicitor was very careful to say, look there can't be any guarantee that the Dairy Cooperative in that case won't take a prosecution, even then the Court went on to say, well, yes but everybody knew why the payment was being made by the relatives, it was to avoid the prospect of a prosecution and that is an illegal contract to stifle a prosecution.

Now, those are in those cases where there are genuine reasons for payments. Here, there is no such reason. In the Court of Appeal my learned friend tried valiantly to say that the Judge was wrong to connect the threats of prosecution, or reporting I should say, with the payment of the money, that that had gone – that he'd gone too far. There could essentially be another reason that we don't know about, and that's as far as my learned friend could take it then and, quite properly, that's as far as my learned friend could take it today.

1230

He couldn't suggest another reason why Mr Wu and his wife would pay $1.2 million, which was Justice Kós observed earlier they had great difficulty in finding, to the other side. Was it a gift? You don't have to have to have consideration under a deed but that's not the question. The question is, what was the reason for the payment?

The entire deed refers to a loan and to repayments of the debt. That is found to be fictitious, so it is not repayment of a loan. There is no obligation to repay a loan from Mr Wu to Mr Liu, it's not a gift, what else could it be? The only other possible inference is that it was related to the threats to take – to report Mr Wu to the authorities. It is almost an irresistible inference in these particular factual circumstances.

The only leverage that Mr Liu has over Mr Wu to get him to make a transfer of a very large amount of money to him is that he knows about Mr Wu's theft from Timber King and that he can make trouble for him with the authorities. That is the only leverage that Mr Liu can have to motivate the payment.

Now, the object of the arrangement, then, was plainly for Mr Liu to enrich himself and for Mr Wu to avoid reporting to the authority. My learned friend would have it that the deal didn't go that far. It was just a matter of, you pay me now and I won't report you now but there's no promise that I won't report you after the payments have, in fact, been made.

Now, with respect, that –

KÓS J:
Well, does that make a difference?

MR FOOTE KC:
I'm sorry, Sir?

KÓS J:
Does that make a difference?

MR FOOTE KC:

Well, it would be – well, if I apprehend –

KÓS J:

Both non-reports are unlawful?

MR FOOTE KC:

So, I do apprehend your Honour correctly. My first point is, even if it's I'm only going to report you for this short amount of time that is limited by up to the date that you pay me, that is illegal anyway. That is stifling a prosecution just for a shorter period. So even without going into the question of did the actual agreement involve an ongoing promise, we already have an illegal arrangement here, but –

WINKELMANN CJ:

Why is it an illegal arrangement? If there's no ongoing promise, it's simply I'm going to go to the police today?

MR FOOTE KC:

Unless you sign this deed which tells me you're agreeing to pay me and but I'm not saying that once you've paid me, you know, once you pay me all bets are off. Let's imagine that –

WINKELMANN CJ:

So, you're not saying that just don't go to the police, I won't go to the police today, is sufficient for it to be an illegal arrangement for the purposes of the Illegal – well, use of the Illegal Contracts Act 1970 and I still wish it was. You're saying it's implicit in that, that I won't go to the police tomorrow or the next day as well? It's the promise not to go to the police in the future?

MR FOOTE KC:

Both are – on my learned friend's construction of the case in this Court, not in the Courts below, the threats motivated the payment but there was – but all bets were off after the payments were made.

Now, if the threats are motivating the payment, the deal up to the time they payments are made must have been, well, I'm not going to report you to the police if you pay me. Right? And otherwise, if Mr Liu went and reported to the police, then Mr Wu wouldn't be paying $1.2 million.

So that's just a shorter period of time where Mr Liu has promised not to go to the police.

WINKELMANN CJ:
So, the appellant's argument is that that period of time is prior to contract and the contract doesn't carry that term forward. It's a deed and they're agreed this course of conduct, et cetera.
1235

MR FOOTE KC:
Well, I mean this conversation does, I think, reveal more that the, with respect, the appellant's argument is sort of dancing on the head of a pin here, but when they say, pay me or I will go to the police, then there's two sides to that deal immediately, isn't there.

WINKELMANN CJ:
Well, you're saying that, and it carries with it –

MR FOOTE KC:
Mr Wu says –

WINKELMANN CJ:
– the promise that I won't go to the police.

MR FOOTE KC:
Yes, and essentially all my learned friend, and so there is then a period of time where Mr Wu and his wife are running around trying to get the money together and during that period, one way of looking at these facts is that there is an

operative agreement there between them that so long as you agree to pay me, then I'm not reporting you to the police. What my learned friend seems to say is, well, once the payments are made, that, you know, all bets are off.

WINKELMANN CJ:

So Mr Grant's argument is sort of like this to draw an analogy, enter into this agreement or else I'm going to punch you today and if you don't enter into the agreement, I will also punch you tomorrow and the next day. He's saying, all it's saying is enter into this agreement or else I'll punch you and that threat is then spent once you've entered into the agreement.

MR FOOTE KC:

The threat is spent, there's no further deal about going forward once the money is paid.

WINKELMANN CJ:

Well you'd say it's distinguishable when it – yes, it's a distinguishable situation, wouldn't that be your point because it's not a single act of violence. There's an ongoing risk to the person of prosecution.

MR FOOTE KC:

Yes, but it's –

KÓS J:

Well, it's a double risk actually. That's the reality. There's a double implication here because not only is there a risk to Mr Wu that he'll be reported, but also there's a risk to Mr Liu that if he reports, he himself will then be charged with blackmail. So it's a bit of a Mexican standoff and the reality is, if you make that bargain, it will be held, it will be adhered to by both sides. Mr Wu will pay the money to avoid the reporting and Mr Liu will not report him because if he does report him, he himself is in trouble. That's the commercial reality of this deal.

MR FOOTE KC:

Yes, well that's with respect very well put. I mean, the respondent's case here is that it's a little artificial to suppose that Mr Wu and his wife paid the money to avoid reporting only up until the point they paid the money because then they've paid for nothing, if the risk, if Mr Liu on the true deal is then able to go to the police, then what have they paid for? They haven't paid for anything. Now the practical realities may be just as your Honour's pointed out that Mr Liu would have to be very careful about going to the police, although he did have a Deed to cover why the payments were made, whether that was for the IRD or whether it was for, you know, later if he ever decided to report them. But it just doesn't make any commercial sense that there's a payment of such a large amount of money, that's covered by quite an elaborate cover story, a fictious cover story being the Deed, which ends at the point that the payments are made. That's no deal for Mr Wu. Why on earth would he do that? So it must involve an ongoing forbearance from Mr Liu to report and that's essentially in cases where the facts are less stark is what the English Courts have found in cases like *Bayly* and *Jones* that we have got this backdrop of potential criminal reporting and a payment is made, even if it's a payment that's paying off a genuine debt, there is a very strong inference that the payment is at least, in part, made to avoid the prospect of reporting to authorities.
1240

Now here, the case is so much clearer, it's almost difficult to overstate. In my submission, this case goes kind of, it doesn't even really lend itself very well to a contract analysis. It is simply –

CAMPBELL J:

I was about to suggest that.

MR FOOTE KC:

It's simply a threat to do harm unless you pay money and there's not a lot of difference to a hold-up and it would be – it's not –

WINKELMANN CJ:

Apart from a fact a hold-up, it has the immediacy thing that a threat to assault does.

WILLIAMS J:

It doesn't involve an exchange of paper.

WINKELMANN CJ:

So it's distinguishable.

MR FOOTE KC:

Yes, that's about all. But let's say, I will release a –

WINKELMANN CJ:

I'm making a point in your favour, Mr Foote, it's not –

MR FOOTE KC:

Yes.

WINKELMANN CJ:

Because your point is that threat to prosecution is an immediate, is an ongoing threat whereas a hold-up or assault is a threat that is – that goes when you're not in physical proximity.

MR FOOTE KC:

Yes.

WINKELMANN CJ:

Whereas this is an ongoing threat which is why you're saying it's a necessary implication that it carries with it they won't.

MR FOOTE KC:

Yes, I'm going one step further than that and let me step away from the assaults. Where both parties know that there is no debt, because that's what Justice Lang found, the action of Mr Liu to say, well, you pay me money that you do not owe me, otherwise I'm telling the police about what you did in an unrelated matter, is simply an extortion and *The Duke De Cadaval v Collins* (1836) 4 Ad & E 858, 111 ER 1006 (KB) case is, in fact, exactly the same.

KÓS J:
Well, that's right, but the problem with your going down this route.

MR FOOTE KC:
Yes.

KÓS J:
Is that the attraction for your side of illegal contracts is the immediate clarity of being a void transaction.

MR FOOTE KC:
Yes.

KÓS J:
And why Mr Grant is trying to carry you across the border back into the arrests is because he is hanging his hopes on affirmation, which doesn't – which is only going to trouble you if it's duress and extortion as opposed to a contract. So, it's a nice trap he's set, do you want to fall into it?

