



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

1959 · 50 · 2009

FIRST SECTION

CASE OF PROCEDO CAPITAL CORPORATION v. NORWAY

(Application no. 3338/05)

JUDGMENT

STRASBOURG

24 September 2009

FINAL

01/03/2010

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Procedo Capital Corporation v. Norway,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Christos Rozakis, *President*,

Nina Vajić,

Anatoly Kovler,

Khanlar Hajiyev,

Sverre Erik Jebens,

Giorgio Malinverni,

George Nicolaou, *judges*,

and Søren Nielsen, *Section Registrar*,

Having deliberated in private on 3 September 2009,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 3338/05) against the Kingdom of Norway lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a limited liability company Procedo Capital Corporation (“the applicant company”), registered in Panama, on 13 January 2005.

2. The applicant company was represented by Mr M. Elvinger, a lawyer practising in Luxembourg. The Norwegian Government (“the Government”) were represented first by Mrs E. Holmedal then by Mrs Fanny Platou Amble, both Attorneys at the Attorney General’s Office (Civil Affairs), as their Agent.

3. The applicant company complained under Article 6 § 1 of the Convention that due to the participation of a certain lay member in the first part of the oral hearing before the High Court and the refusal of the latter to discontinue the proceedings after his disqualification and refer the case to a differently composed High Court, there had been a violation of the right to a fair hearing by an impartial tribunal.

4. By a decision of 29 April 2008, the Court declared the application partly admissible.

5. The applicant company and the Government each filed further written observations (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

A. Factual background to the case

6. The present application has its background in a civil dispute over securities dealings between Procedo Capital Corporation (hereinafter referred to as “Procedo”) and a Norwegian securities broker, Sundal Collier, based in Norway. In October 1998 the latter brought proceedings against the former before the Oslo City Court (*tingrett*), requesting an order that the applicant company pay an amount of 18,481,808 Norwegian kroner (NOK) plus interest in respect of shares Sundal Collier had purchased for the applicant company. The applicant company, which received the summons in December 1999, contested the action and brought a counter-action requesting an order that Sundal Collier pay compensation, the amount of which was to be determined in subsequent proceedings, with regard to losses sustained by the applicant company due to information and advice received from Sundal Collier.

7. By a judgment of 4 January 2002, the City Court ordered the applicant company to pay Sundal Collier NOK 18,131,808 plus interest and dismissed any claim against the latter. Each party was to bear its own costs.

8. The applicant company then lodged an appeal with the Borgarting High Court (*lagmannsrett*).

B. Preparatory High Court decision regarding disjoinder of proceedings

9. In its appeal to the High Court the applicant company requested that, as had been done before the City Court, adjudication in the counter-action, notably concerning the amount of the applicant company’s counter-claim and related causation issues, be disjoined in accordance with Article 151 § 2 of the Code of Civil Procedure. Pursuant to that provision, separate proceedings were contingent on the other party’s agreement. After a preparatory meeting and exchanges of written pleadings on the issue, Mr Justice Minsaas, acting as the rapporteur judge of the High Court, decided on 18 December 2002 not to disjoin either the proceedings or the adjudication, finding insufficient basis for an agreement between the parties to this effect.

C. Appointments of lay members by the High Court at the preparatory stage

10. At the preparatory stage the High Court decided, in view of the financial character of the subject matter, to sit with two lay members with expertise in financial matters and invited the parties to propose candidates. The applicant company did not make any proposal. Sundal Collier proposed Mr Abrahamsen (hereinafter referred to as “Mr A.” or “lay member A.”), an economist, and the applicant company did not object within the set time-limit.

11. On 14 March 2003 the High Court appointed Mr A. as lay member, after having specified the impartiality requirement, and informed the parties about the prospective appointment of a second lay member, Mr D., an economist. However, since it turned out that Mr D. did not satisfy the impartiality requirement, he was replaced by Mr Bonnevie (hereinafter referred to as “Mr B.” or “lay member B.”), a chartered accountant.

12. In the meantime the applicant company appealed against the High Court’s decision of 14 March 2003 to the Appeals Leave Committee of the Supreme Court disputing the necessity and desirability of appointing lay members in general. It also contested the procedure whereby Mr A. had been appointed on the proposal of Sundal Collier and not on a joint proposal by the parties. The applicant company questioned whether Mr A.’s professional background made him suitable as an expert in the case. On 15 May 2003 the Committee upheld the High Court’s decision, finding that the appeal had no prospects of success.

