



THE SUPREME COURT OF NORWAY

On 17 January 2018, the Supreme Court gave judgment in

HR-2018-110-A, (case no. 2017/1490), civil case, appeal against judgment

Addcon Nordic AS

(Counsel Håkon H. Bleken)

v.

Halfdan L. Solberg AS

(Counsel Thomas Rieber-Mohn)

V O T I N G :

- (1) Justice **Kallerud**: The case concerns possible trademark infringement under the Trademarks Act section 4.
- (2) Addcon Nordic AS (Addcon) manufactures the silage additive Ensilox, a form of preservative for waste and by-products from the fishing industry. The additive consists of formic acid, water and the antioxidant ethoxyquin. "ENSILOX" – written in capitals – is a registered trademark, see the Trademarks Act section 3. Addcon is the trademark proprietor.
- (3) Halfdan L. Solberg AS (Solberg) distributed Ensilox to the fishing industry, among others. In 2013, Solberg terminated the agreement with Addcon and switched suppliers to Helm Skandinavien AS (Helm). The name of Helm's silage additive was Helm Aqua+. The two silage additives consist of the same ingredients and are equal for all practical purposes.
- (4) In February 2014, Addcon learned that Solberg was selling a silage additive labelled "ENSILOX", but with a notice presenting Helm as the manufacturer. In a letter to Solberg of 14 March 2014, Addcon demanded that all use of the trademark Ensilox cease and gave notice of a claim for damages. Addcon also wanted to know how much of the mislabelled product Solberg had sold.

- (5) Solberg corrected the mislabelling immediately, but disputed liability since the use of the trademark Ensilox was an accident resulting from the switch of suppliers, and not a trademark infringement.
- (6) On 2 June 2014, Addcon petitioned the court to instruct Solberg to provide information under the Dispute Act section 28 A-1. Oslo District Court dismissed the petition by an order of 7 November 2014 on the grounds that Solberg had already provided the information it was obliged to provide.
- (7) The deliveries in question concern approximately 368 tonnes of silage additive supplied by Helm and redistributed by Solberg during the period August 2013 to February 2014.
- (8) Around 138 tonnes of the total volume were supplied to the customers directly from a tanker. On the delivery notes, the product was correctly stated to be Helm Aqua+, but on Solberg's invoices, Ensilox was presented as the product sold.
- (9) The remaining 230 tonnes were delivered in special containers and cans that Solberg had labelled "ENSILOX" in large capitals, despite them being filled with Helm Aqua+. A hazard symbol was placed below the trademark together with a description of the hazard. There was also a notice describing the risks and necessary precautions in connection with use. Helm was correctly presented as the manufacturer and Solberg as the distributor. No delivery notes accompanied these deliveries. Also on this occasion, Ensilox was incorrectly presented as the product delivered on Solberg's invoices.
- (10) The court of appeal has assumed that it was an unintended mistake only to change the name of the manufacturer, and not that of the product, in connection with the switch of suppliers, and that Solberg had forgotten to update the invoicing software.
- (11) At the time of the switch of suppliers, Solberg was operating with a fixed circle of customers, all of which were notified of the transition from Addcon's to Helm's product. The court of appeal has assumed that the customers were also end users.
- (12) On 27 April 2015, Addcon brought an action against Solberg demanding compensation and damages for unlawful use of the trademark Ensilox.
- (13) Oslo District Court gave judgment on 5 February 2016 concluding as follows:
 - "1. Judgment is given in favour of Halfdan L. Solberg AS.**
 - 2. Addcon Nordic AS is to pay costs of NOK 353 028 – threehundredandfiftythreethousandandtwentyeight – to Halfdan L. Solberg AS within 2 – two – weeks of service of this judgment."**
- (14) The district court emphasised that the mislabelling was due to a misunderstanding, that the products were equal and that the customers had been notified of the switch of suppliers. The court also found that Solberg's use of the word Ensilox only served to identify the type of product and did not infringe Addcon's trademark.
- (15) Addon appealed to Borgarting Court of Appeal, which gave judgment on 2 July 2017 concluding as follows:

"1. The appeal is dismissed.

