Neutral Citation Number: [2021] EWCA Civ 338

Case No: A3/2020/0533 & A3/2020/0533(Y)

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION
Mr Justice Kerr
[2020] EWHC 88 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Double-click to add Judgment date

Before:

LORD JUSTICE LEWISON
LORD JUSTICE MALES
and
LORD JUSTICE BIRSS

- -

Between:

OLIVER DEAN MORLEY T/A MORLEY ESTATES	**Appellant**
- and -	
THE ROYAL BANK OF SCOTLAND PLC	**Respondent**

- -
- -

Hugh Sims QC & John Virgo (instructed by **Cooke Young & Keidan LLP**) for the **Appellant**
Paul Sinclair QC & Natasha Bennett (instructed by **Addleshaw Goddard LLP**) for the **Respondent**

Hearing dates: 23rd & 24th February 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be Thursday 111th March 2021 at 10.30 a.m.

Lord Justice Males:

Introduction

1. The appellant, Oliver Morley, was a commercial property developer who borrowed £75 million from the respondent, The Royal Bank of Scotland Plc, secured on his portfolio of commercial properties in northern England. Unfortunately the loan was concluded in December 2006, not long before the sharp decline in property values during the financial crisis. Following a number of breaches of covenant during its term, Mr Morley failed to repay the loan when its term expired in December 2009. Instead of enforcing its security, the bank continued to negotiate with Mr Morley with a view to reaching a consensual solution and eventually concluded an agreement with him whereby £10 million of the loan was written off, certain of the properties were transferred to a subsidiary of the bank, West Register (Property Investments) Ltd, at a price which was well above their market value, and the remainder were retained by Mr Morley on payment of £20.5 million to the bank.

2. It is Mr Morley's case that in concluding this agreement the bank acted in breach of a duty owed to him pursuant to section 13 of the Supply of Goods and Services Act 1982 to provide banking services with reasonable care and skill and in breach of a duty of good faith. He contends further that he was coerced into concluding the agreement by unlawful pressure placed upon him by the bank, specifically a threat that, if no agreement was reached to transfer the whole portfolio to West Register, it would exercise its right as mortgagee to appoint receivers who would impose a pre-packaged sale of the portfolio to West Register. He says that as a result of this coercion the bank committed the tort of intimidation and the agreement was voidable for economic duress.

3. Kerr J dismissed Mr Morley's claims, concluding that the bank was not at fault in the negotiations which led to the agreement, which were commercial negotiations carried out at arm's length and with the benefit of legal advice on both sides. He concluded further that, although the bank did threaten to appoint receivers to sell the portfolio on a pre-packaged basis to West Register, this was not a threat to do an unlawful act, that the bank acted in good faith, that Mr Morley was not coerced into concluding the agreement, and that he affirmed it, taking no step to set it aside for over five years, all of which meant that the claims for intimidation and economic duress were not well founded. However, he granted permission to appeal to this court. The judge's grant of permission did not extend to permission to challenge his finding of affirmation, but permission on that issue is sought from this court.

4. On the issues of intimidation and economic duress, which Mr Hugh Sims QC for Mr Morley put in the forefront of his case, the submissions before us have ranged widely. The questions debated have included whether the threat made by the bank was to do a lawful or unlawful act, whether the tort of intimidation can apply if the threat is to do a lawful act, whether economic duress amounts to a tort so as to found a claim for damages, how the burden of proof operates on the issue of affirmation when the party allegedly coerced had legal advice, and whether damages in lieu of rescission are available in a case of economic duress when the right to rescind has been lost by affirmation. Interesting as these questions are, however, it is unnecessary to decide any of them. The straightforward answer to the appeal on the issues of intimidation and economic duress is that, on the facts, the judge was plainly right to decide that Mr

Morley was not coerced by the bank's threat into concluding the agreement in question.

5. On the issue whether the bank was in breach of a duty to provide banking services with reasonable skill and care and of a duty to act in good faith, Mr Sims' principal submission was that the bank was in breach of duty because, in negotiating for the transfer of the properties to West Register, the bank was acting as a buyer (i.e. seeking to obtain the properties with a view to medium or long term capital gain) rather than as a lender (i.e. seeking to recover the money which it had lent). I would not accept that the bank was under any implied contractual duty to exercise skill and care in negotiating with Mr Morley after his default, the position being governed by the equitable duties which it owed as a mortgagee. But in any event, this was a false distinction. The bank's objective throughout was to recover its loan, or at any rate as much of it as possible; acquisition of the portfolio was only ever a second-best means of achieving this objective; and the deal which was eventually concluded was one which Mr Morley persuaded the bank to accept despite its reluctance to do so. As the judge correctly found at [191], all of the bank's actions "were rationally connected to its commercial interests". His pithy conclusion at [182] sums up the position neatly:

> "182. I do not find the bank at fault in the conduct of the restructuring negotiations. They were at arm's length and commercial. Mr McConville and the claimant required no lessons in commercial negotiation. The bank's duty of skill and care did not require it to negotiate the restructuring any differently from the way it did so. It was not required by its duty to the claimant to advise him how to resist its attempts to get more money out of him."

6. Accordingly this appeal fails on the facts.

The facts

7. The facts are set out in detail in the judge's judgment. For the purpose of this appeal a more condensed summary, largely taken from the judgment, will suffice.

2006

8. Mr Morley, trading as Morley Estates, was a successful developer of commercial properties who had a track record of achieving high occupancy levels. He had banked with RBS in the past, but had subsequently moved to another bank. In December 2006, however, he was wooed back to RBS's Liverpool office.

