

## THE SUPREME COURT OF NORWAY

On 7 April 2010, the Supreme Court rendered a court order in

**HR-2010-00568-A, (case no. 2009/1909), civil case, appealed court order,**

Norsk Tillitsmann ASA (Advocate Harald Hjort)

vs.

Norinvest Ltd. (Advocate Elisabeth Weme Bjerkestrand – as a qualification test for authorisation to plead before the Supreme Court)

### V O T I N G:

- (1) Justice **Endresen**: The case concerns whether the trustee of a bond loan has standing to bring legal actions relating to any claims held by the bondholders against the borrower.
- (2) Thule Drilling ASA is a rig company that has partly funded the construction of three drilling rigs by obtaining three bond loans in the aggregate amount of MUSD 179. The loan agreements have been concluded with Norsk Tillitsmann ASA as trustee, and the loan agreements are governed by Norwegian law. Miscellaneous security interests were established in connection with the disbursement of the loans, hereunder mortgages secured on the three rigs under construction.
- (3) Ancillary collateral in respect of the loan obligations, in the form of guarantees from the main shareholder of Thule Drilling ASA, Norinvest Ltd., and a number of the other shareholders, was furnished in the context of subsequent amendments to the loan agreements. The guarantees were issued to Norsk Tillitsmann ASA on behalf of the bondholders.

- (4) On 5 January 2009, the law firm of BA-HR sent, on behalf of Norsk Tillitsmann ASA, a request to Norinvest Ltd. for payment pursuant to the guarantee in the amount of MUSD 30.4. No payment was made, and Norsk Tillitsmann ASA filed, on 13 March 2009, a request for an attachment with the Oslo District Court. Norinvest Ltd. is registered in the British Virgin Islands, but is registered with an address in Oslo. Norinvest Ltd. denied that Norsk Tillitsmann ASA had the necessary standing to bring legal action, and the Oslo Enforcement Court rendered a court order with the following conclusion on 15 April 2009:

**"1. The request for an attachment is dismissed.**

**2. No costs are awarded."**

- (5) Norsk Tillitsmann ASA appealed the ruling to the Borgarting Court of Appeal. On 30 September 2009, the Court of Appeal rendered, based on written deliberations, a court order with the following conclusion:

**"1. The appeal is rejected.**

**2. Norsk Tillitsmann ASA is ordered to pay the costs of Norinvest Ltd before the Oslo Enforcement Court and the Court of Appeal in the amount of 156,125 – one hundred and fifty six thousand one hundred and twenty five – kroner no later than two weeks after service of the present court order."**

- (6) Norsk Tillitsmann ASA has appealed the court order to the Supreme Court. The Appeals Selection Committee of the Supreme Court decided that the appeal should be heard before a division of the Supreme Court, cf. Section 5, Sub-section 1, second sentence, of the Courts of Justice Act, and that the deliberations should be conducted in compliance with the provisions of Sections 30-10 and 30-11 of the Civil Procedure Act applicable to appealed judgments, cf. Section 30-9, Sub-section 4, of the Civil Procedure Act.

- (7) On 4 June 2009, Torbjørn Hansen, member of the Storting, submitted a written question to the Minister of Finance concerning various aspects of the trusteeship arrangement for bond loans. In her answer of 12 June 2009, the Minister of Finance emphasised, *inter alia*, the following:

**"The trusteeship arrangement implies, in brief, that the bondholders (the lenders) under each loan jointly leave it to the trustee to exercise their creditor rights as against the bond issuer (the borrower). For the bond issuer, the use of a trustee will imply, in particular, that it can relate to one legal entity that represents all the bondholders, whilst being protected against individual enforcements on the part of individual bondholders, who may have special interests."**

- (8) The following was stated towards the end of the answer:

**"If the outcome of the appeal in the specific case referred to by the member Hansen, concerning Norsk Tillitsmann's legal interest and capacity to sue and be sued, or other aspects of the trustee system, were to suggest that the state of the law should be changed, I will contemplate an initiative for statutory regulation within this area."**

- (9) On 27 October 2009, Norsk Tillitsmann ASA approached the Ministry of Finance, against the background of the court order rendered by the Court of Appeal, requesting clarification, in the form of administrative regulations, to the effect that trustees in the bond market have standing to bring legal actions relating to the loan agreement and appurtenant agreements. On 25 November 2009, the Ministry of Finance circulated a proposal for statutory regulation for comments. Apart from this fact, and the comments occasioned by this consultation round, to which I will revert, the facts of the case remain the same as before the courts below.

