SUPREME COURT OF NORWAY

J U D G M E N T

given 18 October 2019 by the Supreme Court composed of

Justice Magnus Matningsdal
Justice Wilhelm Matheson
Justice Ragnhild Noer
Justice Wenche Elizabeth Arntzen
Justice Kine Steinsvik

HR-2019-1929-A (sak nr. 19-029021SIV-HRET)
Appeal against Gulating Court of Appeal's judgment 2 January 2019

Propiedades Rott SL	(Counsel Leif Inge Håland)
v.	
Trond Lie Nilsen	(Counsel Finn Eide)

(1) Justice **Arntzen:** The case concerns financial settlement after the cancellation of an agreement for purchase of a flat in Spain.

(2) In the spring 2014, Trond Lie Nilsen entered into an agreement with Propiedades Rott SL (hereafter referred to as Propiedades) for purchase of a flat in a planned building project in Villajoyosa, Spain. Propiedades is a company registered in Spain engaging in property development directed to the Norwegian market, among others. Ninety percent of the shares in the company are owned by Valor AS, which in turn is owned by the Norwegian Terje Rott and his family who have residence in Norway. Nilsen is a Norwegian citizen with residence in Norway. He bought the flat for private use.

(3) On 7 March 2014, the parties signed a "binding purchase confirmation". The purchase confirmation was written in Norwegian and signed in Norway. The purchase price was EUR 660 000 with the addition of 10 percent Spanish VAT (IVA). Upon signing, Nilsen transferred a "deposit" of EUR 11 000 to the seller's Spanish bank account.

(4) The agreement was revised twice in 2015, latest by a "binding purchase agreement" signed 25 September 2015 in Spain. The seller's deadline for having the flat ready for takeover was set to 1 June 2016. Before the takeover, a final purchase agreement would be entered into at the Notary Public of Villajoyosa. Under the headline "Terms of payment", Nilsen undertook to pay in the remaining purchase price in different rates until delivery of the flat. In line with the agreement, Nilsen transferred on the same day EUR 250 000 to an account in the Spanish bank Bankinter. The account was established in his name and would be locked "as a guarantee" until the flat was delivered. The interest accrued would be credited to Nilsen. In connection with the transfer of the guarantee amount, he also signed a notarial deed for "creation of a pledge" written in Spanish.

(5) During the autumn 2015, Nilsen's economy suffered a downfall, and he decided to withdraw from the agreement. On 8 December 2015, the parties entered into a new agreement on "Termination of purchase agreement" (hereafter the termination agreement), under which Nilsen was to cover Propiedade's costs and potential loss from the resale of the flat.

(6) In February 2017, Propiedades submitted a claim for damages in excess of NOK 1 500 000. In the loss statement, more than half of the amount was entered as costs incurred by the Norwegian parent company Valor AS and Terje Rott. As we have been informed, the claim related mainly to costs of financing of the company's building loan.

(7) The parties failed to agree on the settlement, and in March 2017, Nilsen brought an action to Stavanger District Court claiming to be released from the guarantee amount after deduction of damages as stipulated by the court. In its response, Propiedades claimed principally that the case be disallowed as it should have been brought before a Spanish court. Alternatively, the company claimed judgment in its favour.

(8) By an order issued 29 June 2017, Stavanger District Court agreed to hear the case. The District Court found that Nilsen had to be considered a consumer. Thus, it follows from Article 15 (1), cf. Article 16 (1) of the Lugano Convention that legal action may be brought in the courts for the place where the consumer is domiciled, i.e. Stavanger District Court.

(9) The order was not appealed, but Propiedades asserted in a pleading 12 December 2017 that the issue of damages should be settled under Spanish law. Stavanger District Court decided to hear the choice of law dispute together with the other issues in dispute. As set out in the District Court's judgment 28 February 2018, the dispute was subject to Norwegian law, and Propiedades was instructed to release the guaranteed amount with the addition of interest after deduction of damages of EUR 26 050.

(10) Propiedades appealed the judgment to Gulating Court of Appeal, claiming that the case should have been governed by Spanish law. During the preparatory phase, the Court of Appeal determined the choice of law issue separately, see section 16-1 subsection 2 third sentence (b), and gave judgment on 2 January 2019 – incorrectly named an "order" – with the following conclusion:

> **"The dispute in case no. 18-072859ASD-GULA/AVD2 is governed by Norwegian law.**
>
> **Propriedades Rott SL will pay costs in the court of appeal of NOK 5 000 – fivethousand – (inclusive of VAT) to Trond Lie Nilsen within 2 – two – weeks of the services of this order."**

(11) In other words, the Court of Appeal agreed with the District Court, and found that the termination agreement of 8 December 2015 "stood on its own". Thus, there was no basis for applying Article 4 (1) (c) of Regulation (EC) No. 593/2008 ("Rome I"), which states that a contract relating to a *right in rem* in immovable property shall be governed by the law of the country where the property is situated.

(12) Propiedades has appealed the Court of Appeal's ruling to the Supreme Court on the point of the application of the law.

(13) It is set out in section 19-1 (1) (b) of the Dispute Act that rulings under section 16-1 subsection 2 third sentence shall be made by way of judgment. Thus, the appeal must be heard in accordance with the provisions on appeals against judgment, see section 19-1 subsection 4 second sentence.

(14) The appellant – *Propiedades Rott SL* – contends:

(15) The choice of law provisions in Rome I must be considered fixed rules under Norwegian international private law. The purchase agreement concerns rights *in rem* to real property, and is according to Article (1) (c) governed by the law of the country where the property is situated. The provision on consumer jurisdiction is thus not applicable, see the exception for such agreements in Article 6 (4) (c). Nor does Rome I contain other exceptions implying that the agreement is governed by Norwegian law.

(16) There is no basis for assessing the termination agreement apart from the contractual relationship as such, see Article 12 stating that all effects of an agreement are regulated by the law of the same country.

(17) Although the applicable law is determined according to the Irma Mignon formula, the dispute must, after an overall assessment, be considered to be most closely connected with Spain since the real debtor resides there. This applies irrespective of whether the contractual relationship is assessed as one.

(18) Propiedades Rott SL has submitted this prayer for relief:

"1. The dispute in case 18-072859ASD-GULA/AVD2 is to be governed by Spanish law.
2. Propiedades Rott SL is to be awarded costs in the District Court, the Court of Appeal and in the Supreme Court.

(19) The respondent – *Trond Lie Nilsen* – contends:

(20) According to Norwegian international private law, the choice of law must be based on the Irma Mignon formula unless there are other more strict choice of law rules. Rome I is not part of Norwegian law, and these choice of law rules are merely included as factors in the overall assessment of the country with which the dispute is most closely connected. The case does not concern an agreement on rights *in rem* to real property, but the financial settlement stipulated in the termination agreement. Therefore, Article 4 (1) (c) of Rome I does not give any guidance for the choice of law issue and does not imply an exception from the consumer provision in Article 6. The dispute is most closely connected to Norway. Propiedades is Norwegian owned by 90 percent, and the termination agreement is drafted by a Norwegian lawyer and entered into in the Norwegian language in Norway.

(21) Trond Lie Nilsen has submitted this prayer for relief:

"1. The appeal is to be dismissed.
2. Trond Lie Nilsen is to be awarded full costs in the Supreme Court."

(22) *My view on the case*

(23) It has been decided with a legally binding effect that the case is to be heard by Norwegian courts, see the consumer rule in Article 15 (1) (c), cf. Article 16 (1) of the Lugano Convention. The question of the choice of law – i.e. under which country's law the court is to give judgment – must thus be governed by Norwegian choice of law rules.

(24) The choice of law is traditionally based on the so-called Irma Mignon judgment included in Rt-1923-II-58, where the following is stated on page 60:

"When deciding which country's rules to apply, one is … mainly obliged to base the decision on general principles of law and the nature of the circumstances in question… For my part, however, I believe it is natural to start with the consideration that a circumstance should be judged on the basis of the law in the country with which it is most closely connected, or where it most naturally belong."

(25) In other words, the connection issue must be considered based on the closeness to "the circumstance" dealt with in the case.

(26) This approximate choice of law rule has been maintained in subsequent case law, although the development suggests that the choice of law issue should be decided under firmer rules. In the Supreme Court judgment in HR-2016-1251-A paragraph 27, it is formulated as follows:

"The starting point for the choice of law is – where the issue is not regulated by any law, custom or other firmer rules – to find the state with which the case, after an overall assessment, is most strongly connected (the Irma Mignon formula). If the choice of law issue is not governed by Norwegian law, there may be reason also to apply EU choice of law rules laid down in Rome I and II. I refer to Rt-2009-1537 paragraphs 32 and 34 and Rt-2011-531 paragraphs 29 and 46 on the Irma Mignon formula and the application of Rome I and II in

Norwegian law. The question is whether there is a statutory choice of law rule that is applicable to the facts of our case."

(27) The facts of the case at hand concern the damages settlement under the termination agreement. There is no law regulating the choice of law. EU's choice of law rules for obligations arising from a contract as laid down in Rome I of 17 June 2008, are thus essential. Rome I is not part of Norwegian law, and, for that reason, it is not necessarily decisive.

(28) A key issue is whether the entire contractual relationship – that is, the purchase agreement and the termination agreement – are to be judged as a whole.

(29) The overall starting point must be that the applicable law would be determined based on the facts of the case. This implies that the termination agreement must be assessed separately. The question is however whether the choice of law provisions in Rome I suggest otherwise.

(30) For my further discussion, I consider it appropriate to quote the relevant part of the termination agreement:

"The parties agree that the purchase agreement is terminated with effect from the date of signing this agreement. Trond Lie Nilsen accepts that Propiedades Rott SL is entitled to compensation for all costs incurred in connection with termination. This includes the following costs:

- **Costs of marketing, travels to Spain etc.**
- **Costs of use of a notary in Spain.**
- **Costs of legal advice in Norway and Spain.**
- **Costs incurred by Terje Rott to be able to maintain Propiedades Rott SL's obligations towards financing bank in Spain, estimated to EUR 35 000.**
- **Potential loss in connection with resale of the flat. Trond Lie Nilsen accepts that the flat is put out for sale on the open market. In that respect, it must be expected that the flat be sold at a discount. Trond Lie Nilsen accepts that the discount given is part of the costs incurred by Propiedades Rott SL as a result of the agreement being terminated.**

The above list is NOT complete with regard to the costs, and it is currently not possible to state an exact amount.

It is estimated that Trond Lie Nilsen may receive EUR 100 000 in payment once registration in Spain is completed – in the autumn of 2016.

(31) The agreement is mutually burdening, as Propiedades accepts that the purchase agreement is cancelled in return for Nilsen's payment of damages. The agreement on the purchase of real property has thus lapsed and been replaced by a new agreement regulating the financial settlement. The agreement also contains provisions on the settlement procedure, which entails that that the damages can be set off against "the interim payment" on Nilsen's locked account, and that the remainder is then released.

(32) Propiedades asserts that a separate assessment of the termination agreement is incompatible with Article 12 of Rome I on the reach of the choice of law. I disagree.

(33) Article 12 reads:

"Scope of the law applicable

1. The law applicable to a contract by virtue of this Regulation shall govern in particular:

a) interpretation

b) performance

c) within the limits of the powers conferred on the court by its procedural law, the consequences of a total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law;

d) the various ways of extinguishing obligations, and prescription and limitation of actions;

e) the consequences of nullity of the contract.

2. In relation to the manner of performance and the steps to be taken in the event of defective performance, regard shall be had to the law of the country in which performance takes place."

(34) Item 1 of the provision implies in short that an agreement must be governed by the same law from "the cradle to the grave". Item 2 concerns the manner of performance, where regard must be had to the law of the country in which performance takes place".

(35) It is clear that the termination agreement is a separate agreement within the meaning of this provision. The fact that the agreement is brought about by a former purchase agreement, does not change this. The dispute concerns the agreed termination settlement, which is to be assessed as one under Article 12 (1). The dispute does not concern the manner of performance under item (2), thus it is of lesser importance that the stipulated damages are to be set off against an amount on a Spanish bank account.

(36) Propiedades further contends that the damages clause in the termination agreement *could* have been included in the purchase agreement, and that the agreements, for that reason as well, must be seen as one. I do not agree to that either.

