



Press Summary

15 March 2023

The Law Debenture Trust Corporation plc (Respondent) v Ukraine (represented by the Minister of Finance of Ukraine acting upon the instructions of the Cabinet of Ministers of Ukraine) (Appellant)

The Law Debenture Trust Corporation plc (Appellant) v Ukraine (represented by the Minister of Finance of Ukraine acting upon the instructions of the Cabinet of Ministers of Ukraine) (Respondent)

[2023] UKSC 11

On appeal from: [2018] EWCA Civ 2026

Justices: Lord Reed (President), Lord Hodge (Deputy President), Lord Lloyd-Jones, Lord Kitchin, Lord Carnwath

Background to the Appeal

This appeal arises out of a contractual dispute between Ukraine and the Law Debenture Trust Corporation plc (“the **Trustee**”), acting on behalf of the Russian Federation (“**Russia**”).

In 2013, Ukraine issued Eurobonds (“the **Notes**”) with a nominal value of US \$3 billion and carrying interest at 5% per annum to Russia, and Russia paid the subscription money to Ukraine. In substance this amounted to a loan of the \$3 billion by Russia to Ukraine, repayable in December 2015. The Trustee is the trustee of the Notes, which were constituted by a trust deed. The Trustee and Ukraine chose to have the trust deed governed by the law of England and Wales and specified that the courts of England and Wales have exclusive jurisdiction to hear any disputes arising out of it. The trust deed and related contractual documents were entered into by Ukraine represented by its Minister of Finance, acting on the instructions of the Cabinet of Ministers of Ukraine (“the **CMU**”).

Ukraine maintains that it undertook the transaction following massive economic and political pressure from Russia to induce Ukraine not to enter into an association agreement with the European Union and to accept Russian financial support instead, in the form of the Notes. That pressure is alleged to have been unlawful under international law and in any event

illegitimate. Shortly afterwards, Russia invaded Crimea and purported to annex it. Ukraine contends that Russia has since interfered militarily and succeeded in destabilising and causing huge destruction across eastern Ukraine. The Supreme Court heard the appeal before Russia's invasion of Ukraine in February 2022 and has not been asked to consider the invasion or events which have followed.

Ukraine initially made some payments under the Notes, but it failed to repay them when they matured on 21 December 2015. The Trustee therefore issued proceedings against Ukraine, claiming the sums due to Russia. Ukraine filed a defence, which alleged (among other things) that, first, Ukraine lacked capacity to enter into the transaction by which the Notes were issued as a matter of Ukrainian law. Secondly, the Minister of Finance lacked authority to enter into the transaction. Thirdly, Ukraine was entitled to avoid the Notes because of duress arising from Russia's unlawful and illegitimate threats and pressure, including restrictive trade measures and threats to Ukraine's territorial integrity and independence. Fourthly, Ukraine was entitled to rely on the public international law doctrine of countermeasures to decline to make payment under the Notes.

The Trustee applied for summary judgment, a procedure which enables the court to decide a claim without a trial where the defence has no real prospect of success and there is no other compelling reason for a trial. The trial judge granted the application. He decided the claim in the Trustee's favour without a trial and ordered Ukraine to pay the sums due under the Notes. On appeal, the Court of Appeal upheld the trial judge's conclusions on the issues of capacity, authority and countermeasures, but held that the claim could not be decided without a trial because Ukraine had an arguable and justiciable defence of duress.

Judgment

The Supreme Court unanimously holds that the Trustee is not entitled to summary judgment. This means that Ukraine will be permitted to defend the claim for the sums due under the Notes at trial before the High Court. Lord Reed, Lord Lloyd-Jones and Lord Kitchin give the majority judgment, with which Lord Hodge agrees. They hold that Ukraine should be permitted to defend the claim on the ground of duress, but only to the extent that it is based on duress of the person or of goods resulting from Russia's alleged threatened use of force. Ukraine's defences on the issues of capacity, authority and countermeasures should be struck out. Lord Carnwath gives a judgment in which he agrees with the majority on the issues of capacity and authority. However, he would have allowed the defence of duress to proceed to trial on a broader basis than the majority. He also considers that the countermeasures defence should be permitted to proceed.

Reasons for the Judgment

Issue 1: Did Ukraine have the capacity to issue the Notes or to enter into the related contracts?

The Supreme Court holds that, as a sovereign state which is recognised as such by the UK government, Ukraine is a legal person with full capacity in English law [20]-[26]. It is not therefore arguable that it lacked the capacity to issue the Notes or to enter into the related contracts [34]. The Court rejects Ukraine's submission that it lacked capacity because its ability to enter into contracts was limited by its constitution and Ukrainian domestic law. It

finds that the capacity of a sovereign state in English law cannot be restricted in this way because it derives from the state's recognition by the UK government, not from the state's internal law [29]. The Court's recognition of Ukraine as a legal person with full capacity is a reflection of its sovereignty and independence. It therefore fully accords with and promotes the principle of international comity [33].

Issue 2: Were the Notes issued or the related contracts entered into without authority?

