

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
FINANCIAL LIST
The Hon Mr Justice Blair

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 29/03/2017

Between:

The Law Debenture Trust Corporation P.L.C

Claimant

- and -

**Ukraine, represented by the Minister of Finance of
Ukraine acting upon the instructions of the Cabinet
of Ministers of Ukraine**

Defendant

**Mark Howard QC and Oliver Jones (instructed by Norton Rose Fulbright LLP) for the
Claimant**

**Bankim Thanki QC, Malcolm Shaw QC and Simon Atrill (instructed by Quinn Emanuel
Urquhart & Sullivan, LLP) for the Defendant**

**Summary of the judgment read out in open court by the judge
prior to the full judgment being handed down in writing**

1. This is a summary of the full judgment which is being handed down in written form. The full reasoning is set out in the judgment, and this does not detract from the terms of the judgment.
2. The claimant applies for summary judgment in respect of non-payment of Notes in the form of debt instruments called Eurobonds. Summary judgment is the procedure by which the court may decide a claim without a trial, where the claimant can show that the defendant has no real prospect of successfully defending the claim.

3. The claimant, the “Trustee”, is The Law Debenture Trust Corporation plc. It is trustee under a Trust Deed which was (or was purportedly) entered into with the defendant on 24 December 2013. The Trustee is a professional provider of such services, and brings these proceedings on the direction of the Russian Ministry of Finance.
4. The defendant is the State of Ukraine. It is the issuer of the Notes. It is represented by the Minister of Finance of Ukraine acting upon instructions of the Cabinet of Ministers of Ukraine.
5. Ukraine’s case is that the Russian Federation (“Russia”) applied massive, unlawful and illegitimate economic and political pressure to Ukraine in 2013 to deter the then administration from signing an Association Agreement with the European Union, which was to have been signed at the Vilnius Summit on 28 November 2013, and to accept Russian financial support instead. The Notes were to be the first tranche of that support. Ukraine’s case, opposed by the Trustee, is that the borrowing resulted from that pressure, and that for this and other reasons, its non-payment of the Notes is justified, and that in any event summary judgment is not appropriate.
6. By the Trust Deed, Ukraine issued US\$3 billion Notes due on 20 December 2015 carrying interest at 5%.
7. The Trust Deed is governed by English law, the English courts having exclusive jurisdiction. Ukraine waived sovereign immunity.
8. It is not in dispute that the Notes are tradable instruments, though Russia acquired the entire issuance. Ukraine’s case is that Russia had no intention of transferring the Notes.
9. The subscription money for the Notes was paid by Russia, and Ukraine received payment in the amount of US\$3 billion into the foreign currency accounts of the Treasury. The Notes were listed on the Irish Stock Exchange.
10. Ukraine’s case is that following the then President’s decision not to sign the EU Association Agreement at the Vilnius Summit on 28 November 2013, protests in Kyiv grew significantly in size. He is reported to have fled on 21 February 2014.
11. Shortly afterwards, Russia invaded Crimea. Ukraine’s case is that Russia has also fuelled and supported separatist elements in, interfered militarily in, and succeeded in destabilising and causing huge destruction across, eastern Ukraine.
12. On 18 December 2015 a moratorium proposed by the Ukrainian Government was approved to suspend payments of the Notes. The Notes were not repaid on the due date, and no payment has been made since then.
13. By the Trust Deed, the holders of at least one-quarter in principal amount of the Notes then outstanding can direct the Trustee to take enforcement proceedings. On 16 February 2016, the Russian Ministry of Finance gave the Trustee such a direction.
14. These proceedings were brought by the Trustee on 17 February 2016. The claim is for US\$3,075,000,000 together with continuing interest.