MR FOOTE KC:
Well, I'm not sure that that can be so, because for example, in *The Duke De Cadaval* case their Lordships said, well, how can it be shown that the money that the Duke paid to his extorter is not still the Duke's money? And they said it cannot be shown other than by seeking to uphold a fraud and that is what is happening here. You cannot affirm a fraud. You couldn't affirm a payment that's extorted from you, whether it's at gunpoint or –

WINKELMANN CJ:
So you're answering the affirmation point now. Are you answering affirmation in duress context?

MR FOOTE KC:
Well, affirmation doesn't even arise, in my submission.

WINKELMANN CJ:
No, but if – okay.

MR FOOTE KC:
If you deal with the matter as the way of just a simple extortion. If you didn't take action against a thief for a number of years, if there's no doubt that a theft had occurred, it couldn't be said from the thief's mouth, the blackmailer, oh, you've affirmed my theft from you because you haven't done anything about it. That can't possibly be, that can't possibly be right.

CAMPBELL J:
That's your no contract point.

MR FOOTE KC:
It is.

CAMPBELL J:
Which really feeds into the artificiality of trying to – well, the potential artificiality of trying to construct a contract over what took place here.

MR FOOTE KC:
Yes.

CAMPBELL J:
Because if we're potentially dancing on the head of a pin, another way in which the contract could be constructed is as a unilateral one rather than an exchange of promises as such.

MR FOOTE KC:
Yes, it's an in –

CAMPBELL J:

If I don't report out the police over the next six months, you will pay me the $1.2 million. But I don't think either party would have really thought of these things in contract terms, frankly.

MR FOOTE KC:

No, so there are two aspects to this. One is that this isn't a contract, it's just an extortion by threat of harm. No property has passed in a beneficial sense.
1245

WINKELMANN CJ:

Well, in one sense it is a contract. We've got a contract by deed. But isn't your better argument on this that it's a sham? Because the thing that is really going on is a payment extorted through blackmail and it's not actually – and that's the sense in which it's sham. It's dressed up as if it's a regular business transaction but, in fact, it's what's not reflected in the documentation is that it's a payment in exchange for this promise, so that's the sense in which it's sham.

MR FOOTE KC:

I think all roads lead back to the same or a very similar place or point because in the reparation cases, and in other cases such as *Haines* and *Hobbs* and what have you, there is a genuine agreement or there is a genuine debt or liability owed but, in this case, there simply is not. There's no debt owed because the loan is fictitious, and the Deed is just an instrument of fraud. There's no obligation under a Deed to repay a loan which doesn't exist no matter what the words on the paper in the Deed say and the Deed is all about the loan and nothing else. So if I may for one moment and this is in the *Bhowanipur* decision, but it is cited in the *Osborne* decision: "In most cases of this kind there is a debt or a liability. Indeed, if there were not, a demand and receipt of money in consideration of refraining from or withholding a prosecution would apparently in itself be a criminal offence." So that's the first point. There is one way of dealing –

WINKELMANN CJ:

Well, that's in a context of prosecution though, isn't it? The prosecutorial discretion, is it?

MR FOOTE KC:

No, it's not. It's a classic reparation case –

WINKELMANN CJ:

Blackmail.

MR FOOTE KC:

– where in this case the wife of the thief from the employer gave a mortgage to secure the debt and she then applied to have that mortgage discharged so it's essentially a reporting and what the Court found was, look, this mortgage was given in order to avoid her husband being reported to the authorities by her employer, but in that case, there was –

WINKELMANN CJ:

But is that a criminal offence? It's not a criminal offence unless it amounts to blackmail, is it?

MR FOOTE KC:

No. My point is what the Judge is saying here is that, look, ordinarily there's a debt or liability that's genuinely owed and, if so, it can still be an illegal contract if you bring into the repayment of that genuine debt another term which is implied that the employer won't go to the authorities. But the Judges go on here, that's really an additional comment to say, well, look in just about all of these cases and it's true of *Bayly*, of *Jones*, of *Bhowanipur* that there is this genuine debt or liability. But where there isn't, then it actually just comes down to a demand and receipt of money which is a criminal offence. So there are two ways of approaching this, if I can, just to be clear. One is to say there is no actual deal here. There's just a shakedown and I'd say that colloquially and I perhaps apologise for that, but that is what it is.

WINKELMANN CJ:

That's your sham argument, that's the sham argument. You're saying that really this is just dressed up as a contract but actually it's just a shakedown.

MR FOOTE KC:

That's what the Judge found. That's what Justice Lang found. He found very clearly this is blackmail, this Deed is not worth the money it's written on. Where I think the Judge went wrong –

WINKELMANN CJ:

I don't know that he did find that, but –

MR FOOTE KC:

– is to then continue to go on and say, well, the Deed remains binding on the two parties. I don't see how that can possibly be.

WINKELMANN CJ:

Yes, it probably suggests he didn't make that finding. He didn't, because he wasn't being asked to, of course, because he was facing a claim under duress.

MR FOOTE KC:

Yes, correct.

WINKELMANN CJ:

So that would explain the path he did follow.

1250

MR FOOTE KC:

I understand the path he followed, absolutely and I think your Honour is right, but the only conclusion from the finding that the Deed just records a fictitious loan that was never made is that there is no genuine underlying debt here from Mr Wu to Mr Liu, and so all Mr Liu is doing is using his knowledge of a crime to extort money from Mr Wu, which in the – where I start –

WINKELMANN CJ:

I just was thinking that these are two alternative framings, one is there's no contract, it's a sham.

MR FOOTE KC:

Correct. And then the second is –

WINKELMANN CJ:

And the other is that there is a contract and it's an illegal contract.

MR FOOTE KC:

If there is a – yes, and they come back to – or they have the same fulcrum I suppose because the other argument is, okay but there was an agreement, there was some kind of agreement between the two parties. What is that agreement? That again comes back to well it's not the Deed, and I've been through that, there's no loan, there's no gift, there's no evidence about any reason that Mr Wu would give Mr Liu this money. What evidence is there? Well the Judge clearly finds that the payments were made because threats to go to the police were uttered by Mr Liu to Mr Wu. It is an almost inevitable inference, and one I submit the Court of Appeal was quite right to draw, that the true agreement was you pay me the money and I won't report your malfeasance in relation to Timber King to the police.

There's no sense in which that 1.2 million can be payment for other matters relating to Timber King. Mr Liu wasn't a director or shareholder of Timber King. He has no right to any money at all from Mr Wu. He tries to make one up and the Judge dismisses that.

So, whether Mr Liu forbore on reporting until the money was paid, which doesn't really make a lot of sense from Mr Wu's perspective, or whether it is a promise that is ongoing and still ongoing today, then that is the true agreement, that Mr Liu would not go and report Mr Wu's malfeasance.

It seems to me that the facts were there, the Court of Appeal was right to say that at the very least the pleadings could be amended if necessary, they decided that it was not necessary, but in any event the Court should root out illegality where it finds it and address it.

So, for either of those reasons, it's my submission that if it's the second reason then I don't think it's controversial that then that must be an illegal arrangement which was void ab initio.

KÓS J:

If it was the other alternative, I mean there are so many hares running in this case now it's hard to keep sight of them all, but the third hare, which is your no contract one, is that void as well or is that the only voidable? It's a transfer made under duress.

WINKELMANN CJ:

Is that the – you mean the sham one?

KÓS J:

Yes, your third no-contract theory.

WINKELMANN CJ:

There is no contract.

MR FOOTE KC:

Well, effectively in that case where you've obtained money by illegal means, I don't know if void and voidable is the right terminology because literally the property in that whatever's passed over has not in fact passed to Mr Liu, he can't possibly say that it is his, on any basis. So if your Honour was extorted by any kind of threat and handed over $1,000 in cash, what *The Duke de Cadaval* case says is, well, that's – while there has been a physical handing over of that cash, you have not parted with the property of that cash, it comes back to you, it's always yours.

1255

WINKELMANN CJ:

I'm not sure that that's right, in relation to the law of sham contracts. Isn't it that the Court gives effect to its true effect and purpose, which would be to say, holding here on your analysis, that it's an extortionate payment and therefore it's that analysis rather than just saying it's as of no effect?

MR FOOTE KC:

In that scenario, the sham contract is only relevant to say, you know, was there a genuine debt owed by Mr Liu to Mr Wu? Once it is determined that there is no debt owing, that that deed is entirely fictitious, it becomes entirely irrelevant. It must be, because it doesn't in any sense justify the transfer of the property. It's just – it is complete irrelevancy. All that's happened here is that Mr Liu has said to Mr Wu, I know about your crime and I'm going to tell the police unless you pay me a whole lot of money and, by the way, please sign this so that if I need it in the future I can run a lie about how it was a loan.

So, it doesn't engage a sham contract, with respect. It's artificial – sorry, not artificial – it's irrelevant.

WINKELMANN CJ:

I'm sorry, are you saying you're not relying on sham contract? That's it's not, it's just a sham, you're not – what are you saying? What do we do with that deed, on your argument?