- (10) The appellant, *Norsk Tillitsmann ASA*, has principally argued that the company must be deemed to perform so many of the functions of a creditor that the company has standing to bring legal action on the basis of its position as a creditor. Secondly, it has been argued that its standing to bring legal action follows from Section 1-4, Sub-section 1, of the Civil Procedure Act, since the company must be held to be the representative of the group of creditors comprised of the bondholders. Finally, it is argued that standing to bring legal action follows from Section 1-3, Sub-section 2, of the Civil Procedure Act, although the trustee must be deemed to pursue third party claims. It is argued that there is a strong practical need for such a standing to bring legal action, and that previous rulings from the Supreme Court have indicated that there may be a standing to bring legal action even if the position of the plaintiff can be classified as that of an attorney. It is emphasised, in this context, that an overall assessment must be made as to the contractual framework that governs the relationship between the bondholders, the trustee and the borrower.
- (11) The appellant, *Norsk Tillitsmann ASA*, has made the following contention:
- "1. The court order rendered by the Oslo Enforcement Court on 15 April 2009 and the court order rendered by the Borgarting Court of Appeal on 30 September 2009 be set aside.**
- 2. Norinvest Ltd. be ordered to pay the costs incurred by Norsk Tillitsmann ASA in relation to the deliberation of the matter of dismissal before the Oslo Enforcement Court, the Borgarting Court of Appeal and the Supreme Court."**
- (12) The appellee, *Norinvest Ltd.*, has primarily invoked the court order rendered by the Court of Appeal, arguing that both its conclusion and the grounds on which such conclusion is premised are correct. It is argued that the sort of division of creditor functions principally suggested by the appellant is unfounded, and that Section 1-4, Sub-section 1, of the Civil Procedure Act is not applicable. As far as concerns the alternative argument presented by the appellant, it is emphasised that unequivocal case law has established that an attorney cannot institute legal proceedings in his or her own name for purposes of pursuing the principal's claim. Such a solution is also merited by a number of weighty considerations. Accepting a standing to bring legal action for a trustee would raise a number of unresolved issues with regard to *res judicata*. Complications may also arise as the result of extinctive good faith acquisition, and the situation becomes unclear if the bondholders were to decide on a change of trustee. It is unsatisfactory that the creditor cannot be held liable for litigation costs, and it is, not least, an unacceptable arrangement for the attorney to be able to request an attachment or a preliminary injunction without the creditor being liable for any unjustified injunction.
- (13) By accepting a standing to bring legal action on the part of the trustee, one will also facilitate the preservation of anonymity on the part of the creditors during the proceedings. Such anonymity would, as a matter of principle, be unfortunate, and would also lead to insolvable problems as far as the assessment of impartiality is concerned, with the right of the debtor to effect set-off as against the creditors being eliminated.
- (14) It is the role of the lawmaker to determine whether the trustee should have standing to bring legal action. However, it is also emphasised that the special considerations invoked in relation to the discussion as to what should be the state of law in this respect will carry considerable weight in the assessment as to whether a statutory amendment would be justified.
- (15) The appellee, *Norinvest Ltd.*, has made the following contention:

**"1. The appeal be dismissed.**

**2. Norsk Tillitsmann ASA be ordered to pay the costs incurred by Norinvest Ltd. in relation to the deliberation of the matter of dismissal before all three courts.**

- (16) *I have concluded* that Norsk Tillitsmann ASA has sufficient affiliation with the claim to have the capacity to bring legal action in its own name concerning the claims of the bondholders, and that the appeal shall be upheld.
- (17) I note, by way of introduction, that the Supreme Court has full jurisdiction over the matter, cf. Section 30-6, litra b, of the Civil Procedure Act.
- (18) Section 1-3, Sub-section 2, of the Civil Procedure Act is worded as follows:
- "The person bringing the action must demonstrate a real need for having the claim resolved as against the defendant. This shall be determined on the basis of an overall assessment of the current relevance of the claim and the affiliation of the parties therewith."**
- (19) It follows from legislative history that the primary objective when drafting the provision was the continuation of the legal interest requirement, as defined through case law, and that the rewording primarily aimed to make the rules more readily understandable. It is, nevertheless, not without relevance to the present case that the wording of the provision now focuses specifically on whether the party structure in question meets a real need.
- (20) Moreover, it is stated explicitly, cf. Proposition No. 51 (2004–2005) to the Odelsting, page 140, that the new statutory provision is worded to facilitate
- "... further development and specification through case law, hereunder in view of changes to societal conditions or when there arise new types of cases that would have been difficult to anticipate in advance."**
- (21) Case law has established 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 ruling published in the "Norsk Retstidende" case law reporter for the Supreme Court, 2006, page 238, and the references specified therein. This must be regarded as the absolute main rule, and the considerations on which the solution established through case law is premised continue to carry the same weight at present. Case law deriving from the Supreme Court nevertheless contains a reservation 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, and the issue of standing to bring legal action on the part of the trustee must therefore be subjected to an independent assessment, where the real need for such standing to bring legal action will be a key factor. The assessment cannot be restricted to the matter of whether it would be most appropriate to characterise the position of the trustee in relation to the bondholders as that of an attorney in relation to its principals.
- (22) I will, as a basis for such assessment, make some observations with regard to the magnitude of the bond market and the main elements of the contractual framework established in the context of such borrowing.
- (23) Until Norsk Tillitsmann ASA was established in 1993, it was primarily the banks that acted as trustee. The market has been consolidated following the establishment of the said company, which is currently owned by a number of banks and financial institutions, and the company's Portfolio is said to represent approximately 90% of the loans registered in the Norwegian Central Securities Depository. At present, Norsk Tillitsmann ASA acts as trustee in respect of approximately 1,700 bond loans and 100 note issuance facilities, with an aggregate outstanding volume of about NOK 750 billion. It has been emphasised that Norsk Tillitsmann ASA holds a dominant position, but the issue

of standing to bring legal action must clearly be assessed in the same manner with regard to other companies that act as trustee based on a corresponding set of agreements.

- (24) Bond loans have traditionally carried low risk, but there has in recent years evolved a market for high-interest bond loans in Norway. As far as such loans are concerned, the trustee will typically play a more active role in both follow-up and the handling of any default situation.
- (25) The bond loans are otherwise characterised by a generally very large number of creditors, and by the facilitation of trading in the bonds, thus implying that the group of creditors may change on a continuous basis. There is a clear need for coordination of the similar interests of the bondholders, and it may seem unrealistically burdensome for a borrower to have to deal with each individual bondholder. The bond loans may, as illustrated by the bond loan under consideration, be secured through miscellaneous financial arrangements that involve a number of jurisdictions, and such complexity strengthens the need for coordination.
- (26) In the early 1990s, the Norwegian Bankers' Association prepared, in cooperation with the Oslo Stock Exchange, a template agreement that governs the relationship between the borrower, the trustee and the bondholders. This contractual framework is still being used when arranging the vast majority of such loans. The agreements, which are concluded between the bond-issuing company and the trustee on its own behalf and on behalf of the bondholders, are characterised by the trustee being entrusted with the active follow-up of the rights of the bondholders as against the issuer, with acting as holder of the furnished collateral on behalf of the bondholders, as well as with any necessary collection effort and legal steps with regard to the loan.
- (27) The contractual framework thereby facilitates the equal treatment of the bondholders and a proportionate allocation of the overall costs associated with attending to the interests of the bondholders.
- (28) The contractual framework implies that each individual bondholder waives the right to personally engage in collection efforts or taking legal steps against the borrower, with the latter accepting, on its part, that the trustee may take such steps on behalf of the bondholders. The trustee is not necessarily obliged to declare default upon every single breach of the loan agreement, as it may attend to the interests of the bondholders in a less intrusive manner if deemed appropriate. An unconditional obligation for the trustee to declare default will only arise upon a resolution in the meeting of bondholders, or upon a request that default be declared being made in writing by bondholders representing no less than 20 percent of the outstanding loan. Although the bondholders may thus instruct the trustee, and although it must be assumed that the trustee will engage in an extensive dialogue with leading bondholders when problems arise with regard to a loan arrangement, it is my view that there can be no doubt that the contractual framework attends, to a considerable extent, to the interests of the borrowers in a well-organised process when such circumstances arise.
- (29) I assume that the stipulations of the contractual framework as to standing to bring legal action will be accepted, as a matter of course, in a number of jurisdictions where one may contemplate taking legal steps, for example in connection with the realisation of furnished collateral, both in the sense that the trustee will be granted standing to bring legal action and in the sense that legal steps from one or more bondholders will be dismissed.