9. On 18th December 2006 the parties executed a loan facility agreement enabling Mr Morley to borrow up to £75 million, to refinance the property portfolio, add new properties to it and provide a "bonus payment" to Mr Morley for his personal use. The loan was repayable in full three years from the first drawdown (which occurred in December 2006). Interest was payable at 1 per cent per annum above the bank's base rate, which then stood at 5 per cent, making interest payable at 6 per cent. If an "Event of Default" occurred and was not put right, the bank could charge a "default" rate which would be 3 per cent over its base rate.

10. Among other things Mr Morley had to ensure that "an interest rate hedging instrument(s) acceptable to the Bank … is entered into and maintained".

11. By clause 10, the loan was to be secured by legal charges over the 21 properties then in the portfolio, but (importantly) it was without personal recourse to Mr Morley. The bank's recourse was limited to the net proceeds of sale of the portfolio, any liability under the hedging instrument, interest payments and rental income.

12. Various "Events of Default" were listed. They included an interest cover ratio (ICR) requirement: rental income must not be less than 1.3 times the interest payable, rising to 1.4 after the first year; and a loan to value (LTV) covenant: the amount owing must not be more than 75 per cent of the value of the bank's security, increasing to 80 per cent at certain times. The bank could call in the whole amount owing if an Event of Default occurred.

13. On 21st December 2006 Mr Morley entered into a "base rate collar" hedging agreement, earning the bank some £75,000. This was done through Mr Matthew McConville, who worked for him. The notional amount was £49 million. The period was three years from 31st December 2006. Such hedging instruments were quite common at the time, but no longer are because customers fare badly when (as later happened) interest rates dropped.

14. About £45 million of the loan monies were used to pay off existing indebtedness to other banks. About £10 million was intended for acquisition and development of new properties. Mr Morley personally received some £15 to £20 million for his own use. As the judge put it:

> "16. He was then 35 years old and single. He had worked hard to build up his business and he wanted to enjoy this new, albeit borrowed, personal wealth.
>
> 17. Over the following months, he made various purchases, not all owned outright. He invested in a mining enterprise in South Africa. He bought land in the south of France and built a luxury villa there. He bought a yacht and sailed it in the Mediterranean. He maintained residences in the north of England and London. He bought a jet, with a mortgage, and some fast cars."

2007

15. In early January 2007 professional valuers valued the 21 properties then in the portfolio at £98.45 million. However, in the course of 2007, problems began to occur. During the second half of 2007 the bank was recording breaches of the ICR and LTV covenants. On 10 October 2007, the valuers revalued the 21 properties at £95.77 million, down slightly from the January valuation. Interest rate changes led to difficulties in Mr Morley meeting payments due under the interest rate collar. The bank began to take a harder line, in effect charging fees as its price for not calling in the loan.

2008

16. Discussions continued through the first half of 2008, but no agreement was reached. On 23rd July 2008 the bank wrote formally, threatening to "accelerate the facility", i.e. to call in the loan based on past breaches of covenant, but offering to waive the breaches if Mr Morley signed a "supplemental agreement" in place of the existing arrangements.

17. Mr Morley's solicitors responded, on 30th July 2008, with a formal letter of claim threatening to seek an injunction unless the bank withdrew its demands and its threat to call in the loan by 4 pm on 1st August. They argued that the past breaches of covenant had been remedied and the contract had been affirmed.

18. A stand-off developed. The bank held back from calling in the loan. There was a meeting on 2nd September 2008. There were email exchanges which the judge described as "robust". The tone became more strained and both sides saw the relationship ending once the current facility expired in December 2009.

19. As the judge pointed out, these exchanges occurred against the backdrop of a volatile and rapidly deteriorating economic climate in the world of banking and finance generally. The collapse of the Lehman Brothers bank in the United States occurred in mid-September 2008, the same day that Mr Morley emailed the bank warning that injunction proceedings were "ready and prepared", protesting that his business did not deserve "this constant amount of harassment from their bank" and complaining of "an unjustified attack on one of your success story accounts".

20. In October 2008, Mr McConville asserted that the claimant was "covenant compliant", would see through the rest of the loan facility period and would then refinance with a different lender when the loan agreement expired. The bank considered seeking updated valuations to "force a breach of covenant", as it was put in an internal email. In fact such a valuation would not have "forced" a breach of covenant, but (assuming it was the case) would have demonstrated that there was such a breach. In the event, however, this step was not taken and the year ended without agreement.

2009

21. In January 2009 a valuation of the property portfolio was obtained. This showed that it was worth some £59.4 million, a substantial decline. This was a very uncomfortable position for the bank. It had made a loan of £75 million and found itself with security for only £59.4 million, with no recourse against Mr Morley personally.

22. In February 2009 Mr Morley made a proposal for reducing the LTV position to a more acceptable level. This included a new three-year loan of £75.75 million together with a "participation arrangement" whereby the bank would share in future increases in asset value, receiving 20 per cent of the "surplus" on a sale or refinance of the portfolio at an appropriate time. He set out a table showing his forecast of predicted future debt against the future value of the portfolio and yields from the properties. According to this prediction, the value of the portfolio would be restored to over £77 million by February 2011 and would by then have overtaken the amount of debt owing, predicted at just over £75 million. Mr Morley proposed "operational savings"; he pointed to past cash injections and anticipated further future ones. He asked, in effect, for more time and for the bank to show forbearance and faith in his ability to

recover and trade his way out of difficulty. Thus the idea that the bank should take (in effect) an equity position in the portfolio first emanated from Mr Morley himself.

