SUPREME COURT OF NORWAY

J U D G M E N T

given on 12 February 2025 by a division of the Supreme Court composed of

Justice Wilhelm Matheson
Justice Arne Ringnes
Justice Erik Thyness
Justice Are Stenvik
Justice Eyvin Sivertsen

HR-2025-251-A, (case no. 24-117982SIV-HRET)
Appeal against Agder Court of Appeal's judgment 28 June 2024

Jørgenvåg Holding AS	(Counsel Jørgen Aandal Vangsnes)
VSD Holding AS	(Counsel Reidar Smedsvig)
v.	
Kardus Holding AS Vika Digital AS Morten Rønning Holding AS Alette Holding AS	(Counsel Christian Henrik Prahl Reusch)

(1) Justice **Ringnes:**

Issues and background

(2) The case concerns an agreement to reduce a loan provided by the sellers of shares, as part of a company transaction. The question is whether the agreement must be wholly or partially set aside under section 36 of the Contracts Act, or, in the alternative, whether it is invalid under section 33 of the Contracts Act.

(3) The appellants – Jørgenvåg Holding AS and VSD Holding AS – are owned by A and B, respectively. The respondents – Kardus Holding AS, Vika Digital AS (previously EHV Holding AS), Morten Rønning Holding AS and Alette Holding AS – are owned by C, D, E and F, respectively.

(4) A, D and E became good friends during data engineering studies. In October 2009, they founded the company Red Rock Solutions AS.

(5) B, C and F worked together, and in 2011/2012, they founded the company Red Rock Marine AS. A, who is related to B, entered as a shareholder in the company.

(6) The companies provided services within lifting and handling equipment for ships and boats.

(7) The founders of the two companies eventually agreed to establish a common parent company. It was named Red Rock AS and will from now on also be referred to as *the company*. Following negotiations, the shares were allocated as follows: 54.5 percent to the companies owned by A and B, and 45.5 percent to the companies owned by C, D, E and F.

(8) As of spring 2017, the companies had approximately 80 employees in total.

(9) On 13 June 2017, the owners entered into a *share purchase agreement* aimed at facilitating a sale of the company. The companies owned by A and B acquired the remaining 45.5 percent of the shares from the other shareholders for a total consideration of NOK 40,950,000. The agreed payment date was 30 August 2017, with settlement to occur "in line with the principle of simultaneous exchange". The buyers made the purchase price conditional on obtaining bank financing. The price was based on a company valuation of NOK 90 million.

(10) Hereafter, I will refer to the companies owned by A and B (the appellants) as *the buyers*, and the companies owned by C, D, E and F (the respondents) as *the sellers*.

(11) As the buyers were unable to secure financing, the parties agreed, in December 2017, that the shares would be transferred in exchange for the sellers receiving a claim on the purchase price; that is, a loan provided by the sellers.

(12) The shares were transferred on 5 January 2018, and the specific terms for the seller financing were set out in a loan agreement entered into on the same day. This agreement will hereafter be referred to as *the seller financing agreement*. The sellers granted the buyers an instalment-free loan on the purchase price, with an annual interest of 4 percent. Accrued interest was to be paid on due date. The loan was secured by a first priority pledge over the transferred shares. Due date was set to the earlier of 31 December 2018 and a "Relevant Exit" – the time

at which the buyers "as a result of a transaction hold less than 50 percent of the shares and the votes in the Company".

(13) On the settlement date, the shares were transferred and a pledge was established through registration in the shareholders register. Simultaneously, C, D, E and F exited the board of Red Rock.

(14) The due date under the seller credit agreement was extended several times by mutual agreement, and was ultimately set to 31 December 2021.

(15) Due to liquidity needs, the company engaged Danske Bank in 2020 to facilitate an equity increase of NOK 50 million. The mandate also included a possible share sale. At that time, the company had three shareholders. The buyers held a total of 90 percent, and Mydland Holding AS, which had since become a shareholder, held 10 percent.

(16) In the spring of 2021, the company entered into negotiations regarding a major delivery to Ocean Infinity Group Limited. During these negotiations, Ocean Infinity expressed interest in investing USD 5–7 million in exchange for approximately 40 percent ownership in the company.

(17) On this basis, Danske Bank prepared a draft proposal on 7 June 2021 outlining the main elements of the transaction. The transaction was to be carried out in two stages: an equity increase of NOK 50 million, followed by a share sale amounting to NOK 20 million.

(18) Overall, the proposal entailed that Ocean Infinity would receive 40 percent ownership by investing a total of NOK 70 million, which would reflect a post-capital increase valuation of the entire company at NOK 175 million. The company valuation of NOK 175 million was stated in the transaction proposal.