D. Oral hearing before the High Court

13. The High Court held an oral hearing over nineteen days or so between 14 October and 13 November 2003 at which each party was represented by counsel and an assistant lawyer. From the outset it was composed of three professional judges – Mr Justice Omsted, President, Mr Justice Bøhn and Mr Justice Nesheim, *ad hoc* judge – and two expert lay judges, Mr A. and Mr B.

14. There were no objections to the composition of the High Court at the opening of the hearing on 14 October 2003 (section 115 of the Administration of Courts Act (*domstolloven*) - Law of 13 August 1915 no. 5, see paragraph 36 below). On that date and on 15, 16 and 20 October 2003 the lawyers for the applicant company made their opening address.

15. On the last-mentioned date the Presiding Judge of the High Court drew the parties’ attention to the fact that it was considering whether (as requested by the applicant company – see paragraph 9 above) it would be appropriate to disjoin the proceedings, as provided for in Article 98 § 2 of the 1915 Code of Civil Procedure (*Tvistemålsloven*), in respect of point 1 of

the counter-action and invited the parties to give further consideration to the matter.

16. In the morning of 21 October 2003 counsel for the applicant company continued his address and entered his plea. Thereafter the assistant lawyer for the respondent began his opening address. At some point during this address lay member Mr A. informed the parties that, in his capacity as an employee of PricewaterhouseCoopers, he had been involved in an assignment for ABG Sundal Collier and First Securities in connection with the listing of a company on the stock exchange. The parties gave notice that they wished to consider this matter in further detail and to revert later to the question whether Mr A. should be able to sit in the case.

17. Before adjourning the proceedings on 21 October 2003, the Presiding Judge provided the parties with further information on the question of disjoining the proceedings with regard to the first point of the counter-action. The parties were asked to give their final comments on this question before counsel for the respondent commenced his opening address in respect of the counter-action.

18. When the proceedings resumed on the following day, 22 October 2003, the Presiding Judge opened by taking up the question of the eligibility of Mr A. in response to the pleadings on this subject submitted by the applicant company's lawyer. Mr A. then provided further details of his relationship with ABG Sundal Collier. Since some of the questions raised by the applicant company required further investigation by ABG Sundal Collier, it was agreed that the issue of the lay member's ability to take part in the case should be adjourned until the following day.

The assistant lawyer for the respondent then continued his opening address and entered his pleas.

The Presiding Judge informed the parties that the Court intended to rule on the various procedural questions raised in the case the next day.

19. When the proceedings resumed in the morning of the following day, 23 October 2003, counsel for the applicant company asked that Mr A. be absent from the pleadings regarding his eligibility. The High Court adjourned briefly to consider the question and, when the proceedings resumed, decided that Mr A. should not take part in the subsequent exchanges on the question.

20. Counsel for each of the parties then made submissions on the question of eligibility with reference to section 108 of the Administration of Courts Act.

21. The parties were then given the opportunity to argue their views on the question of disjoining the proceedings as provided for in Article 98 § 2 of the Code of Civil Procedure.

22. At 12.30 p.m. the High Court adjourned the proceedings until the afternoon and withdrew to deliberate and vote in camera on the questions of eligibility and disjoinder.

23. At 3 p.m. on the same day (23 October 2003) the High Court convened again, sitting with the professional judges and lay member Mr B. The High Court delivered two decisions, signed by the three professional judges and lay member Mr B., but not by lay member Mr A., who had not taken part.

24. The first decision concerned the disqualification matter, in which the High Court observed *inter alia*:

“During the appeal proceedings lay member [Mr A.], who is an economist, remembered a circumstance that he thought appropriate to mention to the other members of the bench and which was then passed on to the parties.

[Mr A.] is a partner in PricewaterhouseCoopers DA. At the time of writing this company is engaged in an assignment for ABG Sundal Collier Norge ASA (referred to hereafter as ABG Sundal Collier), the parent company of one of the parties in this case, Sundal Collier & Co ASA. In collaboration with a second company, First Securities ASA, ABG Sundal Collier has undertaken a consultancy assignment for a company seeking to be listed on the Oslo Stock Exchange. PricewaterhouseCoopers’ assignment consists of providing certain auditing and accounting services in connection with the stock-exchange launch. The assignment was given last spring following a tendering competition and, according to the information provided, most of the work on the assignment is being performed by PricewaterhouseCoopers’ Bergen office. [Mr A] has been entrusted with the task of providing advice in connection with the assignment and will thus be one of the people who will provide the services in question. In this context he has also had some direct contact with a representative of ABG Sundal Collier. According to the submitted documents, the fee for the assignment will be approximately NOK 300,000. The assignment has not yet been completed. The company seeking listing will ultimately be liable for payment to PricewaterhouseCoopers.