23. On 13th February 2009 the bank notified the claimant of the breach of the LTV covenant consequent on the January 2009 valuation. On 20th February it served a further notice exercising its right to charge interest at the default rate of 3 per cent over its base rate.

24. Mr Morley was not happy about this. He wrote back the same day complaining of the bank's "aggressive stance", reminding the bank that the loan agreement did not allow recourse to him personally and warning that he might decide to walk away, a course which (he said) would lead to “a rapid deterioration in value, performance, income flow and void rate”:

> “We are extremely concerned with aggressive stance that you have adopted with us a business with reference to the letter you have sent today [*sic*.] We in turn have to take into serious consideration whether or not, in light of your position, it is worthwhile continuing to intensively manage the portfolio, ‘keeping it all together’ and maintain the cash flow necessary to cover base interest, default interest and hedging costs. As I am sure you are aware, both the main loan and hedge instrument are non-recourse to myself personally.”

25. The bank continued to negotiate on the basis of Mr Morley’s February proposal, but no agreement was reached. On 10th June 2009 the bank sent a proposal to Mr Morley for a new three year loan of £76.84 million, with interest at 2 per cent over LIBOR. The security would be a legal charge over the properties in the portfolio, now 22 in number. A new hedging instrument, acceptable to the bank, at 100 per cent of the amount loaned would be required, as well as a participation agreement which would deliver to the bank, on expiry, portfolio sale or refinance, 20 per cent of the uplift in value from £59.4195 million or, if higher, the sum of £1 million.

26. Following a meeting on 17th June 2009 Mr Bob Dyson (a respected figure in the property world who was acting on Mr Morley’s behalf) wrote to reject the bank’s proposal. He described it as "singularly too penal", principally because the participation agreement (which he described as “the killer”) did not provide Mr Morley with sufficient incentive, when he would need to increase the value of the portfolio by some £21.5 million to repay the loan before benefiting personally from the hard work which would be required to achieve this. Mr Dyson proposed an alternative arrangement.

27. At this stage the bank decided to transfer the handling of Mr Morley's account to its Global Restructuring Group (“GRG”), whose role was, broadly, to deal with customers whose businesses were ailing. Mr Toni Smith of GRG began to consider the possibility of West Register acquiring the whole portfolio in a "pre-pack" receivership. West Register was the bank's subsidiary vehicle for acquiring secured assets by way of enforcing the security. From 30th July 2009 GRG took over the handling of the relationship with the claimant.

28. The bank's understanding was that if it were to enforce its security by appointing receivers to sell the properties on the open market, there would have to be a separate sale transaction to enforce the legal charge over each individual property. However, the transaction costs of multiple receivership sales could be avoided if, instead, Mr Morley would agree to a transfer of part or all of the portfolio to West Register – or if the bank were to appoint receivers who decided to sell part or all of the portfolio to West Register in this way. Mr Smith and others were therefore conscious that there would be a considerable saving in transaction costs if a wholesale transfer could be achieved by agreement with Mr Morley. However, a perceived disadvantage of such a transfer was that West Register was not experienced in property management and would need to take on the burden of managing the portfolio, perhaps for some time. Accordingly it remained the bank's preference to come to an arrangement with Mr Morley rather than that West Register should acquire the properties.

29. Mr Smith was keen to exert pressure on Mr Morley to repay the debt in full if he wished to avoid losing the properties. An acrimonious meeting took place on 24th September 2009. Mr Smith said that the bank expected repayment of the debt in full by the expiry date of the loan agreement in December 2009, little more than two months away, and that it would not accept a discounted redemption of less than £70 million.

30. Further negotiations took place during the final quarter of 2009. These were focused on a discounted redemption by Mr Morley, with the benefit of an extension of time to enable him to raise the necessary funds for a redemption at £70 million. Mr Morley suggested that if the deal did not complete by 21st March 2010, "the portfolio will be handed back to RBS in a fully functioning and working entity in a consensual manner with all agreements in place and documentation required".

31. It is apparent that the bank's preference was to reach a deal with Mr Morley which would not involve West Register taking over the portfolio. An internal briefing note of December 2009 analysed the advantages and disadvantages of a discounted cash redemption on the one hand and an acquisition by West Register on the other. It recognised the "significant performance and delivery risk plus ancillary funding and capital costs" of the latter proposal and recommended a settlement with Mr Morley based on a discounted redemption at £70 million. However, for the purpose of negotiations the bank continued to adopt the stance that it was quite prepared for West Register to take over the portfolio and regarded that as a good option for it.

32. By mid December 2009 the prospects for an agreement based on a discounted redemption appeared promising, despite the acrimonious nature of some of the negotiations. On 18th December the bank sent draft heads of terms to Mr McConville. However, a final agreement was not concluded, with the consequence that, by the end of December, Mr Morley had defaulted on repayment of the loan. The bank did not take steps to enforce its security, but continued to negotiate.

2010

33. On 22nd January 2010 the bank sent a "supplemental facility agreement", signed on behalf of the bank, to Mr Morley. This would have extended the loan facility to 31st January 2010 and provided that the bank would accept £70.1 million plus some interest, with a deposit of £2 million, payable in full by 31st January 2010, in full

satisfaction of Mr Morley's obligations under the loan agreement. It provided for a consensual handover of the portfolio if payment were not made by that date.