The Supreme Court holds that Ukraine's Minister of Finance had ostensible (apparent) authority to sign the trust deed and related contractual documents and to issue the Notes, on behalf of Ukraine. The CMU had ostensible authority to pass a resolution authorising the Minister of Finance to proceed with the transaction [116]. The events leading up to the issuance of the Notes, which involved the President of Ukraine, the CMU and the Minister of Finance, demonstrated to the Trustee a co-ordinated and consistent approach to the borrowing [77]-[81]. If a state represents that a person has authority to act on its behalf, it will be bound by the acts of that person with respect to anyone dealing with him as an agent on the faith of that representation [82]-[90].

The Trustee was not put on inquiry (notice) that the Minister of Finance might not have actual authority as the issue of the Notes would breach the external borrowing limits imposed by Ukrainian law [91]-[113]. The Trustee should not be taken to have known of the existence and meaning of this alleged limit [95]-[101]. The Trustee understood and had no reason to doubt that the Minister of Finance was authorised to issue the Notes, and it was on this basis that the Trustee was content to proceed [114]-[115].

Issue 3: Can Ukraine maintain that it was entitled to avoid the Notes for duress exerted by Russia?

The majority of the Supreme Court holds that, when a party's consent to a contract is induced by threats or pressure, the contract is voidable by the aggrieved party provided that: (i) the threat or pressure was illegitimate under English law; and (ii) there is a sufficient causal connection between the threat or pressure and the aggrieved party's decision to enter into the contract [142]-[144]. Ukraine's allegations in relation to duress concern two different kinds of pressure which are treated differently in English law [145]-[148].

The first category comprises economic pressure, including Russia's alleged imposition and threat of trade restrictions. Trade sanctions, embargoes and protectionism are normal aspects of statecraft. They cannot be regarded as inherently illegitimate or contrary to public policy. Accordingly, the economic pressure alleged by Ukraine does not constitute duress under English law and cannot, in itself, establish a defence to the Trustee's claim. It is unnecessary to consider whether the economic pressure was applied by Russia in breach of international law, as the applicable test is whether the pressure was illegitimate under English law [149]-[170].

The second category comprises Russia's alleged threats to use force to destroy Ukraine's security and territorial integrity. These threats may constitute duress of the person, because they would almost inevitably involve the use of violence against Ukrainian armed forces and civilians. They may also constitute duress of goods, because they are likely to result in the destruction of or damage to property in Ukraine. Duress of the person and duress of goods are clear examples of illegitimate pressure. Accordingly, the success of Ukraine's defence turns on whether Russia's threatened use of force imposed what English law regards as illegitimate pressure on Ukraine to enter into the trust deed and related contracts. That

question can only be determined after trial [171]-[183]. It is justiciable because the court can answer it without determining the validity or lawfulness of Russia's acts under international or domestic law [184]-[193].

It will be necessary to consider the causal connection between Russia's alleged threats of force and Ukraine's decision to enter into the transaction at trial. The onus will be on the Trustee to prove that the threats of force (if established) did not contribute to Ukraine's decision. The economic pressure will be relevant as part of the factual context. If it is found to have accentuated the impact of the threats of force, this will strengthen Ukraine's case [196].

Dissenting on this issue, Lord Carnwath would allow Ukraine's defence of duress to proceed to trial as pleaded. He holds that it is unnecessary to separate the economic from the physical threats, which were parts of a single concerted course of action. He also disagrees with the majority's view that the international legal standards which govern the relationship between sovereign states are irrelevant to the question of whether the conduct of one state towards another is illegitimate for the purposes of duress under English law [217]-[221].

Issue 4: Can Ukraine maintain that non-payment of the sums due under the Notes is a lawful countermeasure?

The majority holds that Ukraine's case on countermeasures is irrelevant to the determination of the rights and duties arising under English law in relation to the Notes [207]. The application by English courts of rules of international law is clearly restricted by domestic constitutional principles, including the principle of non-justiciability [204]. The principles of international law governing the rights of states to take countermeasures are generally not justiciable before courts in this jurisdiction for two reasons: first, English law does not recognise a defence reflecting the availability of countermeasures on the international level and secondly, the subject matter of such inter-state disputes is inherently unsuitable for adjudication by courts in this jurisdiction. It is not the function of national courts to arbitrate inter-state disputes arising on the international level and governed by international law. While the second objection may be subject to exceptions founded on domestic public policy, it was not necessary to address that issue because the first objection is a complete answer [207]. Accordingly, Ukraine has no arguable defence in these proceedings based on any right it may have in international law to take countermeasures on the international level [208].

Dissenting on this issue, Lord Carnwath would have allowed the defence of countermeasures to proceed to trial. In his view, the criteria for availability of the defence of countermeasures in international law are satisfied [224]-[225]. The principle of non-justiciability may be departed from in this wholly exceptional case, between in effect two sovereign states, and in response to a clear breach of fundamental principles of international law to which both parties are subject. Ukraine alleges that this is one such exceptional case, and Lord Carnwath would have permitted the matter to be tested at trial [227].

References in square brackets are to paragraphs in the judgment

NOTE:

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: [Decided cases - The Supreme Court](#)