SUPREME COURT OF NORWAY

On 18 January 2018, the Supreme Court gave judgment in

HR-2018-111-A, (case no. 2017/1573), civil case, appeal against judgment,

Ree Minerals Holding AS (Counsel Knud Jacob Knudsen)

v.

Norman Finans AS (Counsel Stein Owe)

V O T I N G :

(1) Justice **Normann:** The case concerns fulfilment of the obligation to subscribe for shares in a capital increase. The issue is whether the subscriber's payment obligation is lifted when the time limit for notifying the Register of Business Enterprises of the capital increase pursuant to the Norwegian Limited Liability Companies Act [the Companies Act] section 10-9 has been exceeded is due to the subscriber's default.

(2) Ree Minerals AS – ReeM – has as its object to develop and extract profitable deposits of rare earths and earth minerals. In 2014, the company was granted exploration rights by The Directorate of Mineral Administration for the FEN field in Ulefoss in the municipality of Nome. At a general meeting on 13 June 2017, the company's name was changed to Ree Minerals Holding AS.

(3) Norman Finans AS is owned by Harald Norman, who is the sole shareholder and chair of the board. The company was previously named Norman Assuranse AS, but changed names in 2015 in connection with a generational change. The company, hereinafter referred to as Normann Finans or NF, has been a shareholder in ReeM since 2011. In addition, Harald Norman personally became a shareholder in 2013.

(4) At a meeting on 28 February 2014, following a briefing on the capital increase in ReeM, Harald Norman signed on behalf NF an irrevocable power of attorney to the chair of ReeM to subscribe for shares on his behalf. It is not an issue before the Supreme Court that the board was authorised to carry out this capital increase pursuant to the Companies Act section 10-14.

(5) The document, with the heading "INVITATION TO SUBSCRIBE FOR SHARES IN REE MINERALS AS" reads as follows:

> **"In accordance with the notification regarding a capital increase in REE Minerals AS, all shareholders are invited to subscribe for shares in the company. The subscription price per share is NOK 160.**
>
> **If you want to participate in the share issue, please return the below power of attorney to the chair of the board Aslak Aslaksen authorising him to subscribe for the desired number of shares on your behalf.**
>
> **The final subscription date is 28 February 2014. The power of attorney must be received per e-mail by Aslak Aslaksen … within 12:00 on this date.**
>
> **Power of attorney to subscribe for shares:**
>
> **In accordance with the above, I hereby irrevocably authorise the chair of the board Aslak Aslaksen to subscribe for 75,000 shares on my behalf in Ree Minerals AS, each at a nominal value of NOK 1 and a subscription price of NOK 160, giving a total subscription price of NOK 12,000,000. I/we undertake to pay the subscription price to the company's account … within 14 March 2014 in accordance with the board's decision on a capital increase in the company.**
>
> **Name: Norman Assuranse AS**
> **Address: Pilestredet 39, 0166 Oslo**
> **Enterprise no.: 914025699**
> **Place, date: Oslo 28/2 – 2014**
>
> **…"**

(6) The document was signed by Harald Norman, who added in handwriting the following condition for subscription:

> **"The offer is conditional on an option to purchase another 85,000 shares of NOK 200 each; = NOK 17,000,000 effective throughout the year of 2015"**

(7) In an e-mail of 3 March 2014 to Norman from Aslaksen, the condition was accepted by ReeM. Furthermore, Aslaksen stated in an e-mail of 5 March 2014 that he had just spoken to Norman, that Norman had confirmed receipt of ReeM's acceptance and that payment would be made within the time limit.

(8) At a board meeting in ReeM on 6 March 2014, the board decided to carry out the capital increase, and NF's subscription was completed through the power of attorney. The subscription price was NOK 160 per share, a total of NOK 12 million, of which NOK 75,000 constituted share capital and NOK 11,925,000 constituted premium. The amount was to be paid by NF within 14 March 2014.

(9) Despite ReeM's various attempts to collect the payment, the amount was not paid within the time limit, with the consequence that the capital increase could not be registered, see the Companies Act section 10-9 subsection 3.