15. Turning to the dispute, the Trustee has sought to emphasise the standard structure of the transaction as an issuance of Eurobonds, and the fact that it (and not Russia) brings the claim as trustee. It describes Ukraine's defence as an attempt to bring into an ordinary debt claim issues of international law that have nothing to do with the Trustee. It emphasises that Ukraine received in full the funds subscribed for the Notes by Russia.
16. The court's view on that is as follows. It is correct that Ukraine received the funds, and it is not disputed that the structure of the transaction is in standard form. However, the background is extraordinary, and it is not credible to describe this as an "ordinary debt claim".
17. As to the background, there is much material before the court substantiating Ukraine's case as to Russian pressure and ultimately military action. It is right to say that Russia's answer is not before the court, though to a considerable extent this is its own choice.
18. The decision for the court on this application depends on whether in these circumstances the Trustee can nevertheless show that, as a matter of law, Ukraine has no real prospect of successfully defending the claim or issue on which summary judgment is sought, and that there are no other compelling reasons for a trial.
19. Ukraine has four main defences, and each of them raises legal questions of considerable difficulty. So that those who read the judgment have the opportunity to understand fully the nature of Ukraine's case, and how it relates to the issues for decision, the factual part of the Defence is annexed to the judgment.
20. In the deeply troubling circumstances shown in that Defence and in the evidence that has been submitted by Ukraine in support, the court must resolve the legal issues before it by application of the relevant law. Its conclusions in summary are as follows.

(1) Capacity

- (1) Ukraine submits that the Eurobond transaction is void because, as a matter of Ukrainian law, Ukraine had no capacity to enter into it. Its expert evidence that the Note issuance was in breach of Ukraine's Budget Law limit, and that there were constitutional breaches in passing the relevant Decree, is not challenged on this application.
- (2) Ukraine is, of course, a sovereign state. On this point, the court's conclusion is that, whether considering the nature of a state on the international plane, or the nature of a state for the purposes of entering into a loan contract governed by English law, the position is the same. Once a state is recognised as such, as a matter of international law it has unlimited capacity to borrow, and such capacity is recognised under English law (*The Case of the S.S. "Lotus" (France v Turkey)*, PCIJ, Series A, No. 10 (at pp. 18-19)).
- (3) The court accepts the Trustee's submission that this is not a case of lack of power, and therefore capacity, but of the power not being exercised as the law required (*Haugesund Kommune v Depfa ACS Bank* [2012] Q.B. 549). This is properly

characterised as going to a lack of authority on the part of the actors concerned. It is common ground that whereas questions of actual authority are governed by Ukrainian law, questions of ostensible or usual authority are determined by English law as the putative applicable law of the contract.

- (4) In the court's view, it is clear that the Minister of Finance had usual authority to enter into the transaction on behalf of Ukraine. The fact that the Minister of Finance was the signatory of all 31 debt issuances by Ukraine in which the Trustee had acted between 2000 and 2013 establishes such authority beyond doubt. As regards the Trustee, the Minister of Finance was a person whose position gave him usual authority to sign such issuances (*Bowstead & Reynolds on Agency* (20th ed.), Art 72, §8-015). The Trustee is entitled to summary judgment on this issue.
- (5) The Trustee's alternative case is that Ukraine subsequently ratified the relevant agreements. Ukraine's case is that it was unable freely to consider the legal position as regards the bonds because of the military steps being taken by Russia in Crimea and eastern Ukraine. The court agrees with Ukraine that the question of ratification is not suitable for determination on a summary basis.

(2) Duress

- (1) Ukraine submits that wrongful and illegitimate acts alleged against Russia constitute duress under English law, and that the issuance of the Eurobonds on 24 December 2013 was voidable as a result, and was avoided by the moratorium suspending payments of 18 December 2015 (see *Progress Bulk Carriers Ltd v TUBE CITY IMS LLC* [2012] EWHC 273 (Comm)).
- (2) The Trustee contends that the conduct of Ukraine subsequent to the transaction constitutes affirmation of the transaction so that Ukraine cannot now purport to rescind the transaction on grounds of duress. However, the court agrees with Ukraine that the question of affirmation is not suitable for determination on a summary basis.
- (3) Affirmation aside, the Trustee's response to the duress defence is that, as a matter of law, it is non-justiciable in the English court. The most recent authority is *Belhaj v Straw* [2017] UKSC 3. Judgments were handed down by the Supreme Court on the first morning of the hearing, and the parties have been able to take full account of it in their contentions.
- (4) Ukraine submits that this issue is unsuitable for summary determination. The Trustee's response is that summary determination is appropriate because it is clear that the matters raised by Ukraine in its duress defence are non-justiciable, and cannot afford a defence. However, the court does not agree with the Trustee that the justiciability issue is a clear one, regarding it on the contrary as an issue of difficulty.
- (5) But the case law appears to show such issue being considered prior to a trial, in effect as a threshold issue. If therefore the Trustee can establish non-justiciability as a matter of law on a sufficient factual foundation, complexity or the fact that

the case law is evolving should not stand in the way of a decision at the summary judgment stage.