- (30) If it were to be concluded that the trustee does not have standing to bring legal action before the Norwegian courts of law, the provisions of the loan agreements to the effect that individual bondholders cannot themselves bring legal action would obviously have to be set aside. It is hard to see how one could, in such eventuality, identify any legal basis for imposing a restriction to the effect that the regular standing to bring legal action would nevertheless be curtailed, for example by stipulating that standing would only apply to a certain number of bondholders acting jointly. Such ability for individual bondholders to enforce their claims themselves would be a solution that all parties involved have found reason to seek to prevent.
- (31) There would, based on the above, seem to be 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. That such is the case is confirmed by the comments submitted in the consultation round in the context of the proposed legislation I mentioned at the outset. I deem it sufficient to quote certain paragraphs from the comments of key bodies that submitted comments.
- (32) On 17 December 2009, the Norwegian Institute of Public Accountants wrote:
- ”The trusteeship arrangement has a long tradition in Norway. The arrangement is a practical necessity to give small bondholders, in particular, a real opportunity to attend to their interests as against the bond issuers, if necessary by bringing legal action before the courts of law. The arrangement is thereby of major importance to enable the bond market to work effectively, and thus also of major importance in enabling Norwegian businesses to obtain favourable funding through the bond market.”**
- (33) The comments submitted by Norges Bank on 4 January 2010 include, *inter alia*, the following:
- ”In a letter of 9 November 2009 to the Ministry, Norges Bank supported the proposal to the effect that the trustee be granted standing to bring legal action on behalf of bondholders pursuant to the loan agreement. It was emphasised that uncertainty as to the standing to bring legal action might have wide-ranging negative consequences for the Norwegian bond and note markets. ....  
....We will reiterate the importance of such a legislative amendment taking place as swiftly as possible to limit the detrimental effect of the uncertainty that has arisen.”**
- (34) The following is stated in the comments submitted by Folketrygdfondet on the same date:
- ”The background to the case is that a court order rendered by the Borgarting Court of Appeal has given rise to uncertainty as to whether trustees for bond loans may feature as plaintiffs and defendants before the Norwegian courts of law. This has occasioned uncertainty with regard to the well-entrenched practice thus far represented by the trusteeship arrangement. Folketrygdfondet is a large bond investor in the Norwegian market, and shares the view of the Financial Supervision Authority of Norway that such uncertainty may have a major negative impact on the Norwegian bond market as an investment alternative, and its ability to serve as a source of credit for businesses. A prerequisite for an efficient and well-functioning bond market is that there exists a credible trustee service that is able to attend to the interests of the bondholders.”**
- (35) On 5 January 2010, Verdipapirsentralen ASA stated the following:
- ”The Norwegian Central Securities Depository agrees with the assessment of the Financial Supervision Authority of Norway to the effect that the Norwegian bond market is premised on a well-functioning trusteeship arrangement, and that the uncertainty may have a strong detrimental impact on the market.”**
- (36) Finally, Finance Norway (FNO) stated the following on 7 January 2010:

**”The proposal from Norsk Tillitsmann for the matter to be regulated in the form of administrative regulations was based, in particular, on the need for quick clarification as to the standing to bring legal action on the part of trustees. FNO is also very concerned about the issue of timing due, *inter alia*, to concern for the international reputation of the Norwegian bond market.”**

- (37) It falls outside the remit of the Supreme Court to take a view on the appropriateness of any statutory regulation within this area, let alone to take a view on what should be the contents of such statutory regulation, if any. However, I find it impossible to avoid the conclusion, based on the comments I have quoted, that there is a considerable practical need for the trustee to have standing to bring legal action, and such a need is, as I noted at the outset, of relevance to the assessment as to whether the trustee must be granted, based on the current state of the law, standing to bring legal action pursuant to Section 1-3 of the Civil Procedure Act.
- (38) The appellee has argued that granting the trustee standing to bring legal action will raise a number of open questions, and that this indicates that such a solution requires the thorough assessment that would take place prior to any statutory regulation. It is conceded that such considerations may carry weight, under certain circumstances, in the assessment that must be made when the courts of law are faced with new issues, but I am unable to see that the factors referred to by the appellee can be accorded much weight, although it may of course be difficult to anticipate all consequences of granting standing to bring legal action.
- (39) It cannot be ruled out that questions may arise in relation to *res judicata*, but the solution will to a considerable extent follow directly from the rules set out in the Civil Procedure Act with regard to indirect *res judicata*, cf. Section 19-15, Sub-section 1, second sentence, of the Civil Procedure Act. Besides, the fact that each individual creditor has waived the right to bring legal action reduces the practical scope of the problem.
- (40) The other problems invoked may seem somewhat more contrived. In practice, it is unlikely to be of much significance that it is only the trustee that is liable for the litigation costs, and it is, as far as requests for attachments or other restraining orders are concerned, up to the enforcement authorities to impose adequate collateral requirements to secure the potential liability of the plaintiff as against the defendant. If the bondholders were to appoint a new trustee after legal action had been brought, such new trustee would necessarily have to be admitted into the action by joinder as a new party. When it comes to the borrower’s potential loss of set-off rights as against one or more of the bondholders, it is sufficient to refer to the fact that such set-off rights have been explicitly waived in the concluded loan agreements and in the guarantee declaration that forms the basis for the request for an attachment.
- (41) The appellee has also argued that it is, as a matter of principle, unfortunate that the identity of the bondholders is unknown to both the general public and the borrower, and that it must be clarified, at least upon the institution of legal proceedings, who the real plaintiffs are. I find it neither appropriate, nor necessary, to engage in a balancing of the considerations that must form part of the political assessment as to what extent information about the identity of the bondholders should be disclosed. It must, under any circumstance, be clear that such political clarification should not form part of the assessment as to whether the trustee should be granted standing to bring legal action on behalf of the bondholders. For the latter purpose it must be appropriate to operate on the basis of the current rules, which grant wide-ranging anonymity to the bondholders.
- (42) Nor am I able to see that anonymity for the bondholders can be expected to give rise to such partiality problems as to merit the attachment of weight to that problem. Potential partiality cannot have any

impact on the ruling of the judge when the facts are not known to him or her, and the possibility that the judge might use anonymity to render judgment in a case where he or she has interests can safely be disregarded in our context.

- (43) I have already noted that case law deriving from the Supreme Court contains a reservation to the effect that the affiliation requirement laid down by Section 1-3 of the Civil Procedure Act may in special cases be met even if the legal action does not pertain to one's own claim. Such a solution is, incidentally, anticipated already in the ruling published in the "Norsk Retstidende" case law reporter for the Supreme Court, 1936, page 318. The case concerned a partial bond loan, and although the legal structure at the time was different from that of current bond loans, the reality of the then arrangement is close to that of present-day bond loans with trustees. The following is, *inter alia*, stated in the judgment:

**” It must be said to be clearly contrary to the intent and assumptions underlying the loan arrangement for each individual partial bondholder to be able to commence the realisation of collateral on its own. It must be concluded that such realisation can only take place for the full loan as a whole, and it is not in the power of each individual bondholder to force such a sale in the present case.**

**However, it cannot be bindingly concluded therefrom that each individual bondholder is also under all circumstances contractually prevented from ordinary enforcement of the overdue interest and instalments payable to him. Unequivocal authorisation would have to be demonstrated to establish such a wide-ranging waiver of rights.”**

- (44) I am of the view that there is an undisputable need to grant the trustee standing to bring legal action in respect of the claims of the bondholders under the relevant loan arrangement. I cannot see any decisive reasons not to grant such a capacity to bring legal action, and such a capacity to bring legal action is clearly compatible with case law. It was emphasised on page 341 of the ruling published in the "Norsk Retstidende" case law reporter for the Supreme Court, 1989, page 338, that the legal interest provisions are of a mandatory nature, and that there is no room for deciding, through internal agreements, the identity of the parties. This remains equally true today, but cannot prevent weight from being attached, for purposes of the assessment, to the real need that results from the agreements concluded. This must especially be the case when we are concerned with standard terms and conditions that involve and take account of the interests of all affected parties in a way that practical financial life has deemed appropriate.
- (45) The appeal filed by the appellant has been upheld in full, and the appellant must be awarded costs before all courts. The litigation costs are held, in conformity with the submitted cost specification, to be NOK 48,150 before the Enforcement Court, NOK 95,160 before the Court of Appeal and NOK 252,160 before the Supreme Court. The litigation costs include legal fees, as well as court fees to the three courts, in the amounts of NOK 2,150 to the Enforcement Court and NOK 5,160 to the Court of Appeal and to the Supreme Court.
- (46) I vote for the following

#### C O U R T O R D E R :

1. The court order rendered by the Oslo Enforcement Court on 15 April 2009 and the court order rendered by the Borgarting Court of Appeal on 30 September 2009 are set aside.
2. Norinvest Ltd. shall pay the costs of Norsk Tillitsmann ASA before the Enforcement Court, the Court of Appeal and the Supreme Court in the amount of 395,470 – three hundred and ninety five thousand four hundred and seventy – kroner within 2 – two – weeks of the service of the present court order.

- (47) Justice **Matheson**: I agree with the main aspects of the reasoning of the first Justice to deliver his opinion, as well as with his conclusions.
- (48) Justice **Bårdsen**: Likewise.
- (49) Justice **Tønder**: Likewise.
- (50) Justice **Stabel**: Likewise.
- (51) After voting had been completed, the Supreme Court rendered the following

C O U R T   O R D E R:

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Correct transcript certified: