SUPREME COURT OF NORWAY

J U D G M E N T

given on 28 June 2019 by the Supreme Court composed of

Justice Hilde Indreberg
Justice Erik Møse
Justice Ragnhild Noer
Justice Arne Ringnes
Justice Erik Thyness

HR-2019-1225-A, (case no. 18-175510SIV-HRET)
Appeal against Eidsivating Court of Appeal's judgment 29 June 2018

I. Oppland County Authority	(Counsel Arve Martin Bjørnvik) (Assisting counsel: Counsel Johnny Johansen)
v.	
Hab Construction AS	(Counsel Nils-Henrik Pettersson)
II. Hab Construction AS	(Counsel Nils-Henrik Pettersson)
v.	
Oppland County Authority	(Counsel Arve Martin Bjørnvik) (Assisting counsel: Johnny Johansen)

(1) Justice **Ringnes:** This case concerns a final settlement between parties to a construction contract and raises issues on additional payment for reduced productivity – disruption of "trouble and inconvenience" (*plunder og heft*) – and acceleration.

(2) Following a public tender competition, the Norwegian Public Roads Administration, Region East, entered into a contract with Hab Construction AS on 7 July 2011 for improvement and development of the road section Grime – Vesleelva on County Road 34 in Søndre Land municipality. The length of the road section is in excess of ten kilometres, and the work consisted mainly of road building.

(3) The road system is owned by Oppland County Authority. The Public Roads Administration was executive builder on behalf of the County Authority. The project was to be carried out under a performance contract (*utførelsesentreprise*) in accordance with the Norwegian standard NS 3430: General conditions of contract concerning the execution of building and civil engineering works. The agreed contract price was approximately NOK 142.50 million exclusive of VAT.

(4) The works commenced in the autumn of 2011, and the road was finished and handed over on 1 July 2013, which was the agreed completion date.

(5) On 9 September 2013, Hab Construction submitted a final settlement, claiming payment for a number of items that had not previously been settled.

(6) The case at hand deals with items in Change Order Request no. 12 – COR 12. The claims concern additional payment for trouble and inconvenience and acceleration.

(7) Shortly after the project's commencement – in November 2011 – Hab Construction gave notice of conditions on the part of the builder disrupting the work. For instance, the road section had not been cleared of trees, existing lines had not been removed and land acquisition had not been completed. Hab Construction stated that works at the north end of the road section could not commence as planned, that workers engaged in the project were idle and that the operation could not be properly maintained.

(8) In the notice, the contractor also stated that all works would be billed as daywork until a final clarification. The Public Roads Administration rejected the claims.

(9) A revised notice of new disruptions on the builder's part was made in December 2011. This notice was also rejected by the Public Roads Administration.

(10) In yet another notice in December 2012, Hab Construction held that extra costs until 15 January 2012 – based on daywork – constituted more than NOK 9 million. Furthermore, compensation was claimed for 60 days' delay that had prevented progress. The Public Roads Administration once again rejected the claim, insisting on following the contract and arguing that no specific documentation had been provided.

(11) As mentioned, Hab Construction submitted a final settlement in 2013. The claim for compensation for reduced productivity and acceleration amounted to NOK 36.5 million, and was justified as follows:

> **"This claim is based on several and complex factors, both large and small. As a result, the disruptions and extra work in the project are not only caused by the effects of each factor, but also largely by the situation as a whole, which has clearly had accumulated consequences fortifying the overall effects far beyond the sum of each individual factor."**

(12) It was specified that the work itself relating to the individual conditions had mainly been settled:

> **"In this claim, payment is claimed only for the time consequences and the costs accrued due to disruption (trouble and inconvenience) to other work and the project as a whole."**

(13) Hab Construction referred to a number of factors that it believed had entailed extra costs. Among the consequences was increased time consumption and use of official development assistance, a substantial efficiency loss for machines and workers and increased rigging and operation costs. The following was stated with regard to causation between the conditions on the builder's part and the consequences for the contractor beyond what had already been settled:

> **"The causal connections and the consequences are so numerous and so divided that it is practically impossible to separate them from each other, and the cumulative effects are extra. The claim must therefore be calculated as a whole based on the overall situation."**

(14) *The acceleration claim* was based on a request for a 23 weeks' extension. Two optional ways of calculating the claim were presented; based on either lost productivity or compensation for lost early completion bonus under special contractual provisions. The stated bonus claim was NOK 6.9 million.

(15) *The trouble and inconvenience claim* – extra costs due to reduced productivity – was based on the following estimate:

> **"Completed part of contract price including R&O [rigging and operation] NOK 137 million**
> **Initial rigging and operation NOK 18.5 million**
> **Net completed part of contract price NOK 118.5 million**
> **Share relating to time (machines and workers) 75 %**
> **Assessed average efficiency loss 30 %**
> **Contractor's share for own faults 15 %**
> **Efficiency loss on the builder's part: 85 % x 30 % = 25.5 %**
> **This is a careful assessment of the loss compared to previous court rulings and negotiations.**
>
> **Calculation of efficiency loss: NOK 118.5 million x 75 % x 25.5 % = NOK 22.7 million."**

(16) Hence, Hab Construction held that the builder was responsible for an efficiency loss of 25.5 percent.

(17) With the extra costs for additional public assistance, extra rigging and operation, increased prices and financing costs, the total sum claimed for trouble and inconvenience was NOK 29.6 million.

(18) The Public Roads Administration disputed the claim. Later, the parties agreed on several items in the final settlement, but as they failed to agree on all, Hab Construction brought an action on 4 September 2014.

(19) On 8 April 2017, Gjøvik District Court ordered Oppland County Authority to pay NOK 9 757 163 plus VAT to Hab Construction. Costs were not awarded.

(20) This amount included compensation for trouble and inconvenience and acceleration amounting to NOK 5 million exclusive of VAT. The District Court determined the amount at its discretion and referred to its "view on causation and experience with the costs and expenses that may entail".

(21) Hab Construction appealed the judgment as concerned the disputed COR 12 and other claims relating to the settlement for contractual processes.

(22) On 29 June 2018, Eidsivating Court of Appeal concluded the following:

> **"1. Oppland County Authority will pay NOK 15 886 178 – fifteenmillioneighthundredandeightysixthousandonehundredandseventyeight – to HAB Construction AS within 2 – two – weeks from the service of the judgment. Statutory default interest accrues from 19 November 2013 until payment is made.**
>
> **2. The parties will carry their own costs in the District Court and the Court of Appeal.**
>
> **3. The parties will jointly carry the costs of expert judges as previously determined by the District Court and in the Court of Appeal as determined separately."**

(23) The amount in item 1 of the conclusion included compensation for *acceleration* of NOK 2.5 million and for *trouble and inconvenience* of NOK 5 million. The Court of Appeal determined the amount at its discretion.

(24) During the presentation of evidence, Hab Construction asserted 15 catch-all categories of builder's conditions as the cause of the alleged productivity disruptions. This included lack of access because of non-completed land acquisition, lack of access due to late cable laying, culvert failure and changed engineering with regard to traffic safety. The Court of Appeal concluded that ten of these builder conditions would "qualify for compensation for acceleration and/or efficiency loss".

(25) Both the District Court and the Court of Appeal were sitting with expert judges.

(26) Both Hab Construction and Oppland County Authority have appealed the Court of Appeal's judgment to the Supreme Court. Hab Construction's independent appeal concerned the Court of Appeal's decision relating to settlement of the contractual processes, including a part of the disputed COR 12 – the responsibility for sampling of soil. However, on that point leave to appeal was refused by the Supreme Court's Appeals Selection Committee on 17 December 2018.

(27) Oppland County Authority has appealed the part Court of Appeal's ruling relating to the application of law and procedure – inadequate grounds for judgment. Hab Construction has submitted a derivative appeal, arguing that the Court of Appeal has erred in its application of law in the trouble and inconvenience claim.

(28) On 17 December 2018, the Supreme Court's Appeals Selection Committee allowed Oppland County Authority's independent appeal and Hab Construction's derivative appeal.

(29) At the preparatory meeting, it was agreed the Supreme Court would not make any new calculation, and if such a calculation should be relevant, the result would be setting aside of the Court of Appeal's judgment.

(30) In all material respects, the case before the Supreme Court is similar to that before the Court of Appeal.

(31) The appellant – *Oppland County Authority* – contends:

(32) In its hearing of the *trouble and inconvenience claim*, the Court of Appeal has mainly applied a correct legal basis when it comes to the contract's causation requirements and evidence to substantiate such a claim.

(33) However, the Court of Appeal has not applied these requirements in its concrete calculation, but instead made a discretionary calculation based on the situation as a whole. It has failed to identify the works affected, to which extent other works were affected, to which scope and during which periods the disruptions took place, whether some works were affected simultaneously and the costs in this regard. This represents an error of law.

(34) There Court of Appeal has also erred in its assessment of the *acceleration claim*.

(35) The court has not discussed whether the contract's conditions for claiming additional payment for acceleration are met. Furthermore, the court has not considered how many days the builder must answer for, and it has failed to consider the individual effect each builder's fault has had on the critical path. The failure to assess what the allocation of resources would have been if the builder's faults had not occurred is also an error.

(36) Alternatively, the Court of Appeal's ruling must be set aside due to deficiencies in the ruling, see section 29-21 subsection 2 c of the Dispute Act, or subsection 1.

(37) The Court of Appeal has not given grounds for its ruling in accordance with section 19-6 of the Dispute Act. It is not possible from the court's grounds to see whether the causation requirements are correctly applied and on what specific basis the compensation is calculated.

(38) Oppland County Authority submitted this prayer for relief:

> **"1. Eidsivating Court of Appeal's judgment of 29 June 2018 in case 17-133058ASD-ELAG is to be set aside to the extent appealed.**
> **2. HAB Construction AS is to pay Oppland County Authority's costs in the Supreme Court."**

(39) The respondent and appellant in the derivative appeal – *Hab Construction AS* – contends:

(40) The Court of Appeal did not err in making a discretionary calculation of the compensation for *trouble and inconvenience.* The possibility to exercise discretion was expressed in section 192 of the former Dispute Act, and the principle still applies.

(41) However, it was an error of law to demand documentation of causation between each builder's act or omission and the consequences it has had for the contractor's productivity and costs.

(42) What characterises trouble and inconvenience is that many different conditions have contributed, and that the aggregate consequences are larger than the sum of the consequences of individual conditions. This is substantiated by research and expressed in Norwegian and international legal literature.

(43) The reason for the high number of trouble and inconvenience claims before the courts, is the lack of proper preparation. The evidence requirements cannot be so strict that the builders profit from poor engineering. If one relies on the Court of Appeal's opinion of the law, trouble and inconvenience claims will mostly be precluded in practice.

(44) It is also an error of law to reject, categorically, the total costs method and the use of standard calculations as relevant evidence. This is contrary to the principles of free evaluation and free presentation of evidence in the Dispute Act.

(45) The issue at stake when reviewing *the acceleration claim* is whether it was an error of law or a procedural error not to consider the number of days by which Hab Construction would have been delayed.

(46) Although it would have been preferable if the court had done so, it was not an error. It is the cost of catching up with a delay that is to be compensated, which is not necessarily a function of a certain number of days.

(47) The appeal against the procedure cannot succeed. There is no requirement in section 19-6 of the Dispute Act that grounds must be given for the individual discretion.

(48) Hab Construction AS has submitted this prayer for relief:

> **"Principally (if the cross-appeal succeeds):**
> **1. The Court of Appeal's judgment is to be set aside for the disputed trouble and inconvenience part under COR 012.**
> **2. HAB Construction AS is to be awarded costs in the Supreme Court.**
> **Alternatively (if the cross-appeal does not succeed):**
> **1. Oppland County Authority's appeal is to be set aside.**
> **2. HAB Construction AS is to be awarded costs in the Supreme Court."**

(49) *My view on the case*

(50) During construction projects, events may occur disrupting the contractor's performance. For instance, the contractor may have to gather extra resources to catch up on delays, it may be necessary to perform work in a different order than planned, and workers and equipment may not be used efficiently. When the disruptions are caused by faults on the builder's part, claims may arise for additional payment for both acceleration and trouble and inconvenience.

(51) The issue at stake is which evidence is required to demonstrate causation between the builder's faults and the contractor's extra costs.

(52) Although there is a factual and legal connection between trouble and inconvenience claims and acceleration claims, each of them raises special issues. I will therefore discuss the two claims separately, and start by the causation requirements for trouble and inconvenience.

(53) *Trouble and inconvenience*

(54) Trouble and inconvenience is an industrial term with no specific legal content. Its implication, however, is that the contractor incurs extra costs because faults on the builder's part cause reduced productivity or disruptions to *other work* the contractor is to perform.

(55) Hence, we are dealing with *consequences deriving* from acts or omissions of the builder, such as change orders or delays, or other failure in the builder's duty to cooperate. Trouble and inconvenience is often a combination of several events, of which some may be brought about by the builder and some by the contractor. The contractor must ensure to include the risk of disruptions in its planning and calculations.

(56) Claims for additional payment for changes and other conditions on the builder's part must be submitted on an ongoing basis in accordance with the provisions in the contract. Subsequent trouble and inconvenience claims are only relevant when the aggregate economic consequences exceed what the contractor could reasonably expect from the tender documents, and which is not already covered by compensation.

(57) The legal basis for Hab Construction's claim is NS 3430, section 21.1 subsection 1, which reads:

> **"If the contractor incurs extra costs due to delay as mentioned in section 17.1, or incurs extra costs due to other circumstances for which the builder is responsible, he may claim such costs compensated by the builder."**

(58) Under subsection 2, the contractor may only claim compensation "to the extent he cannot limit or prevent the costs with reasonable means".

(59) NS 3430 has a two-track system for additional payment. Section 28 contains rules on the contractor's payment when the builder issues change orders. Section 21 governs the contractor's right to payment of extra costs for other circumstances for which the builder is responsible.

(60) According to the wording of section 21.1, *causation* must be demonstrated between the contractor's extra costs and the builder's acts or omissions. I refer to the words "on the builder's part". It must therefore be limited to costs arising from *other circumstances.* For example, the contractor must carry the costs of his own inefficiency; it does not make him entitled to additional payment.

(61) Beyond that, the wording in section 21.1 gives little guidance as to the content of the causation requirements.

(62) NS 3430 was replaced by NS 8405, 1st edition 2004. Section 24 contains provisions on payment adjustment. Sections 24.1 and 24.2 govern – in my understanding – the contractor's right to payment adjustment for more direct effects of the builder's acts or omissions. Section 24.3 governs the contractor's right to payment adjustment and coverage for disruptions to *other work,* i.e. for trouble and inconvenience.

(63) I trust that section 24.3 is a specification and codification of what applied under NS 3430, cf. Kolrud and others, NS 8405 with comments, 2004, page 284:

> **"The provision concerns the type of consequences often referred to as 'trouble and inconvenience'. Like section 24.2, section 24.3 is also new compared to NS 3430. And like section 24.2, section 24.3 is a specification of the rules on payment adjustment. The contractor is in any case entitled to payment for any effects of changes and other conditions for which the builder is responsible. The purpose of firmly establishing this is thus more of a pedagogic nature, while it clarifies any uncertainty with regard to the procedure."**

(64) Section 24.3 reads:

> **"24.3 Right to payment adjustment and coverage of costs in the event of other disruptions causing extra costs for the contractor**
>
> **If changes, including acceleration or delays in the builder's deliveries and other contribution, entail reduced productivity or disruptions to other work, the contractor is entitled to coverage of the costs and expenses thus caused. The same applies if costs are caused by other conditions for which the builder is responsible. It only applies to the extent the costs or expenses cannot be covered through other measures. The provisions in sections 24.5, 24.6 and 31.4 are applicable to extent they are suited.**
>
> **The contractor shall keep the builder continuously informed of events that could make basis for a claim."**

(65) The provision is amended in the second edition of NS 8405, which was issued in 2008. However, it is section 24.3 of the first edition that is interesting to the case at hand, as it must be considered to express the general causation requirements for trouble and inconvenience. Against this background, I note the following:

(66) Causation must be established in two steps. *First*, evidence of disruption or inefficiency as a result of the builder's conditions must be presented. This includes demonstrating that circumstances for which the builder carries the risk have occurred during the work, which work operations they have affected, during which periods they occurred and which consequences they have had for the contractor in the form of reduced productivity. *Second*, when such probability evidence has been presented, it must be substantiated that the these consequences caused the contractor's extra costs.

(67) The parties have stated that there are many disputes relating to trouble and inconvenience because of the uncertainty as to how strict the evidence requirements are or should be. Case law from the Courts of Appeal also varies to some extent, see for instance Borgarting Court of Appeal's judgments LB-2011-95644 *Lysaker station* and LB-2011-135964 *Nøstvedt tunnel*, and Agder Court of Appeal's judgment LA-2013-175355 *Teigar secondary school*.

(68) The hearing in the Supreme Court has therefore centred on the requirements and guidelines for presentation and evaluation of evidence with regard to causation.

(69) The disagreement between the parties concerns in particular the second step in the establishment of causation: evidence for the concrete *calculation of the additional payment*.

(70) According to Oppland County Authority, evidence must normally be presented for extra costs caused by *the individual* act or omission by the builder. To support its view, the County

Authority has referred to the contractor's burden of proof, and that the grounds for claiming additional payment must be specified to the extent possible for the other party to be able to present its version.

(71) Hab Construction in turn contends that it is impossible to present evidence for such concrete causation. It is a very complex matter, and there is no one-to-one relationship between the extra costs and the individual consequences. The primary reason for trouble and inconvenience is poor planning on the builder's part. When unrealistic demands for proving causation are made, the risk is dumped on the contractor.

(72) My assessment is based on general evidence principles, including the principle of free evaluation of evidence in section 21-1 subsection 1 of the Dispute Act and the right to present evidence in section 21-3 subsection 1. Therefore, within the scope set out in sections 21-7 and 21-8, the contractor is free to present any evidence he believes supports his claim.

(73) The evidence must be evaluated based on the principle of preponderance of evidence, see the Supreme Court ruling Rt-2015-1246 paragraph 35. The purpose of the presentation is to decide – in accordance with the contract's provisions – which amount is correct, based on the facts that ultimately appear more likely.

(74) It is the contractor that must substantiate that the causation requirement has been met. But if the contractor has presented vital evidence, the burden of presenting evidence will shift to the builder, and it may swing back and forth between the parties depending on the value of the evidence presented each time.

(75) If the result of the presentation of evidence is that causation between the contractor's claim and the builder's conditions is just as likely as it is unlikely, the builder will have the benefit of the doubt. In other words, the contractor has the burden of proof.

(76) Kolrud and others, NS 8405 with comments, page 285, discusses the evidence issues raised in trouble and inconvenience cases:

> **"'Reduced productivity' in particular may have many causes, such as poor management and control by the contractor, irrespective of conditions on the builder's part. Also 'disruptions to other work' may have several causes, for instance that other parts of the contracted work are disturbed by more than one event, irrespective of the builder's acts or omissions. It may be very difficult in each case to distinguish between different possible causes."**

(77) In the Supreme Court ruling Rt-2005-788 *The Oslo fjord tunnel*, the Supreme Court found that "extra costs" in section 21.1 of NS 3430 had to be based on the balance between the actual costs incurred due to acts of omissions of the builder, and the costs the contractor would have incurred if the acts or omissions had not occurred, see paragraph 51, cf. paragraph 43. The statements I have quoted from Kolrud and others show, however, that it may be difficult in trouble and inconvenience cases to establish the costs in a hypothetic course of action where one disregards the events caused by the builder.

(78) Establishing the extra costs based on the balance between the actual costs and the contractor's estimated costs is not a good alternative. Such a procedure considers neither the contractor's own conditions or inefficiency nor possible weaknesses in his estimate.

(79) Furthermore, I assume that "numbers based on general experience" for reduced productivity – like those Hab Construction has applied in its estimate – do not adequately reflect the contractor's actual extra costs, unless it is documented that the numbers fit the character and content of the assignment in question.

(80) However, it cannot be ruled out that numbers based on general experience, or estimated by other general methods, may serve as evidence based on the circumstances, perhaps particularly as a supplement to concrete evidence directly associated with the project.

(81) I mention in this regard the parties' reference to extensive material from USA and UK, where different methods for assessing disruption claims are reviewed in great detail, among them the UK guidelines issued by the Society of Construction Law in the so-called Delay and Disruption Protocol, 2nd edition from 2017.

(82) Against this background, I find that the contractor, as a starting point, cannot base its evidence on a general and overall approach alone. The claim must be qualitatively and quantitatively substantiated in line with what I have explained. In other words, the fact that this may not be fully feasible does not mean that it can be completely avoided.

(83) Thus, as a starting point, the injured party – the contractor – is the one to demonstrate exactly which working operations were affected by the builder's conditions, and calculate the extra costs incurred because of it.

(84) This method is in my view supported by the contractual system. According to section 17.5 of NS 3430, the contractor must notify the builder in writing of any claim for more time to complete the assignment or for reimbursement of extra costs. In the second subsection of the provision, it is stated that the contractor "shall within reasonable time specify and justify his claim". A further clarification is given in the first edition of NS 8405, in section 24.3, establishing that the "contractor shall keep the builder informed on an ongoing basis of the development of the basis for the claim". In Kolrud and others, Comments to NS 8405, page 287, it is pointed out that trouble and inconvenience claims tend to increase substantially towards the end:

> **"In this situation, the builder has a legitimate right to be kept informed in the best possible manner on how the claim develops and the basis for it. Although it is difficult to give precise reports, the contractor shall endeavour to provide the best possible information."**

(85) The contractor has a duty of notification and specification, as he has the burden of proving how the builder's conditions have affected his performance. I also note that the Supreme Court, in several rulings, has stressed the relevance of contemporaneous evidence, see HR-2019-928-A paragraph 53 and Schei and others, 2nd edition 2013, page 776.

(86) However, in my view it cannot generally be required that the exact economic consequences of *each and every* condition on the builder's part is documented. The evidentiary requirements must reflect the difficulty of connecting all extra costs to individual acts or omissions of the builder. The requirements cannot be so strict that it becomes impracticable or unreasonably burdensome to the contractor to demonstrate trouble and inconvenience. Also, as I have mentioned, in trouble and inconvenience cases, the aggregate effect on the contractor's productivity is paramount.

(87) Consequently, the calculation of the additional payment will be discretionary to some extent. When the presentation of evidence is connected to the two steps of causation I have described, the possibility to exercise discretion will however be narrowed in. The additional payment may then to a greater extent be based on the proven facts.

(88) Thus, the consideration for the counterparty's possibility to contest the contractor's claim is also maintained.

(89) I will now turn to the *Court of Appeal's application of the law*.

(90) The Court of Appeal stated the following as its legal basis:

> **"The basic condition for being awarded compensation for loss of efficiency is that the contractor's planned production under the contract has been disrupted due to conditions for which the builder carries the risk and responsibility. This means that HAB must substantiate that such conditions exist on the builder's part, and that they have resulted in reduced productivity. Furthermore, HAB must demonstrate causation and the loss/increased costs incurred because of that."**

(91) In my view, the Court of Appeal expresses a correct legal basis, with the modification that the reduction in productivity must be measured against how the situation would have been if the builder's conditions had not occurred, see the Supreme Court ruling *The Oslo fjord tunnel*, paragraph 51.

(92) In its individual assessment, the Court of Appeal stated:

> **"The Court of Appeal finds that the assessment must be based on a demonstration of which working operations were disrupted and subjected to an efficiency loss as a result of conditions for which the builder is responsible, and then calculate the compensation based on these disruptions (from the bottom up)."**

(93) This too is, in my view, an expression of correct application of the law.

(94) The Court of Appeal continues by stating that standardised factors – as applied by Hab Construction in its estimate – were not suited as basis for calculating the extra costs. Nor did the Court of Appeal find that "a subsequent balancing of aggregate loss based on the total numbers in the estimate and the actual costs (top down)" was a suitable method for determining the costs.

(95) Although the Court of Appeal's remarks on this point are somewhat vague, they must be interpreted to mean that the court considered the methods were unsuitable – which the court is free to do. However, if the statements express that the methods were rejected as relevant evidence on a principal basis, it is an error of law, see section 21-3 subsection 1 of the Dispute Act.

(96) The judgment contains statements suggesting that it is a requirement that the economic consequences of each of the builder's conditions must be documented. As I have already mentioned, this means that the evidentiary requirements become too strict in a case where a long chain of events for which the builder is responsible have interacted.

(97) The Court of Appeal gave the following grounds for its determination of additional payment.

> **"Such an approximate measurement will contain uncertainties. There is both a risk that compensation is awarded for costs HAB has not incurred, or for costs that have been covered otherwise, and that the actual effects of the builder's acts or omissions may have been larger. The court finds that the latter risk must be carried by HAB, since it has made no attempt to specify the specific effects on productivity.**
>
> **In its discretionary assessment, the court has emphasised the variety of builder's acts or omissions, of which some are probably of limited relevance to HAB's productivity in terms of scope and/or time, while others have had a larger impact and/or have been present during the entire project. After an overall assessment, the court finds it appropriate to determine the compensation to HAB for the efficiency loss (trouble and inconvenience), to NOK 5 000 000."**

(98) I note that this discretionary assessment appears to be disconnected from the legal bases formulated earlier in the judgment. As the additional payment is determined without basis in Court of Appeal's own legal requirements for establishing causation, the judgment must be set aside on this point due to an error of law.

(99) *Acceleration*

(100) I will now consider the *acceleration claim*.

(101) Acceleration implies that the contractor is forced to add extra resources to catch up on the delay created by the builder.

(102) Under section 17.2 of NS 3430, the contractor has a right to extension due to the builder's acts or omissions. If the builder rejects a legitimate claim for extension, section 17.6 states:

> **"If the builder rejects a legitimate claim for extension under section 17.1 or 17.2, the contractor has a right to accelerate the work for the builder's account unless the acceleration will entail disproportionately large extra costs.**
>
> **Before any acceleration can be initiated, the builder is to receive a written notification containing a costs estimate for the acceleration."**

(103) The parties had agreed that acceleration costs exceeding accrued liquidated damages over the same period of time as the acceleration would be considered disproportionately large.

(104) For acceleration too, causation must be demonstrated between the builder's conditions and the contractor's extra costs. I refer to Marthinussen, Giverholt and Arvesen, NS 8405 with comments, 4th edition 2016 pages 339–340, and the following statement:

> **"Two conditions must be met before the contractor may demand extension. The first condition is that progress has been prevented; the second is that this is due to the builder's acts or omissions. There must be causation between the reduced productivity and the fact that it is due to conditions for which the builder is responsible. The essential point is that progress is affected, in the sense that something is actually preventing it. Several postponements in building projects occur without progress being prevented so that the project cannot be completed within the agreed date."**

(105) Before the Supreme Court, the County Authority has submitted a number of objections to the Court of Appeal's application of law, and raised several interpretation issues relating to the contractual provisions on acceleration.

(106) I do not consider it necessary to go further into this. What matters is the Court of Appeal's assessment of the causation requirement.

(107) The Court of Appeal summarises its assessment with regard to the compensation as follows:

> **"As a consequence of the evidentiary uncertainty as to how large the need of acceleration actually was compared to the progress HAB otherwise would have had, the Court of Appeal has no basis for stipulating HAB's right to extension by an exact number of days. Yet, it seems to be substantiated that HAB has been in a legitimate acceleration situation, thus the compensation must be determined by discretion. Considering the scope and significance of the conditions for which the builder is responsible, and the aggregate effect this had had on HAB's progress throughout the entire project, the court finds that HAB's compensation for acceleration can be set to NOK 2 500 000.»**

(108) Here, I find it hard to see that the Court of Appeal has made a concrete and individual assessment of causation. The court has not specifically considered which delay would have occurred without acceleration, or which costs Hab Construction would have incurred by catching up on the delay.

(109) I find that these faults must be assessed in the same way as the Court of Appeal's assessment of the trouble and inconvenience claim. Thus, I have concluded that also this part of the judgment must be set aside due to an error of law.

(110) Against this background, I conclude that the Court of Appeal's judgment must be set aside as concerns the disputed COR 12 to the extent appealed and heard by the Supreme Court.

(111) Under section 20-2 of the Dispute Act, the successful party is entitled to have its costs covered. Oppland County Authority has succeeded in all material respects. However, exceptions can be made if there are weighty reasons. The case has raised issues that needed clarification by the Supreme Court, and the County Authority in particular has highlighted the principal impact the case has had on the contracting industry. I have therefore concluded that Oppland County Authority should carry its own costs in the Supreme Court.

(112) I vote for this

J U D G M E N T :

1. The Court of Appeal's judgment is set aside as concerns COR 12 to the extent appealed and heard by the Supreme Court.

2. Costs in the Supreme Court are not awarded.

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

(114) Justice **Noer:** Likewise.

(115) Justice **Thyness:** Likewise.

(116) Justice **Indreberg:** Likewise.

Following the voting, the Supreme Court gave this

J U D G M E N T :

1. The Court of Appeal's judgment is set aside as concerns COR 12 to the extent appealed and heard by the Supreme Court.

2. Costs in the Supreme Court are not awarded.