2. Addcon Nordic AS is to pay costs of NOK 383 336 – threehundredandeightythreethousandthreehundredandthirtysix – to Halfdan L. Solberg AS within two weeks of service of this judgment."

- (16) The court of appeal emphasised many of the same aspects as the district court.
- (17) Addcon has brought the case before the Supreme Court for a decision on the application of the law.
- (18) In all material respects, the case remains the same as before the court of appeal.
- (19) The appellant – *Addcon Nordic AS* – mainly contends:
- (20) Solberg has affixed Addcon's trademark to a competing and nearly identical product. Solberg's use of the trademark is in the core of the protection afforded against unlawful use within the meaning of the Trademarks Act.
- (21) All terms of use in the Trademarks Act section 4 have been fulfilled, see subsection 1 a, considered against subsection 3 a, b and d. In addition, case law of the Court of Justice of the European Union (the EU Court of Justice) clearly suggests that Solberg has infringed Addcon's trademark right.
- (22) Although the mislabelling took place after the sale had been completed, infringement has still been committed. One of the effects of Solberg's conduct is that the trademark's function as a guarantee of origin has been damaged – the product delivered by Solberg did not come from Addcon as the label indicated. Despite Solberg having notified its customers, it is unlikely that all of them knew. And although the buyers of a product are end users, redistribution is still a possibility, for instance in the event of excess or bankruptcy proceedings.
- (23) The court of appeal has wrongly emphasised apologetic and subjective arguments from Solberg, which are only relevant in the estimation of compensation and damages.
- (24) Solberg's unlawful use of the trademark gives Addcon a right to compensation and damages under the Trademarks Act section 58. Solberg has acted with gross negligence.
- (25) Addcon Nordic AS has submitted this prayer for relief:

"Principally:

- 1. Halfdan L. Solberg is to pay compensation and damages as estimated by the court to Addcon Nordic AS.**
- 2. Addcon Nordic AS is to receive costs before the district court, the court of appeal and the Supreme Court.**

Alternatively:

- 1. The judgment of the court of appeal is to be set aside.**

2. Addcon Nordic AS is to receive costs in the Supreme Court.

- (26) The respondent – *Halfdan L. Solberg* – mainly contends:
- (27) The judgment of the court of appeal is correct, both in result and in the way in which it was reached.
- (28) Solberg's use of the trademark is not comprised by the prohibition in the Trademark Act section 4, although such use is included in the wording. The crucial point is that Solberg did not use the trademark in the course of trade. Although the EU Court of Justice has not directly expressed that the functions of the trademark are meant to distinguish products from each other in the course of trade, its case law suggests that this is the case. The EU Court of Justice considers the functions of the trademark right, and after a sale has been completed, the proprietor's interests as the proprietor of the mark are not affected.
- (29) Solberg's use was unlikely to have an adverse effect on the trademark's functions. Addcon's legitimate interests as the trademark proprietor were thus not affected. The use of the trademark took place towards Solberg's fixed circle of customers that had been notified of the switch of suppliers. Since these customers were also end users, there was no risk of confusion in a secondary market.
- (30) It must also be emphasised that the labels were affixed to comply with regulations for safe labelling of chemicals, and not to promote a trademark.
- (31) In any case, the printing of Ensilox on the invoices cannot in itself constitute trademark infringement, as it did not affect any of the trademark's functions.
- (32) Addcon's trademark right has not been infringed, and sanctions have no basis in the law. The use is excusable at any rate, and there is no basis for imposing a licence fee in a situation like the one at hand. The claim concerns unnecessary legal fees.
- (33) Halfdan L. Solberg AS has submitted this prayer for relief:
1. **The appeal is to be dismissed.**
 2. **Halfdan L. Solberg AS is to be awarded costs in the Supreme Court.**
- (34) *I have concluded* that the appeal must succeed:
- (35) Being the proprietor of the registered trademark Ensilox, Addcon Nordic AS enjoys protection under the *Trademarks Act section 4*, reading as follows:
- "A trademark right has the effect that no one, without the consent of the proprietor of the trademark right (the trademark proprietor), may use in an industrial or commercial undertaking:**
- a) **any sign which is identical with the trademark for goods or services for which the trademark is protected**
 - b) **any sign which is identical with or similar to the trademark for identical or similar goods or services if there exists a likelihood of confusion, such as if the use of the sign may give the impression that there is a link between the sign and the trademark.**

For a trademark which is well known in Norway, the trademark right implies that no one, without the consent of the trademark proprietor, may use a sign that is identical with or similar to the trademark for similar or any other goods or services, if the use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or repute (goodwill) of the well-known trademark.

Use is considered to include the following:

- a) affixing the trademark to goods or to the packaging thereof
- b) offering goods for sale or otherwise putting them on the market, stocking or delivering them under the sign, or offering or supplying services thereunder
- c) importing or exporting goods under the trademark
- d) using the sign on business documents and in advertising.

Verbal use of the sign is also considered as use."

- (36) Addcon asserts protection under subsection 1 a. This provision, as opposed to subsection 1 b, does not concern the risk of confusion. When the signs, as in our case, are identical and linked with the same product – creating so-called double identity – the protection under subsection 1 a is in principle absolute. But as I will revert to shortly, the case law of the EU Court of Justice suggests that the area of application is limited.
- (37) Section 4 subsection 3 provides examples of what is regarded as use. In addition to affixing the trademark on products or their packaging (subsection 3 a), I note that "stocking or delivering [products] under the sign" (subsection 3 b) and "using the sign on business documents" (subsection 3 d) are also regarded as use.
- (38) The provision in the Trademarks Act section 4 is part of the implementation of the EU Trademark Directive, see Proposition to the Odelsting no. 98 (2008-2009) pages 8 et seq. and page 35. Several trademark directives have been issued by the EU, one replacing the other, but for the issues in this case, there are no material differences between them. Like the parties, I base myself on the *trademark directive of 22 October 2008* (2008/95/EU) (the Directive). The Trademarks Act section 4 reproduces article 5 of the Directive. The parts of article 5 (1) that are most relevant to the case at hand, read as follows:
- "1. The registered trade mark shall confer on the proprietor exclusive rights therein. The proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade:**
- (a) any sign which is identical with the trade mark in relation to goods or services which are identical with those for which the trade mark is registered;"**

- (39) The following is set forth in article 5 (3):

"The following, inter alia, may be prohibited under paragraphs 1 and 2:

- (a) affixing the sign to the goods or to the packaging thereof;**
- (b) offering the goods, or putting them on the market or stocking them for these purposes under that sign, or offering or supplying services thereunder;**

...

(d) using the sign on business papers and in advertising."

(40) In the Directive's preamble, the following is set forth in para 11:

"The protection afforded by the registered trade mark, the function of which is in particular to guarantee the trade mark as an indication of origin, should be absolute in the case of identity between the mark and the sign and the goods or services."

(41) According to both the wording and this general statement, it might appear as if the protection is absolute in the cases mentioned in the Trademarks Act section 4 subsection 1 a and in the Directive's article 5 (1) (a). However, a significant limitation of the area of application has been established through the case law of the EU Court of Justice.

(42) Before I look further into this, I mention that the significance of the Trademarks Act's implementation the Directive and the impact of the case law of the EU Court of Justice have been thoroughly dealt with in more recent Supreme Court judgments, see HR-2016-1993-A para 42 (*Pangea*) and HR-2016-2239-A (*Route 66*). In para 31 of *Route 66*, it is emphasised that the relevant provision in the Trademarks Act was worded in accordance with the EU's previous and current directive, setting out the following:

"... the Act must thus be understood in accordance with the case law of the EU Court of Justice as regards these directives. It implies that the rulings of this Court will be dominant in the interpretation of the Trademarks Act."

(43) As the situation is the same for the interpretation of the Trademarks Act section 4, it is necessary to examine certain judgments by the EU Court of Justice.

(44) I will first address the *EU Court of Justice's general interpretation of the Directive article 5*.

(45) Already in its ruling of 23 May 1978 in C-102/77 *Hoffmann – La Roche*, the EU Court of Justice held that the provisions in the EEC Treaty on free movement of goods only can be limited "... to the extent to which exceptions are justified for the purpose of safeguarding the rights which constitute the specific subject-matter of that property", see para 6 of the ruling. Here, trademark right is comprised by the term "property".

(46) Against this background, it is emphasised in para 7 that when deciding whether the trademark right prevents a certain conduct by a third party, the trademark's "essential function" must be considered:

"... to guarantee the identity of the origin of the trade-marked product to the consumer or ultimate user, by enabling him without any possibility of confusion to distinguish that product from products which have another origin. This guarantee of origin means that the consumer or ultimate user can be certain that a trade-marked product which is sold to him has not been subject at a previous stage of marketing to interference by a third person, without the authorization of the proprietor of the trade-mark, such as to affect the original condition of the product."

(47) As demonstrated, the EU Court of Justice emphasises the trademark's function as a guarantee of origin, and that this function is to make the consumer, or the ultimate user, capable of distinguishing the product from other products "without any possibility of confusion". Hence, the proprietor is protected within the function of the trademark even if it entails restrictions to the free movement of goods.

(48) Similar phrasing is used in the ruling of 12 November 2002 in C-206/01 *Arsenal*, see for instance para 51. In para 54, the opposite – what is *not* protected – is worded as follows:

"The proprietor may not prohibit the use of a sign identical to the trade mark for goods identical to those for which the mark is registered if that use cannot affect his own interests as proprietor of the mark, having regard to its functions."

(49) Hence, the proprietor's interests are only protected under the Trademarks Act section 4 if the use affects the proprietor's interests in the trademark's function.

(50) A trademark may have several functions, which is addressed in subsequent rulings by the EU Court of Justice. I will confine myself to referring to the summary in the ruling of 23 March 2010 in C-236/08 to C-238/08 *Google* paras 76 and 77.

"It follows from that case-law [*Arsenal*, *Adam Opel* and *L'Oréal*] that the proprietor of the mark cannot oppose the use of a sign identical with the mark if that use is not liable to cause detriment to any of the functions of that mark (*Arsenal Football Club*, paragraph 54, and *L'Oréal and Others*, paragraph 60).

Those functions include not only the essential function of the trade mark, which is to guarantee to consumers the origin of the goods or services ('the function of indicating origin'), but also its other functions, in particular that of guaranteeing the quality of the goods or services in question and those of communication, investment or advertising (*L'Oréal and Others*, paragraph 58)."

(51) In addition to the guarantee of origin being an "essential function", the function as a guarantee of quality is emphasised here; that the branded product has the quality the manufacturer has given to it. Other functions are also mentioned.

(52) An example where the trademark right does not afford protection because the use has no adverse effect on the trademark's function is the EU Court of Justice's judgment 14 May 2002 in C-2/00 *Hölterhoff*. Here, the trademark had been used, in direct contact between the seller and the buyer, solely to describe the qualities of the product.

(53) Another example is the judgment 25 January 2007 in C-48/05 *Adam Opel*. Here, the EU Court of Justice decided that as long as the relevant public did not perceive the specific use of the trademark – the affixing of "OPEL" on scale models of Opel's vehicle – as an indication of the product coming from the trademark proprietor, or an undertaking economically linked to it, the use would not affect the "essential function" of the trademark, see para 24.

(54) Relevant in Norwegian case law is the Supreme Court judgment Rt-1975-951 (*Fiskå Mølle*). The case concerned a milling plant that had reused paper sacks originally from Felleskjøpet (the Norwegian Agricultural Purchasing and Marketing Co-operation) as packaging for its own grain feed. The sacks had Felleskjøpet's trademark printed on them,

but the mill plant had affixed labels with its own name and a description of the type of grain feed the sacks contained. The judgment emphasises that this was normal business procedure and that the mill plant only delivered according to advance orders from the users. It is particularly interesting that the function of the trademark as a means to distinguish the proprietor's products from other products – the guarantee of origin – is given special attention in the final part of the judgment. It is held that even if the mill plant could be deemed to have used the trademark, the use "... did not make it look like the sacks came from Felleskjøpet".