(19) This proposal, together with a company presentation prepared a few days later, was well received by Ocean Infinity, and the parties initiated discussions on how to move the negotiations forward.

(20) During a meeting *between the buyers and the sellers* in mid-June 2021, the sellers were presented with two possible amendments to the seller credit agreement. This was followed by an offer document sent by A on 18 June 2021, with a seven-day acceptance deadline. The document stated that "[a] condition for the completion of the Share Issue is that the Creditors have issued a confirmation to the Debtors of their acceptance of either Offer 1 or Offer 2 below".

(21) Under *Offer 1*, the sellers would receive 25 percent of the purchase price of NOK 40,950,000 without interest. Payment was to be made within five days of completion of the share issue. The remaining debt would be written off. *Offer 2* proposed that the sellers receive 10 percent of the purchase price without interest. The remaining debt would be classified as unsecured and interest-free and fall due upon the transfer of more than 75 percent of the shares and voting rights in the company to a third party following the share issue.

(22) Over the next two days, several of the sellers submitted comments by email. D wrote to A: "The more I study this agreement, the stronger my impression that it was 100 percent created in favour of the major shareholders. ... All the benefits lie with the buyer, and all the uncertainties lie with the sellers". A responded:

> "I do not agree at all with your characterisation that all the benefits lie with what you call the 'major shareholders'. This agreement, and the possibility of a new investor, secures value for all of us. In the opposite case, if we don't finalise this agreement, the downside will be great."

(23) F sent an email containing calculations of hypothetical outcomes of the proposed offers, assuming the company was sold for either NOK 100 or 200 million.

(24) The sellers demanded that the percentage in Offer 1 be increased to 30 percent, and A prepared revised drafts of the settlement agreement. On 25 June 2021, he sent the settlement agreement to the sellers for signing with the following message:

> "I can confirm that the agreement is accepted! I'm passing it around for signing. Let's hope that everything goes well in the DD process with Ocean Infinity."

(25) The statement that the agreement had been accepted must be seen in the light of A's prior reservation that the increase from 25 to 30 percent was subject to Ocean Infinity's approval.

(26) The date of signing is 30 June 2021.

(27) In *the settlement agreement*, the purpose is described as follows: "To facilitate the Share Issue, it is necessary to adjust the Seller Financing and the terms for this." Clause 1.1 of the agreement reads:

> "The Seller Financing will be fully settled by paying the Creditors 30 percent of the Seller Financing (the 'Settlement Amount'). Following payment of the Settlement Amount, any outstanding issues between the Debtors and Creditors shall be considered settled without further action (and without the need for further declarations or similar). The table below shows the amount payable to each Creditor."

(28) The total amount payable to the sellers was NOK 12,285,000. Clause 1.2 of the agreement further stipulated:

> "The Settlement Amount shall be paid within 10 business days of receipt of the Issued Amount on the Company's account. If such settlement has not occurred by 31 December 2021, any Party may terminate the Settlement Agreement, in which case the current Seller Financing will remain unchanged."

(29) *The negotiations between the owners of the company and Ocean Infinity* ran parallel to the negotiations between the buyers and the sellers. The owners were assisted by financial and legal advisers. The sellers were not involved in these negotiations and were not kept informed about their content.

(30) During a phone call on 30 June 2021 between Aleksander Raa Storaker in Danske Bank and Ocean Infinity's representative, Ocean Infinity expressed interest in acquiring a larger stake in the company. According to Mr. Storaker, this could range from 50 to nearly 100 percent. A was informed about this on the same day.

(31) One week later, on 7 July 2021, A and B learned that Ocean Infinity was considering acquiring all the shares the company. The first draft of the share purchase agreement was completed on 9 July 2021. Negotiations and transaction-related work continued throughout the summer and into the autumn.

(32) A share purchase agreement was entered into on 8 October 2021. The purchase price for all shares was NOK 180 million, consisting of a cash payment of NOK 105 million and a loan provided by the sellers of NOK 75 million. The seller financing was to be converted into shares in Ocean Infinity.

(33) The settlement was completed on 27 October 2021. A's and B's companies received a total of NOK 94,500,000 from Ocean Infinity, distributed by NOK 51,975,000 to A's company and NOK 42,525,000 to B's company. The NOK 75 million seller loan, intended to be converted into shares in Ocean Infinity, was distributed among A's and B's companies and Mydland Holding AS in the same proportion as the cash payment.

(34) As part of the transaction, an equity increase of NOK 30 million was carried out, designated for the repayment of a convertible loan.