(10) As the payment from NF was never made, ReeM implemented a compulsory sale of NF's and Norman's existing shares. This had the result that all shares owned by them – a total of 15,333 – were sold for a price of NOK 60 each, a total of NOK 919,980. With the

addition of NOK 325,000, which NF had paid in August 2014, ReeM had received a total of NOK 1,244,980.

(11) On 19 August 2015, ReeM brought an action against NF before Oslo District Court demanding that NF fulfill its subscription obligation and pay NOK 12,000,000 plus interest on overdue payment. On 19 February 2016, Oslo District Court gave judgment concluding as follows:

> **"1. The Court finds in favour of Norman Finans AS.**
>
> **2. REE Minerals AS will pay costs in the district court to Norman Finans AS of NOK 390,931 – threehundredandninetythousandninehundredandthirtyone – within 2 – two – weeks from the serving of this judgment. "**

(12) The district court held that there was no legal basis for continued payment obligation after the expiry of the three-month time limit in the Companies Act section 10-9 subsection 3. ReeM's claim for damages for non-performance limited to NOK 12 million did not succeed either. The District Court did not exclude that claims for payment or damages against NF might continue after the expiry of the time limit, but held that this required a separate agreement between the parties or conduct giving rise to liability by FN, neither of which had been argued before the district court.

(13) ReeM appealed the district court's judgment to Borgarting Court of Appeal, which dismissed the appeal by judgment of 12 June 2017. The court of appeal supported the district court's arguments in all material aspects.

(14) ReeM has appealed to the Supreme Court over the application of the law. The Supreme Court's Appeals Selection Committee decided on 5 October 2017 to allow the appeal. The hearing before the Supreme Court was limited pursuant to the Dispute Act section 30-14 subsection 3, so that the respondent's alternative submission that the subscription must be deemed invalid due to prior misleading and inaccurate information is not to be heard for the time being. The same applies to the measurement of possible damages for non-performance.

(15) The appellant – *Ree Minerals Holding AS* – has mainly contended:

(16) Prior to the subscription, a binding agreement was entered into under which NF was to subscribe for 75,000 shares in return for a consideration of NOK 12 million.

(17) The agreement is governed by general contract law. The Companies Act section 10-9 subsection 3 does not resolve the issue.

(18) The agreement must be completed by specific performance, by ordering NF to pay NOK 12 million in return for 75,000 shares in ReeM.

(19) If specific performance cannot be granted, ReeM will claim damages for non-performance.

(20) Ree Minerals Holding AS has submitted this prayer for relief:

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

2. REE Minerals Holding AS is to be awarded costs in the Supreme Court."

(21) The respondent – *Norman Finans AS* – has mainly contended:

(22) The document dated 28 February 2014 is not a separate subscription agreement, but a power of attorney to subscribe for shares with no other legal effects. The obligation towards ReeM did not arise until shares were subscribed for through the power of attorney, and the obligation was lifted when this capital increase was not reported to the Register of Business Enterprises within the time limit, see Companies Act section 10-9 subsection 3.

(23) The document appears to be an ordinary subscription form, except that it contains a power of attorney. Subscription by way of completing such a form has no other legal effects than those set out in the Companies Act. The fact that the subscription was made through a power of attorney does not make any difference.

(24) It is unlikely that a separate agreement has been entered into that deviates from the regulations on capital increase in the Companies Act. Hence, for such an agreement to be deemed entered into, express and unambiguous records are required.

(25) Should the Supreme Court nevertheless conclude that such an agreement was entered into, it is no longer effective, and any share issue described therein can no longer be registered. Hence, pursuant to the Companies Act section 10-9 subsection 3, the subscription is no longer binding.

(26) Specific performance cannot be granted under any circumstances.

(27) In fact, the claim for damages submitted replaces the subscription price, and cannot succeed. The general conditions for damages are not met. ReeM has not documented any causation between the non-payment of the subscription price and the company's economic loss.

