SUPREME COURT OF NORWAY

J U D G M E N T

given on 4 April 2022 by a division of the Supreme Court composed of

Justice Jens Edvin A. Skoghøy
Justice Wilhelm Matheson
Justice Kristin Normann
Justice Espen Bergh
Justice Erik Thyness

HR-2022-695-A, (case no. 21-134824SIV-HRET)
Appeal against Borgarting Court of Appeal's judgment 23 June 2021

SJI Equities Limited	(Counsel Per Magne Ristvedt)
v.	
A B C D E F G	(Counsel Nanette Christine Flatby Arvesen) (Assisting counsel Stig Berge)

(1) Justice **Thyness:**

Issues and background

(2) The case concerns a claim for damages against board members of a listed company that has gone bankrupt. The basis for the claim is allegedly inadequate information to the market regarding the company's financial position.

(3) The appeal to the Supreme Court is limited to the general interpretation of the criterion "precise information" as it was used in the definition of "inside information" in section 3-2 of the then applicable Securities Trading Act. The question is how probable a future circumstance must be in order for it to be "reasonably expected to occur", which are the words used in the Act.

(4) The claim is made against former board members of RenoNorden ASA. RenoNorden was established in 2000, and the company's shares were listed in 2014. The company engaged in waste collection and operated through subsidiaries in Norway, Denmark, Sweden and Finland.

(5) In connection with its stock exchange listing, RenoNorden entered into a favourable loan agreement with a group of banks led by DNB and Danske Bank, with a loan limit of NOK 970 million. The agreement included a clause that gave the banks the right to terminate the loan if the ratio between (a) the RenoNorden group's net debt at the end of a quarter and (b) its adjusted operating result for the preceding twelve months – "NIBD/EBITDA" – exceeded 5.00.

(6) In April 2016, a new CEO took office in RenoNorden. He quickly became aware that the company was pricing itself much lower than its competitors in tenders, which made him worried about the group's future profitability.

(7) Investigations were launched, revealing several loss-making contracts and serious deficiencies in the calculations used in the tender processes. The results were presented at a board meeting on 15 August 2016. Among other things, the board stressed that the findings had a major impact on the company's ability to meet its obligations under the loan agreement.

(8) The report for the second quarter of 2016, which was discussed and approved at the same board meeting, addresses the above-mentioned challenges and shows that the company had made a provision of NOK 159 million for the loss-making contracts as well as a write-down of goodwill of NOK 90.9 million. According to the report, NIBD/EBITDA was 4.7 at the end of the quarter.

(9) At a board meeting in September 2016, a cost reduction and efficiency programme was adopted. The forecasts for the third and fourth quarters showed that the company was behind budget, but in the process of regaining cost control.

(10) The board of directors were updated on the status of the terms of the loan at a meeting on 8 November 2016. The forecasts showed that the situation was challenging with estimated NIBD/EBITDA of 5.08 in the second quarter of 2017 and 5.04 in the third quarter of 2017.

The report for the third quarter of 2016 showed that NIBD/EBITDA was 4.85 at the end of the quarter.

(11) At a board meeting on 18 November 2016, RenoNorden decided to carry out a share capital increase in the amount of NOK 350 million with preferential rights for shareholders to subscribe for the new shares.

(12) In early December 2016, the management forecasts showed that NIBD/EBITDA would be 5.14 at the end of the year. However, subject to the completion of a share capital increase as planned, the budget showed that this key figure would be within the requirements of the loan agreement throughout 2017.

(13) The planned share capital increase was announced on 19 December 2016 and approved at the extraordinary general meeting on 30 January 2017. The subscription price was NOK 1 per share. In comparison, the average market price in 2016 was approximately NOK 14 per share. The capital increase was completed in late February 2017.

(14) Several of RenoNorden's loss-making contracts were not effective before 2017. In March 2017, it became clear that there would be greater losses on the contracts than previously expected. On 1 May 2017, after another review of the contract portfolio, the company published an additional loss provision of NOK 240 million.

(15) On 18 September 2017, RenoNorden announced that the company had filed a bankruptcy petition. The following day, the company was declared bankrupt.

The claim and the proceedings

(16) SJ Investments Ltd., an investment company based in Belize (formerly British Honduras), subscribed for NOK 38 million in the share capital increase. The company then bought shares for NOK 16.8 million in the secondary market in February–March 2017. Its total investment of NOK 54.8 million was lost upon RenoNorden's bankruptcy.

(17) SJI Equities Limited, a wholly-owned Irish subsidiary of SJ Investments Ltd., acquired the latter's alleged claim for losses on its investment in RenoNorden for one euro. On 26 January 2018, the company filed a writ of summons with Oslo District Court against the former board members of RenoNorden, who are the respondents in the Supreme Court case, as well as against two shareholders.

(18) The claimant argued that the respondents were liable section 17-1 of the Public Limited Liability Companies Act, alternatively under general tort law, in that the former board members had acted negligently by providing incorrect and inadequate information to the market and in prospectuses.

(19) In Oslo District Court's judgment 19 May 2019, all defendants were relieved of liability and awarded costs. The District Court found no negligence.

(20) SJI Equities appealed to Borgarting Court of Appeal. However, the claim against the shareholders was withdrawn before the hearing, which meant that the Court of Appeal was only to consider the liability of the former board members.

(21) On 23 June 2021, Borgarting Court of Appeal handed down a judgment and an order. By the order, the case was dismissed without merit for the two shareholders. The judgment had the following conclusion:

> "1. The appeal is dismissed as concerns G, E, D, F, B, C and A.
>
> 2. SJI Equities Limited is to pay costs in the Court of Appeal of NOK 3,649,760 to G, E, D, F, B, C and A jointly within two weeks of the sentencing.
>
> 3. SJI Equities Limited is to pay costs in the District Court of NOK 5,154,092.80 to G, E, D, F, B, C and A jointly within two weeks of the service of the judgment."

(22) The Court of Appeal interpreted the Act to the effect that a preponderance of probability is required for a future circumstance to trigger a duty of disclosure, and concluded that the risk of breach of the terms of RenoNorden's loan agreement did not meet this requirement.

(23) SJI Equities has appealed to the Supreme Court. The appeal relates to the application of the law and is limited to the interpretation of one of the criteria for when inside information may be held to exist.

The parties' contentions

(24) The appellant – *SJI Equities Limited* – contends:

(25) The degree of probability required for a future circumstance to represent inside information is just under 50 percent.

(26) It follows from the wording in section 3-2 subsection 2 of the former Securities Trading Act that circumstances or events not yet occurred can only be considered "precise information" if they "may reasonably be expected to occur". This means that a probability of just under 50 percent that the relevant circumstances will occur, is sufficient.

(27) The provision is based on Article 1 of Directive 2003/6/EC (the Market Abuse Directive) – often referred to as MAD – and Article 1 of Commission Directive 2003/124/EC. The Commission Directive formulates the standard of probability by the expression "may reasonably be expected to come into existence". Similarly to the wording applied in the Securities Trading Act, this implies that the required degree of probability is just under 50 percent.

(28) The phrase "a realistic prospect" used in the judgment from the European Court of Justice (ECJ) of 9 April 2011 in Case C-19/11 *Markus Geltl* cannot be read to imply that a higher degree of probability is required. This is confirmed by the use of "may reasonably be expected to come into existence" in Article 7 (2) of Regulation 596/2014/EU (the Market Abuse Regulation) – often referred to as MAR.

(29) The insider trading rules are intended to ensure the integrity and equal treatment of investors in the markets. This objective is best safeguarded by setting a lower standard of probability for future events than a preponderance of probability. The required level of foreseeability is

also catered for, even though the standard here is slightly lower than the preponderance of probability.

(30) SJI Equities Limited asks the Supreme Court to rule as follows:

> "1. The Court of Appeal's judgment 23 June 2021 in case 19-130220ASD-BORG/02 is set aside.
>
> 2. A, D, G, C, B, E and F jointly and severally liable for SJI Equities Limited's costs in the Supreme Court."

(31) The respondents – *A, D, G, C, B, E and F* – contend:

(32) The formulations in the set of rules suggest that a future event may only constitute precise information if it is more likely than not that it will occur. The *Geltl* judgment does not provide a basis for a different reading.

(33) Policy considerations, which carry great weight in EU law, also suggest that the standard should be a preponderance of probability. A lower standard of probability will give an unclear rule and damage the trust in the securities market, as it may generate an abundance of uncertain information. The standard of probability must also be viewed in the light of the possibility to draw conclusions from expected intermediate steps in a protracted process intended to generate a particular event. If emphasis can be placed on intermediate steps that are less than 50 per cent likely to occur, the threshold for something to constitute inside information may become too low.

(34) A, D, G, C, B, E and F ask the Supreme Court to rule as follows:

> "1. The appeal is dismissed.
>
> 2. A, D, G, C, B, E and F are awarded costs in the Supreme Court."

My opinion

The law and the issue at hand

(35) The case before the Supreme Court is limited to the interpretation of "inside information". The concept is central to the rules on, among other things, the duty of disclosure for issuers of listed securities and the prohibition against insider trading.

(36) During the period relevant to the case at hand, the definition of inside information was set out in section 3-2 subsection 2 of the Securities Trading Act. The provision has been repealed, but the definition of insider trading is largely continued in Regulation (EU) 596/2014 (Market Abuse Regulation), which according to section 3-1 of the Securities Trading Act applies as a Norwegian law with effect from 1 March 2021.

(37) Section 3-2 subsection 1 of the Securities Trading Act had the following wording:

> "Inside information means precise information about financial instruments, the issuer thereof or other factors that are suited to have a significant effect on the price of the

> financial instruments or related financial instruments, and that is not publicly available or generally known in the market."

(38) The provision lays down three requirements: (1) Precise information must be present that (2) is not available to the public, and that (3) is suited to have an effect on the price of the relevant financial instruments.

(39) Subsection 2 specifies the content of the first requirement – often referred to as the "precision requirement". The provision reads:

> "Precise information means information indicating that one or several circumstances or events have occurred or may reasonably be expected to occur, and that is sufficiently specific for conclusions to be drawn about the effect these circumstances or events may have on the price of the financial instruments or the related financial instruments."

(40) Subsection 3 specifies the content of the third requirement – often referred to as the "price impact requirement". The provision reads:

> "Information that is likely to have a significant effect on the prices of financial instruments or associated financial instruments means information that a reasonable investor is likely to use as part of the basis for his investment decision."

(41) The issue at hand is the precision requirement, more specifically the required degree of probability that circumstances not yet occurred will occur later for the circumstances to constitute inside information.

(42) When the minimum standard of probability is met, the circumstances *may* constitute inside information, provided, however, that the other conditions are also met, including the price impact criterion in subsection 3. The latter criterion is met when "*a reasonable investor is likely to use [the information] as part of the basis for his investment decision"*. Since the degree of probability that possible future circumstances will actually occur is significant for the outcome of this test, it takes more for a *possible* future circumstance to constitute inside information than for a similar *circumstance already occurred* to have the same effect.

(43) To put the issue in context, I also note that in a protracted processes, it is not only the end-point that may constitute "precise information", but also intermediate steps, see Article 7 (3) of the Market Abuse Regulation, which is in accordance with the ECJ's interpretation of former EU law in its judgment in Case C/19-11 *Geltl* paragraph 38. In the context of the conclusion of an agreement, not only the conclusion itself, but also for instance the preceding negotiations, may constitute inside information. However, since it may be uncertain whether the negotiations will result in an agreement, it will take more for an ongoing negotiation process to pass the reasonable investor test than for the conclusion of an agreement to so.

(44) The issue for the Supreme Court to decide is limited to the minimum degree of probability that *must* be present for a possible future circumstance – whether it be the end-result or an intermediate step – *potentially* to constitute inside information. As stated in paragraphs 52–53 in *Geltl*, the precision criterion and the price impact criterion are *minimum conditions*, each of which must be satisfied in order for inside information to exist. For a possible future circumstance to constitute inside information, it is therefore necessary, but not sufficient, that the required degree of probability that the circumstance will occur is present.

The interpretation of the law

(45) According to section 3-2 of the Securities Trading Act, only "information indicating that one or several circumstances or events have occurred or may reasonably be expected to occur" may constitute inside information. The standard of probability is expressed through the words "reasonably be expected to occur".

(46) SJI Equities contends that the standard is somewhat lower than the preponderance of probability. The former board members of RenoNorden, the respondents in our case, contend that a preponderance of probability must be present, i.e. a likelihood of more than 50 percent that the relevant circumstance will occur.

(47) Section 3-2 of the Securities Trading Act incorporated the Market Abuse Directive and the implementing Directive 2003/124/EC into Norwegian law. These are maximum harmonisation directives. That means that they apply with the same content in all Member States, and are therefore central to the interpretation of the law.

(48) The expression used in the Securities Trading Act "may reasonably be expected to occur" [*med rimelig grunn kan ventes å ville inntreffe*] is a translation of the wording in Article 1 (1) of the Commission Directive "may reasonably be expected to come into existence". The French, Danish and Swedish versions, respectively, use similar wordings. The German version uses "mit hinreichender Wahrscheinlichkeit in Zukunft eintreten wird", which translates "with sufficient probability will occur in the future". This formulation does not provide a basis for other conclusions than those deriving from the other language versions.

(49) As I see it, the fact that a circumstance may "be expected to occur" does not necessarily mean that it is more likely than not that it will. It is also unclear whether the term "reasonably" has independent significance. To me, it is natural to perceive the term such that it at least does not denote a higher standard of probability than "be expected to occur" alone. Alternatively, "reasonably" merely emphasises that the possibility of the relevant circumstance occurring must have a concrete and rational basis.

(50) Overall, I find that the wording of section 3-2 of the Securities Trading Act supports that the requirement is somewhat less than a preponderance of probability. In addition to what I have mentioned, I place some emphasis on the use of "likely" [*sannsynligvis*] in the wording of the reasonable investor test in subsection 3, which means that the requirement is a preponderance of probability, see the Supreme Court ruling in Rt-2012-629 paragraphs 57–58. If the intention had been to require a preponderance of probability in our context as well, it would have been natural to apply the same wording.

(51) The *Geltl* judgment concerns two questions raised by the German Supreme Court, the Bundesgerichtshof, regarding the interpretation of the Commission Directive. The case arose from an action brought by a German national claiming damages for losses resulting from late publication of resignation of Daimler CEO's, a circumstance that, when made public, caused an increase in the price of the company's shares. The preceding process had taken place step-by-step and lasted for over two months.

(52) The first question was whether intermediate steps in a process leading to a particular event could constitute "precise information". This question was, as mentioned, answered in the

positive. The ECJ stressed that intermediate steps that had not yet occurred, but that might reasonably be expected to occur, could also constitute inside information.

(53) The second question was whether the expression "reasonably" required that the probability be assessed as "predominant or high", or whether it implied that it – provided that prices were highly likely to be effected – was sufficient that the occurrence of the future circumstance or event was "uncertain but not improbable".

(54) After first establishing in paragraph 46 that a "high probability" cannot be required, and in section 48 that events whose occurrence is "implausible" must be disregarded, the ECJ answered the second question as follows in section 49:

> "It follows that, in using the terms 'may reasonably be expected', Article 1(1) of Directive 2003/124 refers to future circumstances or events from which it appears, on the basis of an overall assessment of the factors existing at the relevant time, that there is a realistic prospect that they will come into existence or occur."

(55) Here, the ECJ does not address the two options presented by the German Supreme Court, but limits itself to replacing "may reasonably be expected" by "realistic prospect that they will come into existence or occur." This restraint is hardly coincidental, and it is thus not possible to derive any clear answer to the question in our case. However, in my reading, the expression "realistic prospect" implies a requirement of concrete indications to the effect that the relevant circumstances will occur, but it does not imply that it has to be more likely than not. But, as the ECJ stresses in *Geltl* paragraph 48, the standard of probability cannot be so low as to include circumstances and events that are implausible. Consequently, the standard must at least be on par with equality of probability.

(56) Further, the considerations behind the rules on insider trading do in my view not provide clear guidance on whether the standard of evidence is a preponderance of probability or lower.

(57) Explaining why a high probability that the circumstances in question will come into existence or occur cannot be required, the ECJ states in *Geltl* paragraph 47 that such a degree of probability would undermine the objective of protecting the financial markets and enhancing investor confidence in them. The argument is that such a scenario would enable insiders to derive undue benefit from certain information to the detriment of others that are unaware of it. When describing why, on the other hand, no emphasis can be placed on possible future circumstances whose occurrence is "implausible", the Court points out in paragraph 48 that such a rule may lead issuers to believe "that they are obliged to disclose information which is not specific or is unlikely to influence the prices of their financial instruments."

(58) The considerations highlighted by the ECJ show that the need to obtain price-relevant information must be weighed against the need to avoid that issuers are led to publish information that is not suited to influence rational investment decisions.

(59) Thus, the set of rules seeks to balance these considerations, but without providing a basis for concluding exactly on which degree of probability is required for disclosed information to be considered inside information if the other conditions are met. However, the ECJ's great emphasis on the need to release all price-relevant information suggests, in my opinion, that the reasonable investor test – which is based on an overall assessment – is what normally should determine whether inside information exists. This, in turn, suggests that a probability of up towards 50 percent that future circumstances will occur is sufficient.

(60) A good amount of legal and regulatory case law and legal theory has been presented in the case. However, the materials do not provide a basis for establishing any clear practice or general agreement with respect to the issue at hand.

(61) Against this background, I believe that the directives, regulations and *Geltl* as a whole indicate that in order for a future circumstance to *possibly* constitute inside information, the minimum standard of probability is close to equality of probability, but slightly lower.

Conclusion and costs

(62) In its judgment, the Court of Appeal has assumed that a preponderance of probability is required for the knowledge of a possible future circumstance to trigger a duty of disclosure. I have concluded that this is an error in law that may have had an effect on the Court of Appeal's result. The Court of Appeal's judgment must therefore be set aside.

(63) SJI Equities has won the case. According to section 20-2 of the Dispute Act, the successful party is generally entitled to full compensation for its costs from the opposite party. However, the opposite party may be fully or partially exempted from liability for costs if compelling grounds justify it. The case at hand has raised an issue of principle that needed clarification. I therefore find that no costs should be awarded in the Supreme Court.

(64) I vote for the following

J U D G M E N T :

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

2. Costs in the Supreme Court are not awarded.

(65) Justice **Bergh:** I agree with Justice Thyness in all material respects and with his conclusion.

(66) Justice **Matheson:** Likewise.

(67) Justice **Normann:** Likewise.

(68) Justice **Skoghøy:** Likewise.

(69) The Supreme Court gave the following

J U D G M E N T :

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

2. Costs in the Supreme Court are not awarded.