21. The court's conclusions are as follows:

- (1) Ukraine has made out a strong case that economic pressure applied by Russia by way of trade restrictive measures during 2013 along with threats led to its Government's decision not to sign the EU Association Agreement at the Vilnius Summit on 28 November 2013, and to accept Russian economic support instead of which the Notes issuance was part.
- (2) Ukraine has also made out a strong case that it is necessary to see this as more than simply economic, since drawing closer to the EU was a fundamental national policy objective, so that both the nature of the pressure and its effects were of profound consequence to the state.
- (3) There is also strength in Ukraine's submission that since the Trustee brings the claim at the direction of, and for the benefit of, Russia as Noteholder, a defence of duress, if otherwise available, should not in principle be precluded by the interposition of the Trustee in the transactional structure, but the court need not decide that point.
- (4) Ukraine's case is that the issue is justiciable because it has to be decided as part of a determination of its English law rights, that is, whether the English law contracts to which it is party are voidable (*Shergill v Khaira* [2015] AC 359 at [43]).
- (5) However, it is "axiomatic that municipal courts have not and cannot have the competence to adjudicate upon or to enforce the rights arising out of transactions entered into by independent sovereign states between themselves on the plane of international law" (*JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 at p.499F-G).
- (6) Assessing the trade restrictive measures relied on by Ukraine would inevitably involve adjudication by the court upon transactions entered into between states on the plane of international law. Effectively, that is what Ukraine seeks to establish as its duress defence.
- (7) Further, assessment of the measures would require interpretation by the court of treaties/agreements which are not incorporated into English law. In *Belhaj* at [123], it was said by the Supreme Court "... that international treaties and conventions, which have not become incorporated into domestic law by the legislature, cannot be the source of domestic rights or duties and will not be interpreted by our courts".
- (8) The defence falls therefore within these fundamental prohibitions established in the case law.
- (9) The court's conclusion is that Ukraine's case is non-justiciable in this respect under the foreign act of state doctrine. It raises matters which the court will "abstain or refrain from adjudicating upon" (see *Belhaj* at [11(iii)(c)] and [151],

and *Buttes Gas* at p 934). The Trustee is entitled to summary judgment on this issue.

22. If its case as to economic pressure is non-justiciable, Ukraine submits that threats of the use of force by Russia fall within the public policy exception to the foreign act of state doctrine.
23. This again is an issue which is comprehensively reviewed in the *Belhaj* case. The Supreme Court did not equate *jus cogens* for these purposes with the public policy exception (e.g. at [106]).
24. The court's conclusions are as follows:
 - (1) In oral argument, the Trustee tended to diminish the significance of the threats made in 2013. However, Ukraine is right to say that the threat of the use of force in 2013 has to be seen against the actual use of force in 2014.
 - (2) Ukraine relies on *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* [2002] 2 AC 883 where problems of justiciability were overcome by pointing to violations of the UN Charter and Security Council Resolutions (*Belhaj* at ([80]), the violations being admitted).
 - (3) Nevertheless, the *Belhaj* case makes clear that the *Kuwait Airways* case is exceptional. The prohibition on the use of armed force and on aggression are described as “central areas of abstention” and “giving rise to core examples of issues upon which domestic courts should refrain from adjudicating” under the foreign act of state doctrine (e.g. at [107(iii)]).
 - (4) Applying this statement of the rule, the threats of the use of force by Russia which are relied upon by Ukraine as vitiating the Eurobond transaction fall within the foreign act of state doctrine as issues upon which the court should refrain from adjudicating. They concern threats, and ultimately aggression, by a state and armed conflict between states. On the authorities, these acts are non-justiciable, and fall outside the public policy exception, and cannot give rise to a defence of duress in English law. The Trustee is entitled to summary judgment on this issue.
 - (5) If it is not arguably justiciable, then enforceability cannot be precluded by a permanent stay.

