SUPREME COURT OF NORWAY

On 28 June 2018, the Supreme Court gave an order in

HR-2018-1265-A (case no. 2017/1886), civil case, appeal against order

Deutsche Bank AG	(Counsel Olav Fredrik Perland)
v.	
Erik Martin Vik	(Counsel Hans Ingvald Stensholdt)

V O T I N G :

(1) Justice **Bull:** The case concerns levy of execution on shares. The main issue to be reviewed is under which circumstances a creditor may levy execution on shares of which a third party is the registered owner.

(2) Sebastian Holdings Inc. – hereinafter Sebastian Holdings – was incorporated in 2002 and registered in the Turks and Caicos Islands, a British Overseas Territory in the Caribbean. The company is a so-called exempted company, which means that it may not conduct any trade on the islands other than trade of a minor nature. Until July 2015, the company was wholly owned by Alexander Vik, who was also the company's sole board member.

(3) From 2003 until 2008, Sebastian Holdings was a customer of Deutsche Bank Suisse SA receiving private asset management services from the bank. The services were extended from 2006, but then in a customer relationship with Deutsche Bank AG – hereinafter Deutsche Bank. Under one of the agreements, Deutsche Bank was the primary broker, which meant that Sebastian Holdings could carry out transactions as agent for Deutsche Bank. That made it possible for the company to trade with other brokers without collateral.

(4) Pursuant to the agreements, Sebastian Holdings was to deposit liquid securities or cash on an account to cover so-called margin requirements. These requirements were calculated by Deutsche Bank and then communicated to Sebastian Holdings. In addition, a security agreement was entered into as collateral for all claims Deutsche Bank might incur against Sebastian Holdings, comprising assets deposited on or associated with accounts belonging to Sebastian Holdings.

(5) The primary broker system was first agreed with Deutsche Bank's so-called FX division in New York. In January 2008, an agreement was also entered into with Deutsche Bank's London office.

(6) During the financial crisis in the autumn of 2008, severe losses were suffered from the trades Sebastian Holdings had carried out via the primary broker system. Between 13 and 22 October, the bank therefore submitted several requests for more collateral so that Sebastian Holdings could meet the margin requirements. The requests were mainly met by transfers of assets from the company's London accounts.

(7) One final request for USD 291 million was made on 22 October 2008, as collateral for trades carried out through the London account. The request was due to two calculation errors at Deutsche Bank's London office discovered on 16 and 22 October. At this time, there were no assets left on the London account to cover further claims, and the margin requirement could not be met.

(8) During the same period as these requests were made, substantial assets were transferred from Sebastian Holdings to companies controlled by Alexander Vik or his family, and to Alexander Vik as a private individual. One of these transfers concerned the shares in the Norwegian IT company Confirmit AS, hereinafter Confirmit. The shares were first transferred to Sebastian Holdings's VPS [Central Securities Depository] account in DNB on 14 October 2008, before Sebastian Holdings's total holding of Confirmit shares in DNB was registered on Alexander Vik personally on 15 October 2008. Later – in 2015 – the shares were registered as transferred to Alexander Vik's father, Erik Martin Vik. A transfer agreement is dated 4 January 2016.

(9) Deutsche Bank suffered severe losses because of said events in the autumn of 2008, and brought several actions against Sebastian Holdings. English courts have handed down a total of five rulings, and proceedings have also been conducted in US courts. The basis of enforcement in the case before the Supreme Court is the judgment of 8 November 2013 from The High Court of Justice, Queen's Bench Division, Commercial Court, England in case [2013] EWHC 3463 (Comm), ordering Sebastian Holdings to pay approximately USD 243 million to Deutsche Bank. In addition, interest accrues under English rules on the enforcement of court rulings. The relevant amount is coverage of the said losses suffered during the financial crisis. Deutsche Bank was at the same time found not liable in a cross-action brought by Sebastian Holdings for a substantial claim. Through the decision of the Oslo County Court [*Oslo byfogdembete*] of 13 April 2016, Borgarting Court of Appeal's order of 11 November 2016 and the Supreme Court's decision of 1 March 2017, it has been finally decided that the judgment is enforceable in Norway.

(10) In April 2016, Deutsche Bank requested enforcement of the English judgment. On 26 April 2016, Oslo County Court granted the request, and on 31 May 2016, the enforcement officer [*namsmannen*] levied execution on all shares in Confirmit. While Erik Martin Vik is the registered owner of the shares, the enforcement officer deemed it likely that Sebastian Holdings was the true owner.

(11) Erik Martin Vik appealed the enforcement officer's decision to Oslo County Court, which on 21 December 2016 concluded the following:

> **"1. The appeal is dismissed.**

> **2. Erik Martin Vik will pay costs of NOK 8 606 682 – eightmillionsixhundredandsixthousandsixhundredandeightytwo - to Deutsche Bank AG within 2 – two – weeks of the service of this order."**

(12) The county court, too, found that Sebastian Holdings was the true owner of the shares at the time of the execution proceedings. It was concluded that no genuine and binding share transfer took place from Sebastian Holdings to Alexander Vik in October 2008, or from Alexander Vik to Erik Martin Vik in 2015. The registration in VPS of Alexander Vik and, later, Erik Martin Vik as owners of the shares was to be regarded as pro forma.

(13) In the aftermath of the Oslo County Court's order, the execution lien was also secured by an interlocutory injunction by the same court on 30 March 2017. The subsequent petition for lifting of the injunction after the ruling by Borgarting Court of Appeal of 19 September 2017 in the execution case was not granted, see Oslo County Court's order of 1 December 2017, Borgarting Court of Appeal's order of 23 February 2018 and the order and decision by the Supreme Court of 30 April 2018, HR-2018-797-U. The interlocutory injunction is still in effect.

(14) Erik Martin Vik appealed the order in the execution case to Borgarting Court of Appeal, which on 19 September 2017 concluded the following:

> **"1. The execution lien created by the execution officer of Oslo on 31 May 2016 on shares in Confirmit AS, enterprise no. 976 886 240, deposited on VPS account no. 0791.00.269590, is to be lifted.**
>
> **2. Deutsche Bank AG will pay costs in Oslo County Court of NOK 2 103 626 – twomilliononehundredandthreethousandsixhundredandtwentysix – to Erik Martin Vik within 2 – two – weeks of the service of this order."**
>
> **3. Deutsche Bank AG will pay costs in Borgarting Court of Appeal of NOK 1 287 598 – onemilliontwohundredandeightyseventhousandfivehundredandninetyeight – to Erik Martin Vik within 2 – two – weeks of the service of this order."**

(15) The court of appeal concluded that the transfer in October 2008 was not pro forma.

(16) Furthermore, the court of appeal held that the question whether an individual creditor seeking attachment may assert invalidity under company law must be determined under Turks and Caicos law. The court concluded that such a creditor may not, either under Turks and Caicos law or under Norwegian law, levy execution on any unlawfully distributed or transferred assets.

(17) Deutsche Bank has appealed the court of appeal's order to the Supreme Court. The appeal is against the interpretation of the law and the procedure of the court of appeal. By the Supreme Court Appeals Selection Committee's decision of 21 December 2017, HR-2017-2449-U, the appeal was admitted in its entirety to an oral hearing before a panel of five justices, see the Courts of Justice Act section 5 subsection 1 second sentence.

(18) The appellant – *Deutsche Bank AG* – contends the following:

(19) Execution can be levied on the Confirmit shares on three grounds: No action has been taken by which Sebastian Holdings has expressed a will to surrender its ownership of the shares. The transfer of the right of disposal in VPS only shows that the control has been transferred to Alexander Vik, and on to his father Erik Martin Vik, and not that there has

been a genuine transfer of ownership. If such a transfer should nevertheless be deemed to have taken place, it constitutes an invalid distribution from Sebastian Holdings to its sole shareholder, Alexander Vik. The invalidity entails that Deutsche Bank may levy execution on the distributed shares since the subsequent transfer to Erik Martin Vik was pro forma. Under any circumstance, as the transfer of the shares from Sebastian Holdings to Alexander Vik was also pro forma, the result is that Deutsche Bank may levy execution on them to satisfy its claim against the true owner, Sebastian Holdings.

(20) The ownership cannot have been transferred from Sebastian Holdings to Alexander Vik during the autumn of 2008, as no agreement, declaration or resolution was drawn up to document such a transfer. The court of appeal has erred in its interpretation of the law by not considering this an independent basis for attachment, but only an element in the invalidity and pro forma assessment. Whether or not a legal transfer has taken place depends, here, on the interpretation of the Enforcement Act section 7-1, cf. the Creditors Recovery Act section 2-2, stating that any creditor may seek satisfaction in any property "belonging" to the debtor at the time of attachment. Hence, it is a procedural issue regulated by *lex fori*, which is Norwegian law.

(21) Furthermore, the court of appeal has incorrectly assumed that an individual creditor's right to assert that the debtor's disposal is invalid under company law is regulated by Turks and Caicos law. This, too, is regulated by Norwegian law as *lex fori.* Alternatively, it must be assumed that the ownership of an asset is determined based on the law of the place the asset is located or is registered – *lex rei sitae*. Again, Norwegian law is applicable. In any event, the issue regarding the ownership of the shares in Confirmit is most strongly connected to Norway according to the aggregate contacts test in Norwegian international private law.

(22) In the case at hand, a restitution claim due to invalidity is an action for replevin, a direct effect of the transferor's ownership. The very asset, not the restitution claim as such, is therefore subject to attachment by creditors under the Enforcement Act. This is not changed by the fact that according to company law, the authority to bring an action for replevin is vested in the company's own bodies. The creditors' right of attachment is regulated by provisions in the Enforcement Act, the Bankruptcy Act and Creditors Recovery Act, and not by company law.

(23) The appellant submits that the court of appeal committed a procedural error when failing to clarify that it considered applying Turks and Caicos law in the issue of the right of attachment, despite the parties' perception that Norwegian law was applicable in this issue. The bank would have presented evidence for the law of the Turks and Caicos Island had the court of appeal notified the parties that it was considering the choice of law. This is a breach of the adversary principle – the principle of the right to be heard – the consequence being that the court of appeal had no proper basis for its ruling. As a result, Deutsche Bank has withdrawn its submission that a binding agreement on the choice of law existed.

(24) The court of appeal's general interpretation of the rules on pro forma transactions is also incorrect. Although the court's initial remarks on pro forma are correct, the specific application of the law to the facts and the court's final remarks show that it has limited the issue to concern the parties' intention and the validity of the transaction, i.e. it has applied a so-called subjective pro forma rule. One must instead apply an objective pro forma rule. An objectivisation of the conditions for pro forma is not non-statutory avoidance or

piercing of the corporate veil contrary to the preparatory works to the bankruptcy legislation and case law stating that avoidance is not possible in connection with an individual creditor's collection of debt, only in connection with bankruptcy. Also, the court of appeal has failed to make a sufficiently broad assessment of whether pro forma exists; for instance, it has placed no emphasis on the lack of an expressed will to surrender the shares, or on the fact that the distribution was made to hide the assets from the creditor. Alternatively – if a so-called subjective pro forma rule is to be applied – the court of appeal has applied it incorrectly by not giving weight to Sebastian Holding's independent interests and intentions.

(25) An objective pro forma rule does not involve such vagueness regarding the conditions for declaring that a transfer is not genuine, that it is contrary to the European Convention on Human Rights Protocol 1 Article 1 – ECHR P 1-1 – on the protection of property.

(26) Deutsche Bank AG has submitted this prayer for relief:

> **"1. The order by Borgarting Court of Appeal of 19 September 2017 in case no 17-037829ASKBORG/04 between Erik Martin Vik and Deutsche Bank AG is to be set aside.**
>
> **2. Deutsche Bank AG is to be awarded costs in the Supreme Court."**

(27) The respondent – *Erik Martin Vik* – contends the following:

(28) The court of appeal has applied the law correctly when considering the question whether a transfer has taken place at all, in conjugation with the submissions regarding invalidity or pro forma. These issues are closely intertwined.

(29) The court of appeal has correctly assumed that, in this case, an individual creditor's right to attach assets is regulated by Turks and Caicos law. Limitations to a company's right to enter into certain agreements, procedural rules, legitimacy effects etc. are to be assessed according to the applicable company law, and the same must apply to the consequences of any invalidity. The issue of an individual creditor's right to attach assets is thus of such a character that it must be comprised by said law. It is neither a procedural issue nor a property law issue. And should the Supreme Court consider this a special issue that does not fall to be assessed by the applicable company law or other fixed rules governing the choice of law, the law most closely connected to this particular issue must be that of the Turks and Caicos Islands, the law of the company's domicile.

(30) In any case – if Norwegian law is to be applied – an individual creditor cannot levy execution on assets distributed from the company. The consequence of any invalidity under company law will be the establishment of a restitution claim, and execution can be levied on this claim only. Furthermore, the Companies Act provides limitations as to who may pursue a claim of unlawful distribution. When Sebastian Holdings, through a decision by a body empowered to do so, has not submitted a restitution claim, there is no claim on which execution can be levied.

(31) Should the appellant succeed with its submissions on this issue, the practical consequence will be that an individual creditor may submit avoidance claims, contrary to the assumptions in preparatory works and case law. If an individual creditor, not only the company and its bankruptcy estate, were permitted to assert such claims, it would result

in an unfair distribution among the creditors, contrary to the assumptions forming the basis for the Companies Act and the Bankruptcy Act.

(32) As for the appellant's submission that a procedural error has been committed, the respondent holds that the court of appeal did express in writing that the bank could present a legal opinion on Turks and Caicos law. Yet, the appellant chose not to comment on the choice of law issue, referring instead to its belief that the parties were in agreement that Norwegian law was applicable. The appellant itself must carry the risk of erroneously trusting both that an agreement on the choice of law existed and that such an agreement could be entered into at all.

(33) There has been a genuine transfer of ownership of the Confirmit shares from Sebastian Holdings to Alexander Vik, and then on to Erik Martin Vik. This transfer has been demonstrated, among other things, by the registration of the transfer to Alexander Vik in VPS. The subsequent transfer to Erik Martin Vik is also a genuine transaction. Sebastian Holdings was – pursuant to both Turks and Caicos law and the company's articles of association – exempt from several formality requirements relating to board and general meeting resolutions. Hence, no errors have been committed in the distribution of Confirmit shares that may be given weight in a pro forma assessment.

(34) Objective pro forma implies that the creditors may assert pro forma in cases where the parties themselves may not assert it towards each other. This is an incorrect interpretation of the Enforcement Act section 7-1 and the Creditors Recovery Act section 2-2. The concern for the fairness of the outcome, which is mainly the sole purpose of such an extension of the pro forma rule, does not justify this. The practical implication would be an introduction of a non-statutory right of avoidance or the possibility of piercing the corporate veil of the debtor's transfer of assets to third parties, both of which lack support in preparatory works and case law.

(35) An extension of the pro forma rule may also be ruled out due to the requirements of transparency, accuracy and predictability under ECHR P 1-1.

(36) Erik Martin Vik has submitted this prayer for relief:

> **"1. The appeal is to be dismissed.**
>
> **2. Erik Martin Vik is to be awarded costs in Oslo County Court, Borgarting Court of Appeal and the Supreme Court."**

(37) *My view on the case*

(38) This is a further appeal against an order, and the Supreme Court has only jurisdiction to review the procedure in the court of appeal and the general legal interpretation of a written legal rule, see the Dispute Act section 30-6 subsection 1 b and c. When applying statutory provisions involving the use of discretion, this includes considering which aspects may or must be given weight, see the Supreme Court decision HR-2018-936-U para 15. The Supreme Court may also consider whether the court of appeal has made a sufficiently broad assessment. The court of appeal's application of the law to the specific facts cannot be reviewed.

(39) Both the county court and the court of appeal had to consider the legal effect of the English judgment, which constitutes the basis for execution in the case at hand. Here, it is

sufficient to mention that the court of appeal found that the ownership of the Confirmit shares had not been finally determined. The court of appeal also found that neither the judgment nor subsequent English rulings had legal effects preventing Deutsche Bank from filing claims or submissions that the VPS registrations of Alexander Vik and later Erik Martin Vik as owners of the Confirmit shares were pro forma. The issues of legal effects have been decided under the law of the state in which the judgment was given, in this case English law, as set out in Supreme Court ruling Rt-2010-134 para 33 and the rulings of the Court of Justice of the European Union regarding the same under the Brussels Convention and EU regulations on which the Lugano Convention is based. I mention in particular judgment 4 February 1988 in case 145/86 *Hoffmann* paras 10 and 11. The interpretation of foreign law is outside the jurisdiction of the Supreme Court pursuant to the Dispute Act section 30-6 c, cf. Supreme Court ruling Rt-2006-357 para 13 with further references. The Supreme Court is thus not to consider the enforceability issue, as also set out in the letter of 7 May 2018 from the preparatory judge to the parties.

(40) In the case at hand, the Supreme Court is to consider the court of appeal's general legal interpretation relating to three main issues: First, if a transfer ownership of the Confirmit shares from Sebastian Holdings to Alexander Vik has taken place at all; second, if Deutsche Bank as an individual creditor may levy execution on the shares if they have been unlawfully transferred from Sebastian Holdings to Alexander Vik; and third, whether the transfer in any case must be regarded as pro forma, with the effect that the shares still belong to Sebastian Holdings.

(41) *The issue whether the ownership rights to the Confirmit shares are being exercised*

(42) Deutsche Bank has submitted that the court of appeal's general interpretation of the law is incorrect, since the court has failed to consider Deutsche Bank's submission that no effective decision was made by Sebastian Holdings to transfer the ownership of the shares to Alexander Vik as an independent basis for upholding the execution lien.

(43) To me, it is unclear whether the court of appeal has considered this. On page 30 of the court of appeal's order, it is set out that "it is more natural to deal with the significance of any lack of a formal decision or implementation of the transfer when assessing whether the transfer is valid and whether it was genuine". After concluding that it does not need to consider the issue of unlawful distribution because that would not under any circumstance give an individual creditor a right to attach the distributed assets, the court of appeal states the following on page 35:

> **"The respondent has submitted that the distribution from Sebastian Holdings has been decided by neither the board nor the general meeting, and that this alone entails that the distribution has not been finalised. Thus, the shares still belong to Sebastian Holdings and may be attached in execution. The court of appeal does not share this view. The lack of decisions by the company bodies, or violations of the company's articles of association, may suggest that the distribution is unlawful or invalid. When the transfer has physically taken place by the shares being registered with Alexander Vik as the owner in VPS, the respondent's submission that the transfer has not taken place which in turn allows the creditor to levy execution on the shares, cannot be sustained. That would be to evade the procedure for pursuing claims involving unlawful or invalid distributions, as quoted above."**

(44) The quote may be interpreted to mean that the court of appeal finds that the decision to transfer is embodied in the registration of the shares on Alexander Vik in VPS. However, the transfer of the registered ownership of the shares in VPS from Sebastian Holdings to

Alexander Vik is not necessarily an answer to whether the company had passed a resolution – albeit an invalid one – stating that the ownership was to be transferred to him. But since I have concluded that the court of appeal's order must be set aside on other grounds, I will not go further into this.

(45) *Can execution be levied on assets that have been unlawfully transferred from a limited company?*

(46) The next question in the case at hand is whether the court of appeal has interpreted the law correctly when concluding that an individual creditor may not levy execution on a third party's assets that the third party has received through an unlawful distribution from the debtor.

(47) The court of appeal found that it had to be determined under Turks and Caicos law whether execution could be levied in Norway on assets unlawfully distributed from a company domiciled on the islands. The court of appeal found it could not, not even pursuant to Norwegian law.

(48) Deutsche Bank submits that Norwegian law is applicable, and not Turks and Caicos law, because it concerns the interpretation of the Enforcement Act section 7-1 subsection 2 which sets out that execution can be levied on any asset "belonging" to the debtor, and which creditors may attach pursuant to the Creditors Recovery Act chapter 2. Hence, this is a question of procedural law, where each country applies its own rules, *lex fori*. Alternatively, the bank finds that Norwegian law applies in accordance with the principle *lex rei sitae*, since it concerns the ownership of shares registered in VPS and thus located in Norway.

(49) I agree that this, as a starting point, concerns the general interpretation of the term "belong" in the Enforcement Act section 7-1 subsection 2 and the Creditors Recovery Act section 2-2. However, my view differs somewhat from that of Deutsche Bank in terms of how this affects the choice of law: When the Enforcement section 7-1 subsection 2 – and for that matter also the Creditors Recovery Act section 2-2 – places emphasis on whether an asset "belongs" to the debtor at the time of the attachment, this must be read as a reference to other rules of the Norwegian legal system on rights to assets and on the transfer of such rights. In my view, this also includes Norwegian choice of law rules governing such issues.

(50) I find that the Supreme Court has jurisdiction under the Dispute Act section 30-6 c to consider which choice of law rules apply to determine to whom an asset belongs after having been transferred between several countries. It is true that the choice of law rules are largely unwritten, but in its ruling Rt-2005-1476 paras 14, 16 and 19, the Supreme Court assumed that its jurisdiction under section 30-6 c comprises the general interpretation of the pro forma rules, which are also unwritten, when they become relevant to the application of the Creditors Recovery Act section 2-2. The same must apply to Norwegian choice of law rules. Also, if Norwegian law is applicable, the Supreme Court must consider the court of appeal's general interpretation of the written Norwegian legal rules thus asserting themselves. If foreign law is applicable, on the other hand, the Supreme Court will not have jurisdiction to consider the contents of those rules. In other words, the Supreme Court will be forced to consider the choice of law issue.

(51) Whether or not an unlawful distribution has taken place from a company domiciled in the Turks and Caicos Islands is a company law matter to be resolved by Norwegian courts pursuant to relevant Turks and Caicos law – provided it is possible to obtain sufficiently trustworthy information in this regard, see Supreme Court ruling Rt-2009-1537 paras 52 and 53 on this reservation. The court of appeal has not considered whether the distribution is unlawful or invalid, and consequently nor will the Supreme Court.

(52) If an unlawful distribution has taken place, the question is what type of claim arises on the company's part: a claim for replevin or some other type of claim, for instance a claim for damages? This very claim is in principle what constitutes the asset "belonging" to the company, which the creditor may attach. In my view, this must be determined under the same rules that govern the terms for legal distributions and valid transactions. It seems odd in this context to distinguish between conditions for legal distributions from a limited company, and for valid transactions in general, and the consequences of these conditions not being met. Conditions and sanctions are often balanced against each other. "Invalidity" is as such a useful link word, but nothing more. The effect an unlawful distribution has under Turks and Caicos law is also outside of what the court of appeal has considered, and which the Supreme Court may consider here.

(53) To the extent a claim for replevin exists on the company's part, the next question is whether an individual creditor may levy execution on assets registered on the third party that has received them. The court of appeal concluded that this, too, is governed by Turks and Caicos law, arguing that the right to levy execution on transferred assets is linked to the question of the consequences of unlawful distributions from the company in the Turks and Caicos Islands.

(54) I disagree. Whether or not a creditor may levy execution on an asset or a right transferred from the debtor to a third party through an unlawful transaction giving the debtor a claim for replevin, has more to do with the very enforcement. It must, like other issues regarding enforcement in Norway, be resolved under Norwegian law – *lex fori*. As I will revert to, I do not see the connection between this question and the question under company law of who may request a reversal of an unlawful distribution.

(55) It is true that foreign law may prescribe sanctions for an unlawful distribution that are not identical to a Norwegian claim for replevin. In that case, one must make an individual assessment of whether it is more natural under Norwegian law to level the relevant sanction with a claim for replevin or another type of claim, and then apply Norwegian enforcement rules in accordance with what one decides. Relevant here are the preparatory works to the Enforcement Act section 7-14, Proposition to the Odelsting no. 65 (1990-91) page 152, stating that if a claim for replevin exists, execution can be levied on the asset directly, and not, as under previous law, only on the debtor's claim to have the asset returned.

(56) As mentioned, the court of appeal has found that an individual creditor is prohibited also under Norwegian law from levying execution on assets unlawfully distributed from a limited company.

(57) I disagree with the court of appeal also in this regard.

(58) As mentioned, this is a question whether an asset that a third party possesses after having received it from the debtor through an unlawful transaction, still "belongs" to the debtor within the meaning of the Enforcement Act and the Creditors Recovery Act.

(59) Legal theory seems largely to answer this in the affirmative. I refer to Andenæs, *Konkurs* [Bankruptcy], 3rd edition page 243, Høgetveit Berg, *Proforma i beslagsretten* [Pro forma in attachment law], in the publication Jussens Venner 2017 pages 203–221 on page 204 and Hauge, *Ugyldighet ved formuerettslige disposisjoner* [Invalidity in transactions under law of obligations and property] page 332.

(60) The court of appeal mentions the settlement problems that may arise when the attached assets are part of synallagmatic contracts, as an argument for why an individual creditor cannot levy execution. I note that in other respects, it is clear that execution can be levied on assets to which a consideration is attached, and where similar problems may arise. Under any circumstance, the case at hand does not concern a synallagmatic contract.

(61) The fact that we are dealing with grounds for invalidity making the transaction contestable towards a third party by the debtor only, cannot lead to a different conclusion. The real conflict is under any circumstance between the individual creditor and the third party: If execution cannot be levied unless the debtor contests the validity of the transaction, the alternative is that the asset remains with the third party.

(62) The court of appeal has also emphasised that a creditor's right to attach unlawfully transferred assets is comparable to a non-statutory right of avoidance or the possibility to pierce the corporate veil outside bankruptcy, which is contested in the preparatory works to the Bankruptcy Act and the Creditors Recovery Act – Norwegian Official Report 1972: 20 p. 284-285 – and in Supreme Court ruling Rt-2014-922: The attached asset will only benefit one creditor in connection with an individual creditor's pursuit. Here, I disagree with the court of appeal. It is a normal consequence of a pursuit by an individual creditor that the object of execution does not benefit other, unsecured creditors. If the debtor is insolvent, reducing the other creditors' possibilities of satisfaction, the other creditors may request bankruptcy proceedings so that the execution has no effect if levied less than three months before the deadline, see the Creditors Recovery Act section 5-8.

(63) As an argument against an individual creditor's right to attach assets unlawfully distributed from a limited company, the court of appeal refers to the provision in the Companies Act that the it is for the board, as a mail rule, to make a claim for return of the unlawfully distributed assets. In my view, however, one must distinguish between who may pursue a claim for return under the Companies Act section 3-7 and the who may attach the unlawfully distributed assets to secure own claims against the company. The latter is not regulated by the Companies Act, but by general rules of attachment law.

(64) Since the conclusion is that an individual creditor may levy execution on assets unlawfully distributed from a limited company, the court of appeal's application of the law on this point is incorrect. The court of appeal's order must thus be set aside.

(65) Hence, it is not necessary to consider the appeal against the procedure. During the rehearing in the court of appeal, Deutsche Bank will have the chance to present its views on Turks and Caicos Islands law.

(66) *Pro forma*

(67) I then turn to the question whether the court of appeal has interpreted the rules on pro forma transactions incorrectly when concluding that the transfer of the Confirmit shares from Sebastian Holdings to Alexander Vik was genuine, preventing Deutsche Bank from levying execution on them.

(68) In the case at hand, also the pro forma issue forms part of the interpretation of the Enforcement Act section 7-1 subsection 2, stating that execution can be levied on any asset "belonging" to the debtor, and which the creditor may attach under the Creditors Recovery Act chapter 2. If the transfer is pro forma, the asset still "belongs" to the debtor. As previously mentioned, it is within the jurisdiction of the Supreme Court under the Dispute Act section 30-6 c to consider the court of appeal's general interpretation of the pro forma rules, see Supreme Court ruling Rt-2005-1476.

(69) Since the question arises following a transaction connected to several countries, it must also be determined on which country's legal system the pro forma assessment should be based.

(70) Pro forma is often referred to as a ground for invalidity. The validity of an agreement is normally determined under the legal system otherwise governing the agreement, see Cordero-Moss, *Internasjonal privatrett på formuerettens område* [International private law on the area of law of property] page 249. In the want of an agreed choice of law, this legal system is normally that of the seller's domicile. However, pro forma is different from other grounds for invalidity. It is primarily asserted by a third party towards parties who themselves claim that a genuine transfer of ownership has taken place between them, and it is closely related to more general issues concerning transfer of ownership of assets in which third parties have an interest. These issues are often referred to as pertaining to property law, which makes it natural to view the choice of law for the pro forma issue in the same way. Property law issues are governed by the law of the country in which the asset is located, *lex rei sitae*. Since it concerns shares registered in the Norwegian VPS, Norwegian law applies in this case. The parties concur on this point.

(71) Deutsche Bank claims that the court of appeal has applied a "subjective" pro forma rule, emphasising what the parties have intended with the transfer, while the correct approach would be to assess this based on objective criteria for whether the transfer between the parties is genuine – an "objective" pro forma rule. In addition, the appellant claims that the court of appeal's assessment, under any circumstance, is not sufficiently broad.

(72) I will first examine the question whether the pro forma rule is "subjective" or "objective":

(73) The objective approach to pro forma may briefly be described as an overall assessment of the asserted transfer, where the level or formality, possible motive for pro forma, any absence of other motives for the transaction, and – often decisive – the factual and legal effects it has had for the parties, are particularly important to decide whether the transfer is genuine. With a subjective approach, the question is what the parties themselves have intended with the transfer. One may well rely on the same facts as in an objective approach to identify this intention, but with a subjective pro forma rule, they become aspects of the assessment of evidence, and not aspects of a legal assessment as such.

(74) In my view, existing Supreme Court case law on pro forma does not give a clear answer. From early 19th century and until today, there have been examples of both objective and

subjective approaches, and some rulings are unclear. It would require too much space to examine all the rulings, so I will confine myself to some more recent examples:

(75) In the decision by the Supreme Court's Appeal Selection Committee Rt-1999-865, it is held on page 869 that invalidity due to pro forma "is to be decided, among other things, based on an assessment of the parties' motives when signing the agreement and the subsequent effects the agreement had for them". That can be read as an objective approach.

(76) The ruling Rt-1999-901 seems to reflect a subjective approach. On page 905, it is held that a marriage settlement must be respected by the spouses' creditors unless there are facts suggesting that there was no "real intention" behind the settlement. However, the fact that this concerns a marriage settlement, distinguishes this case from the other cases. In a marriage settlement, it is implicit that transfers of assets between spouses, also in the form of gifts, must be respected even when they – by the very nature of the case – seldom entail significant changes in the factual situation before a possible divorce. In return, requirements are made for attestation and registration, and the Marriage Act section 51 provides a special rule on the protection of creditors when one spouse gives the other a gift, and the donor is insolvent at the time of the gift. The risk of creditor evasion has hence been taken into account by the marriage settlement rules themselves. This means that the assessment whether a transaction between spouses is pro forma is not necessarily normative for the same assessment in other cases.

(77) The ruling Rt-2001-187 appears to be based on an objective approach. I refer to the top of page 193, where it is questioned whether the share purchase agreement would have generated rights for the acquirer that are essential to a shareholder. The individual assessment made by the Supreme Court is also pronouncedly objective, although it mentions in a couple of places "findings of fact" and "substantiating" pro forma.

(78) The ruling Rt-2005-1476, which is made by the Appeals Selection Committee, is clearly based on an objective approach. In para 19, it is held that the pro forma assessment must be based on a number of aspects, and that if it concerns attachment following a transfer of a housing property, the court must thoroughly examine whether the transfer is genuine.

(79) Here, I will point out that the choice between a subjective and an objective approach is only imperative when a subjective approach results in the transaction being considered genuine, while an objective approach would have given the opposite result. If it is clear that the parties' subjective intention was for the transfer not to have any effects between them, there is no reason, even with an objective approach, to carry on to a broader objective assessment of the situation.

(80) Furthermore, the evidence situation often differs depending on whether alleged pro forma becomes the subject of a dispute between the parties or of a dispute where the parties jointly claim towards a third party, most often the transferor's creditor, that a genuine transfer has taken place. In the first type of cases, the parties will normally present opposing views on the original intention with the transaction. In the second type, objective facts will naturally be more essential, also if based on a subjective pro forma rule. These facts clarifying the parties' intention will generally be the same that, with an objective pro forma rule, form the basis for determining whether the real purpose of the transaction corresponds to the formal wrapping. Thus, the two ways of identifying pro

forma may easily overlap, which can be observed in the wording of Supreme Court ruling Rt-2001-187.

(81) This brings me to legal theory. Brækhus and Hærem, *Norsk tingsrett* [Norwegian property law] page 494 prescribes an objective pro forma rule, and so does Brækhus, *Materiell konkurs- og eksekusjonsrett* [Substantive bankruptcy and execution law], 4th edition, 4th abbreviated edition, pages 44–45. The same view, with more detailed arguments, is reflected in the mentioned article by Høgetveit Berg: The parties' own opinion of what they have done may easily be adjusted to the situation they are facing, and may change if need be – without this being a deliberate attempt to deceive someone. Then, instead of determining what the parties have "really" meant based on objective facts, one should let these facts be part of an overall assessment of the objective purpose of the transaction.

(82) Sandvik, *Proforma-overdragelse av fast eiendom* [Pro forma transfer of real property], article in Tidsskrift for rettsvitenskap 1967 pages 48–75, argues in favour of a subjective pro forma rule. But he also states on page 72 that case law is slowly departing from the subjective approach. After Sandvik, no legal theoreticians seem to preach a purely subjective approach.

(83) Although pro forma in principle applies in the same way between the parties as between the parties and a third party, this ground for invalidity – as emphasised in Supreme Court ruling Rt-1999-865 on page 870 – is primarily to protect a third party. I find this to be of importance when formulating the pro forma rule. The difference between this and a subjective approach is, as mentioned, not very large in practice. If a dispute arises between the parties regarding whether or not a transaction between them is genuine, the evidence situation becomes another, without this involving a different pro forma rule.

(84) I cannot see that an objective pro forma rule clashes with the statements in the preparatory works to the Bankruptcy Act and the Creditors Recovery Act, Norwegian Official Report 1972: 20 pages 284–285 and in Supreme Court ruling Rt-2014-922 paras 17-19 that individual creditors should not be entitled to avoid disloyal transactions in the way a bankruptcy estate can. Although the existence of a motive for evading creditors is part of an objective pro forma assessment, it is not necessarily essential, as I have previously pointed out. The fact that one of many purposes of the avoidance rules is to prevent creditor evasion, does not rule out this motive in the assessment under other legal rules. The avoidance rules have their own terms and prescribe their own sanctions, different from those of the pro forma rules. In Supreme Court ruling Rt-1999-865, where, in my view, the Appeals Selection Committee applied an objective pro forma rule, the difference between avoidance and pro forma is highlighted.

(85) Against this background, I conclude that there are compelling reasons for applying an objective approach. It does not suffice only to ask whether the parties subjectively intended that the transaction would be pro forma – one must make an objective assessment. Marriage settlements, as mentioned, are a special category.

(86) Erik Martin Vik has submitted that the application of an objective pro forma rule contravenes the provision on protection of property in EMK P1-1 as it does not give sufficiently accurate, transparent and predictable criteria for the establishment of pro forma – in other words, it is a disproportionate interference with the right to enjoy one's possessions. Here, I refer to what I have said regarding the difference between a subjective and an objective approach, which is not large in practice. I have problems

seeing how the objective approach, but not the subjective, can contravene EMK P1-1, and I will not go further into whether an objective pro forma rule at all can be regarded as interfering with the right to enjoy one's property.

(87) The questions thus remain whether the court of appeal has applied a correct general interpretation of the pro forma rule and whether it has made a sufficiently broad assessment.

(88) The court of appeal's general starting point on 36 of the order reads:

> **"Who the true owner is must be determined based on an overall assessment, where a number of aspects become relevant. The parties' intentions, whether the transaction is completed formally correctly, the effects of the transaction between the parties and the compliance therewith may all be relevant. Also the parties' motivation – for instance a wish to hide assets from the creditors – may count. None of the aspects are decisive. The court of appeal will revert to the various aspects that are relevant to the case."**

(89) I have no objections to this as a description of an objective approach to determine whether a pro forma transaction has taken place. Yet, the statement that none of the aspects are decisive is only correct in the sense that each of them alone is not sufficient to establish pro forma. In a composite assessment, one single aspect may of course be decisive if there are other strong arguments in both directions.

(90) On the other hand, the court of appeal's formulation does not rule out that the court has applied a subjective interpretation of the pro forma rule. As mentioned, the aspects in an objective assessment may in practice also be evidence of the parties' real intention with the transaction in a subjective perspective. My perception is that the court of appeal's conclusive remark on page 44 regarding its assessment is a clear endorsement of a subjective approach:

> **"Finally, the court of appeal remarks that the right to attach in connection with pro forma should be reserved to transactions that in fact are not to be assumed between the parties and in cases where the parties have meant something other than what it seems, see for that matter the order by Borgarting Court of Appeal 16 May 2014 (LB-2014-31453). This applies even more in a case like ours, concerning a distribution from a limited company to a shareholder. The creditors' rights should in such cases be regulated by relevant company law, supplemented by rules on legal protection and avoidance. This also applies when the distribution is made to a sole shareholder."**

(91) Although the court of appeal mentions the transactions for which pro forma "should" be reserved, it is natural to interpret the court of appeal's introductory description of the subject matter in the light of this statement.

(92) However, I do not need to take a final stand on this point, as I find that the court of appeal's order must be set aside in any case since it is based on a too narrow assessment when one assumes that an objective pro forma rule must be applied.

(93) The court of appeal finds it proved that the motive for the transaction was to hide the shares form the company's creditors. However, the court holds that such an evasion is not sufficient to establish pro forma – with which I agree. But the court of appeal then holds that the motivation is "not in itself an indication" of pro forma. That is taking the approach too far – such a motive may under the circumstances be a strong indication of pro forma. Essential here is whether the transaction took place before or after the creditor started pursuing its claim. In this regard, the court of appeal refers to Supreme Court

ruling Rt-1994-235, where, however, the situation seems to have been that the transferor might have future difficulties paying his debt. In the case at hand, the bank's claim had already been established, and the relationship with the creditors was much more pressing than in the case from 1994.

(94) In this connection, I will comment on a remark on page 37 of the order. The court of appeal holds that since Alexander Vik was the sole shareholder of Sebastian Holdings, it is hard to see why the transfer of the shares to him should not be genuine – as a pro forma transfer would have had no effect towards the creditors. This argument – that the transaction must have been genuine because a pro forma transaction would not have had the intended effect towards the creditors – is also found in Supreme Court rulings Rt-1956-913 and Rt-1994-235. In my view, this approach is not suited to the case at hand. A pro forma transfer will in fact have the intended effect as long as it is not discovered that the transaction is pro forma – which is an assumption naturally ascribed to the parties in such cases. It is not necessarily so that most pro forma arrangements are disclosed – or that the parties expect them to be. In fact, it is a paradox to use the evasion motive as an argument *against* the existence of pro forma.

(95) Furthermore, on page 43, the court of appeal disregards the significance of whether a final and valid resolution was by passed by the board in Sebastian Holdings to transfer the Confirmit shares to Alexander Vik. The argument is that this would be an evasion of the rule that individual creditors may not attach assets unlawfully transferred to a third party from a limited company. As I have already said, I disagree with the latter. But I find, under any circumstance, that it may be essential in a pro forma assessment that a limited company has made a distribution contrary to applicable rules, both in terms of formal requirements and substantive conditions. If such rules are ignored, that may be a strong indication that no genuine transfer has taken place.

(96) Even if it were possible under the rules at the company's domicile to carry out a lawful distribution after a summary procedure and almost without traces in the form of written resolutions, or to affirm the distribution later, the transaction may still be regarded as pro forma. Anyone who establishes himself within a jurisdiction with a minimum of real and formal requirements to the company's decisions, and uses the opportunities this gives, must accept that the seeming lack of genuineness is given weight in a pro forma assessment. However, the court of appeal seems to have completely disregarded these aspects.

(97) The overall view in the order is that "the transaction has had the effect one may expect in a case where the shares are transferred from a company owned 100 percent by Alexander Vik to Vik personally", as the court of appeal summarises it on page 44. In my view, this is not a relevant concern in the assessment whether the transfer was pro forma. On the contrary, the starting point must be that the shares were owned by an independent legal entity, and that a shareholder may not freely dispose over the company's assets. The court of appeal thus uses an incorrect legal principle when stating on page 41:

> **"… Regardless of whether the control is exercised by Alexander Vik personally or by him in the capacity of sole board member and sole shareholder of Sebastian Holdings, the effect in both cases is that the control is in fact exercised by Alexander Vik personally."**

(98) When the pro forma assessment is to be made under Norwegian law, it does not matter if the legislation in the company's domicile permits any omission to distinguish between a

company's assets and a shareholder's assets. I refer to what I have previously said regarding the consequences of exploiting the opportunities given in such jurisdictions.

(99) My conclusion is thus that the court of appeal's order is based on an incorrect general interpretation of the pro forma rule and must therefore be set aside on these grounds.

(100) *Costs*

(101) The appeal has succeeded, and the appellant has demanded costs in the Supreme Court. There is no basis for departing from the main rule in the Dispute Act section 20-2, cf. section 20-5, that the successful party is entitled to compensation for costs incurred in connection with the proceedings.

(102) The appellant has submitted a claim for NOK 4 938 918 kroner. A court fee of NOK 6 294 is extra. VAT is added to each of the items in the claim, of which NOK 3 620 700 is costs for counsel. The respondent has held that this exceeds necessary costs. I agree. The total of around 870 billed hours gives an average hourly rate of more than NOK 4 000. It must then be expected that the work has been performed by advocates with solid experience in the relevant legal field who are able to work more efficiently than others. Most of the appellant's arguments before the Supreme Court are also found in the extensive response to the appeal to the court of appeal. When a case is to be heard by the Supreme Court, considerable work remains adjusting the material to oral proceedings. And even when recognising that Supreme Court proceedings normally entail more work for the appellant then for the respondent, I find that the fees in this respect are higher than necessary, and thus exceeding what can be claimed from the respondent. I find that the costs for counsel must be reduced to NOK 1.2 million plus VAT. The total costs awarded is thus NOK 1 919 337 including VAT.

(103) I vote for this

O R D E R :

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

2. Erik Martin Vik will pay costs to Deutsche Bank AG of NOK 1 919 337 – onemillionninehundredandnineteenthousandthrehundredandthirtyseven – within 2 – two weeks – of the service of this order.

(104) Justice **Ringnes:** I agree with the justice delivering the leading opinion in all material respect and with his conclusion.

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

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

(107) Justice **Endresen:** Likewise.

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

O R D E R :

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