34. Mr Morley did not sign and return this agreement. Instead he countered, seeking an extension of the deadline until 31st March 2010 which would give him time to raise the necessary funds and adding a clause making the deposit of £2 million returnable if the deal did not complete. He signed this amended version of the supplemental facility agreement. Discussions continued.

35. Again in February 2010 Mr Morley indicated his agreement to a consensual surrender of the properties in the portfolio if payment of the proposed redemption amount of £70.1 million was not made by 31st March 2010.

36. By the end of March 2010 there was still no concluded agreement, although Mr Dyson commented in an email to Mr Smith that Mr Morley was "within a hair's breadth of settling in full at the agreed sum of £70.1m plus interest".

37. Unfortunately, a fire occurred at one of the secured properties in the portfolio on 12th April 2010. Mr Morley claimed about £4 million from the insurers of the property, but the insurers repudiated liability. This setback came at a difficult time as it reduced the value of the bank's security by several million pounds.

38. Eventually, having obtained a funding proposal from HSBC, Mr Morley wrote on 15th June 2010 withdrawing from the proposal of a discounted redemption at about £70 million which had been discussed for at least the last six months and which he had come very close to agreeing, describing it as "commercial suicide". Instead, commenting that the current market valuation of the portfolio was between £52 and £55 million, he offered four options in full and final settlement. These were as follows:

(1) Option 1 was a discounted redemption at £64 million;

(2) Option 2 was that Mr Morley would pay the bank £32 million to acquire five specified properties and would hand over to the bank the remaining properties;

(3) Option 3 (in fact not an option at all because Mr Morley indicated that he was not interested in pursuing it) was a new three year loan facility based on a previous proposal by the bank which would have included personal recourse to Mr Morley; and

(4) Option 4 was a consensual handover of the whole portfolio.

39. This was the first occasion on which either party put forward the basic structure of the agreement which was eventually concluded, that is to say a "split deal" whereby the bank would take over part of the portfolio and Mr Morley would retain the balance with a payment to the bank. It was Mr Morley's proposal.

40. Within days, however, Mr Morley withdrew Option 1, saying that he was unable to make an offer for the whole portfolio in view of the insurers' repudiation of liability for the fire. Mr Morley urged Option 2 upon the bank, saying on 22nd June 2010 that he was in a position to complete within 10 working days of reaching agreement.

41. A meeting was then fixed for 8th July 2010, attended by Mr Smith for the bank and by Mr McConville and Mr Dyson for Mr Morley, together with Mr Haffner, a partner in the firm of solicitors then acting for Mr Morley. Mr Smith opened the meeting by saying that Mr Morley's Option 2 would not work. That meant that the only one of Mr Morley's four options which still survived was Option 4. Mr Smith said that the bank was going to do "a pre-packed insolvency" (i.e. would appoint receivers who would sell the portfolio to West Register) "and would like to do it on a consensual basis". If that was not agreed by the following Monday (the meeting took place on a Thursday), the bank would appoint receivers anyway. Whatever happened, a "split deal" was not on. Mr Smith handed over a contract for the transfer of the whole portfolio to West Register for signature. If the contract was signed, the bank would not appoint receivers and would provide Mr Morley with "a little bit of extra money" which he could use to pay his unsecured creditors. He explained that the bank had a valuation of the properties at £55 million, that a transfer to West Register was advantageous for the bank and that it could make a profit on the properties in the future. Mr Morley's representatives said that an immediate sale of the properties to West Register was unfair. The meeting ended with Mr Smith reiterating that receivers would be appointed on Monday if a consensual deal had not been concluded by then.

42. The judge found that Mr Smith did not act in bad faith, either at this meeting or at any other time, although he was aggressive and unpleasant. He found that Mr Smith's tone and demeanour at the meeting were such that what he said amounted to a threat. He analysed what that threat consisted of by identifying three possible levels of threat. The first was that unless Mr Morley signed up to a consensual deal, the bank would appoint receivers on Monday, 12th July 2010, that being something which the bank was clearly entitled to do. The second level was that unless Mr Morley signed up to a consensual deal, the bank would appoint receivers on the Monday to sell the portfolio on a pre-pack basis to West Register. The judge was satisfied that this threat was made and (so far as there is a difference) that it was not merely a warning. The third level was that unless Mr Morley signed up to a consensual deal, the bank would appoint receivers on the Monday to sell the portfolio on a pre-pack basis to West Register "at an undervalue and/or without proper market testing and/or for an improper purpose". The judge said that it was inherently unlikely that such a threat was made. He was satisfied that it was not. This finding is not challenged.

43. Mr Morley did not sign the contract which had been handed over. Instead, on the following day, Mr McConville travelled down to London for a further meeting. He put forward a variant of Mr Morley's Option 2 proposal: instead of acquiring five properties for £32 million, Mr Morley would acquire a further two properties, making seven in all, for £40 million.

44. The Monday deadline came and went. Mr Morley did not sign the contract which the bank had handed over. The bank did not appoint receivers. Instead negotiations continued.

45. Mr Morley amended his offer on 19th July 2010, proposing to purchase for £17.5 million a reduced part of the portfolio comprising five properties. He referred to a "very positive conversation" which had taken place on 15th July and confirmed his ability to complete within 10 working days. He sought to put pressure on the bank to accept his proposal by engaging public relations consultants "to prepare a coordinated media and political campaign" which, among other things, would "highlight the very

constructive and reasonable offer being promoted by Morley Estates and how this offer has not seen to have been given reasonable and equitable consideration by RBS".

46. On 27th July 2010 Mr Morley's solicitors threatened to seek an injunction if his proposal was not accepted and receivers were appointed. They argued that any sale of the portfolio to West Register would "fall foul of the rule that a mortgagee cannot sell 'to itself'"; and that a sale could be restrained if the mortgagee did not act in good faith or failed to take reasonable precautions to obtain the best price reasonably obtainable.

47. On 28th July 2010 the bank said that it was prepared to accept Mr Morley's proposal for a split deal, but wanted him to pay £20.5 million rather than the £17.5 million which he had offered. Mr Morley agreed to that counter offer.

48. Accordingly the agreement which was concluded, and was documented on 3rd August 2010, was a variant of Mr Morley's initial proposal for a "split deal". Mr Morley paid the bank £20.5 million and retained five of the properties, called the "List B" properties. The remaining properties, the "List A" properties, were transferred to West Register voluntarily. As a result receivers were never appointed and the question whether such receivers would have transferred the properties to West Register, and if so on what terms, was never put to the test.

Intimidation and economic duress

49. The leading case on the tort of intimidation is *Rookes v Barnard* [1964] AC 1129, which held that a threat to break a contract is capable of giving rise to liability. Lord Devlin accepted the formulation in the 13th edition of *Salmond on the Law of Torts* as an accurate statement of the position when it is the claimant who is intimidated:

> "Although there seems to be no authority on the point, it cannot be doubted that it is an actionable wrong intentionally to compel a person, by means of a threat of an illegal act, to do some act whereby loss accrues to him: for example, an action will doubtless lie at the suit of a trader who has been compelled to discontinue his business by means of threats of personal violence made against him by the defendant with that intention …"

50. More recently, in *Berezovsky v Abramovich* [2011] EWCA Civ 153, [2011] 1 WLR 2290, Longmore LJ described the ingredients of the tort as follows:

> "5. Since the tort of intimidation is at the heart of the Sibneft case it is as well, at this stage, to set out the essential ingredients of that tort as stated by Lord Denning in *Morgan v Fry* [1968] 2 QB 710,724C:
>
> > 'there must be a threat by one person to use unlawful means (such as violence or a tort or a breach of contract) so as to compel another to obey his wishes; and the person so threatened must comply with the demand rather than risk the threat being carried into execution. In such circumstances the

> person damnified by the compliance can sue for intimidation.'
>
> The parties have agreed that it is implicit in this definition that the threatener must intend that his threats be acted on by the person threatened. They have also agreed, for the purpose of these interlocutory proceedings, that it is arguable that the means to be used need not necessarily be unlawful, if they can be categorised as 'illegitimate' whatever that may precisely mean. (It is pointed out that, in defining the crime of blackmail, section 21 of the Theft Act requires only that there be an 'unwarranted demand with menaces' and it is then said that the law of tort should not be kinder to the defendant than the criminal law). That is a debate into which this court does not need to enter. For the purposes of this case therefore the essential ingredients of the tort of intimidation are:-
>
> 1) a threat by the defendant (D) to do something unlawful or 'illegitimate';
>
> 2) the threat must be intended to coerce the claimant (C) to take or refrain from taking some course of action;
>
> 3) the threat must in fact coerce C to take such action;
>
> 4) loss or damage must be incurred by C as a result."

51. Leaving aside whether it is sufficient that the threat is to do something "illegitimate" even if not "unlawful", a point which this court left open in *Berezovsky* and which we do not need to decide in this case, it is plain that the threat must in fact coerce the claimant to take the action in question, in this case to enter into the agreement with the bank.

52. Similarly, coercion is an essential ingredient of economic duress, regardless of whether the threat is to do an unlawful or a lawful act. For example, as Lord Diplock explained in *The Universe Sentinel* [1983] AC 366, 383G-384C:

> "That economic duress may constitute a ground for such redress was recognised, albeit *obiter*, by the Privy Council in *Pao On v Lau Yiu Long* [1980] AC 614. The Board in that case referred with approval to two judgments at first instance in the commercial court which recognised that commercial pressure may constitute duress: one by Kerr J in *Occidental Worldwide Investment Corporation all v Skibs A/S Avanti* [1976] 1 Lloyd's Rep 293, the other by Mocatta J in *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* [1979] QB 705, which traces the development of this branch of the law from its origin in the eighteenth and early nineteenth century cases.
>
> It is, however, in my view crucial to the decision of the instant appeal to identify the rationale of this development of the

> common law. It is not that the party seeking to avoid the contract which he has entered into with another party, or to recover money that he has paid to another party in response to a demand, did not know the nature or the precise terms of the contract at the time when he entered into it or did not understand the purpose for which the payment was demanded. The rationale is that his apparent consent was induced by pressure exercised upon him by that other party which the law does not regard as legitimate, with the consequence that the consent is treated in law as revocable unless abrogated either expressly or by implication after the illegitimate pressure has ceased to operate on his mind. It is a rationale similar to that which underlies the avoidability of contracts entered into and the recovery of money exacted under colour of office, or under undue influence or in consequence of threats of physical duress."

53. In the present case the judge made no finding that Mr Morley was coerced into concluding the agreement with the bank as a result of the threat made at the meeting on 8th July 2010 that unless Mr Morley signed up to a consensual deal, the bank would appoint receivers on the following Monday to sell the portfolio on a pre-pack basis to West Register (which was the only threat which the judge found to have been made by the bank). I would go further, however, and would read his judgment as finding positively that Mr Morley was not so coerced, not least as the judge had earlier directed himself by reference to the ingredients set out in *Berezovsky*:

> "270. Was the claimant presented with no practical choice but to submit to the threat by signing up to the 'consensual' transfer agreement? No; he retained the choice to resist the threat. Indeed, he did so. He did not sign the pre-prepared transfer agreement presented by Mr Smith at the meeting. He, or his agents Mr McConville and Mr Dyson, decided to continue negotiating.
>
> 271. Mr McConville went to London the next day to seek a better outcome than transferring the whole portfolio to the bank. This strategy succeeded, up to a point. The claimant did not decide to litigate, as he could have done. He instructed his solicitors to send a letter before claim, which they did, on 27 July, relying on the bank's proposed breach of its duties as mortgagee. But instead of litigating, the claimant entered into the disputed agreements.
>
> 272. In my judgment, the bank is right to submit that the claimant affirmed those agreements. He took no steps to have them set aside until over five years later. …"

54. Mr Sims submitted that, if this is to be read as a finding that Mr Morley was not coerced, that finding was wrong. In my judgment that submission, which is a challenge to the judge's finding of fact, is hopeless. It is clear from the history which I have set out above that the agreement concluded was the result of a robust (and even

aggressive) negotiation between commercial parties, each of which had legal advice and each of which was well able to look after itself in that negotiation. For his part Mr Morley was not above making threats (for example, to walk away from the properties, causing serious damage to the bank's security), he was prepared to exert political and public relations pressure on the bank (by enlisting the support of his Member of Parliament and by engaging public relations consultants) and he was prepared to threaten an emergency application to court for an injunction. There is no reason to think that he could not have made such an application had he so wished or that he was fearful of the consequences of doing so.

55. Moreover, as the judge pointed out, Mr Morley did not submit to the bank's demand and the bank did not carry out its threat. Instead the parties continued to negotiate for several weeks, just as they had done over the whole period during which Mr Morley had been in default. In the end the agreement concluded was the agreement which Mr Morley wanted and had originally proposed, and which the bank had rejected, namely a "split deal". This was materially different from what the bank had demanded at the meeting of 8th July 2010. It was Mr Morley's successful persistence in the negotiations (or, if you like, in *not* being coerced) which enabled him to achieve his object. In the circumstances of this case the fact that he did not take any step to set the agreement aside until five years later is significant, not only because it demonstrates his affirmation of the agreement, but also because it negates any finding of coercion.

56. If there were any doubt about this, which in my view there is not, it would be dispelled by a document prepared by or on behalf of Mr Morley in August 2010 as a submission to HSBC from whom he was seeking finance. The document, headed "Strategic Focus & Overview", extols the virtues of the deal concluded with RBS (emphasis added):

> "**Medium Term Strategy**
>
> We have recently completed a significant milestone in our overall strategy with the disposal of twelve sites (c£3.1m pa income) to West Properties. These were properties which were previously secured under an RBS facility. *This was a consensual deal and one which was driven by us rather than RBS*. It is important to state this fact, as West Properties are generally perceived within the market as the vehicle to which RBS move their distressed assets into [*sic*.] The assets which have been sold are made up primarily of the portfolio which we have been actively marketing for sale over the last twelve months. The assets which were not included within this original portfolio consisted principally of three Wirral-based assets, their inclusion was necessary given the strong cash flow generated by them which in turn made the overall sale package attractive to West.
>
> With the completion of this sale, we have successfully re-positioned the business as a whole. We now have the concentration on prime locations, better type and standard of stock, stronger tenants and higher Return on Capital Employed. From a funder's perspective the ensuing stronger covenant

> strength and longer term income has greater attraction than previous. …"

57. Mr Sims urged us to treat this document with caution. However, Mr Paul Sinclair QC for the bank informed us that it was only disclosed by Mr Morley in the course of the trial after he had completed his oral evidence and that there was no application on behalf of Mr Morley that he should be recalled to give evidence about it. In those circumstances Mr Sinclair was right, in my judgment, to submit that the onus was on Mr Morley to adduce evidence, if he was able to do so, that this was other than an accurate statement of his position. Even making some allowance for context and "spin", I see no reason to doubt the accuracy of the sentence which I have emphasised. It is entirely in accordance with the evidence as a whole.

58. Accordingly a critical ingredient of any case of intimidation or economic duress is missing from Mr Morley's case. With hindsight, Mr Morley may feel a sense of grievance. But he entered into the agreement with the bank of his own free will.

Breach of a duty to provide banking services with reasonable skill and care

59. Mr Morley's secondary case, as developed orally by Mr Sims, was that the bank was in breach of a duty to provide banking services with reasonable skill and care, although it appears that this was the primary case in the court below and it was put first in the grounds of appeal. The duty in question is derived from section 13 of the Supply of Goods and Services Act 1982, and is therefore said to operate as an implied term of the loan agreement. Section 13 provides:

> "In a relevant contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill."

60. The service which the bank provided by the loan agreement was to make funds available for drawdown by Mr Morley. That service had been provided when funds were initially drawn down in December 2006 and from time to time thereafter. However, by the time which is material to this appeal, that is to say July and August 2010, the provision of those services was some time in the past. After the loan term expired in December 2009 and Mr Morley failed to repay the sums advanced, he was in default and the only question was whether the bank would forbear to enforce its security while the parties negotiated a solution or whether it would exercise its undoubted right to appoint receivers under the mortgage. In those circumstances I would not accept that an implied term in the loan agreement has any part to play in the parties' relationship. Rather their relationship was governed by the express terms of the mortgage and by the equitable principles applicable to that relationship.

61. This analysis is well established. In *Yorkshire Bank Plc v Hall* [1999] 1 WLR 1713, after referring to what he described as "the well-known cases" of *China & South Sea Bank Ltd v Tan Soon Gin* [1990] 1 AC 536, *Downsview Nominees Ltd v First City Corporation Ltd* [1993] 1 AC 295 and *National Bank of Greece SA v Pinios Shipping Co No. 1* [1990] 1 AC 637, Robert Walker LJ continued, at 1728D-F:

> "Those cases together establish or reaffirm that a mortgagee's duty to the mortgagor or to a surety depend partly on the express terms on which the transaction was agreed and partly on duties (some general and some particular) which equity imposes for the protection of the mortgagor and the surety. The mortgagee's duty is not a duty imposed under the tort of negligence, nor are contractual duties to be implied. The general duty (owed both to subsequent encumbrancers and to the mortgagor) is for the mortgagee to use his powers only for proper purposes, and to act in good faith: see the *Downsview* case, at p.317. The specific duties arise if the mortgagee exercises his express or statutory powers: see the *Downsview* case, at p.315. If he exercises his power to take possession, he becomes liable to account on a strict basis (which is why mortgagees and debenture holders operate by appointing receivers whenever they can). If he exercises his power of sale, he must take reasonable care to obtain a proper price. …"

62. This was reiterated by Lloyd LJ in *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] EWCA Civ 116:

> "148. If parties enter into a transaction which is a mortgage, then the law imposes certain obligations on the mortgagee, and confers certain rights on the mortgagor, which go back to the intervention of equity in the early development of mortgages. Although a mortgage is a contractual transaction, the imposition of such duties has nothing to do with the implication of terms in a contract under the general law of contracts: see *Yorkshire Bank Plc v Hall* [1999] 1 WLR 1713, 1728D. Whether these duties are imposed on a given party depends only on whether, on the true analysis of the transaction, it is or is not a mortgage.
>
> 149. Other consequences may follow if the transaction is a mortgage, for example obligations to register the security if it has been created by a company, failing which it may be void against a liquidator or other creditors.
>
> 150. It is therefore important to draw a clear distinction between a transaction which is a mortgage, on the one hand, and one which, however similar it may be to a mortgage in economic or commercial effect, is not a mortgage as a matter of true legal analysis."

63. After referring to a passage in which the judge at first instance had implied a duty into the parties' contract (which was not a mortgage) by analogy with the duty of a mortgagee, Lloyd LJ continued:

> "154. That passage suggests that she was proceeding on the basis of the implication of a term into the contract, but by analogy with the terms imposed by law in relation to a different

> type of transaction, to which this agreement had economic similarities. It seems to me, with respect to her, that she was led by that similarity into drawing, and applying, an analogy with mortgage law, while overlooking, on the one hand, the need to justify the implication on the basis of conventional contract law and, on the other hand, the fact that, in relation to a mortgage, the duties by reference to which she drew the analogy do not derive, and cannot be derived, from such a process of implication, but are imposed as a matter of general law, which does not apply in the present case because the transaction is not a mortgage.
>
> 155. It seems to me that the duties to which a mortgagee is subject are no guide at all on the question whether it is legitimate to imply into the contract a term under which Standard would be subject to such a duty such as the judge found."

64. By the same reasoning, it is not appropriate to imply a contractual term into a mortgage (which in any event is not a contract for the supply of services).

65. Moreover, a feature of the case which escaped attention in the court below was that any receiver appointed by the bank would have been the agent of the mortgagor, that is to say Mr Morley, not the bank, and would have owed duties to Mr Morley accordingly. It would have been for the receivers, exercising their powers in good faith, to decide when and how the properties should be sold. As Lord Templeman explained in *Downsview* at 315C-E:

> "*Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949 is Court of Appeal authority for the proposition that, if the mortgagee decides to sell, he must take reasonable care to obtain a proper price but is no authority for any wider proposition. A receiver exercising his power of sale also owes the same specific duties as the mortgagee. But that apart, the general duty of a receiver and manager appointed by a debenture holder, as defined by Jenkins LJ in *In re B. Johnson & Co (Builders) Ltd* [1955] Ch 634, 661, leaves no room for the imposition of a general duty to use reasonable care in dealing with the assets of the company. The duties imposed by equity on a mortgagee and on a receiver and manager would be quite unnecessary if there existed a general duty in negligence to take reasonable care in the exercise of powers and to take reasonable care in dealing with the assets of the mortgagor company."

66. It follows that the decision whether to sell the properties by way of a pre-pack sale to West Register would have been a decision for the receivers, not the bank, and the receivers would not have been entitled to accept instructions from the bank to sell in this way unless they were satisfied that to do so was in accordance with the duties which they owed as receivers. It follows also that any sale of the properties to West

Register would not have been, in effect, a sale by the bank to itself, but would have been a sale by the receivers acting as agent for the mortgagor.

67. This analysis is sufficient to dispose of the appeal to the extent that it is based on an allegation of breach of duty by the bank. But even if the bank did owe a relevant duty under section 13 of the 1982 Act, I agree with the judge that it committed no breach of such a duty. Mr Sims made two principal complaints.