(35) *The settlement agreement* was finalised on 5 November 2021, with a total payment of NOK 12,285,000. The amount was distributed as follows:

Kardus Holding AS	NOK 3,415,500
Vika Digital AS (previously EHV Holding AS)	NOK 2,565,000
Morten Rønning Holding AS	NOK 2,565,000
Alette Holding AS	NOK 3,739,500

(36) The acquisition of Red Rock was announced on 12 October 2021. The sellers became aware of the transaction through media reports on the same day. The sale price and its terms were kept confidential.

(37) Following a bankruptcy petition, Red Rock AS entered bankruptcy proceedings on 22 September 2022. These proceedings were discontinued in the autumn of 2023.

(38) When the annual accounts for 2021 became publicly available in the autumn of 2022, the sellers discovered that Jørgenvåg Holding AS had a recorded income of NOK 80,366,000, and that VSD Holding AS had a recorded income of NOK 65,752,000.

(39) The sellers believed that the buyers had acted disloyally and had withheld information, and that the sellers retained a claim to the remaining purchase price for the shares as originally agreed in 2017.

(40) On 13 March 2023, Kardus Holding AS, Vika Digital AS, Morten Rønning Holding AS and Alette Holding AS brought an action before Agder District Court, seeking payment of the outstanding settlement amount. The two buyers submitted their response on 4 April 2023, requesting full dismissal of the claim.

(41) On 9 October 2023, Agder District Court ruled in favour of Jørgenvåg Holding AS and VSD Holding AS. No award of costs was made.

(42) The District Court, "under considerable doubt", concluded that there was no basis for revising the settlement agreement under section 36 of the Contracts Act.

(43) The sellers appealed against the judgment to Agder Court of Appeal. On 28 June 2024, the Court ruled as follows:

> "1. Jørgenvåg Holding AS is to pay:
> NOK 4,399,766 to Vika Digital AS,
> NOK 6,414,364 to Alette Holding AS,
> NOK 4,399,766 to Morten Rønning Holding AS, and
> NOK 5,858,510 to Kardus Holding AS,
> within two weeks of the service of the judgment, with the addition of statutory default interest from the due date until payment is made.
>
> 2. VSD Holding AS is to pay:
> NOK 2,879,794 to Vika Digital AS,
> NOK 4,198,416 to Alette Holding AS,
> NOK 2,879,794 to Morten Rønning Holding AS, and
> NOK 3,864,590 to Kardus Holding AS,
> within two weeks of the service of the judgment, with the addition of statutory default interest from the due date until payment is made.
>
> 3. Jørgenvåg Holding AS and VSD Holding AS are jointly and severally to pay costs in the Court of Appeal to Vika Digital AS, Alette Holding AS, Morten Rønning Holding AS and Kardus Holding AS amounting to NOK 293,375, within two weeks of the service of the judgment. In addition, the Court of Appeal's court fees apply.
>
> 4. Jørgenvåg Holding AS and VSD Holding AS are jointly and severally to pay costs in the District Court to Vika Digital AS, Alette Holding AS, Morten Rønning Holding AS and Kardus Holding AS amounting to NOK 451,500, within two weeks of the service of the judgment. In addition, the Court of Appeal's court fees apply.

(44) The Court of Appeal's conclusion was that the settlement agreement had to be set aside in its entirety in accordance with section 36 of the Contracts Act.

(45) Jørgenvåg Holding AS and VSD Holding AS have appealed against the Court of Appeal's judgment to the Supreme Court. The appeal concerns the application of law and the findings of fact. As a new alternative submission before the Supreme Court, the respondents argue that the settlement agreement is invalid under section 33 of the Contracts Act.

(46) The Supreme Court has received written statements from the parties and witnesses. Apart from this, the case remains substantially unchanged from the Court of Appeal.

The parties' contentions

(47) The appellants – *Jørgenvåg Holding AS and VSD Holding AS* – contend:

(48) The Court of Appeal's result is incorrect. There is no basis for wholly or partially setting aside the settlement agreement under section 36 of the Contracts Act. Nor is the agreement invalid under section 33 of the Contracts Act.

(49) The settlement agreement was the result of individual negotiations between professional actors, tradespersons and relatively equal parties. In such circumstances, the threshold for revision is high, requiring a clear demonstration of substantial unreasonableness.

(50) Red Rock was in a difficult financial position, facing the risk of bankruptcy. It was essential for the sellers to secure payment for the loan and to bring the financing arrangement to an end. They made a deliberate choice to accept part of the purchase price with low risk, rather than pursue the possibility of a higher return that came with significant risk.

(51) The subscription price proposed by Danske Bank was not based on any relevant valuation of Red Rock. The purpose of the transaction was to secure liquidity for the company. During a meeting on 6 June 2021, the respondents received key information and had sufficient insight to understand that the company's value exceeded the loan. The respondents deliberately assumed a risk by entering into the settlement agreement without knowledge of the subscription price.

(52) The Court of Appeal also incorrectly assumes that the buyers placed the sellers under time pressure during the negotiations.

(53) A revision under section 36 of the Contracts Act cannot extend beyond remedying the unreasonableness. Maintaining the seller financing was never a realistic option, and, in any case, a complete setting aside is not compatible with section 36.

(54) The relevant consideration under section 33 of the Contracts Act is not the value of the company, but whether the appellants have withheld information concerning their ability to settle the loan. The buyers' responsibility was to avoid bankruptcy and to fulfil their financial obligations.

(55) The information in Danske Bank's transaction proposal did not constitute significant circumstances that the sellers had reason to expect they were given. The subscription price is not relevant for settling the seller financing, and does not reflect the company value. At the time of the agreement, the sellers were aware of all relevant circumstances and made no further inquiries.

(56) The causation requirement is not met, as it is unlikely that the terms of the settlement agreement would have been different had the sellers been aware of the contents of Danske Bank's proposal.

(57) Jørgenvåg Holding AS and VSD Holding AS ask the Supreme Court to rule as follows:

> "1. The Supreme Court finds in favour of Jørgenvåg Holding AS and VSD Holding AS.
>
> 2. Kardus Holding AS, Vika Digital AS, Morten Rønning Holding AS and Alette Holding AS are jointly and severally liable for costs in the District Court, the Court of Appeal and the Supreme Court to Jørgenvåg Holding AS and VSD Holding AS.

(58) The respondents – *Kardus Holding AS, Vika Digital AS, Morten Rønning Holding AS and Alette Holding AS* – contend:

(59) The Court of Appeal's findings of fact and application of law are correct. According to section 36, an overall assessment must be made, in which any imbalance in the formation and contents of the agreement must be considered together.

(60) The buyers had a particularly strong duty of loyalty towards the buyers. The buyers were assisted by financial and legal advisers and were more professional.

(61) A and B did not disclose that negotiations were ongoing with Ocean Infinity based on a company valuation of NOK 175 million, nor did they provide any information about the contents of Danske Bank's transaction proposal. This was clearly relevant information that should have been disclosed to the sellers. The company value was significantly higher than the valuation underlying the share purchase agreement. During the settlement negotiations, the sellers estimated the company's value to be approximately NOK 50 million.

(62) The sellers were further misinformed that an amendment to the share purchase agreement and the seller financing agreement was necessary to complete a share issue, creating an unnecessary time pressure.

(63) At the time the settlement agreement was entered into, the buyers possessed all relevant information and controlled how the situation was presented to the sellers.

(64) The result of the settlement is highly unreasonable and does not align with the parties' original intention to divide the sale price of the company according to their respective holdings.

(65) A revision under section 36 must lead to the settlement agreement being set aside in its entirety.

(66) Alternatively, the agreement is invalid under section 33 of the Contracts Act.

(67) Kardus Holding AS, Vika Digital AS, Morten Rønning Holding AS and Alette Holding AS ask the Supreme Court to rule as follows:

> "1. The appeal is dismissed.
>
> 2. Jørgenvåg Holding AS and VSD Holding AS are jointly and severally liable for costs in the Supreme Court to Kardus Holding AS, Vika Digital AS, Morten Rønning Holding AS and Alette Holding AS."

My opinion

The legal issue

(68) A central question in the case is whether the appellants – the buyers – withheld material information during the negotiation and conclusion of the settlement agreement in June 2021. This can also be framed as a question of whether there was a *failure of disclosure* on the part

of the buyers, which led the sellers to accept a 70 percent reduction in the purchase price for the shares based on false premises.

(69) From a systematic legal perspective, it is natural to begin with considering whether the contract is invalid under *section 33 of the Contracts Act*. Failure of disclosure lies at the core of this ground for invalidity. As stated in Proposition to the Odelsting no. 5 (1982–1983), page 33, formation defects "are primarily regulated by the general grounds for invalidity in sections 28–33 of the Contracts Act."

(70) However, formation defects are also relevant to the overall assessment of whether a contract should be revised – modified – under *section 36 of the Contracts Act.* On the same page of the Proposition, it is further stated that the modification rule in section 36 allows for more flexible, intermediate solutions than invalidity, and section 36 makes it easier to address less serious flaws in the formation of the agreement than those covered by section 33.

