



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

1959 · **50** · 2009

FIFTH SECTION

CASE OF TERMOBETON v. UKRAINE

(Application no. 22538/04)

JUDGMENT

STRASBOURG

18 June 2009

FINAL

18/09/2009

This judgment may be subject to editorial revision.

In the case of Termobeton v. Ukraine,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Peer Lorenzen, *President*,

Karel Jungwiert,

Renate Jaeger,

Mark Villiger,

Mirjana Lazarova Trajkovska,

Zdravka Kalaydjieva, *judges*,

Stanislav Shevchuk, *ad hoc judge*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 26 May 2009,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 22538/04) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a private company, Termobeton (“the applicant company”), on 6 June 2004.

2. The Ukrainian Government (“the Government”) were represented by their Agent, Mr Y. Zaytsev. The applicant company was represented by its director, Mr A. Gorbenko.

3. On 15 October 2007 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

4. The applicant is a private company based in Lugansk, Ukraine.

5. The JSC Panel House Building Company No. 4 (“the company”) used the applicant company’s invention under a licence contract.

6. On 27 July 1998 the applicant company instituted proceedings against the company in the Kyiv City Commercial Court (“the first-instance court”). The applicant company alleged that the company had not made instalment payments due to it under the licence contract.

7. On 1 October 1998 the first-instance court ordered an expert examination in order to calculate the revenues received by the company and the payments due to the applicant company. On the same day the court suspended proceedings pending the outcome of the examination. By a ruling

of 6 November 1998 and a letter of 5 February 1999 the court amended the questions put before the experts and added a new question. The expert report was submitted to the court in December 1999. The institution which performed the examination did not respond to all the questions put by the court due to lack of competence.

8. On 16 December 1999 the first-instance court ordered a new expert examination to be held by another institution. The court put the same questions. By the same ruling the court suspended the proceedings pending the outcome of the examination. The expert report was submitted to the court in May 2000.

9. Between July 1998 and 11 September 2000 the first-instance court scheduled three hearings.

10. On 11 September 2000 the first-instance court allowed the applicant company's claims in part.

11. On 12 December 2000 the president of the first-instance court granted the company's request to review the judgment of 11 September 2000 under the supervisory review procedure. The judgment was quashed, in particular because the first-instance court had failed to comply with procedural requirements prescribed by law while ordering the expert examination. The case was remitted for fresh consideration to the same court. On 16 May 2001 the Higher Commercial Court upheld the ruling of 12 September 2000.

12. On 5 June 2002 the court ordered the expert examination to be held. The proceedings were suspended. The report was submitted to the court in February 2003.

13. In August 2003 the company lodged a counterclaim seeking a declaration that the licence contract was null and void.

14. Between 12 December 2000 and 10 October 2003 the court scheduled some thirteen hearings.

15. On 10 October 2003 the first-instance court found against the applicant company. On 16 December 2003 the Kyiv Commercial Court of Appeal ("the court of appeal") upheld this decision.

16. On 6 April 2004 the Higher Commercial Court quashed the decisions of the lower courts and remitted the case for fresh consideration.

17. Between April and November 2004 the first-instance court scheduled some six hearings.

18. On 16 November 2004 the first-instance court found against the applicant company. On 1 March 2005 the court of appeal upheld this decision.

19. On 7 June and 11 August 2005 respectively the Higher Commercial Court and the Supreme Court dismissed cassation appeals by the applicant company.

20. The parties did not provide this Court with precise information about the number of hearings actually held. According to the information provided

by the Government, the hearings were adjourned on two occasions at the applicant company's request.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

21. The applicant company complained under Articles 6 § 1 and 13 of the Convention that the length of the proceedings in its case had been unreasonable. Since the complaint under Article 13, as drafted by the applicant company, does not raise a separate issue, the Court will examine its complaint about the length of proceedings only under Article 6 § 1 which reads as follows:

“In the determination of his civil rights and obligations ..., everyone is entitled to a ... hearing within a reasonable time by [a] ... tribunal...”

A. Admissibility

22. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

23 The Government contended that the applicant company and the company had contributed to the length of the proceedings and that the State could not be held liable for their behaviour. In particular, they averred that by requesting to adjourn the hearings, modifying its submissions, appealing against court decisions the applicant company itself had caused certain delays to the proceedings. Further, they pointed out that the case was complex and that the judicial authorities had acted with due diligence.

24. The applicant company disagreed.

2. Period to be taken into consideration

25. The Court reiterates that it can take into account only those periods when the case was actually pending before the courts, thus excluding from the calculation those periods between the adoption of the final and binding

judgments and their revocation in the course of extraordinary proceedings (see *Markin v. Russia* (dec.), no. 59502/00, 16 September 2004, and *Pavlyulynets v. Ukraine*, no. 70767/01, §§ 41-42, 6 September 2005). Therefore the period between 11 September and 12 December 2000 cannot be taken into account.

26. The proceedings in question thus lasted approximately six years and eight months.

3. *Reasonableness of the length of the proceedings before the domestic courts*

27. The Court reiterates that the reasonableness of the length of the proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant company and the relevant authorities and what was at stake for the applicant company in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

28. Concerning the question of the complexity of the present case, the Court observes that it mostly concerned an issue of calculation of the instalments due to the applicant company. Although the domestic courts were required to examine a certain amount of documentary evidence, the issues before them were not of such a nature as to necessitate prolonged consideration of the applicant company's case. Therefore, the Court concludes that the subject matter of the litigation at issue cannot be considered particularly complex.

29. The Court notes that the complexity of the case and the applicant company's conduct alone cannot explain the overall length of the proceedings at issue in the present case. It finds that a number of delays (in particular, remittals of the cases for fresh consideration, delays caused by amendments to the questions put before the experts, and prolonged periods of procedural inactivity) can be attributed to the Government.

30. In sum, having regard to the overall length of the proceedings and other circumstances of the instant case, the Court concludes that there was unreasonable delay in disposing of the applicant company's case.

31. There has accordingly been a breach of Article 6 § 1 of the Convention.

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

32. The applicant company further complained under Articles 6 § 1 and 13 that the proceedings in its case were unfair, and about their outcome. It also alleged that the judges at the domestic courts lacked independence and impartiality. In its submissions lodged in 2008, the applicant company also complained that the Supreme Court, by examining the case in the absence of

its representative, had violated its right to an effective remedy for the protection of its rights and deprived it of access to a court. The applicant company relied on Article 13 of the Convention.

33. Having carefully examined the applicant company's submissions in the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention.

34. It follows that this part of the application must be declared inadmissible as being manifestly ill-founded, pursuant to Article 35 §§1, 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

35. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

36. The applicant company claimed 13,735,516.39 Ukrainian hryvnias (UAH)¹ in respect of pecuniary damage. The applicant company further alleged that it had sustained non-pecuniary damage; it left this matter to the Court's discretion.

37. The Government contested the applicant company's claims.

38. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. On the other hand, ruling on an equitable basis, it awards the applicant company EUR 600 in respect of non-pecuniary damage.

B. Costs and expenses

39. The applicant company made no separate claim as to costs and expenses. Therefore, the Court makes no award under that head.

¹ 1,340,214 euros (EUR)

C. Default interest

40. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

- 1 *Declares* the complaint under Article 6 §1 concerning the excessive length of the proceedings admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicant company, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 600 (six hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage to be converted into national currency of the respondent State at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. Dismisses the remainder of the applicant company's claim for just satisfaction.

Done in English, and notified in writing on 18 June 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President