THE SUPREME COURT OF NORWAY

On 1 June 2011, the Supreme Court issued an order regarding

HR-2011-01118-A, (case no. 2011/456), a criminal case, appeal against a court order,

Petrolia ASA
Larsen Oil & Gas AS
Increased Oil Recovery AS
BLH AS
BUS AS – Bergen Underwater Services
Bernh Larsen Holding AS
Independent Oil & Resources ASA
Norwegian Oil Company AS
Net AS
Petrolia Rigs AS
Petrolia Drilling II AS
Petrolia Services AS
DNO International ASA
Independent Oil Tools AS (lawyer Arild Dommersnes)

versus

The Public Prosecuting Authority (public prosecutor Tor Henning Knudsen)

VOTING :

(1) Judge **Møse**: the case concerns an order to companies to hand over evidence pursuant to section 210 of the Criminal Procedure Act. The main question for the Supreme Court is whether the prohibition against self-incrimination stated in the European Convention on Human Rights (ECHR) also applies to legal persons.

(2) In identical letters sent to 15 companies on 13 December 2010, Hordaland Police District asked to be given the trial balance, specified general ledger and complete debtors'/creditors' ledgers in connection with the investigation of an "ongoing criminal case". The companies asked to be told the criminal case that was the basis for the request for disclosure, and what relevance the accounting material had to the issue that was under investigation. The police stated their reasons in a letter to the companies dated 4 January 2011. The reply to Petrolia ASA stated the following, i.a.:

> **"Our request for disclosure has been made due to the investigations carried out in a criminal case against Berge Gerdt Larsen. The requested documents are to be used during the investigation in order to clarify the existence, and if relevant the accounting treatment, of debts and receivables (outstanding accounts) between various companies in which Berge Gerdt Larsen has or is assumed to have an ownership interest or where a community of interest or some other business collaboration exists, as well as such companies' outstanding accounts with other companies...**

Petrolia Drilling ASA has the status of a witness in the case. At the present time, the police have no reason to suspect Petrolia Drilling ASA of contravening any law. As stated above, this request is also not based on such factors. However, the police cannot at any time relinquish the right to make use of the accounting material for other purposes if there should prove to be specific and objective reasons for this. Such a restriction would contravene fundamental criminal procedure rules and the objective of evidence gathering."

(3) The charge against Berge Gerdt Larsen was issued on 12 December 2006. Item I related to section 275, first and second subsections, of the Penal Code, see section 276 concerning a gross breach of trust. What was important in our case was Item II, which dealt with several contraventions of section 12-2, nos. 1 and 2, of the Tax Assessment Act, see section 12-1, no. 1a. The grounds were that, in his tax returns for the 1996-2002 and 2004-2005 financial years, Larsen had failed to state assets in domestic and/or foreign enterprises. An additional charge was later issued on 4 March 2010, and indictment was issued on 19 October 2010.

(4) In a letter to the police dated 17 January 2011, Petrolia ASA stated on behalf of the 15 companies that they would not comply with the request to disclose the accounting material. The reason for this refusal was the assumption on which the request was based, i.e. that Larsen had an ownership interest in any of the foreign companies or that there was a community of interest or some other business collaboration. The disclosure was under no circumstances likely to "construct a pro forma balance sheet for (and thus valuation of) the foreign companies in question". The companies also stated:

"Since Hordaland police district has also been unable to rule out that information in the disclosed accounting material may be used for purposes other than those stated, including the initiation of an investigation into these companies, we have decided not to disclose the material without there being a legal court order on which the disclosure order is based. Due to the proviso stated by the police, the protection against self-incrimination afforded by the ECHR is also relevant."

(5) The police petition for a disclosure order dated 21 January 2011 stated the following, i.a.:

"The information which is available regarding the case provides strong evidence that Berge Gerdt Larsen either directly or indirectly owns significant percentages of the shares/assets in several foreign companies. In order to calculate the tax value of these, the police have obtained documentation from, among others, the companies' service provider abroad. This documentation shows that several of the foreign companies have, have had or may have extensive and long-lasting outstanding financial accounts with the Norwegian companies at which the petition for disclosure is aimed. There are common ownership interests and/or some other community of interest or other business collaboration between the foreign and Norwegian companies. The way in which the Norwegian companies have registered and appraised the outstanding accounts with the foreign companies in their accounts is therefore of importance when calculating tax values and thus the information in the case. Due to the ownership and interest factors in question, information from the Norwegian companies is a natural supplement to that which is registered in the foreign companies. The case consists of

around 100,000 documents. It will therefore be too much to provide a more detailed account of the ownership factors, community of interest and business collaboration. However we enclose an ownership map prepared by ... service provider for several of the foreign companies...”

(6) On 1 February 2011 and pursuant to section 210 of the Criminal Procedure Act, see sections 203 and 204, Bergen District Court ordered the 15 companies to disclose the trial balance, specified general ledger and complete creditors’/debtors’ accounts to the police. In the court’s view, the information had to be assumed to be of importance as evidence in the criminal case against Larsen and there was a duty to give evidence. The police failure to provide assurance that the information could not be used for purposes other than an investigation into the case did not prevent a disclosure order. The prohibition against self-incrimination in ECHR Article 6 could not be pleaded by the companies.

(7) The companies appealed against this to Gulating Court of Appeal, which on 24 February 2011 issued a court order with the following conclusion:

“For the company called Time Critical Petroleum Resources AS, the petition for the disclosure of documents is dismissed.
The appeal is denied with regard to the other companies.”

(8) Like the District Court, the Court of Appeal found that the accounting material was important as evidence. The petition for disclosure was dismissed in relation to one of the companies because the documents were in their entirety outside the period when the criminal acts were committed according to the charge. In the Court of Appeal’s view, the companies were not of such a kind that they were covered by the protection against self-incrimination in Article 6.

(9) The companies submitted an appeal based on the procedure and the application of the law to the Appeals Selection Committee of the Supreme Court, which decided on 30 March 2011 that the appeal case should be decided in its entirety by the Supreme Court in a court consisting of five judges, see section 5, subsection one, second sentence of the Courts of Justice Act.

(10) The appellants – *Petrolia ASA et al* – have on the whole alleged:

(11) The conditions for a disclosure order pursuant to section 210 of the Criminal Procedure Act have not been met. The accounting material relates to a period that is on the whole outside the years to which the charge against Larsen refers. Nor are there reasonable grounds to assume that the information which is requested is likely to shed light on the charge against him. The police allegation that there is a community of interest has not been specified and is based on information which has not been made known to the companies. This contravenes the principle of the right to be heard, so that there has been a procedural error. The petition should not only have been dismissed in relation to one company, since other enterprises are in a corresponding position. The Court of Appeal should also have discussed section 123 concerning an exemption from the duty to give evidence.

(12) In the companies’ view, the police must be understood to be saying that it may be relevant to charge the companies on the basis of the information which the companies are now being asked to disclose. The companies risk a corporate penalty. A duty to disclose accounting material

contravenes the protection against self-incrimination provided by Article 6 of the ECHR. The fact that this protection may be invoked by legal persons follows from case law relating to the Convention and policy considerations. The Court of Appeal's distinction between home-based and other companies is untenable.

(13) Petrolia ASA et al have submitted the following claim:

"1. The police petition for a disclosure order is to be dismissed.

2. Gulating Court of Appeal's order of 24 February 2011 is to be set aside.

3. The appellants are to be awarded costs."

(14) *The public prosecuting authority* has on the whole alleged:

(15) The Court of Appeal has interpreted section 210 of the Criminal Procedure Act correctly. The accounting material which is requested is of value in the criminal case against Larsen, and the companies have a duty to give evidence. The Court of Appeal had a sufficient factual basis to decide on the petition for a disclosure order, based on the police submissions.
The principle of the right to be heard has not been infringed. The fact that the petition was only dismissed in relation to one company is not wrong.

(16) The protection against self-incrimination does not apply to legal persons. Section 123 of the Criminal Procedure Act is not applicable and under no circumstances provides any grounds for exemption from the duty to give evidence. Neither Convention case law nor policy considerations mean that Article 6 (1) of the ECHR may be invoked by enterprises. The provision's basic condition that there must be a "criminal charge" has not been met. Nor has there been any self-incrimination in the sense of the provision, so that Article 6 has at least not been infringed. Case law from other countries indicates that legal persons cannot plead protection against self-incrimination.

(17) The Public Prosecuting Authority has submitted the following claim:

"The appeals are to be dismissed."

(18) *My views on the case:*

(19) The appeal is a further interlocutory appeal against an interlocutory appeal, so that, pursuant to section 388 of the Criminal Procedure Act, the authority is limited to apply to the general interpretation of the law and procedure. If necessary for conducting a complete and effective review of the relationship to the ECHR, the Supreme Court has stated, in relation to the identical rules in section 2-12 of the Enforcement Act and section 30-6 of the Disputes Act, that the Committee may also review the specific subsumption but not the Court of Appeal's assessment of the evidence, see i.a. Rt 2007, page 404, paragraph 40, see paragraph 88, Rt 2007, page 459, paragraph 18, and a court order dated 1 April 2011 (HR-2011-696-U).

(20) In our case, the key issue is whether legal persons are protected against self-incrimination by Article 6 of the ECHR. This is a general interpretation of the law question that the Supreme

Court may review. If the Court of Appeal's interpretation is incorrect, the result will have to be a setting aside. I add that the Court of Appeal did not consider whether there was a "criminal charge" against the company. I will return to this issue later on.

(21) *The protection against self-incrimination*

(22) The protection against self-incrimination is not expressly stated in the ECHR, but according to Convention case law it follows from the general requirement of a "fair trial" stated in Article 6, no. 1.

(23) The Court of Appeal states the following regarding this:

> **"The Court of Appeal comments that the limits of the protection against self-incrimination do not appear to be entirely clear. It is assumed that the interests of private citizens are in the rule's core area, although it is not entirely ruled out that the protection may also be invoked by enterprises. It is assumed that it will in such case primarily relate to home-based enterprises where there is a close link between a natural person and a legal person, unlike limited companies that are owned by other companies, wholly or partly, or which are open to a group of investors.**
> **The case law relating to Article 8 of the ECHR seems to support such a view. The Court of Appeal otherwise refers to that stated by the District Court about this, and the District Court's reference to Ørnulf Øyen's book on this topic. Although the Court of Appeal does not categorically deny that legal persons may be covered by the protection against self-incrimination, the Court of Appeal does not find that there are any considerations or circumstances which indicate that enterprises of the type that the appellants must be regarded as being are covered by the protection against self-incrimination."**

(24) The Court of Appeal's view was that any protection against self-incrimination had to be based on Article 6, no. 1, and that this provision does not usually grant legal persons such protection. However, there might be exceptions, especially for home-based enterprises. I will start off by dealing with the question of whether Article 6 can be invoked by legal persons.

(25) *Does the protection against self-incrimination apply to legal persons?*

(26) Article 1 of the ECHR stipulates that the states shall secure the rights and freedoms defined in the Convention for "everyone" within their jurisdiction. Based on this provision, it is common to claim that the protection afforded by the Convention applies to both natural and legal persons, see, for example, Jon Fridrik Kjølbro's book entitled *Den europæiske menneskerettighedskonvention – for praktikere* (The European Convention on Human Rights – for practitioners), 3rd edition 2010, page 45. However, this is just a general starting point. Some Convention rights are only relevant for individual persons, such as the protection in Article 3 against torture and inhuman or degrading treatment or punishment, etc, see Kjølbro, page 204.

(27) For the sake of good order, I would like to mention that the starting point for the UN International Covenant on Civil and Political Rights (ICCPR) is different, in that case law has stated that only natural persons may complain pursuant to the additional protocol regarding the right to complain. Below, I will not deal with the prohibition against self-incrimination stated in Article 14, no. 3, letter g of the ICCPR.

(28) The European Court of Human Rights has handed down many judgments concerning legal persons' rights, including in cases concerning freedom of expression and ownership rights. There are also several such decisions relating to Article 6 of the ECHR concerning a fair trial. None of them has expressly stated that the protection against self-incrimination applies to legal persons. I will start off by looking at the case law regarding this provision.

(29) In the Fortum Oil and Gaz Oy versus Finland case, the claimant, a limited company, alleged that the legal proceedings in the highest administrative tribunal contravened Article 6. The reason for this was that the company had not received documents relating to accusations that it had abused its market position. The European Court of Human Rights had no doubt that the company had the position of a party that was a "victim", see Article 34 of the ECHR. The case was accepted for review on 12 November 2002 and this decision stated the following, i.a.:

> **"The Court has already assumed that Article 6 applies to legal persons in the same way as it does to individuals and that a company may be regarded as having been 'charged with a criminal offence', within the autonomous meaning of that expression for the purposes of Article 6".**

(30) Here it is stipulated as a general rule that natural and legal persons are afforded the same protection by Article 6, an issue that was not disputed in the case. However, this case concerned the principle of the right to be heard, not self-incrimination, and the quoted statement was part of the grounds for the ruling that the applicant's submissions – concerning the right to a review by a court pursuant to Article 2 of the seventh additional protocol – were obviously untenable and therefore had to be dismissed.

(31) In the Västberga Taxi Aktiebolag and Vulic versus Sweden case, the applicants were a limited company and its director. Both had been told to pay a tax penalty which was covered by the concept of a "criminal charge" in Article 6. In a judgment dated 21 May 2003, the European Court of Human Rights stated that the national procedure infringed the right to "access to court" and to a trial within a reasonable period of time. On the other hand, a legal presumption in the Swedish Tax Act did not contravene the presumption of innocence, since it did not impose an unreasonable burden of proof on the taxpayers.

(32) In this case too, it was not disputed that the company could invoke Article 6. It is also of interest that the presumption of innocence stated in Article 6, no. 2 was regarded, in accordance with case law, as part of the right to a fair trial stated in no. 1, see paragraph 108 of the judgment and the references made therein. All three grounds for the application were thus covered by Article 6, no. 1 – the same provision that the self-incrimination principle is anchored in.

(33) Therefore, according to Convention case law, Article 6, no. 1 at least applies as a starting point for legal persons too. There are no grounds for stating that the protection against self-incrimination is in a special position. The case law regarding this provision also provides no grounds for distinguishing between home-based and other enterprises.

(34) As an argument in favour of this distinction, the Court of Appeal referred, as previously mentioned, to Article 8, which states that everyone has the right to respect for his/her "home". Supported by the French text ("domicile"), the concept has been interpreted in a wider sense, so that not only private homes are covered. In the Chappell versus UK case, Article 8 was applied to

searches of a video distributors' home, which was also the company's business address, see the judgment dated 30 March 1989, paragraphs 26 and 63. In Niemietz versus Germany too, a case which concerned a seizure at a lawyer's office, the Court stated that there is no clear boundary between a home and an office address. Commercial operations may take place based in the home while private operations may take place at office addresses, see the judgment dated 16 December 1992, paragraph 30.

(35) A different approach was chosen in the European Court of Human Rights' judgment dated 16 July 2002 regarding the Société Colas Est et al versus France case, which concerned the examination and seizure of several thousand documents in 56 companies. The court stressed that these were legal persons, referred to the Chappell and Niemietz judgments and then stated in paragraph 41:

> **"Building on its dynamic interpretation of the Convention, the Court considers that the time has come to hold that in certain circumstances the rights guaranteed by Article 8 of the Convention may be construed as including the right to respect for a company's registered office, branches or other business premises."**

(36) The European Court of Human Rights thus departed from the view that the link between the home and working life was the basis for enterprises being able to invoke Article 8. The fact that the provision is under certain circumstances applicable to a legal person's premises was upheld in later case law, see the judgment dated 16 January 2008 in the Wieser and Bicos Beteiligungen GmbH versus Austria case concerning a search of premises and seizure. The court did not assign any importance to the fact that one of the applicants was a lawyer while the other was a legal person, see paragraphs 44-45.

(37) On this basis, it can be ascertained that the Court of Appeal's distinction between home-based and other companies is not supported by either Article 6 or Article 8.

(38) In the further assessment pursuant to Article 6, it is natural to look at the considerations which the protection against self-incrimination is to safeguard. In a Grand Chamber judgment dated 17 December 1996 in the Saunders versus the UK case, paragraph 68, the Court has described these as follows:

> **"The Court recalls that, although not specifically mentioned in Article 6 of the Convention, the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. Their rationale lies, inter alia, in the protection of the accused against improper compulsion by the authorities thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6 … . The right not to incriminate oneself, in particular, presupposes that the prosecution in a criminal case seek to prove their case against the accused without resort to evidence obtained through methods of coercion or oppression in defiance of the will of the accused. In this sense the right is closely linked to the presumption of innocence contained in Article 6 para. 2 of the Convention."**

(39) Later case law has upheld this wording, see the judgment dated 1 June 2010 in the Gäfgen versus German case, paragraph 168, with references.

(40) In the quoted paragraph taken from the Saunders case, the European Court of Human Rights points out that the right to remain silent and right not to incriminate oneself lie within the core area of the concept of a fair trial stipulated in Article 6, and that these rights are intended to avoid a miscarriage of justice and to safeguard the considerations that the provision is more generally intended to safeguard. In addition, the Court points out the close link with the presumption of innocence stipulated in Article 6, no. 2. This rule is – as mentioned in my reference to the Västberga case – applicable to enterprises. In my view, these general due process considerations are a strong argument in favour of legal persons also being able to invoke the protection against self-incrimination when they risk a corporate penalty. A conviction may have radical consequences for them. They should therefore also be protected against self-incrimination.

(41) The European Court of Human Rights also refers to the fact that these considerations are based, i.a., on a desire to protect the accused from unacceptable force, and that the protection against self-incrimination particularly presumes that the prosecuting authority cannot fulfil its burden of proof by relying on evidence that has been obtained by coercion or oppression in defiance of the will of the accused. Since a company as such has no will, this wording may indicate that the protection is aimed at natural, not legal, persons. I cannot see that this can be crucial.

(42) In the first place, as previously mentioned, general due process considerations indicate that legal persons are also protected. Secondly, it will in practice always be individual persons who make decisions and act on behalf of the company. It can be alleged that the coercion which the company's representatives are subject to when a company is the object of a criminal prosecution is significantly different to the coercion that a natural person is subject to when the criminal prosecution relates to him/her personally. However, even if the punishment which applies to the company may affect the company's representatives less, the issue is in my view more a question of a difference in degree than a fundamental difference which can provide grounds for legal persons not being covered by the protection against self-incrimination. The company's representatives may in many cases be in a situation in which there is no choice that makes it natural to identify them with the enterprise. One of the considerations behind corporate penalties is exactly to make the company's management act with greater care, see Proposition to the Odelsting (Bill) no. 27 (1990-91), page 6.

(43) The European Court of Justice has also dealt with cases concerning self-incrimination. In a judgment dated 18 October 1989 in case 374/87 Orkem versus the Commission, the ECHR was invoked but was only discussed briefly. Thereafter the following was stated:

> **"34. Accordingly, whilst the Commission is entitled, in order to preserve the useful effect of Article 11 (2) and (5) of Regulation No 17, to compel an undertaking to provide all necessary information concerning such facts as may be known to it and to disclose to it, if necessary, such documents relating thereto as are in its possession, even if the latter may be used to establish, against it or another undertaking, the existence of anticompetitive conduct, it may not, by means of a decision calling for information, undermine the rights of defence of the undertaking concerned.**
>
> **35. Thus, the Commission may not compel an undertaking to provide it with answers which might involve an admission on its part of the existence of an infringement which it is incumbent upon the Commission to prove."**

(44) The wording of paragraph 35 is repeated in a judgment dated 25 January 2007 in case C-407/04 P Dalmine SpA versus the Commission.

(45) In these two cases, which relate to competition law, the protection against self-incrimination is anchored in the principle of the right to be heard, which is a fundamental Community law right. It is also limited to an order to provide information which entails an admission of the fact that a criminal act exists. The protection afforded by the ECHR is thus more far-reaching.

(46) In a judgment dated 15 October 2002 in the case C-238/99 P Limburgse Vinyl Maatschappij et al versus the Commission, the European Court of Justice further discussed the protection against self-incrimination in light of the European Court of Human Rights case law. The judgment presumes that Article 6 covers legal persons, but this issue was not raised as a problem.

(47) The European Court of Justice has thus found that the principle of self-incrimination may be invoked by legal persons, and has presumed that Article 6 of the ECHR will be applicable. In my opinion, this is to be assigned considerable weight.

(48) Case law from the supreme courts of the USA, Canada, Australia and Germany has been submitted to the Supreme Court of Norway. The conclusion of this case law is that the protection against self-incrimination does not apply to enterprises, especially because this protection aims to prevent force from being used against individual persons in defiance of their will - refer to what I have stated about this above. These discussions are anchored in national constitutions and legislation. They do not contain any discussion of Article 6 of the ECHR and the European Court of Human Rights case law of which I have given an account, and are thus of lesser importance. The most comprehensive of these decisions, the Environment Protection Authority versus Caltex Refining Co Pty Ltd in 1993, was handed down by the Australian Supreme Court with dissenting votes, and shows that the prevailing law varies from country to country. Among other things, it is stated that English courts have found that enterprises are protected against self-incrimination.

(49) I otherwise wish to mention that, in connection with revisions of Norwegian laws, it has been assumed that the ECHR provides legal persons with protection against self-incrimination. In Official Norwegian Report (NOU) 2003:15, page 191, the Sanctions Committee's view was that this would at least to some extent be the situation. The Committee proposed that a self-incrimination provision should be included in the Public Administration Act. This proposal, which included legal persons, has not been followed up.

(50) In Official Norwegian Report (NOU) 2003:12, page 186, the Competition Legislation Committee's starting point was that all the rights pursuant to Article 6 basically also apply to enterprises but that there was some doubt about the protection against self-incrimination due to the link that the European Court of Human Rights has pointed out between this protection and the respect for the person's will, see that stated above. The majority of the Committee proposed a statutory provision that would provide protection based on the European Court of Justice case law, see that stated above, while the minority disagreed with such a link. In Proposition to the Odelsting (Bill) no. 6 (2003-2004), page 146, the Ministry of Labour and Government Administration agreed with the minority's view and proposed that the protection when enforcing the Norwegian provisions should be linked to the ECHR and the European Court of Human Rights. Although the scope of the protection against self-incrimination for enterprises was uncertain, it was in the Ministry's view likely that a certain level of protection does exist.

(51) In legal theory, the most common view is that Article 6, no. 1 applies generally – see, for example, Emberland's book entitled The Human Rights of Companies, 2006, page 110. Two Norwegian presentations discuss self-incrimination in particular. Ørnulf Øyen - *Vernet mot selvinkriminering i straffeprosessen* (The Protection against Self-Incrimination in Criminal Procedure), 2010 - is in favour of the provision not being applicable to legal persons, see especially the summary on page 369. Frode Elgesem and Henning Rosenlund Wahlen - *Vernet mot selvinkriminering og forklaringsplikter overfor forvaltningen* (The Protection against Self-Incrimination and Obligation to Give Evidence to the Administration), which is included in *Tidsskrift for forretningsjus* (a business law magazine), 2010, page 59 et seq – come to the opposite conclusion.

(52) When I am now to summarise the state of the law following that stated above, the starting point must be that Article 6 applies not only to individual persons but also to legal persons unless there are grounds for making an exception. There are no such grounds here. On the contrary, several statements by the European Court of Human Rights indicate that enterprises are covered by the protection against self-incrimination. And as previously mentioned, the general due process considerations on which Article 6 rests also indicate this.

(53) It is true that there are no express decisions by the Court stipulating that the protection against self-incrimination also applies to legal persons. The Supreme Court has stipulated that it is primarily the European Court of Human Rights which is to develop the Convention, see Rt 2000, page 996, on pages 1007-1008, and Rt 2005, page 833, paragraph 45 with references. However, our case concerns the interpretation of the Convention's wording in the light of the objective and the European Court of Human Rights' case law. The interpretation result that I have arrived at appears in my view to be reasonably clear having regard to the overall source of law picture, and is not a result of a dynamic interpretation.

(54) My conclusion is thus that legal persons may invoke the protection against self-incrimination pursuant to the ECHR. The Court of Appeal's decision must therefore be set aside due to an incorrect interpretation of the law.

(55) *The material scope of the protection against self-incrimination*

(56) Out of consideration for the further hearing of this case, I add that the question of whether or not Article 6 is applicable, which I have looked at so far, cannot be viewed independently of the scope of the material protection against incrimination, i.e. whether or not the provision has been violated. In the last assessment, it may be of importance whether it is an enterprise or an individual person that is the rights holder.

(57) I mention here that it is established law that the scope of the protection pursuant to Article 6 depends on the specific circumstances. In the European Court of Human Rights judgment of 29 June 2007 in the O'Halloran and Francis versus the UK case, the following is stated in paragraph 53:

> **"While the right to a fair trial under Article 6 is an unqualified right, what constitutes a fair trial cannot be the subject of a single unvarying rule but must depend on the circumstances of the particular case."**

(58) This main view is also applied to the protection against self-incrimination. In a judgment dated 11 July 2006 in the Jalloh versus Germany case, the following is stated in paragraph 117:

> **"In order to determine whether the applicant's right not to incriminate himself has been violated, the Court will have regard, in turn, to the following factors: the nature and degree of compulsion used to obtain the evidence; the weight of the public interest in the investigation and punishment of the offence in issue; the existence of any relevant safeguards in the procedure; and the use to which any material so obtained is put."**

(59) What is also illustrative is a comment in the Colas Est case, which I have already mentioned. When considering what could be regarded as necessary in a democratic society according to Article 8, no. 2, the Court indicated that it could not be ruled out that a state may have a wider freedom to act when it comes to a legal person's business premises than it would otherwise have.

(60) Our case is not about forcing any statement from the 15 companies, it is about an order that they are to hand over accounting material. These documents – the trial balance, specified general ledger and complete creditors'/debtors' accounts – are real evidence that exist irrespective of the companies' will. It is clear that the threshold for the protection against self-incrimination affecting any such forced evidence or the use of such evidence is relatively high. I refer to Rt 2007, page 932, paragraphs 21, 25 and 34, and to the decision of the Appeals Selection Committee of the Supreme Court dated 1 April 2011 (HR-2011-696-U), paragraph 35.

(61) The Court has otherwise looked at the extent of the information that is being asked for. In the aforementioned judgment in the O'Halloran and Francis versus the UK case, emphasis was placed on the fact that this was not a wide-ranging petition to disclose unspecified documents. I refer to paragraph 58 of the judgment, which contains an overview of the case law.

(62) *Are the companies "charged" in accordance with Article 6 no. 1?*

(63) Since the Court of Appeal determined the case on the basis that legal persons are unable to invoke the protection against self-incrimination, the court did not decide on the basic condition that there must be a "criminal charge" pursuant to Article 6. In light of the result I have arrived at, the Court of Appeal will have to consider this condition in a new hearing.

(64) The companies are not charged, but they allege that they risk being held liable as accessories or possibly being held liable pursuant to chapter 6 of the Norwegian Tax Assessment Act. The reason given for this is that the prosecuting authority is alleging that Berge Gerdt Larsen's foreign companies had various forms of community of interest with the Norwegian companies and has not wanted to rule out that the information contained in the accounting material may be used for purposes other than those stated. It is on this basis that they are invoking the protection against self-incrimination.

(65) The European Court of Human Rights' judgment of 8 April 2004 in the Weh versus Austria case provides an overview of two main groups of cases in which the question of an infringement of the protection against self-incrimination has arisen. Paragraph 42 mentions the use of force with the aim of obtaining information that may be incriminating in "anticipated criminal proceedings". Whether or not such a view is applicable to our case will i.a. have to be considered in light of paragraphs 52-56 of the Weh judgment.

(66) *The procedure*

(67) The Court of Appeal dismissed the appeal against the District Court's ruling apart from in relation to Time Critical Petroleum Resources AS. The reason for this was that the petition for the disclosure of documents by this company related to accounting material dating from 1 January 2007 to 31 December 2008, while the charge dated 12 December 2006 related to the 1996-2002 and 2004-2005 financial years. The petition thus related to documents from a period that was entirely outside the periods stated in the charge. Based on this, the Court of Appeal decided that the prosecuting authority had not proven, on the balance of probabilities, a reasonable possibility that the documents might have evidential value. The petition to disclose documents was dismissed.

(68) The companies have alleged that a procedural error exists since the petitions regarding several other companies also related to periods that are entirely outside the periods stated in the charge. I agree with this. Based on the Court of Appeal's brief reasons for its decision, it is impossible to see why the petition was not dismissed in relation to these companies too. The Court of Appeal order must therefore be set aside for these companies based on this ground too.

(69) The companies have alleged that the Court of Appeal did not take the principle of the right to be heard into account, and that this was another procedural error. The allegation that there is a community of interest between the various companies was based on information that was available to the police but was not made known to the companies. It is alleged that this made it impossible to refute the police allegations.

(70) To this I wish to comment that the Court of Appeal agreed with the District Court's assessment of the link between the companies and the foreign companies that were mentioned in the charge against Larsen – with the exception of Time Critical Petroleum Resources AS. However, the District Court's discussion was brief. It referred to the fact that the foreign companies referred to in the charge "have had, or may have extensive and long-lasting outstanding financial accounts with the Norwegian companies", and to the prosecuting authority's report in the petition dated 21 January 2011, which I have previously quoted. The only factual basis in the petition was an ownership chart supplied by the "service provider" for several of the foreign companies. This is a one-page sketch that shows a number of companies and the relationship between them, and also states their owners.

(71) The prosecuting authority has pointed out that there are more than 100,000 documents in the criminal case against Larsen. Even if not all were of importance to the question of a disclosure order, additional written reports were therefore not very expedient. It had to be up to the Court of Appeal to give notice of an oral hearing. However, the court ruled on the case based on the existing evidence.

(72) I understand that it was not relevant to examine an extremely extensive volume of documents. However, the Court of Appeal could, for example, have asked for a brief written report or have given notice of oral hearings. The procedure which was chosen meant in reality that neither the court nor the companies had any basis other than the chart to relate to. The prosecuting authority's description of the community of interest between the companies remained unchallenged, without any opportunity to check it. In my view, this was an insufficient basis on

which to rule on the petition for a disclosure order. For that reason too, the Court of Appeal's ruling must be set aside.

(73) Lastly, the companies have alleged that the Court of Appeal committed a procedural error by not considering section 123 of the Criminal Procedure Act. According to this provision, a witness may refuse to answer questions if the answer may subject the witness to a penalty. The companies allege that this also applies to a corporate penalty, see sections 48a and 48b of the Penal Code.

(74) According to section 210 of the Criminal Procedure Act, the court may order the possessor to surrender objects that are deemed to be significant as evidence "if he is bound to testify in the case". This proviso involves a reference to the rules concerning the duty to give evidence in chapter 10 of the Act, including section 123. The Court of Appeal referred to sections 203 and 204 concerning seizures in its ruling, but not to section 123.

(75) In the first place, I would comment that section 123 concerning witnesses is a reflection of the protection against self-incrimination in Norwegian law. For a suspect or accused, corresponding protection is provided by sections 90, 230 and 232, as well as by section 167 of the Penal Code.