(3) Implied terms

- (1) Ukraine relies on the principle that, “In general, a term is necessarily implied in a contract that neither party will prevent the other from performing it” (Lewison, *The Interpretation of Contracts* (6th ed 2015) at §6.14). It submits that the minimum content is an implied term which prohibits Russia from preventing or hindering performance, or from preventing or hindering performance arising from breaches of clearly established principles of international law. Performance means Ukraine meeting its obligations under the Notes.

- (2) In that regard, Ukraine can powerfully contend that military action by Russia in Crimea and eastern Ukraine has the economic effect of severely impeding the State's ability to meet its obligations under the Notes.
- (3) Further, it is not in dispute that the Trustee acts on Russia's directions in this matter, and that Russia will be the beneficiary of repayment under the Notes so long as it retains them.
- (4) However, it is at this point that the legal nature of the transaction becomes decisive. The reason that the room for the implication of terms is limited in the case of financial instruments such as the Notes is that transferees or potential transferees have to be able to ascertain the nature of the obligation they are acquiring (or considering acquiring) from within the four corners of the relevant contracts (*BNY Mellon Corporate Trustee Services Limited v LBG Capital* [2016] UKSC 29 at [30]). Otherwise, the scope of transferability would be severely limited, and the market thereby compromised.
- (5) The fact that Russia may have intended to retain the Notes does not impinge on their transferability. The fact that Russia has not transferred the Notes is not legally relevant, because the question of the implication of terms has to be decided at the time of contracting, and not *ex post* (*Marks and Spencer plc v BNP Paribas Securities Services Trust Company (Jersey) Ltd* [2016] AC 742 at [21]).
- (6) Further, the proposed terms which Ukraine seeks to imply even in their minimum form would render the Notes unworkable and untradable, and would thereby contradict their express terms (*BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 52 ALJR 20). The Notes, in form and substance transferable, would effectively cease to be transferable.
- (7) The legal test for the implication of terms is accordingly not satisfied, and the Trustee is entitled to summary judgment on this issue.

(4) Countermeasures

- (1) Ukraine's contention is that countermeasures is a principle of public international law, and that if it is otherwise obliged to make payment under the bonds, it is entitled, on the facts of this case, not to meet that obligation. Non-payment is a proportionate countermeasure, given the severity of the effect of Russian interference on its territorial integrity and economy.
- (2) The question whether the English court is competent to rule on the question of countermeasures in public international law was considered in *Westland Helicopters Ltd. v Arab Organisation for Industrialisation* [1995] 2 WLR 126. It was said at p. 311 that these were not matters that the court could or should consider. As Ukraine says, this finding was obiter. However, this court considers that it is correct in law and should be followed.
- (3) In substance, the case on countermeasures is the same as the case on duress, but placed in the context of non-payment. The defence must fail for the same reasons. Where the underlying acts concerned are non-justiciable, they cannot

result in legal consequences through this route. The Trustee is entitled to summary judgment on this issue.

Other compelling reasons for a trial

- (1) Irrespective of its prospects of success on its four defences, Ukraine submits that there are compelling reasons to proceed to trial because the claim is in reality a tool of oppression which includes military occupation, destruction of property, the unlawful expropriation of assets, and terrible human cost. Ukraine submits that these matters should be the subject of the full rigours of a public trial, and that the summary judgment process is not something to which Russia should be entitled to benefit given its egregious conduct.
- (2) This point was powerfully put by Finance Minister Danyliuk in his evidence, and the court has given it careful consideration. However, ultimately, this is a claim for repayment of debt instruments to which the court has held that there is no justiciable defence. It would not be right to order the case to go forward to a full trial in such circumstances.

Conclusion

25. Accordingly, for the reasons set out above, the Trustee is entitled to summary judgment. The terms of that judgment require determination, and there are a number of consequential matters which the court will proceed to deal with. It is grateful to the parties for their assistance.