MR FOOTE KC:

Well, the Deed, on my argument on both counts, gets entirely put to one side on the basis of the finding that it documents a fictitious loan. It's a sham. It's not – on the first argument, the no contract argument.

WINKELMANN CJ:

So you're saying it's a sham, which is a kind of like classic *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786 kind of analysis, which is it's just a fictitious bundle of rights which hide what's truly going on.

MR FOOTE KC:

Yes, it's a fictitious bundle of rights. There are no rights at all. Once that's found, then you have either you can analyse the situation and once it's decided that the Deed and the loan in particular, that the Deed evidence does not exist, never happened, was not a figment in any sense of any kind of reality, there is no genuine reason for Mr Wu to be indebted to Mr Wu, essentially then in either case that deed is put to – ought to be put to one side and you can analyse the facts of the case in one of two ways.

The first, is that Mr Wu is saying I'll report you to the police because you stole from Timber King unless you pay me $1.2 million. That's it, that's simple, that is actually all that happened here and that is a theft. It is not really subject to any contract analysis. But the other way of dealing with it is to say, okay, well, what's the true agreement? The true agreement is, very plainly, you pay me money and for some period of time I won't report you, your malfeasance with Timber King, to the police. And that, if that's an agreement, then it is an illegal one and both lead back to exactly the same place.

We're just two minutes before one, unless there are any other questions just before lunch, I can do my homework and see where we get to.

WINKELMANN CJ:

All right, we'll take the luncheon adjournment. If that's what you're asking, an extra two minutes for lunch, we'll give you that.

MR FOOTE KC:

That's what I'm asking, thank you.

WINKELMANN CJ:

Thank you.

COURT ADJOURNS: 12.59 PM

COURT RESUMES: 2.17 PM

MR FOOTE KC:
May it please your Honours. I have examined the evidential record and I'll take your Honours to the most relevant parts. They begin with Mr Wu's brief, which is at 201.0028, and at paragraph 47 therein refers to late February/early March: "I was blackmailed and threatened by Jinxing and Jackie ... 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."

Their demands are articulated at paragraph 48 and then at paragraph 56 which is on page 32 and those demands evolved but they always involved money and/or property totalling around 1.2 million. There were various properties discussed, there was $600,000 cash was always in the mix. 59, Mr Wu outlines his concern about being reported to –

WINKELMANN CJ:
Can we go back to the earlier paragraphs, because there's amounts of money being discussed against many particular concerns. Right. 56.1.

MR FOOTE KC:
Yes.

WINKELMANN CJ:
Okay, and then that's a demand for which no money was made on his case, then next is the two properties.

MR FOOTE KC:
Yes, the two properties are mentioned at 56.2, yes, and –

WINKELMANN CJ:

One of which was transferred.

1420

MR FOOTE KC:

Transferred. Well it says this was "...Jackie and Jinxing demanded that I:", 56.2: "Transfer two properties ... once the subdivision was completed ... However, this demand later evolved to entail paying an additional $600,000 and transferring only Lot 1 ... ."

WILLIAMS J:

Just remind me, what was the initial reference you used, whether the English word bribe is in the agreement?

MR FOOTE KC:

I'm sorry, Sir, I didn't quite catch that.

WILLIAMS J:

Just the initial paragraph you took us to? Just give me the number, that's all?

MR FOOTE KC:

Oh, paragraph 47, Sir.

WILLIAMS J:

Thank you.

MR FOOTE KC:

And then paragraph 59, Mr Wu explains that he had: "[His] residence visa ... granted through Timber King in 2017, and the threat of losing it due to allegations reported to the police, the IRD, and Immigration New Zealand added to my stress. Jinxing's actions also took a heavy toll on Crystal" – that's his wife – "leading her to suffer from depression."

And at paragraph 60: “Our parents advised [Danny and Crystal] to pay off [Mr Liu] to extricate ourselves from the situation.”

So that broadly explains the threats as Danny saw them and he was cross-examined at 201.0145. So this is my learned friend questioning Mr Wu beginning at line 19: “Apologies, let me start again. You’ve never been blackmailed by the defendants at any time, have you?” And Mr Wu says: “No, they kept on using the so-called evidence from my email” – that’s a reference to the evidence of his alleged thefts from Timber King – “to get me to pay money. When you look at it, all of the evidence or most of the evidence the defendants are relying on for the emails, no other sort of evidence.” I don’t quite understand that. Question: “You transferred $600,000 and a property to a repay a loan, correct?” “That's incorrect. It is not I it was my wife who was forced ... to do the transfer.”

And later on, I think this is of some relevance, this is 201.0162, so line 11 through to line 27 and I think the most relevant part here is just at line 19: “And when he said he can't do it you’re afraid that he can keep coming after you for the Timber King theft right?” “No that’s incorrect. It is not the theft that I was concerned about, what I was concerned was they are holding on those fake documents as the evidence to report me to Immigration New Zealand, that’s something I was worried about ... I do not want my life to be ... interrupted with.”

WINKELMANN CJ:

Well, that’s different to stifling prosecution. Different to stifling the prosecution, reporting to Immigration, what's that?

1425

MR FOOTE KC:

Yes, look, I’m going to, in a minute, just take you to what Mr Liu said in cross-examination, but I acknowledge that plainly in this case the Judge had to pass through some – a lot of evidence from both sides that he struggled to bring into some sort of order or reasonable form and in the judgment he makes plain that he doesn’t really believe a lot of what either has to say except where it’s corroborated by other matters and essentially says, well, look this is what basically happened so far as I can ascertain and I don't think that your Honours would find it a particularly welcome afternoon if we tried to reinvent that particular wheel, but I'm just taking you, so that you know, to the parts that are mentioned and I acknowledge that there isn't a question, and I apologise if I misled, that's one disadvantage of not being trial counsel in this case, but there isn't a pointed question at Mr Wu saying something like, you didn't expect the promise not to go to the police to be ongoing and for perpetuity did you? Your threats were –

KÓS J:

I'm not so interested in that.

MR FOOTE KC:

I see.

KÓS J:

I'd like to know if Mr Wu was asked what Mr Liu was doing in exchange for the money and I'd like to ask if Mr Liu was asked that question, because at the moment what we seem to have are threats.

MR FOOTE KC:

Yes.

KÓS J:

All I'm trying to work out is how to analyse this case, whether it is a no contract case as your alternative argument is or whether it's a contract case as both you previously and Mr Grant were contending in different ways.

MR FOOTE KC:

Yes, Sir. None of the questions are framed in that sort of quid pro quo way. All we can say is that Mr Wu says, well, look I was told I'd be in trouble, immigration, police, what have you, and I didn't want that to happen unless I complied with the demands. And what were the demands? They were the property and the

$600,000. The question of the exact term and how long essentially the threat to go to the police would be current for, was not really a detail that was –

KÓS J:
I don't think that matters.

MR FOOTE KC:
Okay, all right.

KÓS J:
The question is whether there's an assurance given or implied or actual, there wouldn't be a report.

MR FOOTE KC:
I think it is clear that Mr Wu says, I paid so that I did not get into trouble, that I was not reported by Mr Liu and or Jackie to the police, I think that's, or the authorities. I think that's very clear on the one hand and on the other hand, Mr Liu maintains that this had nothing to do with blackmail, it was all about a loan that he made in 2008. So just to give your Honours the reference for that, 203.0559.

KÓS J:
Sorry, what, 559?

MR FOOTE KC:
Yes. 203.0559. Mr Liu is cross-examined at line 12, or actually line 10: "… I was the lender all the time. The money was borrowed from me." Question: "There was no money, there was no borrowing, was there? This was just extortion." Answer: "Of course loan was given, how come you are saying there was no loan? I oppose what you say."

And at, is it the next page, I think it is, yes, at the top of the next page, the suggestion is made that Mr Liu went back to China and stayed there: "… because you're afraid that if you come back to New Zealand you might get a police investigation?", that is for blackmail, and the answer is: "That is absolutely wrong. How come I would be worried about that?" Question: "Because you extorted $600,000 and transfer of a property off my client." Answer: "Firstly I need, I need to make it clear it is the debt he owed."

So he stuck, and as would be expected, very much to that line which ultimately the Judge dismissed.

1430

Even though the High Court Judge approached this matter by way of duress, when the Judge's findings are read carefully, there's an air of unreality about the contention that seems to be at the heart of my learned friend's case here that there were threats but once the money was paid there was no ongoing promise. There was no quid pro quo for those payments. I've mentioned already that essentially that would be an extraordinary thing for Mr Wu to have agreed to given the fear that he had of report to the authorities. Why would he pay the money if essentially as soon as he did so all bets were off, and so too – if I can just have a moment.