(76) Case law has not decided whether enterprises are covered by section 123. The wording provides no guidance. The preparatory works to Act no. 66 of 20 July 1991, which added the rules on corporate penalties to the Penal Code, do not discuss the issue. In Official Norwegian Report (NOU) 1989:11, the Penal Code Commission stated the following on page 30:

> **"Since it is the enterprise itself that is to be regarded as the accused, the employees and officers of the enterprise have a duty to give evidence as witnesses in accordance with the normal rules of the Criminal Procedure Act. However, the witness may refuse to answer a question if the answer may expose the witness to a penalty or the loss of civil esteem, see section 123, subsection one of the Criminal Procedure Act. Nor does the duty to give evidence apply if the answer would disclose business or industrial secrets, see section 124, subsection one of the Criminal Procedure Act. However, according to subsection two of this provision, the Court may nevertheless order the witness to give evidence. It should be left up to the courts to determine the cases when this may be relevant."**

(77) On page 40 of Proposition to the Odelsting (Bill) no. 27 (1990-91), the Ministry of Justice repeated the commission's views and stated that no need had been proven to issue special rules concerning the duty to give evidence in connection with corporate liability.

(78) The preparatory works thus seem to assume that it is the employees who may invoke section 123. However, it is not expressly stated that enterprises are not covered by this provision, and the issue was not the subject of any discussion.

(79) In connection with the statutory amendment regarding corporate penalties, a new section 84a was added to the Criminal Procedure Act. This provision stipulates that the enterprise's rights as a party to the case shall be accorded to the person appointed by the enterprise. Neither the wording of section 84a nor the preparatory works relating to this section provide grounds for concluding that an enterprise may invoke section 123.

(80) The situation is thus that, according to Norwegian criminal procedure, it is unclear how section 123 is to be interpreted. It is thus natural to interpret the provision in the same way as Article 6, no. 1 of the ECHR concerning self-incrimination, i.e. that enterprises are covered by this protection. The Court of Appeal must decide on the specific application of section 123 in a new hearing.

(81) The Court of Appeal order must thus be set aside due to incorrect interpretation of the law and procedural error.

(82) The enterprises have asked to be awarded the costs relating to the Court of Appeal and Supreme Court, according to an analogy with the Disputes Act's rules, see Rt 2010, page 1381, paragraph 66, with further references. They have won the case and should be awarded costs according to the main rule stipulated in section 20-2 of the Disputes Act. The enterprises have submitted a statement of costs relating to the Supreme Court, according to which the amount of NOK 133,500 excluding value added tax is claimed. This claim is allowed. The amount of NOK 24,000 is claimed for the Court of Appeal. However, no statement of costs has been submitted and, since the Court of Appeal ruled on this case without any oral hearing, the highest amount that can be awarded is NOK 15,000, see section 20-5, subsection four of the Disputes Act.

(83) I vote in favour of this

ORDER:

1. The Court of Appeal order is to be set aside.

2. As costs relating to the Court of Appeal and Supreme Court, the Norwegian state, represented by Hordaland Police District, is to pay Petrolia ASA, Larsen Oil & Gas AS, Increased Oil Recovery AS, BLH AS, BUS AS – Bergen Underwater Services, Bernh Larsen Holding AS, Independent Oil & Resources ASA, Norwegian Oil Company AS, Net AS, Petrolia Rigs AS, Petrolia Drilling II AS, Petrolia Services AS, DNO International ASA and Independent Oil Tools AS jointly the amount of NOK 148,500 – onehundredandfortyeightthousandfivehundred – within two – 2 – weeks of the pronouncement of this court order.

(84) Judge **Bull**: I am on the whole and with regard to the result in agreement with the first-voting judge.

(85) Judge **Normann**: Likewise.

(86) Judge **Utgård**: Likewise.

(87) Chief Justice **Schei**: Likewise.

(88) Following the voting, the Supreme Court issued the following

ORDER :

1. The Court of Appeal order is to be set aside.

2. As costs relating to the Court of Appeal and Supreme Court, the Norwegian state, represented by Hordaland Police District, is to pay Petrolia ASA, Larsen Oil & Gas AS, Increased Oil Recovery AS, BLH AS, BUS AS – Bergen Underwater Services, Bernh Larsen Holding AS, Independent Oil & Resources ASA, Norwegian Oil Company AS, Net AS, Petrolia Rigs AS, Petrolia Drilling II AS, Petrolia Services AS, DNO International ASA and Independent Oil Tools AS jointly the amount of NOK 148,500 – onehundredandfortyeightthousandfivehundred – within two – 2 – weeks of the pronouncement of this court order.

True transcript certified: