

THE SUPREME COURT OF NORWAY

On 7 September 2010, the Appeals Selection Committee of the Supreme Court, comprising Justices Matningsdal, Utgård and Matheson, in

HR-2010-01489-U, (case no. 2010/1376), civil case, appealed court order,

Thule Drilling AS

(Advocate Gunnar Stake-Larsen)

vs.

Norsk Tillitsmann ASA

(Advocate Karstein J. Espelid)

rendered the following

C O U R T O R D E R :

- (1) The case concerns the interpretation of the term “creditor” in Section 60 of the Bankruptcy Act.
- (2) On 29 April 2010, Norsk Tillitsmann ASA filed a petition with the Asker and Bærum District Court, for Thule Drilling AS to be declared bankrupt. The bankruptcy petition is premised on alleged default under the bond loans in the approximate amount of USD 292 million, as well as the disbursements and costs incurred by Norsk Tillitsmann ASA, in the approximate amount of USD 2 million, as the result of the alleged default.
- (3) On 25 May 2010, the Asker and Bærum District Court rendered a court order with the following conclusion:

”The bankruptcy petition of 29 April 2010 from Norsk Tillitsmann ASA against Thule Drilling AS is not upheld.”
- (4) The District Court concluded that Norsk Tillitsmann ASA shall not be considered a “creditor” for purposes of Section 60 of the Bankruptcy Act, and that it consequently was not entitled to file the bankruptcy petition.
- (5) Norsk Tillitsmann ASA appealed the court order rendered by the District Court to the Borgarting Court of Appeal. On 14 July 2010, the Court of Appeal rendered a court order with the following conclusion:

”The court order rendered by the District Court is overturned.”
- (6) *Thule Drilling AS* has appealed the court order rendered by the Court of Appeal to the Supreme Court in a timely manner. It has, in the main, invoked the following arguments:

- (7) The court order rendered by the Court of Appeal is premised on an incorrect interpretation of the term creditor in Section 60 of the Bankruptcy Act. By a creditor is meant only a creditor that will be entitled to claim dividends on its claims in the event of bankruptcy. The creditor entitled to dividends is the owner of the claim. Norsk Tillitsmann ASA is not entitled to dividends. The contractual regulation between the bondholders and Norsk Tillitsmann ASA with regard to the right of action is of no relevance. It is not permissible for a creditor to assign its right to petition for a declaration of bankruptcy to a third party without at the same time assigning the claim.
- (8) Section 60 of the Bankruptcy Act does not, unlike Section 1-3 of the Civil Procedure Act, codify a legal standard, and the provision does not allow for policy considerations to be taken into account. Under any circumstance, more weight must be attached to the wording of this statutory provision and the legal history thereof, which clearly define the meaning of the term “creditor”, than to policy considerations. The Supreme Court’s invocation of policy considerations in the ruling published on page 402 onwards of the 2010 volume of the *Retstidende* court reporter cannot, as the Court of Appeal has done, be reapplied to the interpretation issue being contemplated in the present case. Besides, the Court of Appeal has failed to attach weight to policy considerations that favour a different interpretation of Section 60 of the Bankruptcy Act.
- (9) Thule Drilling AS has made the following contention:
- ”1. The court order rendered by the Borgarting Court of Appeal be set aside.
 2. Norsk Tillitsmann ASA be ordered to pay the legal costs of Thule Drilling AS, in the amount of NOK 60,300, before the Borgarting Court of Appeal and in relation to the deliberation of the appeal before the Supreme Court, with the addition of late payment interest from the due date until payment is made.”
- (10) *Norsk Tillitsmann ASA* has filed a Notice of Intention to Defend against Appeal and has, in the main, invoked the following arguments:
- (11) It follows from the contractual framework between the parties that Norsk Tillitsmann ASA is the immediate and direct holder of the claims against Thule Drilling AS, both in relation to those amounts (dividend payments) that will subsequently be paid out to the bondholders on a pro rata basis, and in relation to those amounts (dividend payments) that will only accrue to Norsk Tillitsmann ASA.
- (12) The legal perspective adopted by the appellant is mistaken. The essence of the legal assessment performed by the Court of Appeal concerns, like that of the Supreme Court in its court order of 7 April 2010, how the bond market is regulated through the contractual framework that has been established. The key feature of this structure is the manner in which the creditor functions are assigned to Norsk Tillitsmann ASA, whilst the bondholders themselves are at the same time barred from engaging in debt enforcement. Consequently, the structure of the bond market is far from being comparable to a traditional attorney/third party relationship. Furthermore, the Court of Appeal has correctly concluded that the considerations invoked by the appellant cannot result in Norsk Tillitsmann ASA being deprived of the rights it is intended to hold by virtue of the contractual framework and the structure of the bond market, as far as its position as a creditor in the event of bankruptcy is concerned.
- (13) Norsk Tillitsmann ASA has made the following contention:
- ”The appeal be dismissed.”
- (14) The *Appeals Selection Committee of the Supreme Court* notes that the case concerns a second-tier appeal, and that the jurisdiction of the Appeals Selection Committee therefore is limited pursuant to Section 30-6 of the Civil Procedure Act. The appeal concerns the Court of Appeal’s interpretation of Section 60 of the Bankruptcy Act, over which the Appeals Selection Committee does have jurisdiction, cf. Section 30-6, *litra c*.