(71) The respondents have chosen to invoke section 36 as their principal basis for setting aside the settlement agreement. In support of revision, they have also invoked subsequent circumstances that fall outside the scope of the assessment under section 33. Moreover, there exists a "more general principle that a party with multiple bases for a claim may choose which to assert…", see HR-2025-220-A, paragraphs 41 and 42, with further reference to Rt-2015-276 *Bori*, paragraph 36. Against this background, I will use section 36 of the Contracts Act as the basis for assessing whether the settlement agreement must be wholly or partially set aside.

Section 36 of the Contracts Act

(72) Section 36 of the Contracts Act gives the courts a legal basis for wholly or partially setting aside a contract "if it would be unreasonable or in conflict with generally accepted business practice to invoke it". An individual, overall assessment is required, which must include the following according to subsection 2:

> "When making a decision, account will be taken not only of the contents of the agreement, the positions of the parties and the circumstances prevailing at the time of the conclusion of the agreement, but also of subsequent events and circumstances in general."

(73) In cases involving *commercial contracts*, such as the one at hand, the importance of predictability in business life, and the notion that each party must bear the risk of its own commercial assessments and decisions, will often weigh against revision under section 36, see Proposition to the Odelsting no. 5 (1982–1983), page 29.

(74) In several cases, the Supreme Court has applied a high threshold for revising agreements between professional parties where, due to *changed circumstances*, the agreement has become unreasonable for one of the parties. In Rt-2003-1132 *Norrønafly*, paragraph 46, it is stated that "substantial grounds are needed to establish unreasonableness and set aside agreed terms in commercial contracts between professional parties". The threshold is described as requiring "manifest unreasonableness". The case in Rt-2012-1537 *Smestad* concerned "a long-term commercial contract", see paragraph 47. In paragraph 46, it is emphasised that "only clearly manifest cases of unreasonableness are covered", and that in commercial contracts, "the threshold is particularly high".

(75) When a contractual party has *assumed a calculated risk*, section 36 cannot be applied to prevent that the risk materialises, see Rt-2013-388 *Røeggen*, paragraph 55. An illustrative case is Rt-2010-1345 *Oslo Vei*, where, in the contract, the risk associated with the unforeseen development was "deliberately placed" on the contractor. The Supreme Court found that there was clearly no basis for revision under section 36, see paragraph 46.

(76) One party in a commercial relationship *having made a poor business deal,* cannot serve as grounds for revision under section 36, see Viggo Hagstrøm, *Obligasjonsrett*, [law of obligations] 3rd edition, 2021 page 320.

(77) A factor to consider under section 36 is "the positions of the parties". In the rulings referenced above, the Supreme Court has emphasised that the agreement was entered into between *professional parties.* In the arbitration award ND-1990-204 *Ula*, the arbitration tribunal applies a scale whereby the threshold for revision under section 36 increases along with the parties' level of professionalism, reaching its highest point when the parties possess top-level expertise. I endorse this approach.

(78) It is also relevant to consider *the relative strength* between the professional parties – whether they are on equal footing, or whether one party, due to its position, resources or expertise, is better positioned to shape the contractual terms to its advantage.

(79) Another factor to consider under section 36 is "the circumstances prevailing at the time of the conclusion of the agreement". A key issue in the case is whether the buyers fulfilled their *duty of disclosure* during the negotiations and when entering into the settlement agreement. This duty of disclosure derives from the duty of loyalty in contractual relationships, which is significant in contract law.

(80) In cases involving a failure to disclose information, Rt-2012-1926 *Fokus Bank*, paragraph 48, establishes that an imbalance in the contractual relationship may be attributable to incomplete or misleading information provided by the debtor. In other words, it must be shown that the failure to disclose information had a material impact on the agreement. Thus, in *Røeggen*, paragraph 129, the Supreme Court's premise was that the investor would have refrained from the investment had he received correct information from the bank. The weigh to be given to the failure to disclose information in the overall assessment under section 36 must be determined on an individual basis, which I will address later.

Individual assessment

(81) I initially note that the parties to the case are limited liability companies owned by the six founders of Red Rock. The companies have no employees and were represented by their owners during the contract negotiations. In this case, therefore, the assessment under section 36 of the Contracts Act must take into account the owners' experience, background and level of professionalism.

(82) The question is whether *the settlement agreement* entered into on 30 June 2021 between the sellers and the buyers must be revised under section 36 of the Contracts Act. In this agreement, the original price for the sellers' shares – NOK 40,950,000 – on which the sellers had granted credit, was to be reduced to NOK 12,285,000, representing a 70 percent reduction in the buyer's debt. In addition, the agreement required the sellers to waive accrued interest.