One other aspect of the Court of Appeal's judgment that's worth looking at in terms of that ongoing sort of obligations of the underlying true agreement is at paragraph 42. This is where the Court of Appeal say that given the Deed was a sham: "… there had to be some explanation for Mr Wu paying Mr Liu $1.2 million in cash and kind. We consider that the conclusion that the payment was made to prevent Mr Liu reporting Mr Wu's earlier theft … was correctly drawn …" and one of the reasons that the Court of Appeal give is that the WeChat messages set out the concerns of Mr Wu and his wife that what would happen a few years later if Mr Liu was to "go after us again". And Mr Liu says, well, look this is "impossible" but this can't be recorded in writing because the law doesn't allow us to do this. "Mr Liu later makes the point that if there was a written agreement it could be used by Mr Wu … to say ['we're blackmailing you']. We draw the same conclusions from these exchanges …"

So in the respondent's submissions at paragraph 43, you will see the submissions that that sort of evidence indicates that the parties were looking forward, you know, what if you come back in a few years and Mr Liu's saying, no, no, no impossible, I won't do that but we can't write down that I won't go to the police because that would (a) put him at risk of being shown to be a blackmailer but also because it would, he knew full well that it wouldn't be legally binding. So there is evidence there that shows that the parties were not, all bets were not off once the money was paid. This is an ongoing agreement of payment for continued silence.

Can I finish by looking at two, just a couple of, just have a moment, so at paragraph 77 of the High Court judgment, paragraph 77. This is where Justice Lang sums up in a way and he says here: "… [I] am satisfied that Mr Wu and Crystal entered into the Deed because of the pressure applied by Jackie and Jinxing." Now just as a tangent, I think it's that we have the finding "in all likelihood" that Justice Kós and my learned friend discussed, but there are two other instances, and one is here where the Judge says that he is satisfied of the link between the threats and the payment. "The pressure was plainly improper because the threats amounted to blackmail, which is a criminal offence. Further, Jackie and Jinxing had no legal right to use Mr Wu's actions in stealing from Timber King as a means by which to obtain a pecuniary benefit for themselves." And they go on to make the point about the value of the assets being, demonstrating the seriousness that Mr Wu and his wife took the threats. 1435

Now, but that central paragraph there is important and with respect to the Judge, might have given notice of the fundamental illegal behaviour that is occurring here.

If we go back, if I can take your Honours very briefly to *Williams v Bayly*, this is Lord Westbury, at page 331 in the paginated authorities. But it's very brief to read: "I apprehend the law to be this, and unquestionably it is a law dictated by the soundest considerations of policy and morality, that you shall not make a trade of a felony. If you are aware that a crime has been committed, you shall not convert that crime into a source of profit or benefit to yourself ... If men were permitted to trade upon the knowledge of a crime, and to convert their privity to that crime into an occasion of advantage, no doubt a great legal and a great moral offence would be committed."

So that, for example, really is the basis for the no contract side of the argument. A theft or an extortion of this matter, nature, is not the type of relation to which contractual principles apply. There is no intention to create legal relations if you hand over money to an extorter or a thief.

But further, so then I leave that point, that's –

KÓS J:
Page 220 of that report.

MR FOOTE KC:
Yes, Sir, it is.

WINKELMANN CJ:
No, I think he's – I think the Judge is asking you to go to page 220 of that report?

KÓS J:
Yes, that's right, that's right. Just we were lost as to which page it was on, but I see it's page 220.

MR FOOTE KC:
It's page 220 of the report and 331 of the paginated numbers, Sir.

So, that is, that same principle, is reflected in the *Bhowanipur* judgment and I took your Honours to that quote just before the break where their Lordships drew the observation that most cases have a genuine debt underpinning them but if they don't then all you have is, essentially, a crime being committed by extortion.

WINKELMANN CJ:

Well, this is all very well but the question is was the legal form – it was originally pleaded and proved as a duress, although who knows what it was pleaded as.

KÓS J:

Or a simple restitution, really, wasn't it?

WINKELMANN CJ:

Yes, it was not pleaded as anything – a cause of action unknown to New Zealand's law, but it was proved as duress giving rise to, I assume, action for money had and received once the contract was avoided. This could apply to duress or a legal contract or sham, couldn't it? I mean, it depends on its kind of a general –

MR FOOTE KC:

Principle.

WINKELMANN CJ:

– apple pie and motherhood type statement.

MR FOOTE KC:

I suppose so, I hadn't thought of it in those words, but I can – I've made my point about the no contract. The second part that I wanted to say, though, is yes, the pleadings do not point out duress, they do not point out illegality, but it is a very small step from threats not to report to an agreement which involves payment for an agreement, a forbearance not to report and there are just two authorities I want to take you to, to emphasise that point and it's in the textbook *Goff and Jones* (10th edition) and this is at page 548, paginated 548 of the authorities bundle. Will that come up on my screen? I'll just wait for that. Thank you.

1440

So just by the letters 10-28 on the right-hand side, paragraph begins there: "The fine line between the honest compromise and the improper threat is essentially one of fact. A threat to prosecute may often be coupled with an implied promise that there will be no prosecution," or report in this case, "if money is paid to the person making the threat. The threat may be made to a debtor ... or to a third party, such as the debtor's relative or friend."

Then at the end of that paragraph there's a reference to Justice Porter in the *Mutual Finance v John Wetton & Sons Ltd* [1937] 2 K.B. 389 case which in turn relies on the judgments in *Jones v Merionethshire Building Society* and also both those cases for this point were cited in *Polymer*: "It is enough if the undertaking were given owing to a desire to prevent a prosecution and that desire were known to those to whom the undertaking was given. In such a case one may imply ... a term in the contract that no prosecution should take place."

So, Justice Porter, and sorry, I've jumped around here, just to go back –

WINKELMANN CJ:
I mean, that's pretty much what we've been discussing all along. It may be discussed in a case form, but that's what we've been discussing all along.

KÓS J:
Well paragraph 10-29 sums it up perfectly.

MR FOOTE KC:
Two?

KÓS J:
Paragraph 10-29, the next paragraph in *Goff and Jones*.

MR FOOTE KC:
Yes Sir, that's exactly right. It sums it up perfectly, so –

KÓS J:
Which almost has a kind of transfer of burden sense in it.

MR FOOTE KC:

Yes. At the bottom of the previous page, and I should have read this first: "... no direct threat is necessary, no promise need be given to abstain from prosecution." Now these cases, or these comments, are in the context of the reparation cases that I talked about earlier where relatives are paying genuine debts owed. Right, so this case is even more extreme. If the implication can be drawn in those cases where there is a real commercial reason for money to be changing hands, then surely it can properly be drawn by the Court of Appeal in a case like this where there is no genuine underlying debt that is being repaid with the transfer of the 1.2 million. So, my submission is that it was a very safe and orthodox inference by the Court of Appeal, that having threats made translate to the true agreement being payment for ongoing silence.

Finally, just so that I don't leave this out there, my learned friend makes much of other cases like *Pharmacy Care* in particular. I, with respect, don't understand particularly his strong reliance on that case because it's all about whether or not threats were made in that case that there might be a prosecution. This is the case of the man who was found to be inappropriately billing the drug manufacturer and/or the government drug supplier. Now, they settled what was a genuine dispute for $80,000. The defendant was claiming 160,000, but if your Honours read that judgment the Court of Appeal spent a lot of time deciding whether Justice Paterson's credibility finding in the High Court that there was no threat made, was able to be upheld, and they come to the conclusion very firmly that they can uphold that. So they are saying, and all that case stands for, is that in those particular facts there was no threat of prosecution made.

So, I don't see how that case takes much – it goes on to say, well, even if it was made, it's been left a bit long. So that's it on the affirmation point. But in terms of saying, oh well you see, when you threaten prosecution you deal with it through a duress analysis and not on an illegal contract analysis, well they never got to any illegal contract analysis because it was found no threat was made. That's exactly the same with *Hobbs* where there is apparently a threat that "you will be floating in the harbour". There was then a commercial agreement between two businessmen. But again, the Judge went very carefully through all the evidence and found that the "floating in the harbour" comment had not been established on the evidence. So there just simply was no threat, so therefore there was no duress, of course, but there also was no basis on which to found any discussion of an illegal contract.

1445

The only case on which the Court has said, well, yes, there might have been a threat here to go to the IRD was the *Haines* case and the *Haines* case was a relationship property settlement between husband and wife, obviously. The husband said, or the wife sued on the agreement, the husband said amongst other things, no, you threatened take me to the IRD and so that's why I signed the relationship property agreement. It was a summary judgment case. The Court of Appeal said, yes, there may have been a threat to go to the IRD but in the circumstances of the case, which involved the separation of companies, properties, vehicles, et cetera, where the parties had reached the agreement by bringing in mediators of their own choice, the Court said, look, we're not persuaded that it could possibly, if the threat was made, it could possibly have been causative of the husband signing the property agreement.

So, again, duress didn't get off the ground there. There wasn't really any way in which illegal contracts could then be discussed. Even if it was in that case, it could have been viewed through an illegal contracts lens and the discretionary aspect of the what is section 76 of the CCLA could have been applied just to exercise any offending parts of the agreement.

So all of those cases, with respect to my friend, I don't see assists the Court.

WINKELMANN CJ:
Well, we will read them with care, Mr Foote.

MR FOOTE KC:
Thank you. Unless your Honours have any other questions, that's all I have to say on the illegality and duress aspects of the matter.

WINKELMANN CJ:

Thank you.

MR FOOTE KC:

Thank you.

WINKELMANN CJ:

And you are now handing over to Ms Simkiss?

MR FOOTE KC:

I am.

MS SIMKISS:

May it please your Honours. I hope not to detain us too long or to cover ground that has already been covered but, in my submission, the issue of affirmation does stand somewhat separate from the question of illegality, because my learned friend will have to persuade the Court that it is a duress case, not an illegality issue at all, before the question of affirmation arises. And then the question is, on the facts, whether there is affirmation. So that is all I will be addressing here is whether there could be affirmation on the facts as found.

We have put in a brief summary of oral points which I won't repeat but I do want to make it clear that we've got the following key points to make and the first is that there definitely are policy considerations that are important to the, if you like, defence of affirmation or doctrine of affirmation. But my submission is that they don't bite in the way that the appellant says that they do in this case, because of the particular facts.

WINKELMANN CJ:

So are you addressing the circumstance where it's duress is the cause of action?

MS SIMKISS:

I have to, yes, your Honour.

WINKELMANN CJ:
Yes.

MS SIMKISS:
That's the only way in which affirmation arises, because you can't affirm a void contract.

So the first point is on policy. Now, Justice Williams –

KÓS J:
But there are two duresses now floating.

MS SIMKISS:
Two duresses?

KÓS J:
Two duresses. One is a duress of a contractual obligation.

MS SIMKISS:
Yes.

KÓS J:
And the other one is duress in the shakedown, completely void transaction argument, no contract argument Mr Foote was also making, the third hare. So I don’t know that affirmation arises in that one, because if it's void there’s nothing to affirm, but there can potentially be laches.

MS SIMKISS:
Yes.

KÓS J:
Or acquiescence.

MS SIMKISS:

Correct. That's indeed correct. Now, it's not a contractual analysis, you're quite correct. There could be some kind of disqualifying contract – a doctrine like laches but that's never been alleged. In fact, there's never been any pleading or evidence that shows any prejudice and my submission is, that's a key point.

WINKELMANN CJ:

Would be hard for them to plead that, because it was not pleaded, or even run in the High Court.

MS SIMKISS:

Well, the issue of affirmation was live in the High Court and the cause of action was money had and received.
1450

WINKELMANN CJ:

No but we're moving, Justice Kós has asked you for other issues which raise different factual issues, don't they?

MS SIMKISS:

Yes, they do and just to stand back, I think the different factual issues can be broadly summarised as being about prejudice so that there can be some kind of disqualification based on an estoppel, that kind of thing. My submission is that actually was a live issue in the High Court because the cause of action was money had and received. So a change of position or prejudice type argument could've been raised then. There was nothing to prevent the defendant in the High Court from raising an issue of laches and that just didn't happen, so that is where we are. No issue that could go to that. No facts that could go to that.

So it's simply a question of contractual affirmation on the very limited facts, you know, if we actually get there, if we get there through the illegality argument. But just to be very clear and as simple as possible, Justice Williams said when speaking to my learned colleague, Mr Foote, that it's a question of fact. And indeed it is. It is a question of fact. It is an objective assessment of the facts and the context and what you need is an unequivocal indication of an election. Conduct that's not compatible with making the opposite election. So you can't have your cake and eat it too. You have to, at some point, make a choice, so that's an actual election, or it will be made for you by way of an imputed election. But in all cases, it's a question of fact.

WINKELMANN CJ:

But isn't it the main, wouldn't your main argument be that even if you assume duress, if it's a situation here where there's no return consideration, there can be no reason to apply affirmation. It just seems like a wrong doctrine to apply and why would you not just apply the Limitation Act. I suppose it might be that this is such an unusual case that it just doesn't seem any, there seems to be no kind of justice in applying an affirmation defence where it's on the basis that it's just been a delay.

MS SIMKISS:

And I agree with you, so I think in either route, if you like, that would be where I would end up, that if you look at it as if it is just a contractual affirmation question, then on the facts there was no affirmation because there was nothing to be done and nothing, in fact, was done to positively affirm the contract. So that's point one. But we are in a funny –

WINKELMANN CJ:

Well as to that, given that duress was operating, would you need to have some clear evidence that the duress was no longer operating?

MS SIMKISS:

Yes, and we lack that in this case. So we've got a, what we can say about what the found facts were, were that there was duress up to the point of the payments, which was the end of November 2018, and I think the Court of Appeal was right to say they're probably beyond that actually. It's unlikely that it fell off immediately after the payments were made. But there wasn't a finding of fact, unfortunately, by Justice Lang in the High Court about when it actually came to an end. That gives us difficulty, I guess, with counting. If you're going to start counting the months or years of delay, if you like, but my submission is that that's not actually the way you approach these things at all. This is not a limitation period question. If you're going to simply count the months and years, then it should be just a limitation question and that would be six years in this case.

My learned friend placed some emphasis, and I should say so did the Court in *Pharmacy Care*, on if you like commercial certainty. That there's a value of commercial certainty which means that the Court should find affirmation in this sort of case, and in this case in particular, and to that I just want to say one thing. There isn't a value of commercial certainty which is engaged where the agreement is a sham one and I think as has been pointed out in many different ways today, it's not a commercial agreement. It's not even really an exchange of value. There's nothing mutual, you know, the word "commercial" is really out of place here. So my submission is that that really shouldn't weigh in the balance in any way at all. Because the real deal is, in my submission, one of extortion or blackmail, however you wish to term it, when the respondent says that there should be certainty. What is effectively the argument, is that the blackmailer is entitled to certainty that he has escaped with his gain and that's why it's not a good fit and why it probably ought to be disregarded in this case.
1455

So, I do need to address *Pharmacy Care* because it is the case, I think, that comes closest to saying that there is, essentially, a time period within which you need to do something or else lose your rights to disaffirm a contract that's obtained under duress.

Pharmacy Care, as my learned friend has noted, is a bit unusual. It's not clear from the High Court or the Court of Appeal judgment just how much argument there was on the issue of affirmation. But in any case, I think, my submission is, it's wrong to read that judgment as saying three years, or in that neighbourhood, is too long to wait to disaffirm the contract. That's, while that might have been the right decision in that case for all the facts that applied to that case, it's not a general rule that applies to other cases, it's not a benchmark and in my submission my learned friend has attempted to suggest that there is some kind of benchmark, there's some kind of cutoff after which –

KÓS J:

I don't think it's an alternative, I don't thinks that's his argument, it's not an alternative limitation period.

MS SIMKISS:

No, indeed.

KÓS J:

A short stop limitation. It's when does the – two things, first, when does the duress cease to be operative?

MS SIMKISS:

Yes.

KÓS J:

Secondly, then you must act in a timely way or timeous way.

MS SIMKISS:

Timeous way. Well, my submission is that that is not really a requirement. It's a factor that goes to affirmation, no doubt, but there's no measure of timeliness that can be applied to this case or to any case. Absent looking at the whole set of facts in the round.

So, in the round, in this case we have a contract where there was nothing more to do. There was no requirement for Mr Wu to do anything, nor for Mr Liu for that matter. Money had been paid and the parties were no longer in touch at all.

Then, he did nothing. Well, that's very explicable. So, if you go back to the test, what is the conduct here that's unequivocal? That's not unequivocal. It's highly equivocal.

There's a case that I have relied on in my outline which is called *Mir Abdul Rehman v Mir Heena* [2013] HKCA 144. It's a Hong Kong Court of Appeal case which is actually the only case we could find that had anything like this kind of similar facts but also consideration. In that case, it was a transfer of an interest in a flat under threat of violence.

WINKELMANN CJ:
Can your learned senior or learned junior put up the case?

MS SIMKISS:
Yes, yes. The facts are quite simple. So the woman in the relationship was threatened by her soon to be ex-partner, signed over a half of her flat to him. He left the country, she continued to live there and, if you like, nothing happened. The parties exchanged messages, some of them were even relatively friendly. They also had negotiations about what to do about this transfer of an interest in the flat and the Hong Kong Court of Appeal effectively said, well, you know, okay, it's true that she took no steps to set the Deed aside for years but they said then: "Mere inaction" – I am going to find you the page reference for this, it's at –

WINKELMANN CJ:
What's the wrongful act here, or the?

MS SIMKISS:
Say that again, sorry?

WINKELMANN CJ:
Why is it duress?

MS SIMKISS:
The threat of violence.

WINKELMANN CJ:

Oh, okay.

MS SIMKISS:

She was beaten and then she had the threat hanging over her. So the page I'm looking for is page 101.0163. Oh, no, I may have that wrong, I'm afraid. It's actually – it's going to be page 134 at 144, this is the page.

KÓS J:

Page 144?

MS SIMKISS:

Yes, so this is where the discussion of this issue starts.

KÓS J:

Which paragraph?

MS SIMKISS:

Paragraph 65. Paragraph 65 is an extract from the lower Court, so that's the decision that was being appealed from. And then the Court of Appeal Judges say at paragraph 77: "I would respectfully agree ... Mere inaction on the part of a victim of duress cannot ... be taken ..." et cetera.

WINKELMANN CJ:

Doesn't really help you that one.

MS SIMKISS:

Yes, indeed it does, your Honour.

1500

WINKELMANN CJ:

I said it doesn't – well because it says where "in which the [appellant] was taking no action to enforce his ostensible rights under that Deed".

MS SIMKISS:

I'm sorry?

WINKELMANN CJ:

Does not – "the [appellant] was taking no actions to enforce his ostensible rights under that Deed".

MS SIMKISS:

Yes.

WINKELMANN CJ:

So, her inaction, what's the principle you draw from it?

MS SIMKISS:

The principle I draw from it is that because there was nothing for her to do, under the Deed or otherwise, the fact that she did nothing was taken by both the Court at first instance and the appeal court as meaning, as being equivocal as to whether she affirmed the arrangement.

WINKELMANN CJ:

Is she the appellant?

MS SIMKISS:

She is the – is she the –

WINKELMANN CJ:

Because it says in which the –

MS SIMKISS:

No she was the – she's the respondent.

WINKELMANN CJ:

Yes she's the respondent because it says "in which the [appellant] was taking no action to enforce his ostensible rights under that Deed".

MS SIMKISS:
Yes.

KÓS J:
She had transferred her interests to him but he left her in possession.

MS SIMKISS:
She had signed a legal document to transfer her – he had left her in possession.

KÓS J:
There was nothing for her to do.

MS SIMKISS:
Correct.

KÓS J:
But there was, in his case, the right to evict her which he hadn't exercised.

MS SIMKISS:
He could have done that, yes. So, the point there –

WINKELMANN CJ:
I mean, not that I'm saying that you're wrong but it seems distinguishable to me.

MS SIMKISS:
I understand the point you're making and my submission is that it is actually, it's a helpful pointer at whether somebody doing nothing is indicative of whether they affirm the arrangements in place or not. This is a case where she had nothing that she really had to do and so the fact that she did nothing was considered important, and in my submission that is important.

WINKELMANN CJ:
So you're saying it stands the proposition that doing nothing is not evidence of an affirmation?

MS SIMKISS:

It's equivocal, is my submission.

WILLIAMS J:

It's going to depend on the facts.

MS SIMKISS:

That's precisely right.

WILLIAMS J:

Question is have you embraced the agreement.

MS SIMKISS:

Well that's a really good way of putting it, your Honour, and my point is that inaction can't really be said to embrace the agreement.

WILLIAMS J:

Well, maybe it can in some circumstances.

MS SIMKISS:

Yes, and I just want to make this point. There's quite a few cases that say, and *Pharmacy Care* is among them, delay can be enough. Delay can be enough on its own to evidence affirmation, and I do not doubt that that is true. However, the cases which *Pharmacy Care* rely on, while delay was relevant to all of them, in none of them was delay sufficient on its own.

WINKELMANN CJ:

Just seems to me this is quite a particular and peculiar kind of an agreement, so it's not like a lot of those cases where there is a commercial transaction so there is commercial certainty comes into it.

MS SIMKISS:

Yes, well and indeed I agree. I wish to push back though on the idea that just doing nothing for a long period of time is going to be enough in any of the cases because that's just not how the cases have been decided.

KÓS J:

I mean, not to disagree too much with the Chief Justice, it is a peculiar sort of agreement but any agreement that's the product of a threat will be a peculiar sort of agreement.

MS SIMKISS:

I suspect that's really…

KÓS J:

They're certainly not likely to be commercial agreements.

MS SIMKISS:

Well that's actually one of the reasons why this case is quite different from all the cases that guide us on the question of affirmation, because there's something sitting, you know, underneath it that makes sense. There's an exchange of value, there's some kind of commercial rationale to it.

KÓS J:

Yes, I'm not talking about lawful act duress here or economic duress that's the sort of threats we're dealing with here. Reporting ones, violence ones.

MS SIMKISS:

Yes.

WINKELMANN CJ:

Well that's that. But I'm talking about the kind – a lot of these transactions are where you're compelled into a commercial transaction by duress.

MS SIMKISS:

Correct. And you're right, they are very different from this case. So, I just want to finish what I wish to say about delay is that the cases actually don't support anything more than the proposition that delay can be enough, delay can be enough. But actually, when you look at how they were decided, and I'm going to come back to *Pharmacy Care*, all of them have something else to them that amounts to affirming conduct. So you've heard the facts of *Haines*, of *Hobbs*, *Foster v Phillips* HC Auckland CP2845/89, 5 September 1990, and The Atlantic Baron. These are all covered in my written submissions so I won't labour it, but in every single one of those cases there was some performance by the party, as well as a delay in challenging or attempting to avoid the contract, so the delay periods were short or long, but in every single case there was something else.

So in *Morley (t/a Morley Estates) v Royal Bank of Scotland plc* [2021] EWCA Civ 338, which was the five-year delay, there was a statement by the person attempting to void that their previous agreement had been consensual and he had continued to deal with the bank for the five-year period. So that was consistent with his, if you I like, embracing, in your words, Justice Williams.
1505

In The Atlantic Baron which is actually cited all the time for the proposition that delay can be enough, actually in that case the Court specifically found delay is relevant but I would not consider it to be sufficient and they found that affirming conduct included payments, a statement that the payment was made in full and final settlement and the taking of delivery of the ship. So, even that case which is cited for that proposition all the time, doesn't quite go there and say delay is enough.

WINKELMANN CJ:
I mean, are you affirming it if it's a fully-executed contract anyway? If you just do nothing? It's surely just the cause, it's the Limitation Act that governs.

MS SIMKISS:
I agree. It is – thinking about affirmation in this context is a little strange because we're talking about something that's, if you like, complete. Most of the time when affirmation comes up in contract law it's because the question is, well, have I lost my right to cancel this agreement? Do I have to actually now carry out my commitment to buy this house or company or whatever? That's when affirmation –

KÓS J:

It's the *Fercometal SARL v Mediterranean Shipping Co SA* [1989] 1 AC 788 line of cases.

MS SIMKISS:

Precisely, yes.

WINKELMANN CJ:

I just might, I'm signalling to you I'm finding – struggling, not with your submissions, of the concept of affirmation applying in this context at all, but notwithstanding Mr Grant's persuasive submissions.

MS SIMKISS:

Well, let me lay out the problem. I am with you on that. The problem we have here is that *Pharmacy Care* can potentially be read and my submission is it was read by Justice Lang as essentially some kind of guide to how much delay is too much? And that if that was right for *Pharmacy Care*, it's not a general rule and if the Court can do something really helpful in its decision on this case, it might draw attention to that fact. That actually, delay on its own doesn't operate like a limitation period as far as *Pharmacy Care* –

WINKELMANN CJ:

Well, isn't the proper analysis that the cause of action is complete and you'd have to show waiver of the cause of action, not affirmation?

MS SIMKISS:

Yes.

WINKELMANN CJ:

So that would have to show – you'd have to show that the, so that with full knowledge of rights, decided not to proceed to recover. It just seems not –

MS SIMKISS:

If we were just talking about that kind of limitation, yes.

WINKELMANN CJ:

And I don't even know why you'd be bound by that, but anyway, mmm.

MS SIMKISS:

Yes, so there's a really – I don't know if your Honour's had had the opportunity to read Professor Bigwood's quite large and discursive articles about affirmation. I mean –

CAMPBELL J:

Dense, I think, would be the word.

MS SIMKISS:

Quite rewarding reading but –

WINKELMANN CJ:

An attack on a fellow colleague – former colleague.

MS SIMKISS:

It's a point he makes that in the context of especially a waiver that's not a conscious election, so a real decision which is what we're talking about here, that really there should be some kind of prejudice that must be shown before someone can be disqualified from avoiding a contract if, you know...

WINKELMANN CJ:

A fully executed contract.

MS SIMKISS:

Right, so that's – actually, Professor Bigwood doesn't really talk about fully executed contract and I think that's because it comes up very seldom.

KÓS J:

I wouldn't dare call Professor Bigwood's work dense, but can you point to me where in those lengthy articles, there are two of them, he said that?

MS SIMKISS:
Yes.

KÓS J:
Pinpoint?

MS SIMKISS:
Yes, I can, in fact.

KÓS J:
Thank you.

MS SIMKISS:
I might have to go back to my – Justice Kós, I've marked two passages.

KÓS J:
Thank you.

WINKELMANN CJ:
What tab is it in the authorities?

CAMPBELL J:
25 and 26 of the appellant's.

MS SIMKISS:
Look, my learned friend will correct me, I think one of the reasons it's in the bundle is because it's really helpful on issues of policy and some of the complexities. So, I'm looking first, your Honour, at Part 1 and on page 493 of the bundle, 82 of the article, there's a heading VII.

KÓS J:
Right.

MS SIMKISS:

And then he goes – what he’s really saying there is that you can wait around, you can do nothing, you could, you know, yes, at a certain point you’ve got – you can't have your cake and eat it too. But you can wait to decide whether you are going to have your cake.

And then in Part 2, there is a good summary of his conclusions which is –

WINKELMANN CJ:

I think the fact it's fully executed is relevant then.

MS SIMKISS:

Yes.

WINKELMANN CJ:

When you look at his formulation.

MS SIMKISS:

Well, it's interesting that he doesn’t really touch on that kind of scenario.

WINKELMANN CJ:

But even his first quote.

MS SIMKISS:

Yes.

WINKELMANN CJ:

His prologue.

MS SIMKISS:

Yes.

WINKELMANN CJ:

Suggests that it's relevant.

KÓS J:
Where's that?

WINKELMANN CJ:
"The principle of the common law is well settled. When a man faced with two alternative and mutually exclusive courses of action, chooses one and has communicated his choice to the person concerned in such a way as to lead him to believe that he has made his choice" –
1510

KÓS J:
Sorry, which page?

WINKELMANN CJ:
This is prologue 38, the first one, I think?

KÓS J:
First part, yes, okay. Thank you.

MS SIMKISS:
I don't think that's at all a controversial proposition of law. What he's saying there is that you cannot infinitely sustain not choosing. You have to at some point choose and by choosing one you extinguish the other.

WINKELMANN CJ:
No, I don't think that's what he's saying. I think he's saying that there it has to be that they're alternative and mutually exclusive courses of action and it communicates to the other person in a way which makes them believe that that's – they've chosen that course of action, which is a concept of reliance.

MS SIMKISS:
Yes.

WINKELMANN CJ:
So it doesn't really apply in the context of a fully executed contract.

MS SIMKISS:

Well, what that – it doesn’t really apply, yes, I think you are right, but I don’t – I think it applies – it doesn’t really apply partly because that passage is about an actual election to affirm and in this case we’re talking about an implied or inferred or imputed election.

WINKELMANN CJ:

Right, thank you.

KÓS J:

Okay and what as the second part? I won’t detain you longer, but just that –

MS SIMKISS:

Part 2 and it is on – there’s a nice summary of the previous article on page 506 and it's the second bullet point.

KÓS J:

Thank you. Right, page 620, thank you.

MS SIMKISS:

Now, I will ask your Honours, if you wish me to point out the factual findings of the other cases that I was just talking about or are you comfortable?

WINKELMANN CJ:

No, we’re comfortable to look at the cases ourselves.

MS SIMKISS:

Very good, okay, thank you. There’s one point I just need to make sure is very clear. My learned friend doesn’t actually disagree with me at all, the only conduct that could possibly be relevant to affirmation here happened after the end of the duress which I think we agree must – cannot be before the November 2018 payments. So that means that the only thing that could be relevant would be the delay and the only other thing that could be relevant was the sporadic messages in July in 2019 which don’t mention the Deed at all.

Now, I know that there's other references in Justice Lang and in my learned friend's submissions about offers to go into business at all, et cetera, but that conduct's not relevant and my submission is to the extent there was, if you like, friendly communication that's actually more consistent with fear on the part of Mr Wu than it is with affirmational contentment.

WINKELMANN CJ:

Attempts to ingratiate himself.

MS SIMKISS:

Indeed, yes.

WINKELMANN CJ:

Right, is there anything else?

MS SIMKISS:

I only have one more point to make and it's really about the policy that needs to be thought about when your Honours make your decision. So my submission is that the Court should be very slow to reach a conclusion that Mr Wu has affirmed the contract and that's for two reasons.

One, is about the effect of the blackmail on Mr Wu. It is really that the victim's silence or inaction should be very slowly taken as proof of affirmation. There's lots of explanations why a victim, a person in fear, may say nothing. So, that is my first submission on that point.

My second submission is that and I haven't cited authority for this on the basis the Court will be familiar with the concept of ex turpi causa, no person should profit from their own wrong, and I submit that the application of that principle is very clear here. We don't have any denial anymore that there was a blackmail and an extortion of reward by Mr Liu, so my submission that the ex turpi causa principle has a very clear direction of travel.

WINKELMANN CJ:
Well, that's Lord Westbury.

MS SIMKISS:
Yes, it is, your Honour.

WILLIAMS J:
Is there anything in the idea that the affirmation, the embracing of the contract post-execution will – the relevant context will depend on the – will need to be proportionate to the seriousness of the duress? I haven't said that very well. That the evidence of acceptance would need to be proportionate to the seriousness of the duress and its effect on the victim?
1515

MS SIMKISS:
I appreciate the question and I think the answer's yes, and I think I've put it in a slightly different way in my submissions.

WILLIAMS J:
Oh, a better way probably.

MS SIMKISS:
But in this way it's simply an application of the principle that the evidence needs to be, you know, suitable to the improbability or probability of the question being asked. Here we're saying is it probable, is it likely that Mr Wu would be really accepting and comfortable with the fact that he'd been extorted out of $1.2 million? My suggestion is that no, you'd probably need some quite good evidence, better than we have here, to be satisfied that that's the case.

WINKELMANN CJ:
That you need good evidence or another way of putting Justice Williams' proposition is that if the duress was quite powerful, you'd need good evidence that it had come, its effect had come to an end.

MS SIMKISS:
Indeed.

KÓS J:
I could give you an example. Let's imagine that Mr Wu and Mr Liu suddenly became great friends again and went back into business. Well, in that situation, Mr Wu would have no comeback because matters clearly would be understood to be resolved between them.

MS SIMKISS:
I suspect that's right. That's a bit like the case, the *Nemesis DBK* case.

KÓS J:
Yes, exactly.

MS SIMKISS:
Yes, and that's not a difficult conclusion, I think, on those facts.

KÓS J:
That's right.

WINKELMANN CJ:
I'm dubious.

CAMPBELL J:
I would think Justice Williams' question really is answered in terms of the requirement for any affirmation to be unequivocal.

MS SIMKISS:
That's right, yes, that is right, Justice Campbell and the –

CAMPBELL J:
If you have blackmail, one might think it has to be particularly unequivocal.

MS SIMKISS:
Yes, I agree and that's why doing nothing doesn't really move the needle, in my submission, here.

WINKELMANN CJ:
Right, those are your submissions?

MS SIMKISS:
I'm more than happy to answer questions, but that is all I wish to say.

WINKELMANN CJ:
Thank you very much.

MS SIMKISS:
As the Court pleases.

WINKELMANN CJ:
Mr Grant, reply?

MR GRANT:
Just a few points of reply, your Honours. The first point is just to touch on the pleadings point, having now heard or been taken to some of the evidence after lunch. The first thing I'd submit that having seen that, that none of the cross-examination of Mr Wu that you were taken through, in the appellant's view at least, put the questions anywhere near squarely enough in terms of what the true nature of this agreement was. All that you saw in those answers, in my submission, was an individual confirming that he'd been threatened which is not really in dispute and was not really in – was within the scope of the pleading in the High Court.

What you didn't hear was or weren't taken to was any cross-examination of Mr Liu on that point. There doesn't, in my submission, appear to be anywhere near squarely enough an evidentiary record of what the witnesses said about that question because –

KÓS J:

It's bit hard though, isn't it. I was puzzling about what I would do if I'd been counsel. I mean, Mr Liu just kept banging on about there being a loan. Kind of hard to work out how to get him to shift off that hobby horse.

MR GRANT:

Well, indeed. I mean, I would, and again I suppose I was counsel for him, and I should say that just in terms of my learned friend's comment that it was somehow the first and third defendant, the defendant's responsibility, I refute that obviously on the basis that, of course, it wasn't in the pleading so why would we, why would the defendant have raised it. But –

CAMPBELL J:

I'll come back to you on that in a moment.

MR GRANT:

All right, yes, Sir, thank you. Well, just in terms of that, Sir, I mean I was obviously puzzling on it as well and the question, you know, of course he would deny it and say, well, no it was the satisfaction of a loan, but it was never put to him, well, no it wasn't, it was the payment of money to you so you wouldn't go to the police. That question, so far as I can see, was –

WINKELMANN CJ:

Well, hang on, was that really not put to him? Because wasn't it put to him that it was payment of money in response to a threat.
1520

MR GRANT:

As in it was a contractual – well, it wasn't put in that that was the bargain that was reached, the true bargain that was reached and again, it's that distinction that I'm drawing between a threat and a promise and that's no – anyway, Justice Campbell, I –

CAMPBELL J:

Well, the much maligned statement of claim or amended statement of claim, I'll just provide a defence to it if I might.

MR GRANT:

Yes, I think it probably needs one at this point.

CAMPBELL J:

The plaintiff pleaded that the blackmail lead him to (1) enter into the Deed and (2) transfer the property and the money and it was clearly pleaded that both of those things were the result of blackmail and he also pleaded that the loan was – he didn't say fictitious, can't quite remember what the allegation was. All of that was accepted and is no longer in dispute. The defendant pleaded in response that the payments were actually made under – in respect of the loan agreement and the settlement thereof as set out in the Deed, to which the plaintiff replied that, once again, the loan agreement was fictitious. If the plaintiff has established that the transfer of the property, so the money and the one property, were the result of duress is it not incumbent on the defendant then to prove some other lawful basis upon which those transfers took place?

MR GRANT:

Well I mean the – sorry, I'm just thinking that one through – the High Court found, yes, that the defendant's alternative explanation was not accepted and that the plaintiff's version of events was the correct one, but that in my submission is a separate question to then saying that there was a bargain reached so I don't think – it doesn't then fall onto the defendant to say any more than – well, I mean, the defendant did offer an alternative explanation that was rejected, but what was not accepted or not found by the High Court was that there was this concluded illegal bargain.

So I think to the extent that – in direct answer to your question, no, the burden, in my submission, does not shift onto the defendant to prove an alternative case although they did attempt to prove one. It's really incumbent on the plaintiff to say, well, this is the version of events, and it was incumbent on the plaintiff in my submission to say well actually this was the true bargain and it's very clear that the plaintiff never did from the evidence that you've seen and it's very clear from the evidence where he says, well I didn't steal any money in the first place, so of course there was no illegal bargain, how could there be, because there would be no bargain to strike because there'd be no forestalling of prosecution because there would be no prosecution in the first place.

KÓS J:

Justice Campbell's question kind of picks up the point that's in *Goff and Jones* at paragraph 10.29, that passage that Mr Foote took us to before.

MR GRANT:

Oh, yes.

KÓS J:

"Consequently, a compromise will be upheld only if it is evident that a person is settling a civil claim against another and that the settlement has not been reached by any express or implied promise that, if there is no settlement, the matter will be reported to the police ... " Seems to me to imply the very point that Justice Campbell is making which is that it becomes incumbent on the defendant when there has been a payment as a result of threats to show that there wasn't an illegal promise.

MR GRANT:

Well I push back on that a little Sir in the sense that that doesn't strike me that the *Goff and Jones* passage is a burden shift so much as – it doesn't fall upon the defendant to prove a negative essentially. What Justice Lang found and what I'd submit he was entitled on the evidence before him to find was that there was a deed that provided for the transfer of funds and it wasn't in repayment of a loan, and he went no further than that and I think that that was a finding that was open to him and that was the basis for his judgment. I resist any proposition that somehow the burden shifts on the defendant to explain away what happened, I mean that's just, in my submission, not appropriate.

Just a couple of other points if I may. The first is this *Mir* decision which was cited on our side in the Court of Appeal and I think demonstrates sharply in some ways the point that I have been labouring to make about the distinction between a threat and a promise. That case does share similarities –

WINKELMANN CJ:
Is your junior going to put that up?

MR GRANT:
Yes, can we get it up on the screen? Thank you, your Honour.

KÓS J:
Oh yes, *Mir*, yes.
1525

MR GRANT:
It's the Hong Kong Court of Appeal case and I should say at the outset that, you know, huge reliance isn't placed necessarily on a precedential value but it demonstrates the point which is that when you have a situation where in this case there's been a threat of violence and property has been transferred as a result of that threat of violence, but there is no corresponding promise evident to forestall from that violence in the future, that is a different situation from the one, for example, in *Osborne* and all the illegality cases and *Polymer* and everywhere else where you do have that term.

What we have in this *Mir* case, and that I would suggest what we have here, is simply a threat to commit violence and in the hope or in – yes, in the hope of trying to – well, yes, in fear of that threat, property has been transferred. That's not the same thing as the threatening person then saying, well I'm going to not carry out this threat, I agree not to carry out this threat if you transfer the property, and you'll see that this case was decided entirely under duress rather than under an illegality lens and I'd suggest that it demonstrates quite nicely the next step that the Court of Appeal took but should not have, which is that a threat can stand on its own as part of the analysis without also converting that into an illegal term.

It wouldn't've been appropriate in my submission, for example, to say that the – obviously a very unfortunate set of facts, the woman who had been subject to physical violence somehow entered into an illegal bargain to stop herself being further harmed in exchange for transferring of property. That's not the route the Court went down here and I'd suggest that the analogy with this case is strong from that perspective.

Just a couple of points to finish on the affirmation parts. Actually, one more before I leave in terms of the – to respond to Mr Foote, the discussion about *Pharmacy Care*, I appreciate your Honours are going to go away and read *Pharmacy Care* but the point that I'd emphasise is there was a suggestion that *Pharmacy Care*, because it was effectively an obiter because no duress finding was made, I'd suggest that that doesn't detract from its force because, as I took you to before at paragraph 94 of *Pharmacy Care*, the Court did engage in consideration of a public policy enquiry, or rather, whether or not public policy was engaged in the context of a duress case. It wasn't as if the Court gave it short shrift and didn't consider it because duress wasn't found, the analysis in my submission was detailed and that's really why it – oh, yes, it's just up on the screen, just to remind your Honours – that's why it remains the leading case, because the Court did undertake that analysis notwithstanding the fact that duress hadn't been established.

Just a couple more points I'm afraid your Honours, there is a bit to mop up. The suggestion, and I'll just make the point shortly, the suggestion or the emphasis placed on delay as the most powerful factor or standing on its own as a factor to evidence affirmation was raised by my learned friend. This is not in my submission a delay-only case. It's not as if, to put it in Justice Kós' language, this is not a shortstop situation at all. Delay is a factor that suggests affirmation and I take Justice Campbell's point that in this situation there needed to be an unequivocal affirmation. Well, a long period of delay, as all the cases say, is a factor that points strongly in that direction. It's not as if it's effectively shortening the limitation period, it is just suggesting that intent to affirm.

KÓS J:

Right, but that's interesting, why then – this was the point the Chief Justice has gone on about and I didn't agree with it to begin with but now I do, passionately –

MR GRANT:

That was a quick change Sir, yes.

KÓS J:

– what, why would you put a shortstop? You know, I mean why – because it has that effect, why isn't it enough in a situation where the parties have no ongoing relationship between them, they're not doing anything, why can't, as a matter of policy, Mr Wu simply wait out the six years until he's more happy with proceeding and might have got a lawyer and basically worked himself up to the point of issuing proceedings? Why can't he do that on the fifth year and 365th day, fourth day?

1530

MR GRANT:

Well, I think, yes, well perhaps to take it, if I could just put it in the broader context rather than focusing on Mr Wu, because we're talking about sort of policy and perhaps how future cases might think about this. Clearly there has been a long-standing policy in this area of law that parties need to have certainty that they can move on with their affairs without it then being stifled, probably the wrong word, but –

KÓS J:

Isn't that what the six-year period is for?

MR GRANT:

Well, no. The cases have all taken a view that that's not, that the limitation period is not the yardstick. It's an earlier period because we're talking about, well, put it this way, perhaps it's a distraction to talk about years. It's evidence of an intention to affirm. Delay is evidence of an intention to affirm. It's not a matter of policy in the way that this six-year limitation, the Limitation Act represents parliamentary policy. It's more that delay is evidence of an intention to affirm and, of course, once affirmation is founded, it doesn't matter whether it's six years. I mean, in *Haines* that Court would have found affirmation after a few months because there were other indicators of an intention to affirm. So, I think, with great respect to the limitation idea, is a little bit beside the point when it's considered that ultimately the Court's inquiry is into somebody's intention whether it – unequivocal intention to affirm a contract.

KÓS J:

Okay.

MR GRANT:

Then just in terms of the ex turpi argument which was raised, I mean, I think the Court, in my respectful submission, should be careful about going too far with that principle here because, of course, that would mean that affirmation in all of these cases based on a pre-existing threat made in the formation of the contract, that would mean that that – again affirmation would just simply be washed away because it necessarily involves a prerequisite wrong that a person has undertaken, in this case threatening somebody else to enter into a contract, and if ex turpi were to apply, contracts could never be affirmed on that basis because it would mean that the party who has applied the threat has benefited from that wrong.

Then the very last point, just to touch on Justice Kós' comment, I'll perhaps leave it to my written submissions because it is in there quite fulsomely, but in terms of affirmation here, in the appellant's submission, there are strong indicators of Mr Wu's, not only Mr Wu's delay, but also Mr Wu's intention and desire to then be back in business with Mr Liu. I accept that certain contact after the Deed has been executed and performed, may be equivocal, it sort of could go both ways. Although what I would say about that is that Justice Lang clearly has seen the evidence and weighed up what that contact meant, but there are indicators in the evidence of that particular point that Justice Kós has raised which is Mr Wu clearly being content and wanting to go back into business with Mr Liu which, in my submission, as Justice Lang found, points firmly towards affirmation, an intent to affirm the Deed.

Unless your Honours have anything else, those are my submissions in reply.

WINKELMANN CJ:

No, thank you, Mr Grant. We thank all counsel for their excellent submissions. We are most assisted, and we will reserve our decision and now retire.

COURT ADJOURNS: 3.34 PM