68. The first was that in its dealings with Mr Morley the bank had failed to follow its own internal policy guidance, which emphasised that the bank's objective would in general be to support a viable business, in particular if the default was not due to the fault of the borrower. He accepted that this guidance could not be determinative, but submitted that it was nevertheless relevant in any assessment of what reasonable care and skill required. I reject this submission. The aspirational language of a purely internal document provides no secure foundation for any case of breach of duty by the bank in this case.

69. The second complaint was that the bank was in breach of duty because it failed to act as a lender in its dealings with Mr Morley, and instead was acting as a potential buyer of the property portfolio. I would reject this submission on the facts. Throughout, the bank's objective, and so far as I can see its only objective, was to recover as much as possible of the amount which it had loaned to Mr Morley. It sought to do this by negotiating a discounted redemption of the loan with him and it was only when he ruled out the possibility of making any offer on this basis that the bank was prepared to consider the "split deal" which he was urging. But even if the bank had mixed motives, that would have made no difference. It is unnecessary that a mortgagee should have "purity of purpose", that is to say that its *only* motive is to recover, in whole or in part, the debt secured by the mortgage: *Meretz Investments NV v ACP Ltd* [2006] EWHC 74 (Ch) at [300] to [314]; *Cukurova Finance International Ltd v Alfa Telecom Turkey Ltd (No 3)* [2013] UKPC 2, [2016] AC 923 at [78].

Breach of a duty to act in good faith

70. Finally, Mr Sims submitted that the bank was under a duty to act in good faith, or not to act vexatiously or contrary to its "legitimate commercial interests", pursuant to an implied term of the loan agreement. He cited *Property Alliance Group Ltd v Royal Bank of Scotland* [2018] EWCA Civ 355, [2018] 1 WLR 3529, where an issue arose whether a lending bank's right to require a valuation of the secured property at the borrower's expense was subject to any implied limitation. This court (Sir Terence Etherton MR, Longmore and Newey LJJ) held that it was:

> "169. In our view, however, the power conferred by clause 21.5.1 of the 2011 facility was not wholly unfettered. We agree with Mr Handyside that the provision will have been inserted for the benefit of RBS, and there is, of course, no question of RBS having owed fiduciary duties. In the circumstances, it seems to us that RBS must have been free to act in its own interests and that it was under no duty to attempt to balance its interests against those of PAG. It can, however, be inferred that the parties intended the power granted by clause 21.5.1 to be exercised in pursuit of legitimate commercial aims rather than,

> say, to vex PAG maliciously. It appears to us, accordingly, that RBS could not commission a valuation under clause 21.5.1 for a purpose unrelated to its legitimate commercial interests or if doing so could not rationally be thought to advance them.”

71. The issue in that case was somewhat different from that which arises here, and I would not necessarily accept that the bank was under any such duty in its negotiations with Mr Morley. But even if it was, Mr Sims’ submission fails on the facts. The reason why it was submitted that the bank was acting contrary to its legitimate commercial interests, and thus in breach of this duty, was because, according to Mr Sims, it was acting as a buyer and not as a lender. This way of putting the case therefore adds nothing to Mr Sims’ second submission in relation to the section 13 duty and in any event is ruled out by the judge’s finding that all the bank’s actions were rationally connected to its commercial interests:

> “191. As for the second duty relied on, by the same reasoning I reject the submission that the obtaining of the revaluation received in January 2009, the charging of the default interest rate or the manner in which the negotiations were conducted, were acts done in order to vex the claimant maliciously. All the bank's actions were rationally connected to its commercial interests. I reject the claim for breach of the second duty by the same reasoning as in the case of the first duty.”

Conclusion

72. I would refuse permission to appeal on the issue of affirmation and would dismiss the appeal.

Lord Justice Birss:

73. I agree.

Lord Justice Lewison:

74. I also agree.

ORDER

UPON THE APPLICATION by the Appellant for permission to appeal against paragraph 1 of the Order dated 27 February 2020 of Mr Justice Kerr whereby it was ordered that the Appellant’s claim was dismissed

AND UPON Mr Justice Kerr, by his Order dated 27 February 2020, granting the Appellant permission to appeal on what the Appellant described in his Grounds of Appeal as "Grounds 1 to 7"

AND UPON the Appellant seeking permission from the Court of Appeal on 12 March 2020 to appeal additionally on what his Grounds of Appeal described as "Ground 8"

AND UPON the Order of Lord Justice Lewison dated 2 July 2020, adjourning the decision as to whether to grant the Appellant permission to appeal on "Ground 8", to the hearing of the appeal

AND UPON HEARING Leading Counsel for the Appellant and Leading Counsel for the Respondent

AND UPON READING the relevant documents

IT IS ORDERED

1. The Appellant's application for permission to appeal on "Ground 8" is dismissed.
2. The Appellant's appeal is dismissed.
3. The Appellant shall pay the Respondent its costs of and occasioned by (i) his applications for permission to appeal and (ii) this appeal, to be subject to a detailed assessment (if not agreed) on the standard basis.
4. The Appellant shall by 4pm on 25 March 2021 make an interim payment to the Respondent on account of the costs referred to in paragraph 3 above in the sum of £121,479.56.
5. The Appellant shall pay interest on the Respondent's costs from the date of payment to the solicitors of the costs as invoiced by the solicitors to the Respondent, at the rate of 1% above Base Rate (as set from time to time) until 11 March 2021 and thereafter at the rate prescribed by section 17 of the Judgments Act 1838.
6. Permission to appeal to the Supreme Court is refused.
7. This Order shall be served by the Appellant on the Respondent.

Dated 11th March 2021