(83) *The buyers'* approach to the issue of revision under section 36 can generally be summarised as follows:

(84) The settlement agreement resulted from negotiations in which the sellers faced a choice. They could either accept an agreement allowing a fair level of certainty that 30 percent of the purchase price for the company's shares would be paid, or choose a 10 percent down-payment with full settlement later, conditional on a sale of more than 75 percent of the company and the completion of a share issue. While the latter solution offered a greater financial upside, it also entailed significantly greater risk. It was uncertain whether a sale of 75 percent of the company would take place. It was also uncertain whether Ocean Infinity would invest in the company, and without an equity increase, bankruptcy was a genuine possibility.

(85) The buyers' point is that the sellers weighed the two offers and chose the first to secure payment of part of the purchase price. The fact that the company was sold for NOK 180 million after the settlement agreement was entered into – which would have ensured full payment for the sellers' shares – is, the buyers argue, a result of a commercial risk the sellers chose to assume.

(86) As I have pointed out, section 36 of the Contracts Act cannot be applied to remedy the consequences of commercial decisions and calculated risk. When assessing the settlement agreement solely from the buyers' perspective, it does not meet the criteria for contractual revision.

(87) In my view, however, the buyers' approach is too narrow. The question of revision under section 36 entails an exercise of discretion, taking into account a range of factors. In this case, the assessment must include the background to the settlement agreement, the parties' positions and relationships, the information available to them at the time of the conclusion of the agreement, and the unbalanced terms of the settlement agreement.

(88) I will start by addressing *the background to the settlement agreement*.

(89) The sellers and the buyers are owned by entrepreneurs who founded and developed the businesses that ultimately became part of the Red Rock group. There were close personal relationships between the entrepreneurs, and all six worked full-time in the companies. The Court of Appeal describes it as follows:

> "From the outset, there was considerable enthusiasm and determination. As understood by the Court of Appeal, all six individuals worked long hours in what best can be described as a joint entrepreneurial endeavour, extending well beyond standard working hours, with relatively modest pay and no financial compensation for lost evenings, weekends or holidays."

(90) *The share purchase agreement*, entered into in 2017, was intended to facilitate the sale of the company, enabling the entrepreneurs to reap the rewards of the efforts invested in the undertakings. A and B believed that selling the company would be easier if only the two of them were shareholders. In the Court of Appeal's judgment, the following is stated regarding the purpose of the agreement:

> "This brings the Court of Appeal back to what, based on the testimonies, must be regarded as the parties' shared objective under the Share Sale Agreement [share purchase agreement]

> already on 13 June 2017: to sell all the shares to a third-party investor to compensate the company's founders for their contributions over the preceding years."

(91) I agree with this description.

(92) The buyers were unable to finance the purchase of the shares by the agreed date, and the objective under *the seller financing agreement* was to finance the purchase of the shares. The sellers agreed to extend the due date on several occasions. The loan and the extensions were granted to give the buyers additional time to realise the value of the company.

(93) I note that the seller financing agreement did not replace the share purchase agreement, but rather amended its terms of settlement. During the negotiations of the settlement agreement, the contractual relationship between the parties was thus regulated by the share purchase agreement *and* the seller financing agreement.

(94) Consequently, the six entrepreneurs agreed on a common objective of selling the company to ensure payment for all of them. In my view, the buyers had an *increased duty of loyalty* under both the share purchase agreement and the seller financing agreement. For the buyers, there was a particular incentive to secure a higher valuation for the company than the one underlying the share purchase agreement, which was NOK 90 million.

(95) I will now turn to *the positions of the parties* and *circumstances prevailing at the time of the conclusion of the settlement agreement*.

(96) The parties were engaged in commercial activities through their companies. My impression, however, is that the sellers in particular were not professional investors, as their backgrounds were primarily in engineering and sales. The Court of Appeal stated that the parties had varying levels of financial expertise and differing degrees of legal understanding, and I proceed on that basis.

(97) Particularly striking, however, is *the imbalance* between the parties in terms of information and their ability to influence the content of the agreement.

(98) The sellers exited the company's board in connection with the share sale and had neither access to nor any influence over the negotiations with Ocean Infinity. A and B, through their companies, were assisted by financial and legal advisers, and their counsel drafted the settlement agreement. A played a central role in the negotiations with Ocean Infinity. My understanding is that, due to their positions, resources and knowledge, the buyers were in a strong position to draft the terms of agreement to their advantage.

(99) Negotiations between the buyers and sellers commenced in mid-June 2021. At that time, Ocean Infinity had provided positive feedback on the transaction proposal from Danske Bank, and further steps were discussed during the investment negotiations. However, Ocean Infinity made it a condition that a solution be found regarding the seller financing, to prevent the sellers from realising the pledge due to default. This was the context for the buyers' proposal to amend the seller financing agreement.

(100) The sellers were notified that Ocean Infinity was contemplating an equity injection of approximately NOK 50 million and a purchase of some shares. However, they were not informed of the transaction proposal from Danske Bank. They were therefore unaware that the subscription price in the proposed capital increase was based on a post-investment

company valuation of NOK 175 million, or that Ocean Infinity intended to purchase shares from the buyers for NOK 18 million – albeit at a lower price per share than the subscription price in the capital increase. This amount represents approximately 90 percent of the total purchase price of NOK 20 million.

(101) Given the evidence presented and the Court of Appeal's judgment, I must proceed on the basis that *the sellers understood* the company to be worth significantly less than the valuation underlying the transaction proposal. Before the Supreme Court, the sellers have expressed that A had informed them that the company was worth considerably less than NOK 90 million – the amount on which the share purchase agreement was based – and that an equity injection was necessary to avoid bankruptcy. The Court of Appeal stated the following:

> "Based on the evidence presented, both the written correspondence between the parties and the statements given during the appeal hearing, the Court of Appeal concludes that the four sellers were informed that the company was in a very difficult financial position, and that, in order to have an investor invest in Red Rock to secure the company's survival, it was an absolute prerequisite that the Seller Financing be amended."

(102) *The buyers* submit that the sellers had sufficient information to understand that the company's stated value exceeded the loan provided by the sellers. They argue that the sellers took a conscious risk by failing to seek clarification of the subscription price and by not making any enquiries to the buyers or their legal counsel.

(103) As I understand it, this is precisely what F did in an email dated 20 June 2021, where he wrote to A: "An investor amount of NOK 50 million has been mentioned, but is the value of the company set/ready negotiated?" A did not respond to this e-mail.

(104) It may appear naive that the sellers did not make further enquiries or engage advisers to assist with the negotiations of the settlement agreement. However, this must be understood in the light of the sellers' well-founded *trust* in A and B. The Court of Appeal's judgment cites from the sellers' statements that they "had complete trust in" A and everything he told them. The sellers were confident that the two buyers "would also act in the best interests of the four sellers during the negotiations, thereby realising the purpose of the agreement entered into in 2017". The Court of Appeal held that "the four sellers also believed they stood shoulder to shoulder in the situation and that the two buyers were negotiating on behalf of all of them".

(105) The mutual trust found by the Court of Appeal to have been proven is also reflected in the parties' testimonies before the Supreme Court. I highlight the following from F's testimony:

> "There is a clear thread running through the entire period, from the establishment of Red Rock to the signing of the settlement agreement, that we have stood shoulder to shoulder with B and A. Throughout, we have trusted that all information received from B and A was accurate and provided in the best interest of all parties."

(106) As the case stands, the sellers' failure to make enquiries does not – in my view – absolve the buyers of their duty of disclosure. More generally, I proceed from the premise that a debtor negotiating a debt reduction with a creditor has a broad duty to disclose any information that may be material to the creditor's assessment.

(107) I also refer to my earlier remarks regarding the duty of loyalty. Relevant in this context are the text messages exchanged between A and B around the time the sellers were commenting on the proposed amendments to the seller financing agreement. One message read: "The best would be if everyone accepted between 27 and 30 percent". The response was: "Yeah, 30 percent means around 12–13 million. That gives us about 2.5". Another message read: "Well, lots of good emails are coming in now…" This exchange suggests that the buyers expected to receive liquid assets in excess of the amount agreed to be paid to the sellers. By concealing which assets they would have at their disposal, they prioritised their financial interests over their obligation to repay the sellers' loan.

(108) Furthermore, the buyers argue that the company valuation underlying the transaction proposal was not a relevant piece of information, and that it mattered more to the sellers whether the buyers had sufficient liquidity to pay the loan. As I understand it, the position is that the failure of disclosure had no *influence* on the sellers' decision to accept a reduction of the loan to 30 percent of its original amount.

(109) I do not accept this argument. Admittedly, neither the subscription price nor the amount to be injected as equity was, in itself, directly relevant to the repayment of the loan. However, the sellers had communicated to the buyers that the company was worth much less than NOK 90 million – the valuation underlying the share purchase agreement. It seems clear to me that, had the sellers known that the negotiations with Ocean Infinity were based on a materially higher company valuation, it would have influenced their choice. Such knowledge would have created an opportunity to negotiate solutions other than those offered by the buyers, or to maintain the seller financing agreement without security. The latter agreement must also be assumed to have affected the sellers' choice between the two available offers.

