

vitiated by threat despite the fact that the cour d'appel had not established the existence of coercion on the part of Mr X, that it had not taken into account the true statement that he had the right to make a higher bid and that Mrs Y, a capable woman in possession of her faculties, had freely signed an advantageous agreement.

*Held:* The Cour de cassation upheld the decision of the cour d'appel to annul the declaration on the ground of threat and dismissed the appeal on a point of law.

*Judgment:*—Whereas the appellate court noted the unremitting steps taken by Mr X in relation to Mrs Y, together with his repeated threats that he would outbid her if she did not agree to withdraw and let him take her place as the successful bidder in return for a promise to provide her with accommodation for a further two years and to pay her 25,000 francs; as it found that on 17 March, in the course of one of his final visits to the home of Mrs Y, whom he found alone, Mr X at last succeeded in overcoming her resistance and got her to sign the document which he had brought with him, already prepared, under pressure of the same threats which he had previously used, in order to instil in that inexperienced woman 'such fear as to rob her of her free will and to override her consent, which she would not otherwise have given' to an act which would deprive her of a house which she had acquired only in order to be able to continue living in it.

—Whereas the contested judgment further states that, although Mr X undoubtedly had the right to submit a higher bid and, in the event of his bid being successful, to institute eviction proceedings, the existence of that right 'was nevertheless incapable of rendering the compulsion exerted by him lawful, since Mr X, who had no right or entitlement capable of justifying his claim to require the signature of a declaration that Mrs Y had been acting on his behalf or her withdrawal in his favour, was not seeking to assert a legitimate right'.

—Whereas having regard to those absolute findings and assessments, the contested judgment, which contains a sufficient statement of reasons, constitutes justification in law for the decision of the appellate court.

#### Notes

(1) In this case, X had a right *de surenchérir*, ie a right to outbid others at auction. This right may be exercised even within 10 days after the last and highest bid has been made (in this case by Y).<sup>30</sup> If X had asserted that right, he would have been legally entitled to force Y to leave the house. However, X threatened Y that he would exercise his right *de surenchérir* in order to obtain from Y a declaration that she had been acting in the auction on X's behalf (which X in fact did obtain, thus depriving Y of her own rights in the house). As the right *de surenchérir* is not given for this purpose, X was guilty of abuse of right, rendering the threat illegitimate.<sup>31</sup>

(2) French case law and legal doctrine agree that a threat must be illegitimate to avoid a contract on the ground of threat. The Code civil does not contain an

<sup>30</sup> See P Malaurie, L Aynès and P-Y Gautier, *Les contrats spéciaux*, 13th edn (Paris, Cujas, 1999) 137.

<sup>31</sup> Cf the note by Holleaux: 'The objective pursued by the perpetrator of the violence was an objective other than the normal purpose to be achieved by exercising the right which he may have possessed. There was thus an abuse.'

express provision on this point, but some authors argue that it follows *a contrario* from Article 1114 (reverential fear).<sup>32</sup>

(3) Threats of physical violence are always illegitimate; threats of exercise of a right (for example legal action), on the other hand, are legitimate, unless the exercise of a right amounts to abuse of right. The Cour de cassation put it thus in:<sup>33</sup>

[T]he threat of recourse to legal action constitutes violence within the meaning of Article 1111 et seq only if there is an abuse of the right to resort to such action, either because it is exercised for a purpose other than the achievement of its proper objective or because it is used in order to obtain a promise or an advantage which is unrelated or disproportionate to the essential obligation owed.

(4) In the decision of the Paris cour d'appel, a woman who was caught shop-lifting in a branch of the Monoprix firm agreed to pay 5,000 francs to the firm in order to induce it to refrain from taking proceedings against her.<sup>34</sup> As the 5,000 francs was far greater than the amount of the firm's loss, it was held that there was abuse of right.

(5) Apart from abuse of right, a threat to exercise a right may also be illegitimate if it is accompanied by illegitimate means of pressure, for instance a threat of a strike coupled with (threats of) physical violence.<sup>35</sup>

BGH, 23 September 1957<sup>36</sup>

11.7 (DE)

#### The threatened wife

*If the means and the purpose of the exerted pressure are in themselves legitimate, the threat may nevertheless be illegitimate, depending on whether the person threatening has a legitimate interest in achieving the result he is after, and whether, according to all right-minded persons, the threat constitutes a reasonable means to achieve that result. Furthermore, a threat is illegitimate only if the person making the threat knows or should know the facts rendering the threat to be contrary to morality (bonos mores).*

*Facts:* The plaintiff bank had business dealings with the firm H, the proprietor of which was the defendant's husband; the defendant had an interest in the undertaking by virtue of having invested in it. On 11 November 1953 the plaintiff concluded an agreement with the firm. The defendant acted as guarantor for the performance of the obligations owed by the firm to the plaintiff. After composition proceedings had been instituted in respect of the assets of the firm H, a settlement was duly reached; however, it was not performed by the defendant's husband. The plaintiff then brought an action against the defendant under the guarantee. The defendant pleaded in her defence that the guarantee she had provided was a nullity, since she allegedly had avoided it pursuant to § 123 BGB. She argued that the

<sup>32</sup> See, eg Malaurie et al (above n 18) n 517; B Nicholas, *The French Law of Contract*, 2nd edn (Oxford, Clarendon Press, 1992) 107.

<sup>33</sup> Cass civ 3e, 17 January 1984, Bull civ III, no 13.

<sup>34</sup> Cour d'appel de Paris, 31 May 1966, Gaz Pal 1966.2.194; RTD civ 1967.147, annotated by J Chevallier.

<sup>35</sup> See Cass soc, 8 November 1984, Bull civ V 423.

<sup>36</sup> BGHZ 25, 217.

deputy director of the plaintiff had threatened her that criminal proceedings for 'kite flying' (jobbing in bills) would be brought against her husband unless she guaranteed his debts; as a result, she had been induced into signing the deed of guarantee.

*Held:* The Bundesgerichtshof set aside the decision of the appellate court, dismissing the plaintiff's claim, because it had applied a wrong standard in deciding whether the threat, which was lawful in its means and object, was illegitimate. The Bundesgerichtshof formulated the test which should have been applied and referred the case back to the appellate court.

*Judgment:* (a) The answer to the question as to the criteria which must be fulfilled in order to render a threat unlawful where the means and the objective of the pressure exerted are in themselves permissible cannot be made to depend solely on whether the party making the threat is legally entitled to require the threatened person to provide the declaration in question. If he is so entitled, the threat will not normally be tainted by unlawfulness; however, there are also cases in which, notwithstanding the absence of such legal entitlement, the threat cannot be held to be unlawful. The contrary view, regularly expressed in the past and still found even today in the works of certain academic jurists, according to which a threat must invariably be unlawful in the absence of such entitlement, must be rejected, as has been shown in later decisions of the Reichsgericht . . . and in decisions of the Bundesgerichtshof . . . The Senate concurs with that conclusion.

According to those decisions, it is necessary first of all to examine whether the person making the threat has a legitimate interest in achieving the result sought after by him and whether, in the view of all fair-minded and right-minded persons, the threat constitutes a reasonable means of achieving that result . . . In the assessment which those decisions require to be carried out, it is necessary to have regard to all circumstances which characterize the events which occur. It is true that these include, most importantly, the question whether the person making the threat has a right to the objective which he is seeking to achieve. Even where he does not possess such a right, however, his conduct may appear justified in the particular circumstances of the case. This may be taken into account *inter alia* where, despite the fact that the legal order does not confer on the creditor any enforceable right, considerations of public policy indicate that the debtor should fulfil his obligations. Where, in such circumstances, the means employed by the creditor in making the threat are in themselves permissible, his conduct will still be capable, in the absence of any other aggravating factors, of being regarded as compatible with public policy and hence as not unlawful.

(b) Those principles also apply to a threat to lay an information leading to a criminal prosecution which—in the opinion of the creditor, at any rate—is justified.

A creditor cannot be debarred from requiring the debtor to make good the damage done to him by the latter's criminal act on the basis that, unless the debtor does so, he may expect such information to be laid . . . Such a threat must be regarded as a reasonable means of achieving its purpose; its justification is to be found in the relationship between the criminal act and the claim asserted.

That assessment is not altered by the fact that the case may involve a relationship between the creditor and a third party. Even where the creditor has no legal claim against that third party in substitution for his claim against the debtor, the threat may nevertheless, depending on the circumstances of the case, be regarded as permissible. That will be the position, for example, where the third party has participated, in a manner which does not fall foul of the criminal or civil law, in the criminal act giving rise to the damage suffered, or where he has gained some

advantage from it. The question of illegitimacy cannot be answered solely by reference to the concerns of the person threatened; the interests of the creditor also have to be taken into account. From the creditor's point of view, it may seem morally justifiable in such a case for him to threaten the third party—by whom he may also feel himself to have been prejudiced, or whom he may consider to have profited from the criminal act—with the laying of an information against the person who committed that act unless the third party also takes reasonable steps to make good the damage suffered.

Thus it is invariably necessary to weigh up all the circumstances in their entirety. The possibility cannot be excluded, even in a case such as that described by way of example above, that a threat to procure the institution of criminal proceedings may be unlawful. It is true that this will most frequently be the case where there exists an inherent connection between the criminal act and the claim asserted by the creditor; however, it is possible to envisage other situations involving competing interests in which such a threat may be justified.

. . . The criminal acts allegedly committed by the husband in the present case are said to have consisted of the issue and acceptance of what are known as 'kites' (fictitious bills), by means of which, it is claimed, he sought to obtain capital for his firm. The defendant's involvement in the firm was not insignificant; she had placed DM 36,000 at the disposal of the firm H. and had entered into a deficiency guarantee in favour of the firm Ho. in the sum of DM 24,000. Given those circumstances, there may be grounds for thinking that she too benefitted, even if only indirectly, from the conduct in which her husband is alleged to have engaged and from the discounting of the bills by the plaintiff, to its detriment. In accordance with the statements made above, that factor should not be left out of account in the assessment of the question whether the threat was unlawful; it should at least have been discussed.

[About the material requirements of applicability of § 123 BGB:]

(b) . . . As has already been mentioned above, it is also necessary, in considering whether the avoidance was permissible pursuant to § 123 BGB on the ground of the issue of a threat, to have regard to the interests of both parties. The primary consideration must of course be the need to protect the freedom of decision of the person to whom the threat is made; however, the fact that that person may have been prevented from exercising such freedom by the acts of another is not enough to render § 123 BGB applicable . . . There must also exist, on the part of the creditor, some intrinsic attitude of a particular kind which necessarily characterises his conduct as an unlawful threat within the meaning of § 123 BGB.

It is on that basis that the Reichsgericht arrived at its decision. It pointed out, first of all, that the person issuing the threat must be conscious of the pressure exerted by him, and that his intention must be to compel the performance of an act by bending the will of the other party . . . There appears to be no dispute in that regard . . .

It must not be forgotten that avoidance pursuant to § 123 BGB on account of the issue of a threat is permissible only where there also exist, in relation to the unlawfulness of that threat, certain intrinsic elements underlying and prompting the conduct of the person by whom the threat is made.

As has been emphasised above, it is not only the interests of the person whose freedom of action has been taken away that must be taken into consideration; the question must always be asked as to whether, and to what extent, the person issuing

the threat also deserves protection. He should unreservedly be given that protection where his attitude in the matter accords with the principles established by the legal order . . .

It follows that a creditor will be protected against avoidance where, in issuing his threat, he proceeds without fault on the basis of facts which do not appear to render his conduct impermissible. By contrast, such protection must invariably be denied, having regard to what amounted at the time to the overriding interests of the person threatened, where the person exerting the pressure correctly appreciated the facts but drew the wrong legal conclusions from them. In such circumstances, the person issuing the threat will have deviated in his intentions from the fundamental requirements which the law imposes on all persons, and will consequently be forced to accept a finding that his conduct was impermissible and thus unlawful . . .

It follows that it is necessary to adhere to the following rule: in order for a finding of unlawfulness to be made within the meaning of § 123 BGB, it must be established that the creditor is, or should be, aware of the facts characterising his threat as contrary to morality; culpable ignorance is thus equivalent to knowledge of the facts. Under no circumstances can the illegitimacy of the threat be precluded by an incorrect legal assessment of the facts on the part of the creditor . . .

The judgment must therefore be set aside, and the case must be referred back to the appellate court.

#### Notes

(1) German law appears to take a somewhat different approach to the requirement of illegitimacy. In accordance with § 123(1) BGB, a contract can be avoided if a party was illegitimately induced, by a threat, to enter into the contract.<sup>37</sup> The emphasis is thus on the illegitimate nature of the inducement. It could be argued, however, that if the inducement is illegitimate, the threat itself is also illegitimate. In any event, it is not unusual for German courts and legal authors to relate the requirement of illegitimacy to the threat.<sup>38</sup>

(2) The illegitimacy of the threat may arise from the means of the pressure (ie the threatened harm), its purpose or the relation between means and purpose of the pressure.<sup>39</sup> The threat is always illegitimate if the means of the pressure is illegitimate, even though the purpose of the pressure may well be legitimate, for example if a promisee is threatened with physical violence by his promisor to pay his debt. Vice versa, the threat is also illegitimate if the purpose of the pressure is illegitimate, although the means of the pressure may be legitimate, for example if A threatens B with legal action (to which A is legally entitled) in order to induce B to enter into an illegal or immoral contract. In this type of case, however, the contract will generally be void on the ground of illegality (§ 134 BGB) or immorality (§ 138

<sup>37</sup> Cf Art 29I of the Swiss OR.

<sup>38</sup> See *Palandt/Ellenberger* § 123, para 19; BGHZ 25, 217, 219; BGH, NJW 1983.384.

<sup>39</sup> See Flume, *Allgemeiner Teil des Bürgerlichen Rechts*, vol II: *Das Rechtsgeschäft*, 4th edn (Berlin, 1992) 535ff; B Markesinis, H Unberath and A Johnston, *The German Law of Contract*, 2nd edn (Oxford, Hart Publishing, 2006) 316–17.

BGB).<sup>40</sup> Finally, in the case of *Widerrechtlichkeit der Mittel-Zweck-Relation* (also known as *Inadäquanz von Mittel und Zweck*), both the means and the purpose of the pressure are legitimate, yet the threat is illegitimate because it is illegitimate to use this particular means to this particular end. The Bundesgerichtshof has repeatedly held that the decisive test is

... whether the person issuing the threat has a legitimate interest in achieving the result sought after by him and whether, in the view of all right-minded persons [or: in accordance with the principle of good faith], the threat constitutes a reasonable means of achieving that result, taking into consideration all the circumstances of the case, especially the interests of both parties.<sup>41</sup> If A, who suffered damage as a result of a criminal act by B, threatens B with criminal prosecution to compensate him for his injury, the threat is not illegitimate as it does not constitute an *unangemessenes Mittel*. The position will be different, however, if A threatens B with criminal prosecution to make B pay a debt which B indeed owes to A, but which is wholly unrelated to B's criminal act. In this case the threat does constitute an *unangemessenes Mittel*.<sup>42</sup>

The question whether the exerted pressure must be illegitimate in order to avoid the contract on the ground of duress was originally of no great importance in English law, as the only form of duress recognized was that to a person,<sup>43</sup> where the threat is in its nature illegitimate. In the early cases of 'economic duress' the test applied by the courts was whether there was a 'coercion of the victim's will' such as to 'vitiating his consent',<sup>44</sup> but this was not consistent with the explanation of duress given in cases in which duress was argued as a defence to a criminal charge.<sup>45</sup> Therefore the 'vitiating of consent' test met with strong disapproval<sup>46</sup> and several authors have argued that, instead, greater emphasis should be placed upon the nature of the pressure.<sup>47</sup>

#### House of Lords

#### 11.8 (E)

#### *Universe Tankships Inc of Monrovia v International Transport Workers Federation, The Universe Sentinel*<sup>48</sup>

*Whether a threat is (il)legitimate depends on the nature of the threat and the nature of the demand.*

<sup>40</sup> See BGHZ 25, 217, 220–22, which also deals with the question whether there can be *Inadäquanz von Mittel und Zweck* if the threat with criminal prosecution is directed against a third party.

<sup>41</sup> Cf BGH 2, 287, 297, in 11.2.D below, p 558; BGHZ 25, 217, 220, 221, above, p 549; BGH, NJW 1982, 2301, 2302; BGH, NJW 1983, 384, 385.

<sup>42</sup> See BGHZ 25, 217, 220–22; also see above at 440, also dealing with the question whether there can be *Inadäquanz von Mittel und Zweck* if the threat with criminal prosecution is directed against a third party.

<sup>43</sup> See above, p 542.

<sup>44</sup> See, eg Kerr J in *The 'Siboen' and the 'Sibotre'* [1976] 1 Lloyd's Rep 293.

<sup>45</sup> See the speeches of Lord Wilberforce and Lord Simon of Glaisdale in *Lynch v DPP for Northern Ireland* [1975] 1 All ER 913, 926, 938.

<sup>46</sup> See, in particular, Atiyah, 'Economic Duress and the 'Overborne Will'' (1982) 98 *LQR* 197.

<sup>47</sup> See, eg McKendrick (above n 7) 354.

<sup>48</sup> [1983] AC 366.