SUPREME COURT OF NORWAY

J U D G M E N T

given on 13 September 2022 by a division of the Supreme Court composed of

Justice Hilde Indreberg
Justice Aage Thor Falkanger
Justice Wenche Elizabeth Arntzen
Justice Espen Bergh
Justice Borgar Høgetveit Berg

HR-2022-1752-A, (case no. 22-025299SIV-HRET)
Appeal against Eidsivating Court of Appeal's judgment 27 November 2021

Sparebank 1 Østlandet	(Counsel Olav Fredrik Perland)
v.	
A The National Consumer Council (intervener)	(Counsel Amund Noss) (Assisting counsel Asle Bjelland)

(1) Justice **Høgetveit Berg:**

Issues and background

(2) The case concerns a bank's liability towards a customer after fraudsters had made the customer share information that led to unauthorised payments from her account. The key issue is the interpretation of the intent requirement in section 35 subsection 3 third sentence of the Financial Contracts Act.

(3) A opened a bank account in Sparebank 1 Østlandet in April 2016, and entered into agreements on e-bank and BankID[1]. The latter agreement sets out that BankID is personal and must not be shared with or used by anyone other than the customer. It also sets out that authentication codes, passwords and other security information must not be revealed to anyone – including the police, the bank and household members.

(4) On 29 May 2020, A received a call from a man who said he was from Sparebank 1. He asked if A had applied for a loan, which she denied. A was then transferred to another alleged employee of the bank, who was to help her delete the loan application. The man asked for her national identification number, codes from the BankID code chip and password. Between 1:29 and 1:45 p.m., she gave her code nine times. The information was used to carry out four bank transactions between 1:40 and 1:45 p.m., of in total NOK 240 336.

(5) After the phone call, A noticed an SMS from the bank saying that her phone number had been changed in the internet bank. She then suspected that she might have been scammed, and contacted the bank immediately. The bank discovered that someone had logged into the internet bank with A's BankID and then changed her contact information. The limit for transactions in the internet bank had been increased to NOK 400 000, and the four transactions had been completed. The bank prevented the transfer of part of the amount, so that the final loss was NOK 153 240.

(6) A demanded a full reimbursement from Sparebank 1 Østlandet. The bank refused, arguing that A had intentionally breached her obligation not to reveal codes and password.

(7) The case was brought before the Bank Customers' Complaints Board. On 24 September 2020, the majority of the Board found that A had not intentionally breached the agreement, but that she was liable for NOK 12 000 due to gross negligence, see FinKN-2020-706. The bank refused to comply with the Board's decision.

(8) A brought an action. On 2 March 2021, Glåmdal District Court ruled as follows:

> "1. SpareBank 1 Østlandet is not liable.
>
> 2. SpareBank 1 Østlandet is to compensate A, born 00.00.1946, for her costs in the District Court of NOK 147 248 within two weeks of the service of this judgment."

(9) A appealed to Eidsivating Court of Appeal which, on 27 November 2021, ruled as follows:

> "1. SpareBank 1 Østlandet is to pay NOK 141 240 plus default interest from 1 July 2020 to A within fourteen days from the service of this judgment.

[1] A personal electronic credential for secure identification and signing online.

2. SpareBank 1 Østlandet is to compensate A for her costs in the Court of Appeal of NOK 480 472 within fourteen days of the service of this judgment."

(10) Sparebank 1 Østlandet has appealed against the judgment to the Supreme Court, challenging the Court of Appeal's application of the law.

(11) In the Supreme Court, the National Consumer Council has intervened in favour of A.

(12) On 21 February 2022, the Supreme Court received a written submission from Finans Norge, with a legal basis in section 15-8 of the Dispute Act. The submission is to highlight public interests and form part of the decision-making basis, see section 15-8 subsection 2 third sentence.

(13) Some new documents have been presented to the Supreme Court. With regard to the issues for the Supreme Court to consider, the case stands as it did in the Court of Appeal.

The parties' contentions

(14) The appellant – *Sparebank 1 Østlandet* – contends:

(15) According to the BankID agreement, the customer is obliged to study the documentation before the service is put into use, and must not reveal personal BankID, codes or password to anyone, including household members, the police and the bank.

(16) Intent under section 35 subsection 3 third sentence of the Financial Contracts Act is present when the customer deliberately gives a code or password to another person. No actual knowledge or awareness of the relevant agreement term is required to establish intent. In that case, one would have had a legal rule that encourages customers not to read the terms of the agreement, not to pay attention when the terms are explained and not to study any other information from the bank.

(17) In any case, there is no additional requirement of knowledge of the risk of misuse. Alternatively, it must suffice that the customer ought to or had to have understood that the breach created a risk of misuse.

(18) For the customer to be exempt from liability for the breach, he or she must have committed an excusable error. A's error was not excusable. She was clearly informed of her obligation not to reveal codes and password. This obligation is clear and key to the contractual relationship, and the duty of care is general knowledge. Her age and status as a consumer are thus of less importance.

(19) If A's conduct was not intentional, the rule on intent will not have any independent relevance next to the rule on fraud.

(20) Sparebank 1 Østlandet asks the Supreme Court to rule as follows:

"I Principally:

1. Sparebank 1 Østlandet is not liable.

II In the alternative:

1. The Court of Appeal's judgment is set aside.

III In both cases:

2. A is to compensate the bank's costs in the Court of Appeal.

3. The National Consumer Council is to compensate the bank's costs in the Supreme Court."

(21) The respondent and the intervener – *A and the National Consumer Council* – contend:

(22) A has wilfully revealed codes and password over the phone. While this, objectively, constitutes a breach of her obligations under the BankID agreement, it is not sufficient to establish intent under the Financial Contracts Act. The latter requires that the customer was aware of more than the actual acts or omissions.

(23) Firstly, intent requires that the customer was aware of the obligation and of the breach. Even if negligent mistake of law should be present, this does not meet the requirement of intentional breach in section 35 subsection 3 third sentence. The case does not concern the contractual legal effect of a breach of contract, but the interpretation of a statutory provision. The intent requirement in section 35 subsection 3 third sentence cannot be converted to strict liability with exemption only for excusable mistake of law. Alternatively, if intent does not require that the customer was aware of the obligation and of the breach, the minimum requirement must be grossly negligent mistake of obligation. In any case, A does not meet such a requirement.

(24) Secondly, intent requires that the customer was aware of the loss potential of the actions. The customer must have understood at the time of the act that the breach created an imminent risk of misuse of the payment instrument.

(25) The Court of Appeal found that A had not deliberately breached her obligations when giving codes and password to the fraudsters, as she thought she was speaking to representatives of the bank. She was not aware that the agreement prohibited her from doing so in that specific situation. The appeal must therefore be dismissed.

(26) A asks the Supreme Court to rule as follows:

"1. The appeal is dismissed.

2. A is awarded costs in the Supreme Court."

(27) The National Consumer Council asks the Supreme Court to rule as follows:

"The National Consumer Council is awarded costs in the Supreme Court."

My opinion

The issues

(28) The question is whether A is liable for the entire loss incurred due to the fraud.

(29) Chapter 2 (V) of the Financial Contracts Act regulates others' misuse of an account or payment instruments. The term "payment instrument" is defined as a "private instrument or set of procedures agreed between the customer and the institution, and which the customer uses to initiate a payment order", see section 12 (c). This implies that when BankID is used for a money transfer in an internet bank, BankID will be a part of a payment instrument.

(30) A customer who is entitled to use a payment instrument, must use it "in accordance with the conditions for issuance and use, and take all reasonable measures to protect the personal security features attached to the payment instrument", see section 34 subsection 1 first sentence of the Financial Contracts Act. The term "personal security features" include code chip and password linked to a BankID.

(31) In the general terms of use for Personal BankID, the following is set out in clause 9:

> "Personal BanklD is personal and must not be transferred or otherwise given to or used by any person other than the Customer. Passwords, personal codes and other safety procedures must not be revealed to anyone, including the police, the bank or household members."

(32) Four transactions were completed from A's account without her consent, see section 24 of the Financial Contracts Act. The bank is as a starting point liable for loss incurred due to unauthorised payments, see section 35 subsection 1 of the Financial Contracts Act. Exceptions are set out in section 35 subsections 2 and 3. Subsection 3, which is relevant here, reads:

> "The customer is liable for the entire loss incurred due to unauthorised payments if the loss can be ascribed to the customer's gross negligence in failing to fulfil one or more of the obligations under section 34 subsection 1. If the payment transaction has been carried out by use of an electronic payment instrument, the customer is only liable for a sum up to NOK 12 000. If the loss can be ascribed to the customer's intentional failure to fulfil the obligations under section 34 subsection 1, the customer shall carry the entire loss. The same applies if the loss can be ascribed to the customer's fraudulence."

(33) The Court of Appeal found that A's *act* was wilful, but that she was not aware of her *breach*. The Supreme Court must rule based on this. The parties agree that A was at least grossly negligent when giving codes and password to the persons presenting themselves as employees of Sparebank 1. She is therefore liable under any circumstances for a sum of NOK 12 000, see section 35 subsection 3 second sentence of the Financial Contracts Act. The question is whether A is liable for the entire loss, see section 35 subsection 3 third sentence.

Must the customer have been aware of the breach to be liable under the provision on intent in section 35 subsection 3 third sentence of the Financial Contracts Act?

(34) Section 35 subsection 3 third sentence of the Financial Contracts Act covers loss ascribed to the customer's "intentional failure to fulfil the obligations under section 34 subsection 1". Through the term "failure", the wording refers to the actions forming the basis for the breach. This may indicate that intent only requires that the customer, objectively, has acted in breach of the obligations. In my view, however, the most natural linguistic interpretation is that intent must also include the breach, since the wording refers to the "obligations".

(35) The system in section 35 of the Financial Contracts Act is that the bank's liability for loss due to unauthorised payments is reduced in proportion to the degree of blame on the part of the customer. According to section 35 subsection 2, the customer is liable for a sum up to NOK 1 200 for loss due to unauthorised payments by use of personal codes. According to subsection 3, the customer is liable for the entire loss if he has been grossly negligent in failing to fulfil the obligations under section 34 subsection 1, but only for up to NOK 12 000 if the transaction has occurred by use of an electronic payment instrument. The reason why the customer's liability is limited in such cases, is that it serves the banks and society to facilitate use of electronic payment instruments. The institutions may spread their losses among the customers, see page 157 of the partial report from the working group for the Payment Services Directive, to which I will return.

(36) If the loss is due to the customer's intentional breach of the obligations under section 34 subsection 1, the customer must carry the entire loss. The same applies if the loss can be ascribed to the customer's fraudulence. The rule presupposes that the customer in such cases has acted very reprehensibly, see for instance page 122 in Proposition to the Odelsting No. 94 (2008–2009), to which I will also return.

(37) In other words, the provisions in section 35 subsection 3 presuppose that the customer's liability for loss incurred due to unauthorised payments is determined following a two-step assessment. Once breach has been established, the legal effect is determined based on the degree of blame related to the breach. It is not a question of contractual performance in a traditional sense. Unlimited liability for actions that are intentional, but without awareness that the actions constitute breach – where exemption is granted only for an excusable error related to one's understanding of the contractual obligations – will in my view conflict with the reasoning behind and the structure of section 35 of the Financial Contracts Act. With the bank's interpretation, simple negligence becomes decisive in these cases, since only an excusable error will exempt the customer from liability. If intent were only linked to the act itself – and not also to the breach – section 35 would probably have had a different structure and wording.

(38) The customer's liability may be reduced under section 36 of the Financial Contracts Act, following a broad and overall assessment. However, no reduction can be made where the loss due to the unauthorised transaction is the result of intentional breach under section 34 subsection 1, cf. section 36 subsection 1 third sentence. If intent can be established for unconscious breach of the obligations, it would seem inconsistent and unreasonable if such reduction should not be possible.

(39) Proposition to the Odelsting No. 94 (2008-2009), preceding the enactment and the current wording in section 35 of the Financial Contracts Act, is based on two reports. One of them is Norwegian Official Report 2008: 21 from the Banking Law Commission. The report does not address the specific issue we are dealing with, but the Commission appears to presuppose that intent could be placed above gross negligence on a negligence scale, see Norwegian Official Report 2008: 21 side 97–98.

(40) With regard to section 35 of the Financial Contracts Act, the Ministry mainly relied on a partial report from February 2009 by a working group tasked to propose possible implementation of the Payment Services Directive 2007/64/EC in Norwegian law. The work of the Banking Law Commission partially overlapped that of the working group. The difference between the Commission's and the working group's proposal was primarily of a technical nature.

(41) As a result of the implementation of the Payment Services Directive, the Ministry of Justice did not consider it expedient to have a common regulation of the loss spread after others' fraud and the customer's own errors as the Bank Law Commission had proposed, Proposition to the Odelsting No. 94 (2008–2009) page 117. The adopted wording is therefore based on the wording from the working group. However, neither the Ministry's description of the status of the law before 2009 nor the comments to section 35 of the Financial Contracts Act add anything to the interpretation of the intent requirement, beyond the fact that it implements Articles 60 and 61 of the Payment Services Directive, see Proposition to the Odelsting No. 94 (2009-2009) pages 185–186.

(42) A more detailed description of the intent requirement is also lacking in the Ministry's reference to Directive 2007/64/EC. In the reference to the Directive's Article 61, it is pointed out that the Directive does not allow for limiting the customer's liability where the customer has acted fraudulently or has intentionally breached the obligations under Article 56, see Proposition to the Odelsting No. 94 (2009-2009) page 122. The Ministry continues:

> "In such cases, the payer has acted very reprehensibly and must be imposed with unlimited liability for his loss, as under applicable Norwegian law."

(43) Admittedly, this comment aims at the Directive. A main objective of the implementation is that the Financial Contracts Act is to be read in the same manner as the Directive. The wording and the system of the Directive and section 35 of the Financial Contracts Act are thus also very similar.

(44) A new Financial Contracts Act was adopted in 2020, but has not yet entered into force. With regard to the Proposition, the Ministry writes that the further implications of the intent requirement in private law may be unclear. It may also be unclear what the Ministry believed was applicable law. Nonetheless, considered in isolation it may seem that the Ministry presupposed that intent does not have to include the breach, see Proposition to the Storting 92 LS (2019–2020) page 186. The Ministry's proposed provision was not adopted. The rule that was adopted – which requires that the customer had to understand that the breach created an imminent risk of misuse – presupposes that this intent concept is in line with "otherwise applicable rules", see Recommendation to the Storting (2020-2021) page 21, cf. page 20. I will therefore not emphasise these slightly contradictory remarks by the lawmakers, which in any case must be considered supplementary work in the case at hand.

(45) No case law exists on the intent requirement in section 35 of the Financial Contracts Act, from either before or after the amendment in 2009. Since the Financial Contracts Act also prior to the amendment in 2009 distinguished between the actions constituting the breach and the assessment of the customer's blame, Rt-2004-499 can nonetheless be mentioned. Here, the Supreme Court found that the writing down and storage of PIN-code in conflict with the agreement were not sufficient to establish gross negligence. The writing down of the code was necessarily wilful. Intentional breach of the agreement was not alleged by the bank. However, it would be alien to the system if the act were to be considered intentional, while at the same time not grossly negligent.

(46) Case law exists from the Bank Customers' Complaints Board on various aspects of section 35 of the Financial Contracts Act. In cases similar to ours, where the customer has been tricked into believing that a bank employee is asking for codes and password, the majority of the Board has consistently not found intentional breach under section 35 subsection 3 third sentence. I perceive this to be the result of a broader overall assessment with a focus on the mistake of law.

(47) In legal literature, the content of the intent requirement in section 35 subsection 3 of the Financial Contracts Act are discussed by Marte Eidsand Kjørven, Alf Petter Høgberg and Geir Woxholth in *Lov og Rett* [law and justice] 2021/6 pages 335–366. The article also discusses our specific case. A's contentions generally coincide with the assessments and conclusions of these authors.

(48) In Hagstrøm, *Obligasjonsrett* [tort law], 3rd edition 2021 by Herman Bruserud, Ivar Alvik, Harald Irgens-Jensen and Inger Berg Ørstavik, pages 501–506, the concept of intent in contract law is discussed in more general terms. The discussion starts by pointing out the fact that in contract law, there is no great need to draw a line between intent and gross negligence. Hagstrøm then mentions previous discussions of whether intentional breach of contract requires that intent cover the consequences, or whether it is sufficient that the party is aware of the breach of the terms of the contract. Referencing arbitration case law and legal literature, Hagstrøm concludes that the contract types are so different that intent covering the consequences cannot be a general requirement. For instance, he states that "intentional failure to comply with vital procedures constitutes such a considerable breach of loyalty that the term intent is appropriate, regardless of whether the party has had a justifiable hope of a happy outcome". However, Hagstrøm – and as far as I can see all the sources he references – presupposes that the contractual party at least must wilfully have breached the agreement for the conduct to be considered intentional.

(49) The intent requirement in criminal law and the provisions on mistake of law give little guidance in private law, and I will therefore not elaborate on that.

(50) Based on the wording and the structure of section 35 subsection 3 of the Financial Contracts Act, I therefore find that the customer must have been aware of his breach to be covered by section 35 subsection 3 third sentence.

(51) In its findings of fact, which have not been challenged by the bank, the Court of Appeal found that A was not aware of her breach when she gave codes and password to the fraudsters. She believed she was talking to a representative of the bank and was not aware that the agreement prohibited her from revealing codes and password in that specific situation. The lack of

awareness of the breach means that she cannot be considered to have acted with intent under section 35 subsection 3 third sentence of the Financial Contracts Act.

Conclusion and costs

(52) Against this background, the appeal must be dismissed. It is then not necessary for me to consider whether the intent requirement in section 35 subsection 3 third sentence of the Financial Contracts Act also contains a requirement that the customer was aware of the loss potential.

(53) A and the National Consumer Council have claimed compensation for their costs in the Supreme Court. According to section 20-2 subsection 1 of the Dispute Act, Sparebank 1 Østlandet is to cover A's and the Consumer Council's costs in the Supreme Court. I see no reason to grant an exemption under section 20-2 subsection 3.

(54) A has claimed NOK 751 200, while the National Consumer Council has claimed NOK 187 500. The amounts are mainly legal fees of a total of 250 hours, each of NOK 3 000 including VAT. Sparebank 1 Østlandet has not objected to the size of the claims. I find that the claims must be accepted, see section 20-5 of the Dispute Act.

(55) I vote for this

J U D G M E N T :

1. The appeal is dismissed.
2. Sparebank 1 Østlandet is to compensate A's costs in the Supreme Court of NOK 751 200 within two weeks of the service of this judgment.
3. Sparebank 1 Østlandet is to compensate the National Consumer Council's costs in the Supreme Court of NOK 187 500 within two weeks of the service of this judgment.

(56) Justice **Bergh:** I agree with Justice Høgetveit Berg in all material respects and with his conclusion.

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

(58) Justice **Arntzen:** Likewise.

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

(60) The Supreme Court gave this

J U D G M E N T :

1. The appeal is dismissed.
2. Sparebank 1 Østlandet is to compensate A's costs in the Supreme Court of NOK 751 200 within two weeks of the service of this judgment.
3. Sparebank 1 Østlandet is to compensate the National Consumer Council's costs in the Supreme Court of NOK 187 500 within two weeks of the service of this judgment.