- (55) I conclude thus far that the Trademarks Act section 4 subsection 1 a – due to the case law of the EU Court of Justice – must be interpreted only to protect the proprietor if the use has an adverse effect on the trademark's functions, such as the guarantee of origin and guarantee of quality. Hence, only the use that may affect the proprietor's interests in the trademark's functions is unlawful. I add that a trademark's functions may indeed overlap, and that a sharp distinction between them is hardly required in our case.
- (56) I will now consider *whether it is a requirement that the trademark's functions in fact have been affected*, or if it is sufficient that the use constitutes a *risk* of the same.
- (57) Here, I return to *Arsenal*, where the issue was the football club Arsenal's trademark registration for "ARSENAL" used on souvenirs. From a stall outside the arena, Matthew Reed sold, among other things, scarves marked with "Arsenal" without this being an official club product. However, on the stall there was a sign stating that the goods were not official Arsenal merchandise.
- (58) After concluding in para 55 that here, as opposed to in *Hölterhoff*, it did not concern a purely descriptive use, the EU Court of Justice states the following in para 56:
- "Having regard to the presentation of the word 'Arsenal' on the goods at issue ... the use of that sign is such as to create the impression that there is a material link in the course of trade between the goods concerned and the trade mark proprietor."**
- (59) In the Court's opinion, this impression of a commercial connection persisted, despite the sign informing the consumers that the goods were not official, see para 57. The same paragraph concludes:
- "... there is a clear possibility in the present case that some consumers, in particular if they come across the goods after they have been sold by Mr Reed and taken away from the stall where the notice appears, may interpret the sign as designating Arsenal FC as the undertaking of origin of the goods."**
- (60) Hence, It was sufficient that there was "a clear possibility" that the guarantee of origin would be affected. In my understanding, this means that it is sufficient that there is a risk that the trademark's functions are affected by the use in question. I also refer to *Google* para 75 where it is emphasised that the protection is limited in cases where a third party's use of the trademark "... affects or is liable to affect the functions of the trademark".
- (61) In my view, the protection under the Trademarks Act section 4 is not only applicable in a *sales situation*.

- (62) The wording in neither section 4 nor article 5 suggests that there is a distinction between before and after a sale. On the contrary, the Norwegian Trademarks Act contains a specific example of use that naturally takes place after a sale, see section 4 subsection 3 b – "delivering ... under the sign". This option is not expressed in the Trademark Directive as concerns goods. There is also no indication in article 5 (3) that a distinction must be made between before and after a sale.
- (63) Also, I find no support in the case law of the EU Court of Justice for holding that post-sale use is not comprised by article 5 (1) (a). It is true that no judgments have been presented specifically concerning a situation where the use has taken place after the product is sold. And – of course – it is reflected in the judgments, and the legal principles set out therein, that such cases often deal with use in a sales situation. But the case law does not suggest that the protection ceases because of the sale. For instance, in *Hoffman-La Roche*, the function of the guarantee of origin towards "the consumer or ultimate user" is emphasised, see para 7 from which I have already quoted. In *Arsenal*, the same is written in para 48 regarding the "consumer or end user". The Court has presumably borne in mind that the goods – through a resale or otherwise – may pass through several links and that one must generally be able to trust the guarantees following from the use of the trademark.
- (64) While it is most practical that the trademark's functions have significance before and during a sale, I cannot see why protection should not be afforded in a post-sale situation if unlawful use also at this stage may affect any of the trademark's functions. For instance, a product that has been labelled with the wrong trademark may turn out to have a defect that, due to the mislabelling, can be linked to the trademark proprietor. Both the guarantee of origin and the guarantee of quality may be affected in such a case.
- (65) The original buyer's knowledge that the use of the trademark does not mean that the goods come from the trademark proprietor is not decisive in this regard. I refer to what I have quoted from *Arsenal* para 57. In addition to the resale case, there may be cases concerning the buyer's bankruptcy, incidental borrowing of goods or goods lost. I remind that in such events, it is sufficient that there is a risk that one of the trademark's functions is affected.
- (66) I will now turn to the *assessment of the case at hand*.
- (67) The appeal concerns only the application of the law. The facts of the case are thus not disputed, and I refer to what I have included from the court of appeal's presentation.
- (68) It is clear that Solberg was not authorised to use Addcon's trademark, and that the use took place in the course of trade. Such use isj also otherwise covered by the wording of the Trademarks Act section 4. Solberg has branded products from Helm with Addcon's trademark Ensilox, see section 4 subsection 1 a, and supplied the products with Addcon's trademark affixed, see section 4 subsection 3 a and b.
- (69) The issue is thus whether Solberg's use of the trademark, nevertheless, was such that it created no risk of affecting the trademark's functions, cf. what I have already said about the interpretation of the Trademarks Act section 4 in the light of the case law of the EU Court of Justice.

- (70) The containers and the cans were, as mentioned, labelled with "ENSILOX". Although there was a notice below stating in small types that the manufacturer was Helm, and not Addcon, it was easy to assume that the content was Ensilox. Hence, the information regarding the content was wrong or, at best, misleading. Because the affixed trademark was not that of the manufacturer, the product's origin was unclear. For instance, the labelling might have implied that it concerned a licence production of Ensilox.
- (71) In my opinion, it must first be established that Solberg's labelling of the packaging created a risk of affecting the trademark's functions, in particular the guarantee of origin and guarantee of quality. Solberg's unlawful use of the trademark made it unclear where the product came from, and the content was not Ensilox, but Helm Aqua+. It must be generally assumed that such use of a third party's trademark creates a risk of infringement. It is also possible that it creates a risk of affecting other functions of the trademark, but I will not elaborate on this.
- (72) In my opinion, the *special circumstances of the case* do not change this starting point.
- (73) Although the goods were delivered to a fixed circle of customers who are normally end users, such mislabelling generally creates a risk of affecting the proprietor's interests in the trademark's functions. And while the intention was not to resell the goods, it cannot be excluded that tradesmen borrow or buy from each other. It is true that the customers had been notified, but no information indicates that all *employees* had been notified and remembered that, despite the Enxilox labels, the product was in fact Helm Aqua+. One may also imagine other situations where Solberg's notification of its customers would not be relevant. The trademark's function as a guarantee of origin thus risked being affected despite Solberg's notification.
- (74) Another argument is that the products were equal, and the customers were indifferent as to whether they received Ensilox or Helm Aqua+. In my opinion, this is also not sufficient to legitimise the use of the trademark. Although the products are equal, one may not affix a third party's trademark on one's own product, not even after the sale has been completed. The *Fiskå Mølle* judgment illustrates this: The mill plant's use of sacks with Felleskjøpet's trademark for deliveries to customers that had pre-ordered the product was accepted partly because the labelling showed that the grain feed in the sacks did not come from Felleskjøpet. In the case at hand, however, the labelling was confusing. The practical impact of this would have materialised if, for instance, the product was flawed.
- (75) Finally, it has been contended that the purpose of the labelling was exclusively to meet the safety requirements, see Regulation on classification, labelling etc. of hazardous chemicals of 16 July 2002. Pursuant to the Regulation section 15, the labelling must meet a number of requirements, among them that "[t]he chemical's description or trade name" must appear. Also, a "[h]azard symbol with a description of the hazard" must be affixed. Furthermore, there must be "[w]arnings providing adequate information on the hazards... and necessary precautions ... when using the chemical". The purpose of the labelling was allegedly to meet these requirements, not to "trademark" the product. It is submitted that since the labelling had no commercial function, the use is not comprised by the protection under the Trademarks Act section 4.

- (76) This argument must also be dismissed. It has been stated that the labels were the only marking of the containers and the cans. Even if the sole purpose was to comply with safety requirements, it is clear that also the incorrect trademark – or the "trade name" – clearly appeared on the labels that Solberg affixed to the packaging. As I have already demonstrated, this alone created a risk of affecting the trademark's functions. The fact that the purpose was not to promote sale is thus irrelevant.
- (77) Against this background, my *conclusion* is that Solberg, when labelling the containers and the cans, used Addcon's trademark in contravention of the Trademarks Act section 4.
- (78) On the other hand, there was no infringement with regard to the items delivered directly from the tanker, as the use of the trademark was limited to the invoices stating incorrectly that the product sold was EnsiloX. While the use of trademarks on business documents is indeed comprised by the Trademarks Act section 4 subsection 3 d, I find that the risk of affecting the trademark's functions exclusively due to a misprint on the invoices is too remote to be given weight.
- (79) I will now turn to the issue of *compensation and damages*.
- (80) The claim for compensation is based on the Trademarks Act section 58, which gives a right, among others, to "compensation corresponding to a reasonable licence fee for the exploitation" by wilful or unintended infringement, see the background for the provision in Proposition 81 L (2012-2013) pages 30 et seq.
- (81) As I see it, Solberg is liable for unintended trademark infringement concerning the product delivered with labels displaying Addcon's trademark. The total volume was 230 tonnes, which was allegedly sold for a total of NOK 1 639 500. There is no basis for establishing intent or gross negligence. The provision in section 58 subsection 2 is thus not applicable. As the case stands, there is also no basis for measuring a large compensation. I find it reasonable to estimate the compensation to five percent of the selling price, rounded to NOK 80 000.
- (82) Addcon has also claimed *damages*.
- (83) One of the items of claim refers to the costs Addcon incurred in connection with the petition to the court to instruct Solberg to provide information. The claim is limited to the costs that accrued during the period until Solberg provided the information that the court found Solberg had an obligation to give. The district court held that there was reason to reproach Solberg for not having provided the information earlier. I see no reason for ruling otherwise now. The claim is dismissed.
- (84) Addcon has also claimed damages in the amount of NOK 196 000 for legal costs accrued before the said petition, hence before the writ of summons. My perception is that the amount has not been included in neither Addcon's statement of costs before the district court in connection with the petition nor before the district court in the main case. The documentation submitted shows that the amounts mostly relate to legal fees for work on "[t]rademark infringement ENSILOX" in March, April and May 2014. There was correspondence between the parties during this period. The petition to the court to instruct

Solberg to provide information was, as mentioned, made in early June the same year. I have concluded that the claim must succeed.

- (85) Addcon has won the case. I find no reason to depart from the main rule in the Dispute Act section 20-2 subsection 1, see section 20-9. Costs are awarded in all instances.
- (86) Counsel Bleken has submitted a statement of costs before the Supreme Court claiming a total of NOK 780 090 including legal fees. The respondent has claimed that the stated time spent on preparation to the Supreme Court hearing – 180 hours – is unnecessarily high. Considering the scope of the case, not to mention the substantial international source material that had to be reviewed, I find that the time spent is justifiable. I thus take the statement of costs into account. A court fee of NOK 28 323 is added to the legal fees, so the total costs in the Supreme Court amount to NOK 809 232.
- (87) Costs in the district court of NOK 266 875 and in the court of appeal of NOK 799 907 including court fees, are extra.
- (88) Total costs of NOK 1 876 014 are awarded.
- (89) I vote for the following

J U D G M E N T :

1. Halfdan L. Solberg is to pay to Addcon Nordic AS NOK 80 000 – eightythousand – in compensation for trademark infringement.
2. Halfdan L. Solberg is to pay to Addcon Nordic AS NOK 196 000 – onehundredandninety-sixthousand – in damages for trademark infringement.
3. Halfdan L. Solberg is to pay to Addcon Nordic AS costs in the district court, court of appeal and the Supreme Court of NOK 1 876 014 – onemilliononeighthundredandseventysixthousandandfourteen -
4. Time for performance is 2 – two – weeks of the service of the judgment.

- (90) Justice **Matheson:** I agree with the justice delivering the leading opinion in all material aspects and with his conclusion
- (91) Justice **Bull:** Likewise.
- (92) Justice **Bergh:** Likewise.
- (93) Justice **Tønder:** Likewise.

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

J U D G M E N T :

1. Halfdan L. Solberg is to pay to Addcon Nordic AS NOK 80 000 – eightythousand – in compensation for trademark infringement.
2. Halfdan L. Solberg is to pay to Addcon Nordic AS NOK 196 000 – onehundredandninety-sixthousand – in damages for trademark infringement.
3. Halfdan L. Solberg is to pay to Addcon Nordic AS costs in the district court, court of appeal and the Supreme Court of NOK 1 876 014 – onemilliononeighthundredandseventysixthousandandfourteen -
4. Time for performance is 2 – two – weeks of the service of the judgment.