(37) Item 21 of the Preamble of Rome I, contains the following guideline on the country with which an agreement is to be considered "most closely connected":

> **"In the absence of choice, where the applicable law cannot be determined either on the basis of the fact that the contract can be categorised as one of the specified types or as being the law of the country of habitual residence of the party required to effect the characteristic performance of the contract, the contract should be governed by the law of the country with which it is most closely connected. In order to determine that country, account should be taken, inter alia, of whether the contract in question has a very close relationship with another contract or contracts."**

(38) It is presumed in the last sentence that one may enter into *separate* closely related agreements without these being judged as a whole.

(39) Magnus & Mankowski, European Commentaries on Private International Law, Rome I Regulation, 2017, page 279, states the following on such agreements:

> **"It is not infrequent that two or more separate contracts are closely connected – for instance a main contract and an accompanying guaranty or insurance, a distribution contract and the single deliveries under it etc. In principle, the law for each of these contracts has to be determined separately. Yet, the main contract can 'infect' the connected other contract so that the law of the main contract applies to the other contract as well."**

(40) In other words, the starting point is that even closely related agreements must be assessed separately, unless there is a basis for letting the main agreement override the associated agreement.

(41) In my view, there is no basis for determining the applicable law in the issue of damages based on the previous purchase agreement. The purchase agreement and the termination agreement are historically connected, but, legally, the termination agreement "stands on its own", as formulated by the Court of Appeal.

(42) My conclusion thus far is that Rome I does not contain rules suggesting that the applicable law must be determined based on a joint assessment of the purchase agreement and the termination agreement. Hence, it is not necessary for me to address the choice of law with regard to the purchase agreement itself.

(43) Essential for the choice of law, however, is Article 6 of Rome I Article 6 on consumer agreements. The main rule under item (1) of the provision is that the law of the country where the consumer resides. The provision reads:

> **"1. Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:**
>
> **(a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or**
>
> **(b) by any means, directs such activities to that country or to several countries including that country,**
>
> **and the contract falls within the scope of such activities."**

(44) As it appears from the provision, the agreement must have a purpose outside the person's trade or profession in order to be comprised by the consumer rule. As opposed to Article 5 in the previous consumer rule in the Rome Convention of 1980, the predecessor of Rome I, it is in other words not a condition that the agreement governs purchase of goods or services. On this point, the choice of law provision in Article 6 has the same application as the jurisdiction provision in Article 15 (1) (c) of the Lugano Convention and Article 15 of the Council Regulation (EU) No. 44/2001 (Brussels I), later replaced by Article 17 of Council Regulation (EU) 1215/2012.

(45) The termination agreement is entered into for purposes outside Nilsen's trade. It is thus clear that it meets the criteria for being regarded as a consumer agreement, see also Article 6 (1) (b) about the professional activities being directed to the country where the consumer resides. I cannot see that any of the exceptions in item (4) of the provision are applicable. Nilsen resides in Norway, and Rome I thus instructs that the dispute be governed by Norwegian law.

(46) The consideration of international uniformity of the law strongly suggests that the choice of law rule under EU law should be applied, in particular in a case like the one at hand, where the application of the consumer rule in Article 6 is rather clear. The fact that the choice of law follows the jurisdiction also entails advantages with regard to litigation costs. In consumer relationships, the same considerations come to bear in both contexts. The jurisdiction

provision makes court proceedings more accessible, while the choice of law provision, both at a contractual and a court level, makes background law more easily accessible.

(47) Moreover, the dispute is closely connected to Norway. The company directs its activities to the Norwegian market, among other things through a Norwegian website. The ownership interests in Propiedades are mostly Norwegian, and Nilsen has his residence in Norway. The termination agreement was drafted by the seller's Norwegian lawyer, and more than half of the disputed claim concerns costs incurred by the Norwegian owners.

(48) My conclusion is consequently that the case is governed by Norwegian law. The appeal should thus be dismissed.

(49) The respondent has claimed compensation for costs in the Supreme Court. I have no objections to the size of the claim.

[Paragraphs 50, 51 and 52 have not been translated as they concern procedural matters of lesser interest for foreign readers.]

(53) I vote for this

J U D G M E N T :

1. The appeal is dimissed.

2. The decision regarding costs is postponed to the ruling that finalises the case.

(54) Justice **Matheson:** I agree with Justice Arntzen in all material respects and with her conclusion.

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

(56) Justice **Steinsvik:** Likewise.

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

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

J U D G M E N T :

1. The appeal is dismissed.

2. The decision regarding costs is postponed to the ruling that finalises the case.