(28) Norman Finans AS has submitted this prayer for relief:

"1. The appeal is to be dismissed.

2. Norman Finans AS is to be awarded costs in the Supreme Court."

(29) *I have concluded* that the appeal must succeed.

(30) The Companies Act section 10-9 subsections one and three reads as follows:

> **"(1) If the minimum amount resolved by the general meeting has been subscribed to, the Register of Business Enterprises shall be notified of the capital increase within three months from the end of the subscription period. The report shall state the amount of the capital increase.**
>
> …
>
> **(3) If the Register of Business Enterprises is not notified of the capital increase by the end of the time limit, it may not be registered. The subscription of shares will in such event not be binding. This will similarly apply if registration is refused due to an error which cannot be remedied."**

(31) The question is thus whether the fact that the subscription of shares "will in such event not be binding", so that the share issue may not be completed, also has consequences under *contract law*, which implies that the company can no longer demand settlement for the subscription of shares.

(32) I will first address the characteristics of the subscription as a legal transaction.

(33) A company's invitation to subscribe for shares or a similar approach may be perceived as an offer the recipient is free to accept with the consequence that an agreement has been entered into. But such invitation to subscribe for shares or similar may also be regarded as a request from the company to certain persons or others to make an offer to subscribe for shares. Irrespective of how one sees this, a subscription for shares may in principle make basis for a mutually binding legal relationship between the parties, but the dates of commitment may not be same.

(34) In Magnus Aarbakke's article, Subscription, Invalidity and Liability in TfR 1989, he states the following in this regard on page 335:

> **"… The incorporators/the company must ensure that a share is issued and that the subscriber is given the right to this share; the subscriber is obliged provide a consideration to the company…**
>
> **Bearing this in mind, it is natural to assume that a subscription is subject to general contract law rules on mutually binding agreements. This must also be a principle view. But some concerns emerge that are more relevant in corporate affairs than those emerging e.g. in connection with a purchase agreement. These special concerns must influence the thoughts on invalidity, breach and liability in connection with subscription for shares."**

(35) It must be assessed individually whether a binding subscription agreement has been entered into in each case. In my view, the name of the relevant document cannot be decisive. Nor can I see that it necessarily matters if the subscription has taken place in the minutes of the general meeting, a document quoting the general meeting's decision to increase the share capital, see the Companies Act section 10-7 subsection 1 and section 10-18, or if the subscriber prior to the share issue has undertaken towards the company to subscribe for shares.

(36) The question is thus whether NF has entered into a binding agreement to subscribe for shares in ReeM.

(37) Initially, I quoted from the relevant document. In my view, the fact that the document signed by Harald Norman has the heading "INVITATION TO SUBSCRIBE FOR SHARES IN REE MINERALS AS", is not decisive.

(38) The power of attorney granted to the chair of the board in ReeM, Aslak Aslaksen, to subscribe for shares on behalf of NF, is "irrevocable". Hence, it follows from the Norwegian Contract Act section 10 subsection 1 that "if a person holding an authorisation performs a legal transaction in the name of the person who has imparted the authorisation, and within the limits stipulated by the authorisation, the said legal transaction creates rights and obligations directly for the person who has imparted the authorisation."

(39) The final date for subscription is stated in the document to be 28 February 2014, which is the same day as Harald Norman authorised the chair of the board to subscribe for 75,000 share on behalf of NF.

(40) Furthermore, it is set out that NF "undertakes" to pay the subscription price of a total of 12 million within 14 March 2014 "in accordance with the board's decision on a capital increase in the company". This suggests that the document is an invitation from ReeM to subscribe for shares. On the other hand, the handwritten remark by Harald Norman suggests that NF made an offer to subscribe.

(41) When considering the whole document, I find it most natural to consider the first part of it as an invitation from the company to subscribe, and the second part as an acceptance made conditional by Norman's adding of the remark.

(42) If this, alternatively, can only be regarded as an offer from Norman, the offer is nevertheless accepted by the e-mail of 3 March and the telephone call of 5 March 2014, according to which ReeM accepted Norman's condition and that Norman acknowledged this.

(43) Against this background, I have concluded that a mutually binding agreement was entered into between NF and ReeM under which ReeM was to issue 75,000 shares in return for NF's paying a subscription price of NOK 12 million.

(44) The question is thus whether the Companies Act section 10-9 subsection 3 entails that NF's payment obligation was lifted at the expiry of the three-month time limit for notifying the Register of Business Enterprises of the capital increase.

(45) Subsection 3 sets out that the subscription will "not be binding" if the three-month time limit is exceeded. A natural interpretation of this wording would be to consider NF's payment obligation to be lifted. Nevertheless, In my view, the wording cannot be decisive.

(46) As I have accounted for, a subscription for shares can make basis for a mutually binding legal relationship between a company and a subscriber. In my view, it is not necessarily so that the legal effects of the contractual and corporate regulation is the same in all situations. But where the rules under company law deviate from principles under contract law, this is typically due to corporate concerns, see e.g. the Companies Act section 10-7 subsection 3, cf. section 2-10 pursuant to which a subscription is binding after the capital increase has been registered. The rule is meant to protect the interests of the other subscribers and the company's creditors.

(47) However, a contractual party may not plead unbound under general rules on invalidity and breach, when *it is he* who has caused the invalidity or the breach, and I cannot see that special concerns apply for this company suggesting that the solution must be another.

(48) If the capital increase is not registered, the company cannot issue the shares, and the company is in principle liable for the delay. The Companies Act 1976 only regulated the consequences of non-registration in connection with incorporation. The common interpretation of the Companies Act 1976 section 4-7 – the predecessor of the current section 10-9 – was that exceeding of the six-month time limit for notification did not

prevent subscription from taking place later. But if the company did not ensure registration within reasonable time, it was assumed that the subscriber had a right under general contract law to cancel the agreement, see Aarbakke in TfR 1989, page 353.

(49) As demonstrated, the consequence of exceeding the time limit for notification is expressly regulated in the Companies Act section 10-9 subsection 3. The following is set out regarding this amendment in Proposition to the Odelsting no. 23 (1996–1997) on page 160:

> **"The Register of Business Enterprises states the following about subsection 3:**
>
> **'The provision regulates non-compliance with the deadline subsection 1. The Committee takes it that the provision is mainly a continuation of the current Companies Act. We believe that this is not correct, as the current Companies Act section 4-7 subsection 2 is considered more of a directive without consequences involving cancellation of the subscription. We refer, among other things, to the commentary to the Companies Act by Marthinussen/Aarbakke and Skåre/Knudsen. This has also been the practice of the Register of Business Enterprises since 1988. We believe it concerns a new rule. In terms of contents, we support the implementation of the provision as we assume that it will contribute to a clarification of the information provided by the in the Register of Business Enterprises and a supplement to the Register of Business Enterprises Act section 4-1."**

(50) Both the district court and the court of appeal have used the statement of the Register of Business Enterprises to support their view, and NF holds that the quote shows that the lawmaker's intention has been that the subscription is no longer binding if the capital increase is not registered within the time limit.

(51) I do not share this view. I find that the statement must be interpreted in light of the state of the law under the Companies Act 1976. This implies that the subscription is no longer binding if exceeding of the time limit is due to the company's or other subscribers' inaction. But I cannot see that the lawmaker, by referring to this statement, has considered the situation that occurs when the time limit has been exceeded due to the subscriber's default. This issue has not been addressed. If the lawmaker had meant to deviate from such a basic principle under contract law and introduce a rule stating that a party may be released from its own contractual obligation by breaching it, this would have been clearly specified.

(52) Moreover, a rule stating that a party's breach of its own payment obligation means that the same obligation is lifted would be inconsistent with the principle of strict liability for own lack of money.

(53) Also, legal theory contains statements supporting that the subscriber's payment obligation in such cases cannot be deemed lifted, see Aarbakke and others, The Companies Act and the Public Companies Act, Commentary, 4th edition 2017 page 704 and Andenæs, Private and Public Companies, 3rd edition 2016 page 115.

(54) Furthermore, the court of appeal has found support in Eidsivating Court of Appeal's judgment, included in RG-2008-1142, which also concerned non-payment and non-registration of a capital increase. There, the court of appeal concluded that the subscriptions made were not binding after the expiry of the time limit for notification, and that also other obligations of the company or the subscribers after the capital increase had

been lifted. In this particular case, however, there were three subscribers of whom one had failed to provide the consideration for the shares. The issue was whether the two other subscribers, who had provided the consideration, could claim repayment from the company.

(55) The judgment illustrates that if the lack of registration is due to events *beyond the control of the subscriber*, then it is set out in the Companies Act section 10-9 subsection 3 that the subscription will not be binding. This result is also consistent with what would be the solution if general contract law principles had applied.

(56) In addition, the company has had small chances of collecting the consideration before the expiry of the time limit in section 10-9 subsection 1, cf. section 10-12 subsection 4, cf. sections 2-12 to 2-17. A legal action for enforcement within the three-month time limit is practically impossible to arrange. If the subscriber had been under no contractual obligation to provide the consideration after the expiry of the three-month time limit, he would have had a chance to speculate – in fact a share option.

(57) After an overall assessment, I have concluded that the Companies Act section 10-9 subsection 3 cannot be interpreted so as to imply that the subscription is no longer binding when the time limit for notification has been exceeded, when this is due to the subscriber's default. The court of appeal's conclusion that there is no basis for upholding the payment obligation under the subscription agreement after the expiry of the time limit is based on an error in law.

(58) In its appeal to the Supreme Court, ReeM has sought specific performance of the agreement. However, the Supreme Court has not considered whether the subscription is invalid due to misleading or inaccurate information regarding the company prior to the subscription, see the Dispute Act section 30-14 subsection 3, and judgment cannot be given on the merits of the case.

(59) Provided that the court of appeal, in the continued hearing of the case, concludes that the mentioned submission on invalid subscription does not succeed, the issue arises whether ReeM is entitled to specific performance. Before the Supreme Court, NF has argued against such an entitlement, while ReeM has maintained its view that this is possible.

(60) The main rule under Norwegian law is that a creditor has a contractual right to, and may obtain judgment for, specific performance, see Hagstrøm, Law on Contracts and Torts, 2nd edition 2011 page 379. As for the right to payment, this rule is without exceptions.

(61) The question is then whether there are concerns deriving from company law suggesting a different solution.

(62) I cannot see that the provision in the Companies Act section 10-9 subsection 3 prevents specific performance in a case like the one at hand, involving only one subscriber – NF. The claim for specific performance is, however, conditional on ReeM implementing a new capital increase, so that NF receives 75,000 shares once it has been registered. I add that the capital increase must be completed within reasonable time, and I refer to what I have previously stated regarding the state of the law under the Companies Act 1976 section 4-7, see para 48.

(63) The appeal has succeeded, and the appellant has claimed costs in the Supreme Court of NOK 256,500. The court fee of the Supreme Court is extra. Costs are awarded pursuant to the Dispute Act section 20-2. Costs for the entire hearing before the district court and the court of appeal must be decided during the new hearing before the court of appeal, see the Dispute Act section 20-8 subsection 3 and the Supreme Court judgments Rt-2015-475 and Rt-2015-600.

(64) I vote for this

J U D G M E N T :

1. The judgment of the court of appeal is set aside.

2. Norman Finans AS will pay to Ree Minerals Holding AS costs in the Supreme Court of NOK 281,676 – twohundredandeightyonethousandsixhundred-andseventysix within 2 – two – weeks from the serving of this judgment.

(65) Justice **Noer:** I agree with the justice delivering the leading opinion in all material aspects and with her conclusion.

(66) Justice **Høgetveit Berg:** Likewise.

(67) Justice **Falch:** Likewise.

(68) Justice **Matningsdal:** Likewise.

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

J U D G M E N T :

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