- (15) The Supreme Court has concluded, in the ruling published on page 402 onwards of the 2010 volume of the *Retstidende* court reporter, that Norsk Tillitsmann ASA has standing to bring legal action pursuant to Section 1-3 of the Civil Procedure Act in cases relating to any claims held by the bondholders against the borrower. Although the main rule under Norwegian law is that an attorney will normally not have standing to bring legal action in its own name with regard to the claim of its principal, cf. the Supreme Court ruling published on page 238 onwards of the 2006 volume of the *Retstidende* court reporter, it is noted in paragraph 21 of the 2010 order that a reservation exists to the effect that circumstances may be sufficiently special as to make it appropriate to grant standing to bring legal action in respect of third party claims. It follows from paragraph 28 of the court order that a decisive factor in favour of granting Norsk Tillitsmann ASA such standing is that the contractual framework implies that each individual bondholder has waived the right to personally engage in collection efforts or taking legal steps against the borrower, with the borrower having accepted, on its part, that the trustee may take such steps on behalf of the bondholders. It follows from paragraph 30 of the court order that another decisive factor is that a requirement that each individual bondholder would have to enforce its claim is a solution that all parties involved have found reason to seek to prevent. Moreover, it is noted in paragraph 31 that there is “a strong practical need for the trustee to have standing to take legal steps aimed at attending to the interests of the bondholders in respect of the relevant loan”. It is noted in that context that standing to bring legal action is necessary out of concern for the international reputation of the Norwegian bond market.
- (16) The Appeals Selection Committee is of the view that it follows – as noted by the Court of Appeal – from considerations relating to the coherence of the regulatory framework that a right for Norsk Tillitsmann ASA to engage in the judicial collection of debt as an individual creditor necessarily also implies that Norsk Tillitsmann ASA must be deemed to be a creditor entitled to receive dividends for purposes of Section 60 of the Bankruptcy Act. The Appeals Selection Committee is of the view that this lies at the core of the term creditor as used in the said provision, and that this is not based on any form of extensive interpretation. The considerations and assessments that formed the basis for the standing to bring legal action acknowledged in the ruling published on page 402 onwards of the 2010 volume of the *Retstidende* court reporter are general ones, and the relevance thereof is not limited to cases concerning provisional security, although that constituted the background to that specific ruling. The Appeals Selection Committee of the Supreme Court is of the view that a solution under which the trustee would be able to bring legal action on behalf of the bondholders to secure and collect claims against a solvent creditor, but would not be able to petition for a debtor to be declared bankrupt in the event of insolvency, cannot be justified. The appeal must therefore be dismissed.
- (17) Norsk Tillitsmann ASA has not requested a cost award.
- (18) The present court order is rendered unanimously.

CONCLUSION:

Appeal dismissed.

Karl Arne Utgård
(signature)

Magnus Matningsdal
(signature)

Wilhelm Matheson
(signature)

Correct transcript certified: