



SUPREME COURT OF NORWAY

On 19 August 2019, the Supreme Court's Appeals Selection Committee composed of Justice Kristin Normann, Justice Henrik Bull and Justice Espen Bergh, issued an order in

HR-2019-1577-U (case no. 19-087874SIV-HRET), civil case, appeal against order:

Leif Magne Tandstad

(Counsel Erling Torbjørnsson Eggen
represented by Counsel Anne Christina
Ødegaard)

v.

HSBC Holdings plc
HSBC Bank plc
HSBC Bank plc

(Counsel Alexander Michael Plows)

O R D E R :

- (1) The case concerns the rejection of a class action. The issue is whether Norwegian courts are the correct venue according to the provisions of the Lugano Convention.
- (2) On 28 March 2018, Leif Magne Tandstad brought a class action for damages in Oslo District Court. The defendants were eventually identified by his counsel as HSBC Holdings plc, HSBC Bank plc domiciled on the Isle of Man and HSBC Bank plc domiciled in London. Their counsel has informed that the two latter are the same legal entity. From now on, the defendants in the class action will be collectively referred to as HSBC.
- (3) HSBC demanded among other things that the class action be rejected due to Norwegian courts' lack of jurisdiction under the Lugano Convention.
- (4) Oslo District Court considered the issue and ruled as follows on 26 November 2018:
 - “1. The case is rejected.
 2. Leif-Magne Tandstad will pay total costs of NOK 15 000 to HSBC Bank plc. The claim is due for payment within two weeks of the service of this order.”

(5) Leif Magne Tandstad appealed the order to Borgarting Court of Appeal, which ruled as follows on 11 April 2019:

“1. The appeal is dismissed.

2. Leif-Magne Tandstad will pay costs in the Court of Appeal of NOK 37 000 – thirtyseventhousand – to HSBC Bank plc and HSBC Holdings plc jointly within two weeks of the service of this order.”

(6) *Leif Magne Tandstad* has appealed the Court of Appeal’s order to the Supreme Court. In short, it is contended that the harmful event must be regarded as having occurred in Norway within the meaning of the Lugano Convention. It is also contended that the Court of Appeal has incorrectly established a “minimum requirement” that, to be sued in Norwegian courts, the defendant must have known about the subsequent tortfeasor.

(7) Leif Magne Tandstad has submitted this prayer for relief:

“1. The order by Borgarting Court of Appeal in 19-017561ASK-BORG/04 is to be set aside.

2. HSBC Bank plc Isle of Man, HSBC Bank plc London and HSBC Holdings plc London are to pay the costs of the appeal.”

(8) *HSBC Holdings plc and HSBC Bank plc* contend that none of the options in Article 5 (3) of the Lugano Convention can be invoked in this case, which means that the case cannot be heard in Norway. The harmful event, if any, has not occurred in Norway, nor have any adverse effects been demonstrated here. This is not even relevant because of the minimum requirement correctly established by the Court of Appeal.

(9) HSBC Holdings plc and HSBC Bank plc have submitted this prayer for relief:

“Principally:

1. Leave to appeal is to be refused.

Alternatively:

2. The appeal is to be dismissed on its merits.

In all cases:

3. HSBC Bank plc and HSBC Bank Holdings plc are to be awarded costs.”

(10) *The Supreme Court’s Appeal Selection Committee* notes that the Committee is fully competent under section 30-6 (a) of the Dispute Act.

(11) In brief, the class action was brought because a number of persons claimed they had been defrauded by the company Oslo Direct Consulting. The company had given the impression that it provided loans in HSBC by using HSBC’s name and logo, and demanded considerable fees in that respect. The persons affected by the fraud were not directly involved with HSBC, but they allegedly received loan papers in Norway from Oslo Direct Consulting and paid processing fees in Norway to Oslo Direct Consulting’s account in DNB.

- (12) The claimant contends that HSBC has acted negligently by operating with inadequate control and safety procedures. This contention is specified only to a small extent. The Appeals Selection Committee has problems perceiving which specific acts or omissions by HSBC that, in the claimant's view, give rise to liability. It has not been stated that they were committed in Norway. As to the country where elements establishing liability are present, the appellant stated the following in a pleading to the Supreme Court of 18 June 2019:

“In the case at hand, there is no way of telling whether the inadequate safety procedures were in Singapore or in Finland or in the UK. Or elsewhere.”

- (13) The action has been brought in Oslo District Court in accordance with Article 5 (3) of the Lugano Convention. The Convention applies as Norwegian law under section 4-8 of the Dispute Act. Article 5 (3) states that matters related to tort can be brought “in the courts for the place where the harmful event occurred or may occur”. Thus, for Oslo District Court to have jurisdiction under this provision, that place must be within Oslo District Court's judicial district. It is not sufficient that the event has occurred somewhere in Norway.
- (14) The basic aim of the jurisdiction rules in the Lugano Convention is predictability: The defendant must to a reasonable extent be able to foresee where an action may be brought, see for instance Case C-144/10 *BVG* paragraph 33, where the Court of Justice of the European Union points out that this is emphasised in recital 11 in the preamble of Council Regulation (EC) No 44/2001, which corresponds to the Lugano Convention. The rules of special jurisdiction in the Convention, including Article 5 (3), must therefore be interpreted restrictively, see Case C-170/12 *Pinckney* paragraph 25.
- (15) The Court of Justice of the European Union has concluded, in Cases C-228/11 *Melzer*, C-387/12 *Hi Hotel* and C-360/12 *Coty Germany*, that a presumed tortfeasor cannot be sued in the courts for the place where an accomplice is stated to have performed his part of the damage. On the other hand, if the presumed tortfeasors have jointly caused the damage in the same place, they can be sued there, see Case C-352/13 *CDC Hydrogen Peroxide*. In these cases, the Court of Justice has emphasised that the case must be brought in the court objectively best placed to determine whether the elements establishing liability are present, see in particular *Melzer* paragraph 28. This consideration comes in addition to the aim of predictability, and the rule established by the Court in these cases are also suited to maintain the latter.
- (16) The Court of Appeal has referred to a discussion in legal theory where it is argued that *CDC Hydrogen Peroxide* indicates that an action brought against one of several tortfeasors should more generally be accepted in the courts of the place where only one of the other tortfeasors has performed his or her part of the “joint and commonly planned activity”, see Magnus and Mankowski (red.) *Brussels Ibis Regulation* pages 288–289. On page 293, it is stated however that if two or more tortfeasors “are not acting willingly in concert, not coordinated with each other”, each tortfeasor must be dealt with separately. This shows that the aim of predictability for the defendant also here constitutes a basic premise for the discussion.
- (17) The mentioned judgments and the discussion in Magnus and Mankowski concern the place where the harmful event took place. It follows from *Hi Hotel* paragraph 33 et seq. and *Coty Germany* paragraph 52 et seq. that the courts concerned may nonetheless have jurisdiction if the damage occurred there. The action in the case at hand has been brought in Oslo District Court because the adverse effects have allegedly occurred here.

- (18) Again, the aim of predictability is crucial, as accentuated in the Court of Justice's Grand Chamber judgment in Joint Cases C-509/09 and C-161/10 *eDate Advertising* and *Martinez* paragraph 50. In *Hi Hotel* and *Coty Germany*, this was not an issue. In *Hi Hotel*, a French hotel was sued in Germany by a photographer who claimed the hotel had violated his copyright by allowing publication of his photos of the hotel in a German-language book. In *Coty Germany*, a Belgian company was sued in Germany for having sold a perfume to a reseller in Germany in conflict with German trademark law.
- (19) In several cases regarding violations committed via the Internet, the Court of Justice of the European Union has to a large extent accepted that the adverse effects may be regarded as having occurred in any country where the relevant websites are available without the messages necessarily being directed at the public in that country. Reference is made to *eDate Advertising* and *Martinez*, Case C-523/10 *Wintersteiger*, Case C-170/12 *Pinckney* and Case C-441/13 *Hejduk*. However, the Court has been careful to highlight the nature of the rights allegedly violated – in *eDate Advertising* and *Martinez*, it was the right to private life; other judgments dealt with territorially limited intellectual property rights. As mentioned, the aim of predictability was expressly accentuated in *eDate Advertising* and *Martinez*, and the same must be deemed to form the basis for the other judgments.
- (20) Such predictability will be present if the defendant has basic knowledge of the subsequent tortfeasor's activity, as pointed out by the Court of Appeal. It cannot be ruled out that other forms of connection between the defendant and the subsequent tortfeasor may, under the circumstances, be sufficient to establish venue based on the place where the damage has occurred.
- (21) However, the Appeals Selection Committee cannot see that the claimant, in this case, has submitted anything to suggest that the defendant ought to have foreseen that others would misuse its company name, logo etc. in an attempted fraud with adverse effects in Oslo.
- (22) The claimant has not countered the defendant's information that HSBC does not conduct business directed at the Norwegian market. What is highlighted is that the defendant's negligent act is having operated with inadequate safety procedures somewhere in the world, without the claimant being able to say where or what kind of inadequate safety procedures. This negligence has then made it possible for swindlers in Norway to pretend to offer loans on behalf of HSBC, again without the claimant demonstrating a connection between HSBC and the swindlers that could offer HSBC any form of predictability with regard to proceedings in Oslo.
- (23) Admittedly, the claimant has pointed out that HSBC, a major international bank, at least on their French-language website, has a general warning against misuse of the bank's name and logo in attempts to commit fraud. However, there is always a risk that someone, somewhere in the world, will misuse profiled companies' names and logos in such attempts. This risk, or that the company itself recognises the risk and tries to warn large parts of the world against it, cannot alone have the effect that the company must expect to be sued by the injured party anywhere the swindlers might succeed. In the Appeals Selection Committee's view, that would completely water down Article 5 (3), which must be interpreted restrictively according to the Court of Justice of the European Union.
- (24) Against this background, the Appeals Selection Committee agrees with the District Court and the Court of Appeal that the case must be rejected. That means that the appeal is dismissed.

- (25) HSBC has won the case, and is under section 20-2 subsection 1 of the Dispute Act entitled to full compensation for legal costs. There is no reason to apply the exemption rule in section 20-2 subsection 3. Costs in the District Court and in the Court of Appeal are awarded according to the respective rulings. Before the Supreme Court, HSBC has claimed legal costs of NOK 45 000 plus MVA. The claim is accepted.
- (26) The order is unanimous.

C O N C L U S I O N :

1. The appeal is rejected.
2. Leif Magne Tandstad will pay costs in the Supreme Court of NOK 56 250 – fiftysixthousandtwohundredandfifty – to HSBC Bank Holdings plc and HSBC Bank within 2 – two – weeks of the service of this order.

Henrik Bull
(sign.)

Kristin Normann
(sign.)

Espen Bergh
(sign.)