(110) From an objective standpoint, the notion that a third-party investor might be interested in securing a majority shareholding in the company cannot have been considered too remote. And a few hours after the signing of the settlement agreement, on 30 June 2021, A was informed that Ocean Infinity was contemplating purchasing a larger share of the company, potentially ranging from 50 to 100 percent. Merely a week later, on 7 July, A received confirmation that Ocean Infinity wished to purchase all of the shares. Thus, a significant change in the premises for the settlement agreement occurred very shortly after its conclusion, without the sellers being informed.

(111) The *subsequent events* may be summarised as follows:

(112) Upon the sale of all shares in the company *the buyers* received a cash consideration of NOK 94,500,000, as well as shares in Ocean Infinity valued at NOK 67,500,000. As a consequence of the settlement agreement, *the sellers* received NOK 12,285,000 – instead of the original price of NOK 40,950,000, which would have been fully covered by the buyers' cash consideration under the share sale.

(113) *In summary*, I find that the failure of disclosure has rendered the terms of the agreement unreasonable. In my assessment under section 36, I also emphasise the preceding events, the buyers' duty of loyalty and the sellers' well-founded trust that the buyers would act in the best interests of all parties during the negotiations with Ocean Infinity. In the light of this, I believe it would be unreasonable to enforce the settlement agreement as written, and that it must be revised under section 36 of the Contracts Act.

(114) The question is, then, *whether the settlement agreement must be wholly or partially set aside*. In Proposition to the Odelsting no. 5 (1982–1983), page 41, it is stated that the wording of the Act "allows for a flexible choice of remedies". Nonetheless, the premise is that the scope for revision does not extend beyond remedying the unreasonableness. This is confirmed in the Supreme Court ruling in Rt-1998-1683, page 1699, where it is stated: "In my opinion, the words 'to the extent' [*for så vidt*] indicate that the possibility of revision only applies if an agreement is unreasonable or unbalanced."

(115) The buyers contend that a hypothetical analysis is required to determine what the outcome would have been had the sellers been aware of the contents of the transaction proposal from Danske Bank. In any case, they argue that maintaining the seller financing agreement would not have been a viable option, as the likely result would have been a marginally increase in the agreed price.

(116) The Court of Appeal concluded that the settlement agreement had to be set aside in its entirety. This means that the sellers are entitled to payment in accordance with the share purchase agreement, minus the payment made under the settlement agreement. Additionally, a 4 percent interest, as agreed in the seller financing agreement, applies for the period from 5 January 2018 to the settlement date, 5 November 2021.

(117) In our case, defects in the formation of the agreement are the main reason why enforcing the agreement as written would be unreasonable. The debt reduction was accepted based on false premises. I find it difficult to form an opinion on the outcome if the buyers had fulfilled their duty of disclosure. Taking all circumstances into account, the most reasonable and natural outcome is that the settlement agreement is set aside in its entirety, which is also my conclusion.

Conclusion and costs

(118) Against this background, the appeal is dismissed.

(119) The respondents have won the case and are entitled to costs in the Supreme Court in accordance with the general rule in section 20-2 subsection 1 of the Dispute Act. Compensation for legal fees is claimed in the amount of NOK 995,600 with an additional 248,900 in VAT, making a total of NOK 1,244,500. Additionally, NOK 30,171 is claimed for travel and accommodation expenses for the respondents and for the assisting counsel, as well as NOK 2,171 for other expenses. Finally, a court fee for the Supreme Court amounts to NOK 34,479.

(120) I find that costs may be awarded in line with the statement of costs, see section 20-5 of the Dispute Act.

(121) I vote for this

J U D G M E N T :

1. The appeal is dismissed.

2. In costs in the Supreme Court, Jørgenvåg Holding AS and VSD Holding AS are jointly and severally liable to pay NOK 1,311,321 to Kardus Holding AS, Vika Digital

AS, Morten Rønning Holding AS and Alette Holding AS, within two weeks of service of this judgment.

(122) Justice **Thyness:** I agree with Justice Ringnes in all material respects and with his conclusion.

(123) Justice **Sivertsen:** Likewise.

(124) Justice **Stenvik:** Likewise.

(125) Justice **Matheson:** Likewise.

(126) Following the voting, the Supreme Court gave this

J U D G M E N T :

1. The appeal is dismissed.

2. In costs in the Supreme Court, Jørgenvåg Holding AS and VSD Holding AS are jointly and severally liable to pay NOK 1,311,321 to Kardus Holding AS, Vika Digital AS, Morten Rønning Holding AS and Alette Holding AS, within two weeks of service of this judgment.