After [Mr A.] had explained the situation, the [applicant company] requested further information from the opposing party and the parties subsequently exchanged pleadings on the question of eligibility. At today’s hearing Advocate Gade, acting for [the applicant company], filed an objection to the eligibility of lay member [Mr A.]. The parties were given the opportunity to comment on the question. [Mr A.] was not present in court during the submissions and decision on the question of his eligibility.

[The applicant company] argues that lay member [Mr A.] is disqualified pursuant to section 108 of the Administration of Courts Act. The company refers, among other things, to the information that PricewaterhouseCoopers has obtained approximately six per cent of the commissions carried out for ABG Sundal Collier during the last three years. A commission concerning a stock market introduction is very prestigious and is currently a rare occurrence. It is obvious that PricewaterhouseCoopers has considerable interest in obtaining this type and other kinds of assignments from ABG Sundal Collier, a main actor in this market. As a partner in PricewaterhouseCoopers, [Mr A.] has a direct financial interest in the company’s income and future income potential. What is decisive is how this matter would appear to the public. The counter-action in the case concerns a considerable compensation claim against Sundal Collier & Co ASA. According to the information available, there is currently no activity in this company, and it is obvious that, for the purposes of the impartiality issue, this company ought to be identified with ABG Sundal Collier, which has continued the daughter company’s activity. There is clearly too close a connection between [Mr A.]

and the respondent for [Mr A.] to serve as a judge in the case. A further disqualifying circumstance is that [Mr E.] of ABG Sundal Collier is a central witness in the case with regard to the question whether [the applicant company's] representative during a meeting with Sundal Collier & Co ASA, attended by [Mr E.], made statements which could provide a basis for demanding confiscation of assets. It is untenable for [Mr A.] to assess whether the witness statement from a person with whom he has a relationship of continuous professional cooperation is valid.

At the preparatory stage [the applicant company] was particularly concerned about the need for any lay members appointed to have sufficient independence from the parties and in this connection the company pointed to the close business relations between the large companies in the financial sector. It should also be emphasised that the law firm of counsel for the respondent carried out commissions for ABG Sundal Collier in connection with the stock market introduction. ...

Sundal Collier & Co ASA claim that lay member [Mr A.] is not disqualified from taking part in the case. His connection to the respondent in the appeal is too loose. This is illustrated by the fact that it never occurred to [Mr A.] in the beginning that there could be a ground for disqualifying him. The assignment in question is very small and [Mr A.] does not play a central role in it. His role is primarily to provide advice to PricewaterhouseCoopers' office in Bergen, which is handling the consultancy. Bills and fees are addressed to ABG Sundal Collier and First Securities, but it is the company which is to be introduced on the stock market which will cover the costs. [Mr A.] does not have any daily or permanent dealing with the consultancy. This is a one-off consultancy consisting in objective accountancy considerations. [Mr A.] is not personally a contractual party and PricewaterhouseCoopers has no direct or indirect interest in the outcome of the court case. [Mr A.] will be removed from the consultancy. No one from counsel's law firm who is directly involved in the case has been aware of the matter. The law firm has no commission for ABG Sundal Collier in connection with the stock market introduction but only for the company whose introduction is being sought.

The Norwegian financial milieu is small and there are very few large accountancy firms that are able to take on such consultancies. A strict interpretation of section 108 of the Administration of Courts Act would lead to a very narrow choice of competent lay members in cases where particular competence in finance and accountancy is required. ...

The High Court is of the view that there is nothing to suggest that lay member [Mr A.] is not fully able to reach an impartial decision in the case, notwithstanding the contractual relationship between ABG Sundal Collier and PricewaterhouseCoopers. It is noted that [Mr A.] himself did not view this relationship as a problem, and it was not until the second week of the proceedings that it occurred to him that he should mention the relationship. This is not decisive, however, since the question of disqualification must be considered on the basis of a more general assessment of what relationship between a lay member and a party will be deemed unacceptable pursuant to section 108 of the Administration of Courts Act.

The High Court notes that objections to the eligibility of the lay member have been entered by [the applicant company] and the court refers to [the applicant company]'s submissions as cited above. Having considered the matter in its entirety, the Court is of the view that, in the light of the circumstances, lay member [Mr A.] should withdraw.

The decision is unanimous.

Conclusion

[Mr A.] is ordered to withdraw.”

25. In the second decision the High Court decided to disjoin the proceedings:

“Having put the question to the parties of disjoining the proceedings as provided for in Article 98 § 2 of the Code of Civil Procedure, the Court unanimously decided with respect to the counter-action – item 2 of the [applicant company’s] statement of claim – that the following two questions should be considered first:

1. Whether, in the light of the negotiating situation between the parties, Sundal Collier & Co ASA were in breach of their obligations in relation to [the applicant company], in other words whether there was an obligation for SCC not to apply for attachment in Norway, Sweden and/or Luxembourg.

2. Whether there exist other fault-based or strict grounds for liability in connection with the applications for attachment in Norway, Sweden and Luxembourg.

The decision means that for the time being the court will not review questions relating to a causal link in respect of the alleged losses or the question whether there should be imputation of liability between the [the applicant company] and the company Plentius.

After the proceedings had been completed in accordance with this decision, the High Court ruled, following deliberations, that a decision should be rendered in both the primary and the counter-action on the basis of the decision adopted.

26. When the proceedings resumed on Monday 27 October 2003, counsel for the applicant company filed a motion for the case to be discontinued on the grounds of the High Court’s order of 23 October 2003 requiring lay member Mr A. to withdraw. Counsel for the respondent objected. Thereafter the Presiding Judge informed the parties that the High Court had unanimously decided that the proceedings should continue, as provided for in section 15(1) of the Administration of Courts Act (see paragraph 37 below). In this regard the High Court stated the following in its judgment of 22 January 2004:

“The disqualification of the lay member [Mr A.] did not disqualify the other judges and the need for expert evidence was safeguarded in the further proceedings.”

27. According to the transcripts of the High Court’s hearings, it subsequently heard the case from 28 to 30 October, 3 to 7 November and 10 to 13 November 2003.

28. In a decision of 17 November 2003 the High Court reiterated its decision of 23 October 2003 on the disjoinder of the proceedings and affirmed that the appeal proceedings had been conducted in accordance with this decision until 13 November 2003. It further stated that, after its

deliberations held on 14 and 17 November 2003, it had decided to close the proceedings and adjudicate the case – both the principal action and the counter-action as it had been pleaded.

E. Judgment by the High Court and appeal by the applicant company

29. By a judgment of 22 January 2004, the High Court upheld the City Court's judgment in the main and ordered the applicant company to pay specified amounts for Sundal Collier's legal costs both before the City Court and the High Court.

30. According to the High Court's judgment, at an unspecified time after the City Court's judgment of 4 January 2002, Sundal Collier & Co ASA's broker activity had been taken over by the parent company ABG Sundal Collier and since then the former company had had no economic activity.

31. The applicant company sought to appeal against the High Court's procedure and judgment to the Supreme Court (*Høyesterett*).

32. As to the procedure, the applicant company argued that the High Court judgment ought to be quashed, notably on the ground that the court had been unlawfully constituted. This was due to the participation of lay member A., who had been disqualified under section 108 of the Administration of Courts Act (Article 384 § 2, item 2, of the 1915 Code of Civil Procedure). In the alternative, the applicant company maintained that lay member A.'s participation must have had an influence on the High Court judgment (Article 384 § 1). The proceedings had lasted for "seven" days by the time lay member A. was ordered to withdraw. The substantive questions concerned relatively old facts, which meant that the parties' pleadings and the case documents would be central to the High Court's determination of the case. Moreover, the respective decisions to disqualify lay member A. and disjoin the proceedings had been taken in the same court session. A decision to disjoin the proceedings presupposed that the judges had discussed the substance of the case, an issue that had been raised on the fourth day of the hearing already. In the further alternative, the applicant submitted that the High Court's decision to continue the proceedings with reference to section 15 of the Administration of Courts Act after A.'s withdrawal had constituted an error of procedure.

33. The Court notes that in its notice of appeal of 8 April 2003 to the Appeals Leave Committee of the Supreme Court, the applicant company reiterated, *inter alia*, that it "had consistently argued in favour of disjoining the proceedings before the High Court, as had been done before the City Court, in accordance with Article 151 § 2 of the Code of Civil Procedure".

34. On 16 July 2004 the Appeals Leave Committee of the Supreme Court (*Høyesteretts kjæremålsutvalg*) refused the applicant company leave to appeal with regard to the High Court's procedure, finding it obvious that

the appeal had no prospects of success. As for the remainder, the Committee refused the applicant company leave on the ground that the appeal represented no interest beyond the particular case and that no other reason warranted the appeal being heard by the Supreme Court.

II. RELEVANT DOMESTIC LAW

35. The requirements of impartiality of judges and lay members are set out in sections 106 to 108 of the Administration of Courts Act (*domstolloven*) – Law of 13 August 1915 no. 5. In the present case, the national High Court relied on section 108, which reads:

Section 108

“Nor may a person sit as a judge or juror if there are other particular circumstances which are liable to weaken confidence in his impartiality. This applies in particular if a party requests that he withdraws on this ground.”

36. As for the procedure for handling questions of impartiality, the following provisions of the 1915 Act were relevant:

Section 111

“A party wishing to request that a person be excluded from taking part [in the proceedings] should do so as soon as he becomes aware of the matter which justifies the request.

He may no longer request exclusion pursuant to section 108 if he was aware of the particular circumstances but nonetheless proceeded to plead the case before the court.

The request may be submitted either orally or in writing and shall state the reasons relied on.

Section 115

“Before the hearing of the particular case begins, the president of the court shall inform the jurors or lay members that they are excluded from serving if they fall within any of the situations referred to in sections 106 or 107, or if, for their part, such circumstances exist as referred to in section 108, and he shall call upon them and the parties to disclose the fact if this should be the case.”

37. The 1915 Act contains the following provision on the possibility to continue a hearing in the event of a member’s inability to sit:

Section 15

“If any member of the court or jury is unable to attend after the main hearing has begun, the hearing may be continued without summoning a replacement provided that there is only one juror or lay member and only one judge less than the number normally required. Both in civil and criminal proceedings, a judge who, in accordance with section 12(1), may serve as the president of the court must always be present.

When the Court of Appeal is composed only of three professional judges, the proceedings may not be continued if any of them is unable to attend.”

38. Article 98 of the former Code of Civil Procedure (*tvistemålsloven*) – Law of 13 August 1915 no. 6, replaced with effect from 1 January 2008 by a new Code, stated:

Article 98

“The court may join one or more cases for combined hearing and in such case for joint ruling when the hearing of the case may thus be facilitated or accelerated and when at least one of the parties is the same in all of the cases.

The court may decide that there shall be a separate hearing concerning one or more claims combined into a single case or concerning individual issues in dispute concerning the same claim.

The decision of the court in accordance with this section may not be challenged or appealed.”

39. The above provision regulated the disjoinder of proceedings only, not the disjoinder of adjudications, which were governed by Article 151 § 2. The latter provision provided that in a case concerning a compensation claim or other claims the size of which was disputed, the adjudication of the size of the claim could, at the request of both parties, be adjourned.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

40. The applicant company complained that, in the proceedings before the High Court, it had not been afforded a fair hearing before an impartial tribunal as guaranteed by Article 6 § 1 of the Convention, which in so far as relevant reads:

“In the determination of his civil rights and obligations ..., everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law.”

The Government disputed the applicant company’s complaint and invited the Court to find that there had been no violation of the Convention in the instant case.

A. Preliminary issue regarding the scope of the case

41. The Court reiterates that, in its initial application under the Convention, the applicant company complained that the High Court had

lacked the requisite impartiality for the purposes of Article 6 § 1 on account of its having pursued its examination of the case notwithstanding its decision of 23 October 2003 that lay member A. was disqualified and despite A.'s position and potential influence on the outcome of the case. The applicant company pointed out that the case concerned "in the first place ... an obvious issue of objective impartiality "[b]ut that [this did] not mean that the matter would not give rise, also, to an issue of subjective impartiality".

42. Subsequently, at the merits stage before the Court, the applicant company pleaded that the High Court as a whole had lacked subjective impartiality, relying on several new items of evidence not previously submitted either before the national courts or the European Court. This included in particular a written statement by lay member B., dated 12 June 2008, relating notably to the attitude of the professional judges during the proceedings, to which the Government objected with reference to a letter from the Presiding Judge to Mr B. dated 7 October 2008. However, in the Court's view the new evidence significantly alters the substance of the applicant company's complaint about lack of impartiality under Article 6 § 1 of the Convention. It is not covered by the Court's decision of 29 April 2008 declaring the complaint admissible. Therefore the Court will not consider the applicant company's argument that the High Court as a whole was personally biased against it. The Court will confine its examination to whether there were objective reasons to fear that, on account of lay member A.'s participation, the High Court, despite its having discharged him, failed to meet the impartiality requirement in Article 6 § 1 of the Convention in its determination of the civil dispute at issue.

B. Submissions of the parties

1. The applicant company's arguments

43. The applicant company complained that the High Court had failed to comply with the requirement of impartiality in Article 6 § 1 on account of its having pursued its examination of the case notwithstanding its decision of 23 October 2003 that lay member A. had been disqualified from taking part in the case. This decision had been taken on the sixth day of the hearing, after the High Court, with lay member A.'s participation, had heard the applicant company's opening address on all aspects of the case and the respondent party's opening address on the main action and the merits of the counter-action (albeit not the causation and quantum aspects of the latter claim), and had deliberated. Although it had been beyond dispute that lay member A. had been disqualified from taking part in the case, the High Court did not seem to have examined the issue whether its remaining members still satisfied the requirement of impartiality.

44. Moreover, the applicant company emphasised that on 23 October 2003 the High Court had also decided to disjoin the proceedings relating to the counter-action, implying that separate proceedings should first have been conducted regarding the merits of the counter-action while leaving aside, at that stage, the issues of quantum and causation. This did not mean that the High Court would have to give a separate judgment on the former issues. However, as was apparent from its decision of 17 November 2003, the High Court had already on 23 October 2003 entertained serious doubts as to the need to continue the proceedings by hearing the parties on the causation issues. The decision to disjoin the proceedings made sense only because, as early as 23 October 2003, the High Court had taken the *prima facie* view, as it indeed decided on 17 November 2003, that it would not wish to hear the parties on the causation issue since the counter-claim would fail on its merits.

45. Such a *prima facie* assessment of the merits was not binding on the High Court and, from a strictly legal point of view, the decision to disjoin the proceedings had merely concerned a procedural matter. However, the fact that the High Court was in a position to disjoin the proceedings on 23 October 2003 without any lengthy formal deliberations (if any), confirmed that there had been a continuous exchange between the judges composing the High Court who by then had heard the case over several days. Whether such exchanges could be qualified as deliberations from a formal legal point of view was not decisive. Thus it could not be seriously denied that the High Court's decision to disjoin the proceedings, which *de facto* implied a *prima facie* assessment of the case, might well and was actually likely to have been influenced by lay member A.'s participation in the first six days of the proceedings.

46. The fact that lay member A., despite having been invited to inform the court of any disqualifying circumstances prior to his appointment, did not disclose his links with Sundal Collier until the proceedings were well under way could only enhance the applicant company's legitimate concern about lay member A.'s position and the influence he may have had on the proceedings.

47. It was not accurate, as claimed by the Government, that the Supreme Court had reviewed the impartiality issue. On the contrary, the Supreme Court had refused to even hear the appeal.

2. The Government's arguments

48. The Government stressed that lay member A.'s withdrawal had been motivated not by subjective factors, but by objective reasons only. This in itself implied that there was no legitimate reason to fear that he could have adversely influenced the other judges and thus have affected their impartiality.

49. Moreover, his connection to Sundal Collier had consisted solely of a relatively minor role of giving advice in an assignment involving Sundal Collier's parent company. In reality the commission had been carried out on behalf of the company for which a stock-exchange introduction was being considered, as could be deduced from the fact that it was this company that had been responsible for paying the consultancy fees. None of the parties to the case before the High Court had been involved in the assignment. The loose connection between Mr A. and Sundal Collier was also illustrated by the fact that he had not thought of raising the impartiality issue until four and a half days into the hearing. The High Court had been very cautious and had allowed a wide margin of safety when, in spite of the loose connection between Mr A. and Sundal Collier, it had decided that he should withdraw. It could reasonably be questioned whether there were sufficient reasons to doubt his objective impartiality. These considerations ought to be taken into account when considering whether A.'s participation could have affected the impartiality of the remaining members of the High Court formation.

50. In the Government's view it was significant that, while the impartiality issue was raised four and a half days into the hearing, the High Court, with the applicant company's approval, had deferred its decision on the withdrawal until the sixth day. It must be assumed that in the interval, the possible ineligibility of Mr A. had made him and the other judges particularly cautious. For example, he had not participated in the decisions on withdrawal or on disjoining the proceedings.

51. The Government stressed that there was no evidence to support the applicant company's allegation that Mr A., during the first six days of the proceedings, had participated in deliberations and submitted views in relation to the case at hand. As was customary in all civil cases before the domestic courts, the deliberations on the merits had been held after the closure of the hearing "21 days" after Mr A. had been discharged.

52. In the light of the above, the applicant company had had no legitimate reason to fear that the High Court had not been impartial.

53. In no way did the High Court's decision under Article 98 § 2 of the Code of Civil Procedure to disjoin the proceedings imply a lack of impartiality. Such a decision related only to the progress of the proceedings and did not imply any appraisal of the merits. This was shown by the fact that it was not until after the oral hearings had been concluded and the High Court had deliberated for two days that it found that the counter-action had been ill-founded. It had therefore become unnecessary to continue the proceedings concerning the counter-action. Accordingly, the previous decision on disjoinder of the proceedings cannot be considered as an indication of any predisposition on the part of the High Court.

54. The High Court had considered the impartiality issue and found that lay member Mr A.'s participation did not disqualify the other judges. It should be noted that the applicant company had not lodged any application

for disqualification, which it could have been expected to do if it had considered this a problem. The High Court's assessment of its own impartiality was also upheld by the Supreme Court.

55. Finally, the Government pointed out that, as a result of the strict manner in which the Norwegian rules on impartiality were applied, it was not infrequent in practice that a judge or juror had to withdraw on objective grounds after the hearing had commenced. A principle whereby the withdrawal of one member would automatically require the withdrawal of the court as a whole, and a full hearing before a differently composed tribunal, would not only be unnecessary but also expensive and time-consuming and would lead to practical problems for smaller tribunals.

C. Assessment by the Court

56. The Court considers that it is essentially the requirement of "impartiality" that is in issue in the present case (see *Ekeberg and Others v. Norway*, nos. 11106/04, 11108/04, 11116/04, 11311/04 and 13276/04, § 31, 31 July 2007). The existence of impartiality for the purposes of Article 6 § 1 of the Convention must be determined according to a subjective test, that is, on the basis of the personal conviction of a particular judge in a given case, and also according to an objective test, that is by ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (see *Wettstein v. Switzerland*, no. 33958/96, § 42, ECHR 2000-XII; *Pétur Thór Sigurðsson v. Iceland*, no. 39731/98, § 37, ECHR 2003-IV; *Kyprianou v. Cyprus* [GC], no. 73797/01, § 118-121, ECHR 2005-XIII; and *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 75, ECHR 2007-...). It should be reiterated that the principles established in the Court's case-law apply to lay judges as they do to professional judges (see *Langborger v. Sweden*, judgment of 22 June 1989, Series A no. 155, p. 16, § 32; *Holm v. Sweden*, judgment of 25 November 1993, Series A no. 279-A, p. 14, § 30; and *Pullar v. the United Kingdom*, judgment of 10 June 1996, *Reports of Judgments and Decisions* 1996-III, p. 792, § 29; see also *Ekeberg and Others*, cited above, § 31).

57. As to the subjective test, the personal impartiality of a judge must be presumed until there is proof to the contrary (*ibid.*, § 32).

58. Under the objective test, it must be determined whether, quite apart from the judge's personal conduct, there are ascertainable facts which may raise doubts as to his or her impartiality. In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public. Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. This implies that in deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the party concerned is important but not

decisive. What is decisive is whether this fear can be held to be objectively justified (see, amongst other authorities, *Pullar*, cited above, § 37, and *Ekeberg and Others*, cited above, § 33).

59. In the present case, the Court first observes that, in reviewing the matter, the other High Court members found nothing to indicate that lay member A. would not have been “fully able to reach an impartial decision in the case”. No evidence has been adduced in the Convention proceedings to suggest that lay member A. was personally biased against the applicant company (see *Pullar*, cited above, § 43, and *Ekeberg and Others*, cited above, § 32). The Court sees no reason to hold otherwise.

60. It was the existence of certain links between lay member A. and the respondent party and the fact that the applicant company had requested his disqualification that led the High Court to discharge him pursuant to section 108 of the Administration of Courts Act.

61. Considering the issue from the angle of the requirement of objective impartiality under Article 6 § 1 of the Convention, the Court notes that at the material time lay member A. was a partner in a consultancy firm, PricewaterhouseCoopers. On the latter’s behalf and in concert with others he provided auditing and accounting services for ABG Sundal Collier in relation to the prospective launch of a third company on the stock exchange. PricewaterhouseCoopers’s involvement had followed a competitive tender and had included advice of an essentially technical character. Lay member A. did not assume any main role in the assignment. None of the recipients of the services so provided by PricewaterhouseCoopers was a party to the proceedings before the High Court; ABG Sundal Collier was only a parent company of the opposing parties, Sundal Collier & Co ASA. While bills and fees had been addressed to the latter (and First Securities), the commission which PricewaterhouseCoopers received in return for its services had been paid by the company for whom the stock-exchange introduction was being considered.

62. In these circumstances, apart from noting the existence under Norwegian law of appropriate safeguards to ensure the impartiality of judges and lay judges (see *Ekeberg and Others*, cited above, § 48), the Court does not find any direct link between lay member A. and the opposing party in the proceedings. Nor does it appear that Mr A. had any direct interest in the outcome of the case between the applicant company and the respondent company.

63. The Court considers that the reasons for doubting Mr A.’s objective impartiality, although they may be legitimate, were not particularly strong.

64. Furthermore, neither of the parties had any objections to the High Court’s composition when invited to comment on this at the opening of the hearing on 14 October 2003. Lay member A.’s own revelations, subsequently, about the assignment in question occurred on 21 October 2003, four and a half days into a hearing which extended over nineteen days

or so until 13 November 2003. At the time of Mr A.'s revelation, counsel for the applicant company had made his opening address and counsel for the respondent party had just started his opening address. In accordance with the wishes stated by the parties, the High Court gave them an opportunity to reflect on the disqualification issue and to revert to the matter later. The issue became the subject of pleadings by the parties and clarification by A. on 22 October 2003 and further pleadings in his absence in the morning of 23 October 2003. In the afternoon of that day, the remaining members of the High Court unanimously upheld the applicant company's request to order lay member A. to withdraw. Mr A.'s presence was limited to, and terminated after, a relatively early phase of the hearing (see *Ekeberg and Others*, cited above, § 45). Thus far, all the procedural steps taken by the High Court in relation to the handling of Mr A.'s withdrawal had been agreed to by the applicant company.

65. On the following hearing day, on 27 October 2003, the High Court rejected the applicant company's claim that, as a consequence of lay member A.'s participation, the High Court as a whole was disqualified and ought to discontinue the proceedings. On that date those members apprised themselves of the issue regarding their own impartiality and found that lay member A.'s disqualification did not disqualify them. The Court is not convinced by the applicant company's argument that the High Court, as composed after lay member A.'s withdrawal, failed to satisfy the impartiality requirement under Article 6 § 1 of the Convention.

66. In this connection, the Court finds unpersuasive the particular concern expressed by the applicant company that lay member A. may have had an influence on the High Court's decision of 23 October 2003 to disjoin the proceedings regarding the counter-action and, by implication, the adjudication of the case. It should be noted that a disjoinder of the proceedings regarding the counter-action had previously been requested or favoured by the applicant company in its appeal to the High Court, and then at a preparatory stage before the latter and also, so it appears, at the hearing (see paragraphs 9 and 33 above). On 20 and 21 October 2003 the High Court President took the matter up with the parties. On 23 October 2003 they pleaded the issue after the High Court had (unanimously) ordered Mr A. to withdraw. Later that day the High Court deliberated on it without Mr A.'s participation and (unanimously) decided to disjoin the proceedings provisionally.

67. The decision only became definitive when the High Court, after having heard the case for eleven more days, until 13 November 2003, and deliberated on 14 and 17 November 2003, decided that the case was ready for adjudication without hearing additional argument on the counter-action.

68. Thus, it transpires that the High Court's decision to disjoin the proceedings relating to the counter-action was reached in lay member A.'s absence and in substance endorsed the applicant company's position on a

point of procedure. While the latter is not in itself decisive, it significantly weakens the allegation that lay member A. could have unduly influenced the decision to the detriment of the applicant company. Its submission that the decision could indicate that A. had contaminated the proceedings by influencing other members to adopt an unfavourable stance towards the applicant company in their determination of the merits of the case must therefore be rejected.

69. In the Court's view, any misgivings stemming from the possibility that Mr A. might have exerted influence on other members of the High Court formation by taking part in informal exchanges with them was adequately addressed by their (unanimous) order of 23 October 2003 that he withdraw and their (unanimous) decision of 27 October 2003 that his disqualification did not disqualify them (see, *mutatis mutandis*, *Ekeberg and Others*, cited above, § 48).

70. Thus, it cannot be said that lay member A. was involved either directly or indirectly in determining the civil dispute when the High Court, after having heard arguments from both parties over eleven further hearing days and having deliberated for two additional days, adjudicated the case (see *Ekeberg and Others*, cited above, § 47).

71. In the light of the above, the Court finds that the nature, timing and short duration of his involvement in the proceedings concerned were not capable of causing the applicant company to have legitimate doubts as to the impartiality of the High Court as a whole. The High Court was therefore not obliged to discontinue the proceedings and allow them to restart before a differently composed High Court for the purposes of the requirement of an impartial tribunal under Article 6 § 1 of the Convention (see *Ekeberg and Others*, cited above, § 49).

72. Accordingly, there has been no violation of Article 6 § 1 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

Holds that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 24 September 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President