



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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FIFTH SECTION

Application no. 28981/23
TORGOVO-LOGISTYCHNYY KOMPLEKS ARKTYKA, TOV
against Ukraine
lodged on 17 July 2023
communicated on 19 August 2026

SUBJECT MATTER OF THE CASE

The application concerns the seizure, for debt, of the applicant company's mortgaged assets. The applicant company complains that, in the proceedings in which it attempted to challenge that seizure, Article 6 of the Convention and Article 1 of Protocol No. 1 were breached.

In 2014 the applicant company borrowed 100 million Ukrainian hryvnias (UAH, about 6 million euros (EUR) at the time) from a State-owned bank. The applicant company mortgaged its assets, buildings of a logistics complex and land, to secure the loan. In the mortgage agreement the assets were valued at about UAH 299.91 million.

After the applicant company's default on some loan payments, the bank demanded early repayment (by 13 April 2016) of the entire debt, with interest and various penalties: on 10 March 2016 – about UAH 113.05 million (including interest of about UAH 13.5 million), and on 24 May 2016 – about UAH 114.36 million (including interest of about UAH 16.86 million).

Notaries issued four writs of enforcement ordering collection of debt against the mortgaged assets. Under domestic law notarial writs of enforcement are directly enforceable against mortgaged assets by the State Bailiffs, there is no requirement for the mortgagee (creditor) to obtain a court judgment in order to collect on such assets, if debt is not in dispute. The Bailiffs may transfer the assets to the creditor and, if the assets are greater

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than the debt, the mortgagee must reimburse the mortgagor 90 percent of the difference.¹ The following writs were issued:

Writ date, number	Approximate amount, UAH	Nature of debt
27/03/2017, no. 704	93.33 million	principal
27/03/2017, no. 705	60.77 million	interest for the period 15/03/2016 to 15/03/2017 and penalties
22/05/2017, no. 779	97.62 million	principal
22/05/2017, no. 780	22.39 million	interest for the period 22/05/2016 to 22/05/2017

Enforcement proceedings were initiated to enforce those writs. On 18 April 2017 a valuer appointed by the State Bailiffs assessed the value of the mortgaged assets at about UAH 172.65 million (about EUR 5.96 million).²

The applicant company pointed out that, in court proceedings for foreclosure which the bank had initiated but then withdrew and discontinued,³ on 18 July 2017 a court-appointed expert assessed the assets at about UAH 339,44 million (about EUR 11,35 million).

Under section 57(5) the Enforcement Proceedings Act of 2016, the State Bailiffs had to inform the applicant company about the asset valuation and the company could appeal to court against the valuation within ten days of being notified. However, the courts later established, in the Bailiffs Actions Case (see below), that the applicant company had not been informed of either the initiation of the enforcement proceedings or any of the Bailiffs' actions.

On 23 May 2017 the bank informed the Bailiffs that the debt to be satisfied was about UAH 198.58 (EUR 6.67 million, including interest of about UAH 40.53 million). Before this Court, however, the applicant company alleges that the correct amount of the recoverable debt was about UAH 139.27 million.

On 23 and 24 May 2017 the Bailiffs transferred title to the mortgaged assets to the bank, on the basis of the bank's application and the valuer's asset valuation.

Several sets of proceedings followed, three of which are particularly relevant.

1. Bailiffs' Actions Case.⁴ The courts found that the State Bailiffs had unlawfully failed to duly inform the applicant company of any of their decisions. The courts declared unlawful the State Bailiffs' decisions to seize

¹ Section 37 § 3 of the Mortgage Act of 2003 (as worded at the relevant time) provided that the mortgagee acquired the right of property to the mortgaged assets at the price determined by the certified valuer and required the mortgagee to reimburse to the mortgagor 90 percent of any amount by which the value of the assets exceeded the mortgagee's secured claims.

² The applicant company pointed out that, in court proceedings for foreclosure which the bank initiated but then withdrew, on 18 July 2017 a court-appointed expert assessed the property at about UAH 339,44 million (about EUR 11,35 million).

³ Domestic court case no. 911/2798/16.

⁴ Domestic court case no. 826/7243/17.

and inventory the assets, to transfer the mortgaged assets for sale, to appoint a valuer for property assessment and to discontinue the enforcement proceedings following transfer of the assets to the bank. Final decision: Supreme Court, 8 September 2021.

2. Writs Enforceability Case.⁵ The applicant company challenged the writs on two grounds: first, that the notary had breached the applicable procedural rules when issuing them, and second, that the alleged debt did not exist and was in fact contested. The courts declared unenforceable the writs of 22 May 2017 (nos. 779 and 780) because the loan agreement had not been notarised, with the consequence that, under the applicable rules, the notary was not competent to issue those writs. Final decision: Supreme Court, 21 September 2021.

In the Writs Unenforceability Case, the first-instance Commercial Court also found that the interest on the loan had stopped accruing on 13 April 2016, the date by which the loan amount had to be repaid early on the bank's demand.

3. Assets Transfer Case.⁶ In June 2017 the applicant company lodged a claim seeking to invalidate the Bailiffs' documents transferring the assets to the bank, which constituted the basis for the registration of the bank's ownership of those assets. Section 37 of the Mortgage Act of 2003 provides that, where a mortgagee registers, through an out-of-court procedure, his or her property rights to the mortgaged assets to satisfy the debt, the mortgagor can challenge in court the decision to register the mortgagee as the owner. The first-instance court allowed the applicant company's claim but a Court of Appeal subsequently rejected it. In a final decision, on 21 March 2023 the Supreme Court upheld the Court of Appeal's decision.

The Supreme Court found that the bank could satisfy, from the mortgaged assets, any debt secured by mortgage, not only the debt reflected in the writs of enforcement. It held that the writs had been declared unenforceable in the Writs Enforceability Case on procedural grounds, rather than because the applicant company did not owe a debt to the bank. However, the Supreme Court appears not to have addressed the fact that in the Writs Enforceability Case the applicant company had also raised substantive arguments concerning the amount of the debt. The Supreme Court stated that the amount of the debt did not fall to be examined in the Assets Transfer Case but, apparently, did not point to any other procedure in which that amount could be determined.

It further appears that the Supreme Court did not address the apparent contradiction between the bank's declaration as to the amount of interest to

⁵ Domestic court case no. 910/10374/17.

⁶ Domestic court case no. 910/15190/20.

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be repaid and the courts' findings in the Writs Enforceability Case as to date on which the interest had stopped accruing (13 April 2016).⁷

The Supreme Court pointed out that the applicant company had failed to challenge the valuation report prepared by the valuer appointed by the Bailiffs. It did not comment on how such a challenge could be made, in view of the findings in the Bailiffs' Actions Case, to the effect that the applicant company had not been informed of the enforcement proceedings.

⁷ According to the bank, as of 24 May 2016 the interest was UAH 16.86 million, while as of the date of enforcement, 23 May 2017, it was UAH 40.53 million, even though according to the court findings in the Writs Enforceability Case the interest was supposed to stop accruing on 13 April 2016.

QUESTIONS TO THE PARTIES

1. Did the applicant company exhaust effective domestic remedies in respect of its complaints?

In particular, was it open to the applicant company to appeal against the valuation report issued by the valuer appointed by the State Bailiffs, for example using the procedure envisaged by section 57 (5) of the Enforcement Proceedings Act? When did the applicant company and/or its representatives first have knowledge of the above-mentioned valuation report?

Was it open to the applicant company to claim from the bank and/or the State Bailiffs any difference between the value of its assets as assessed by the valuer appointed by the State Bailiffs and the amount of obligations as declared by the bank, on the one hand, and, on the other hand, the asset value and the debt amount as asserted by the applicant company? For example through: (i) a claim under section 37 of the Mortgage Act, (ii) a claim for unfair enrichment under Article 1212 of the Civil Code⁸, (iii) a claim for damages against the State Bailiffs (see, for example, *Ponomaryov v. Ukraine*, no. 3236/03, § 53, 3 April 2008, and *Kontsevych v. Ukraine*, no. 9089/04, § 52, 16 February 2012)?

2. Did the applicant company have access to a court, as required by Article 6 § 1 of the Convention, to contest the amount of the debt declared by the bank and/or the valuation of the mortgaged assets accepted by the State Bailiffs, and/or to claim any difference between them and the asset value and debt amount as asserted by the applicant company?

In particular, did the applicant company validly waive its right to contest those amounts in a free, lawful and unequivocal manner (compare, for example and *mutatis mutandis*, *Suda v. the Czech Republic*, no. 1643/06, § 48-49, 28 October 2010; *Tabbane v. Switzerland* (dec.), no. 41069/12, § 27, 1 March 2016; *Beg S.p.a. v. Italy* (dec.), no. 5312/11, § 127, 20 May 2021)?

3. Did the applicant company have a fair hearing in the determination of its civil rights and obligations in the proceedings that ended in the decision of the Supreme Court of 21 March 2023 (“Assets Transfer Case”)? In particular:

(i) was there a breach of the principle of legal certainty on account of alleged contradiction in the findings in those proceedings and in the two sets

⁸ Article 1212 § 1 of the Civil Code of Ukraine provides that a person who acquired property or kept it at the expense of another person (victim) without a sufficient legal basis is obliged to return this property to the victim. A person is also obliged to return the property when the basis on which it was acquired subsequently disappeared. § 2 provides that this claim is possible regardless of whether the unjustified acquisition or preservation of property was the result of the behaviour of the acquirer of the property, the victim, other parties or the consequence of an external event outside of the parties’ control.

of proceedings that ended, respectively, in the Supreme Court’s decisions of 8 and 21 September 2021 (“Bailiffs Actions Case” and “Writs Enforceability Case”)?

(ii) did the Supreme Court give sufficient reasons for its decisions, including on the question of in what proceedings the correctness of the amount of debt to be collected and the asset valuation could be contested?

4. Was there an interference with the applicant company’s rights under Article 1 of Protocol No. 1 to the Convention and did the respondent State comply with the requirements of that provision? Did the respondent State discharge its positive obligation under Article 1 of Protocol No. 1 (see, for example, *Sovtransavto Holding v. Ukraine*, no. 48553/99, §§ 94-98, ECHR 2002-VII; *S.L. and J.L. v. Croatia*, no. 13712/11, §§ 57-90, 7 May 2015; *Hunguest Zrt v. Hungary*, no. 66209/10, §§ 22-33, 30 August 2016)?

In particular, in view of the failure to notify the applicant company of the State Bailiffs’ actions and the findings of the domestic courts in the Assets Transfer Case (which ended in the Supreme Court’s ruling of 21 March 2023) to the effect that the amount of debt was to be determined based on the bank’s own declaration, independent of the content of the notarial writs of enforcement, was the applicant company sufficiently involved in the proceedings to be able to defend its rights and interests? Did domestic law provide for any independent forum in which the correctness of the bank’s declaration and the valuation of assets could be determined?