The Charter of the United Nations signed on 26 June 1945

CHAPTER V: THE SECURITY COUNCIL

Article 23

1. The Security Council shall consist of fifteen Members of the United Nations. The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council. The General Assembly shall elect ten other Members of the United Nations to be non-permanent members of the Security Council, due regard being specially paid, in the first instance to the contribution of Members of the United Nations to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution.
2. The non-permanent members of the Security Council shall be elected for a term of two years. In the first election of the non-permanent members after the increase of the membership of the Security Council from eleven to fifteen, two of the four additional members shall be chosen for a term of one year. A retiring member shall not be eligible for immediate re-election.
3. Each member of the Security Council shall have one representative.

Article 27

1. Each member of the Security Council shall have one vote.
2. Decisions of the Security Council on procedural matters shall be made by an affirmative vote of nine members.
3. Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members; provided that, in decisions under Chapter VI, and under paragraph 3 of Article 52, a party to a dispute shall abstain from voting.

Article 51

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

EC Treaty 1957

CHAPTER 2

PROHIBITION OF QUANTITATIVE RESTRICTIONS BETWEEN MEMBER STATES

Article 28

Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited

between Member States.

Court of Justice of the European Communities

OPINION OF ADVOCATE GENERAL KOKOTT

delivered on 14 December 2006

Case C-142/05 Åklagaren v Percy Mickelsson and Joakim Roos

B – *Interpretation of Articles 28 EC and 30 EC*

1. Article 28 EC – Measure having equivalent effect

38. Article 28 EC prohibits quantitative restrictions on imports and all measures having equivalent effect between Member States.

39. In the view of the Commission, restrictions on use as contained in the Swedish regulations constitute measures having equivalent effect.

a) Dassonville formula

40. According to the definition developed by the Court in *Dassonville* all measures which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions. (18)

41. According to the arguments put forward by the defendants in the main proceedings – which are, however, disputed by the Swedish Government – the restriction on the use of personal watercraft introduced by the new Swedish regulations would lead to a fall in personal watercraft sales of more than 90 per cent. Accordingly, the Swedish regulations would impair trade between Member States directly and*actually*. In any case, however, according to the *Dassonville* formula a *potential* impairment would be sufficient for classification as a measure having equivalent effect. At any rate it is not inconceivable that national rules restricting the number of waters on which personal watercraft may be used have a bearing on purchasers' interest in that product and thus lead to a decline in sales and therefore also to a decline in sales of products from other Member States. Such national rules are therefore at least potentially capable of impairing trade between Member States. Accordingly, the Swedish regulations would constitute a measure having equivalent effect.

b) Application of the *Keck* criteria to arrangements for use

42. However, because the *Dassonville* formula is so broad, ultimately any national rules restricting the use of a product may be classified as a measure having equivalent effect and need to be justified.

43. The question therefore arises which the Court also raised – albeit in another connection – in its judgment in *Keck*, which is whether any measure which potentially also affects the volume of sales of products from other Member States can be characterised as a measure having equivalent effect. (19)

44. It becomes clear that this question regarding arrangements for use, that is to say national rules governing how and where products may be used, is particularly pressing when we consider a few examples.

45. For example, a prohibition on driving cross-country vehicles off-road in forests or speed limits on motorways would also constitute a measure having equivalent effect. In the case of these restrictions on use too, it could be argued that they possibly deter people from purchasing a cross-country vehicle or a particularly fast car because they could not use them as they wish and the restriction on use thus constitutes a potential hindrance for intra-Community trade.

46. With regard to the delimitation of the broad scope of Article 28 EC when the *Dassonville* formula is applied, the Court has attempted from time to time to exclude national measures whose effects on trade are too uncertain and too indirect from the scope of Article 28 EC. (20) However, an argument against these criteria is that they are difficult to clarify and thus do not contribute to legal certainty.

47. Instead I suggest excluding arrangements for use in principle from the scope of Article 28 EC, in the same way as selling arrangements, where the requirement set out by the Court in *Keck and Mithouard* is met.

48. In its judgment in *Keck and Mithouard* the Court found that there is an increasing tendency of traders to invoke Article 28 EC as a means of challenging any rules whose effect is to limit their *commercial freedom* even where such rules are not aimed at products from other Member States. (21) In the context of arrangements for use, ultimately individuals may even invoke Article 28 EC as a means of challenging national rules whose effect is merely to limit their *general freedom of action*.

49. With regard to *selling arrangements* the Court ruled in *Keck and Mithouard* that the application to products from other Member States of such national provisions is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment, so long as those provisions apply to all relevant traders operating within the national territory and so long as they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. (22) The '*Keck*exception' does not cover *product-related rules*, which relate to the characteristics of products. (23) The judgment in *Keck and Mithouard*concerned the prohibition on selling goods below the purchase price. Following that judgment the Court has for example classified prohibitions on Sunday trading and the prohibition on anyone other than specially authorised retailers selling tobacco as provisions on selling arrangements. (24)

50. The consequence of this case-law is that national rules which satisfy the selling arrangement criterion do not fall within the scope of Article 28 EC with the result that they are permissible under Community law without the need for the Member State to justify them.

51. Against this background the present case now gives grounds to consider whether arrangements for use should not, by analogy with the Court's ruling in *Keck*, be excluded from the scope of Article 28 EC.

52. If we consider the characteristics of arrangements for use and selling arrangements, it is clear that they are comparable in terms of the nature and the intensity of their effects on trade in goods.

53. Selling arrangements apply in principle only after a product has been imported. Furthermore, they indirectly affect the marketing of a product through consumers, for example because they cannot buy the product on certain days of the week or advertising for a product is subject to restrictions. Arrangements for use also affect the marketing of a product only indirectly through their effects on the purchasing behaviour of consumers.

54. National legislation which governs selling arrangements is not normally designed to regulate trade in goods between Member States. (25) A national legislature does not in general seek to regulate trade between Member States with arrangements for use either.

55. Against this background, it therefore appears logical to extend the Court's *Keck* case-law to arrangements for use and thus to exclude such arrangements from the scope of Article 28 EC.

56. Consequently, a national provision restricting or prohibiting certain arrangements for use does not come under the prohibition laid down by Article 28 EC, so long as it is not product-related, so long as it applies to all relevant traders operating within the national territory and so long as it affects in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States.

c) Application of the *Keck* criteria to the present case

57. The Swedish regulations are not product-related since they do not make use dependent in particular on personal watercraft meeting technical requirements other than those harmonised in the Recreational Craft Directive. The restriction on use does not therefore require any modifications to the personal watercraft themselves.

58. The Swedish regulations also apply to all relevant traders operating within the national territory, since they do not discriminate according to the origin of the products in question.

59. However, it is uncertain whether the Swedish regulations affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States. At first sight, this requirement is also met. A restriction on use may make a product less attractive to consumers and thus impair the marketing of the product. However, as a rule domestic products and foreign products are affected in the same manner by that consequence.

60. Nevertheless, it became apparent in the oral procedure that Sweden does not produce personal watercraft domestically. It must therefore be considered how the fact that there is no domestic production affects the examination of the *Keck* criterion, according to which products from other Member States and domestic products must be affected in the same manner by the national rules.

61. In connection with a *selling arrangement*, the Court has ruled that the existence of domestic production cannot be relevant. (26) As grounds the Court states that such a purely fortuitous factual circumstance may, moreover, change with the passage of time; if it were the relevant factor, this would have the illogical consequence that the same legislation would fall under Article 28 EC in certain Member States but not in other Member States, depending on whether or not there was domestic production. The situation would be different only if the national rules at issue protected domestic products which were similar to products covered by the contested rule or which were in competition with those products. (27)

62. Those principles can be applied by analogy to arrangements for use. It must therefore be examined whether the national measure*protects* domestic products which are in competition in the sense that it affects products from other Member States more than competing domestic products.

63. Motorboats are possibly products which are in competition with personal watercraft. In the absence of sufficient factual information it is not possible to assess in the present case whether motorboats are in competition with personal watercraft and whether personal watercraft are more affected by the Swedish rules than the comparable domestic products; this is a question for the national court. If the referring court answers these questions in the negative, the Swedish rules would not fall within the scope of Article 28 EC for that reason. If, on the other hand, the questions are to be answered in the affirmative, the referring court would then be required to examine whether the unequal treatment could be justified on grounds of protection of the environment. (28) However, there could be no justification under the second sentence of Article 30 EC if the Swedish rules proved to be a protectionist measure or arbitrary discrimination. (29)

64. However, it is possibly not actually necessary, for the purposes of assessing the present case, to examine whether there are domestic products which are in competition with personal watercraft and whether those comparable products are less affected by the Swedish rules.

65. In its judgment in *Keck* the Court held that national selling arrangements which satisfy the *Keck* criteria are not by nature such as to*prevent* their access to the market or to impede access any more than they impede the access of domestic products and therefore fall outside the scope of Article 28 EC. (30)

66. It may be concluded from this finding that, conversely, a national measure restricting or prohibiting an arrangement for use is not excluded from the scope of Article 28 EC if it prevents access to the market for the product in question. (31)

67. In this respect it is not only rules which result in complete exclusion, such as a general prohibition on using a certain product, that are to be regarded as preventing access to the market. A situation where only a marginal possibility for using a product remains because of a particularly restrictive rule on use is to be regarded as preventing access to the market.

68. It is for the national court to decide whether national rules prevent access to the market. In the present case there are

several reasons to suggest that the Swedish rules prevent access to the market for personal watercraft. The provisions of the Swedish regulations lay down a prohibition on the use of personal watercraft with the sole exception of use on general navigable waterways – at least for the period until the county administrative boards have designated other waters for the use of personal watercraft.

69. In determining whether the Swedish rules amount to general prohibition on use in the transitional period until other waters have been designated by the county administrative boards the crucial question is whether permission to use personal watercraft on general navigable waterways is given more than a merely marginal importance which does not affect the character of the Swedish regulations as a general prohibition on use.

70. The Swedish Government has argued that there are roughly 300 such general navigable waterways, although it was not able to indicate the surface covered by the general navigable waterways. On the other hand, the statement by the defendants in the main proceedings during the oral procedure gave the impression that despite their number general navigable waterways offer only marginal possibilities for using personal watercraft. They claimed that such waterways simply do not exist in much of the country, they are not interconnected, are difficult to reach and, moreover, are often not suitable for the use of personal watercraft on safety grounds, since they are, for example, frequently used by heavy tankers or are a long way from the coast. The Commission also takes the view that the rules amount to a complete prohibition on use. The exclusion of general navigable waterways from the prohibition on using personal watercraft does not therefore appear to affect the character of the Swedish regulations as a fundamental prohibition on use during the transitional period until other waters have been designated by the county administrative boards. It is irrelevant that the prevention of access to the market would be only temporary since access would be prevented not only for a negligibly short period.

71. For the purposes of the examination it will therefore be assumed hereinafter that the Swedish rules constitute a barrier to access to the market and that they should not therefore be excluded from the scope of Article 28 EC. In order to be compatible with Community law they must therefore be justified under Article 30 EC or by imperative requirements in the general interest.

72. If the referring court finds that the Swedish regulations are not to be classified as a barrier to access to the market, it would have to undertake the examination described above, but put aside, that is to say it would have to investigate whether there are domestic

products which are in competition with personal watercraft which are less affected in law or in fact. (32)

2. Justification

73. According to the *Cassis-de-Dijon* case-law, national measures having equivalent effect which apply without distinction may be justified where they are necessary in order to satisfy imperative requirements. (33) Since the Swedish rules do not discriminate according to the origin of the product, they are applicable without distinction to domestic products and to products from other Member States. (34) The Swedish Government relies on protection of the environment in order to justify its regulations on the use of personal watercraft. This is recognised as an imperative requirement in case-law. (35) The Court has also repeatedly stressed that protection of the environment constitutes one of the essential objectives of the Community. (36)

74. The national rules must also comply with the principle of proportionality, that is to say they must be appropriate, necessary and suitable for the purpose of attaining the desired objective. (37) This means in particular that if a Member State has a choice between equally appropriate measures it should choose the means which least restricts the free movement of goods. (38)

75. On account of their exhaust and noise emissions and because they can be ridden in areas where there are breeding and spawning grounds, personal watercraft can cause damage to the environment. Against the background of the various negative effects of personal watercraft on the environment, to which all the governments which have made submission in the proceedings have referred, national rules which limit the use of personal watercraft are undoubtedly appropriate for the purpose of protecting the environment.

76. However, it must still be considered whether national rules like the Swedish regulations are *necessary*, i.e. whether there is no equally appropriate but less onerous means of protecting the environment.

77. As far as necessity is concerned, the question arises first of all whether rules which differentiate according to the way in which the personal watercraft in question is used would constitute a less drastic, but equally appropriate, means. The defendants in the main proceedings have argued that personal watercraft have different effects on the environment depending on the way they are used. Thus, only the use of personal watercraft as sports vehicles or toys, with the characteristic circuit driving and fast acceleration, is detrimental to the environment, whereas the use of personal

watercraft as a means of transport would not have any greater effects on the environment in terms of noise and exhaust emissions than small motor boats – indeed it would even have lesser effects as a result of lower fuel consumption.

78. Even assuming that these statements are correct, (39) however, the Swedish rules could not be classified as disproportionate for that reason, since compliance with rules that differentiate according to the driving method would, as the Swedish Government has rightly pointed out, be more difficult to monitor and to implement than rules which prohibit use on certain waters in principle, and are not therefore equally appropriate.

79. However, the principle of proportionality could possibly require national rules on the use of personal watercraft to distinguish between different types of personal watercraft. The defendants in the main proceedings have argued that a distinction should be drawn between different kinds of personal watercraft. Only jet-skis would be used for play and sport and are characterised by driving methods which are harmful to the environment. Personal watercraft, on the other hand, would merely be used as a means of transport and are even less damaging to the environment than motorboats, which are also to be taken into consideration. The Court does not have all the information on the properties and effects of different kinds of personal watercraft to give a definitive answer to the question of proportionality from this point of view. Nor was it possible to infer from the statements made by the other parties to the proceedings before the Court that such a differentiation could be made with regard to effects on the environment; rather, they took the view that all personal watercraft had identical characteristics. If, however, the referring court is able to confirm that different kinds of personal watercraft also have different effects on the environment in terms of intensity, it would have to take into account, when examining the question of proportionality, the extent to which a proportionate measure on the use of personal watercraft can include such a differentiation on grounds of protection of the environment.

80. In a situation like the present case, nor does the principle of proportionality preclude the criminalisation of a prohibition which may be necessary in order to reinforce the prohibition, in particular because the penalty is only a fine.

81. The Swedish regulations, aside from general navigable waterways, chose the form of a fundamental prohibition subject to authorisation and not the less drastic form of authorisation subject to prohibition. General authorisation subject to prohibition as a rule constitutes the less drastic measure. Nevertheless, the principle of proportionality does not automatically require that approach to be

taken. Authorisation subject to prohibition would have to be equally appropriate for the purpose of protecting the environment. In assessing this question, particular attention should be paid to the specific regional features of each Member State. In this regard, the Swedish Government has argued that Sweden is characterised by a very large number of lakes and a long coast with sensitive flora and fauna which require protection. Against this background, Sweden's argument that in view of the specific geographical features the approach of authorisation subject to prohibition is not practicable and as such not equally appropriate as the opposite model of prohibition subject to authorisation is persuasive.

82. However, problems appear to be raised by the proportionality of rules like the Swedish regulations in view of the fact that during the period until a decision is taken by the county administrative boards the use of personal watercraft is generally prohibited other than on general navigable waterways.

83. This means that until a decision is taken by the county administrative boards riding is also prohibited on waters in respect of which the protection of the environment may not actually require this. The Swedish rules themselves assume that aside from general navigable waterways there are waters on which protection of the environment would permit personal watercraft to be used.

84. However, if it were required that until other waters are designated by the county administrative boards personal watercraft may be ridden, this could mean that the flora and fauna of many waters which are sensitive to encroachments by personal watercraft would be destroyed irretrievably. Such rules would not therefore be as appropriate for the protection of the environment as the approach chosen.

85. In order to satisfy the principle of proportionality, however, as the Commission has rightly pointed out, rules like the contested regulations must include a deadline by which the county administrative boards must have complied with their obligation to designate other waters. As Norway has rightly stated, the length of the deadline must take account of the fact that the county administrative boards require a certain time to obtain the information that they require in order to decide on which waters the use of personal watercraft has no detrimental effect. On the other hand, the legal certainty of traders, such as importers of personal watercraft, requires that the date by which the county administrative boards must have taken their decisions be fixed in order to allow those traders, amongst other things, to plan their business. As the Swedish Government acknowledged in the oral procedure, by the time of the oral procedure only 15 of 21 counties had adopted relevant

provisions. National rules which do not provide by which date a very far-reaching prohibition of personal watercraft remains therefore breach the principle of proportionality.

86. If use of a certain category of personal watercraft were permissible without any great restriction before the Swedish regulations were adopted – according to the submissions made by the defendants in the main proceedings this seems to have been the case for personal watercraft –, the principle of proportionality could also require that a transitional period should have been introduced for them. (40)

3. Interim conclusion

87. Thus, to summarise:

National legislation which lays down arrangements for use for products does not constitute a measure having equivalent effect within the meaning of Article 28 EC so long as it applies to all relevant traders operating within the national territory and so long as it affects in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States, and is not product-related. However, prohibitions on use or national legislation which permit only a marginal use for a product, in so far as they (virtually) prevent access to the market for the product, constitute measures having equivalent effect which are prohibited under Article 28 EC, unless they are justified under Article 30 EC or by an imperative requirement.

National rules which also lay down a prohibition on using personal watercraft in waters in respect of which the county administrative boards have not yet taken any decision on whether protection of the environment requires a prohibition on use there are disproportionate and therefore not justified unless they include a reasonable deadline by which the county administrative boards must have taken the relevant decisions.

Kongeriget Norges Grundlov, given i Rigsforsamlingen paa Eidsvold den 17de Mai 1814

§ 110c.

Det paaligger Statens Myndigheder at respektere og sikre Menneskerettighederne.

Nærmere Bestemmelser om Gjennemførelsen af Traktater herom fastsættes ved Lov.

Tilføyd ved grlbest. 15 juli 1994 nr. 675.

LOV 1999-05-21 nr 30: Lov om styrking av menneskerettighetenes stilling i norsk rett (menneskerettsloven)

§ 1. Lovens formål er å styrke menneskerettighetenes stilling i norsk rett.

§ 2. Følgende konvensjoner skal gjelde som norsk lov i den utstrekning de er bindende for Norge:

1. Europarådets konvensjon 4. november 1950 om beskyttelse av menneskerettighetene og de grunnleggende friheter som endret ved ellevte protokoll 11. mai 1994, med følgende tilleggsprotokoller:

a) Protokoll 20. mars 1952,

b) Fjerde protokoll 16. september 1963 om beskyttelse av visse rettigheter og friheter som ikke allerede omfattes av konvensjonen og av første tilleggsprotokoll til konvensjonen,

c) Sjette protokoll 28. april 1983 om opphevelse av dødsstraff,

d) Syvende protokoll 22. november 1984,

e. Trettende protokoll 21. februar 2002 om avskaffelse av dødsstraff under enhver omstendighet,

2. De forente nasjoners internasjonale konvensjon 16. desember 1966 om økonomiske, sosiale og kulturelle rettigheter,

3. De forente nasjoners internasjonale konvensjon 16. desember 1966 om sivile og politiske rettigheter med følgende tilleggsprotokoller:

a) Valgfri protokoll 16. desember 1966,

b) Annen valgfri protokoll 15. desember 1989 om avskaffelse av dødsstraff.

4. De forente nasjoners internasjonale konvensjon 20. november 1989 om barnets rettigheter med følgende tilleggsprotokoller:

a) Valgfri protokoll 25. mai 2000 om salg av barn, barneprostitusjon og barnepornografi,

b) Valgfri protokoll 25. mai 2000 om barn i væpnet konflikt

5. De forente nasjoners internasjonale konvensjon 18. desember 1979 om avskaffelse av alle former for diskriminering av kvinner med tilleggsprotokoll 6. oktober 1999.

Endret ved lover 1 aug 2003 nr. 86 (i kraft 1 okt 2003 iflg. res. 1 aug 2003 nr. 991), 10 juni 2005 nr. 49 (i kraft 1 des 2005 iflg. res. 2 sep 2005 nr. 965), 19 juni 2009 nr. 80 (i kraft 19 juni 2009 iflg. res. 19 juni 2009 nr. 696). Endres ytterligere ved lov 10 juni 2005 nr. 49 (i kraft fra den tid fjortende protokoll til EMK trer i kraft, jfr. lov 18 juni 2005 nr. 49, II).

Lov om avslutning av avtaler, om fuldmagt og om ugyldige viljeserklæringer. 1918-05-31-4

§ 33. Selv om en viljeserklæring ellers maatte ansees for gyldig, binder den ikke den, som har avgit den, hvis det paa grund av omstændigheter, som forelaa, da den anden part fik kundskap om erklæringen, og som det maa antages, at han kjendte til, vilde stride mot redelighet eller god tro, om han gjorde erklæringen gjældende.

Hålogaland lagmannsrett – Dom 2009-07-03

Lagmannsretten finner at ble inngått en bindende avtale om kjøp av aksjene i Eliassen Rorbuer AS idet selger aksepterte Johansens bud på kr 12,2 millioner den 26.09.2007. Avtalen reguleres av lov om kjøp av 13.05.1988, idet partene ikke har inngått avtale om annet.

Johansen har for lagmannsretten forklart at hans opplysninger til megler om at han ikke hadde finansiering må forstås som et finansieringsforbehold. Lagmannsretten er ikke enig i dette. Et kontraktsrettslig forbehold foreligger ikke uten at løftegiver har avgitt et utsagn eller forholdt seg på en slik måte at det er nærliggende for adressaten å oppfatte betingelsene. Opplysninger om at finansieringen er uklar har språklig sett ikke det innholdet som Johansen anfører. Det er ingen forhold som tyder på at Johansen har sagt noe, eller forholdt seg på en måte, som kan oppfattes som et forbehold. Budskjemaet inneholder ingen opplysninger i den retningen. Det samme gjelder budloggen. Et finansieringsforbehold er av så vesentlig betydning at det har formodningen mot seg at megler skulle overse det eller unnlate å anmerke noe om det i budloggen. Det bemerkes at budloggen ellers fremstår som fullstendig og detaljert om de vesentlige forhold.

Lagmannsretten finner det sannsynliggjort at Johansen selv bekreftet overfor megler at finansieringen var i orden, slik det fremgår av telefonlogg utarbeidet av Kirsten Setsaas 26.09.2007 kl 15.55, og som hun har bekreftet i sin vitneforklaring. Det er ingen holdepunkter for at Setsaas har misforstått eller bevisst har forklart seg uriktig på dette punkt. Dette underbygger at meglers forståelse av at Johansens bud var uten forbehold var i samsvar med det Johansen selv mente.

Konklusjonene ovenfor bekreftes av Johansens etterfølgende opptreden. Han hadde kontakt med megler i tiden etter budprosessen om finansieringen og la frem alternativer for oppgjør av kjøpesummen. Den 09.11.2009 mottok han en epost fra Tom-Erik Olsen hvor det blant annet fremgår:

« Forslaget deres er helt uaktuelt for selger. Selger står fortsatt ved sitt tilbud som ble forelagt dere der selger tilbyr seg å akseptere 9 mill ved overtakelse 1 januar 2008 og resterende beløp på 3,2 mill innen 1. juli 2008...

Skulle dere ikke ønske å benytte dere av tilbudet så går avtalen som først avtalt med overtakelse av Eliassen Rorbuer as 1. januar 2008. »

E-posten ble ikke besvart av Johansen. Det er sannsynlig at Johansen ville ha reagert dersom han hadde ment at budet var betinget av finansiering.

Johansen har anført at selgers aksept var betinget av at finansieringen var klar, og at avvik fra tilbudet medfører at partene er ubundet av sine utsagn. Lagmannsretten forstår innholdet i telefonloggen av 26.09.2007 kl 15.55 som at selger aksepterte budet fra Johansen i tillit til at opplysningene om finansieringen var i orden. At det senere viste seg at opplysningen ikke er korrekt gir ikke uttalelsen preg av forbehold eller betingelse for avtaleinngåelsen. Det samme underbygges av selgers etterfølgende opptreden, som har forholdt seg til aksepten som bindende. Lagmannsretten finner det sannsynliggjort at akseptbrevet ble sendt den 27.09.2007, slik Kirsten Setsaas har forklart. Fremlagt kopi viser at brevet ble signert av Setsaas. Megler fulgte opp Johansen med spørsmål om finansiering, slik det også fremgår av epost av 09.11.2007 og innkalling til et avklarende møte på Leknes.

Lagmannsretten legger til grunn Setsaas opplysninger om at overtakelse pr. telefon ble avtalt til 02.01.2008, hvilket også fremgår av akseptbrevet og eposten av 09.11.2007. Tidspunktet var også grunnlaget for møtet på Leknes 06.12.2007.

Selger har frafalt krav på tilleggsvederlaget etter endringsavtalen, og det er etter dette ikke nødvendig for lagmannsretten å gå inn på om partene er forpliktet i henhold til endringsavtalen.

Lagmannsretten finner ikke grunnlag for å sette avtalen til side etter avtaleloven § 33 eller § 36. Avtaleloven § 33 gjelder tilfeller hvor adressaten, i dette tilfellet selger, har kunnskap om omstendigheter som gjør det i strid med redelighet og god tro å gjøre avtalen gjeldende. I dette tilfellet har Johansen påtatt seg risiko ved å forplikte seg til en avtale uten å være sikker på at han klarer å gjøre opp for seg. Selger eller megler har verken holdt tilbake opplysninger eller vært i posisjon til å utnytte opplysninger eller Johansens villfarelse på en utilbørlig måte. Vilkårene for å anvende bestemmelsen er således ikke til stede.

Johansen arbeider i det daglige som selvstendig næringsdrivende, og er involvert flere ulike eiendomsrelaterte prosjekter. Han har blant annet deltatt i utbygging og salg av et større boligprosjekt. Johansen er således en profesjonell aktør i eiendomsmarkedet. Han bærer selv risikoen for at han har tilstrekkelig kunnskap og erfaring når han innlater seg på et prosjekt i størrelse

og karakter som i denne saken. Selger har gitt de opplysningene som er viktige for vurderingen av forsvarlig pris og risikoen ved prosjektet. Megler har i tillegg gitt skriftlig informasjon om anbefalte forholdsregler som Johansen har valgt å ikke følge. Det vises særlig til at det i prospektet er inntatt råd om å innta forbehold ved budet, å gjennomføre en due diligence og at det er særlig gjort oppmerksom på at selskapet kan ha verdier eller forpliktelser utover eiendommen. Om beregningen av kjøpesummen er det uttalt at:

> *« Kjøpesummen beregnes ut fra eiendommens antatte markedsverdi med justering for de netto verdier eller forpliktelser som ligger i selskapet. Det er vanlig at eiendelen utsatt skattefordel og gjeldsposten utsatt skatt i utgangspunktet ikke hensyntas. Det skattemessige avskrivningsgrunnlaget for eiendommen er ofte redusert gjennom allerede foretatte avskrivninger, og medfører normalt en reduksjon i kjøpesummen. »*

Lagmannsretten kan ikke se at det er omstendigheter som gjør det urimelig å gjøre avtalen gjeldende, selv om ansvaret er svært belastende for Johansens økonomi, slik at avtalen ikke settes til side etter avtaleloven § 36.

Johansen er forpliktet i henhold til avtalen om kjøp av aksjene og har misligholdt avtalen ved å ikke betale kjøpesummen. Kontraktsbruddet skyldes manglende finansiering av kjøpesummen, hvilket er forhold underlagt Johansens kontroll. Johansen har plikt til å betale erstatning etter kjøpsloven § 57 første ledd.

Johansen har ved å hevde seg ubundet av avtalen, sammenholdt med manglende oppfyllelse, de facto hevet avtalen. Det skal utmåles erstatning etter kjøpsloven § 67.

Lagmannsretten finner at selger har gjennomført et dekningssalg på forsvarlig måte innen rimelig tid etter at Johansen hevet avtalen, jf. kjøpsloven § 68. Det vises til at selger markedsførte objektet med bistand fra megler og at salgsarbeidet ble tatt opp umiddelbart. Megler har fulgt opp alle kjente interessenter og selger har avslått bud som har vært åpenbart for lave og holdt Johansen løpende orientert om uviklingen. Dersom interessegruppen Johansen hadde kontakt med var reelt interessert i prosjektet, var Johansen den nærmeste til å formidle kontakt for et bindende bud.

Tilbudene Johansen selv har formidlet forutsatte blant annet en vesentlig selgerkreditt, at selger skulle frafalle Johansens ansvar og forbehold om godkjenning av reguleringsendringer m.m. Det kan ikke med rimelighet forventes at selger skulle akseptere tilbud med dette innholdet. Dersom Johansen mente at det var grunnlag for videre forhandlinger, var han den nærmeste til å ta initiativ til det.

Selger har krav på erstatning for prisforskjellen mellom kjøpesummen og prisen etter dekningstransaksjonen, jf. kjøpsloven § 68, jf. § 67 - som i dette tilfellet utgjør kr 3,2 millioner.

Selger er påført kostnader i form av meglerprovisjon og diverse utlegg ved dekningssalget med kr 159 730, hvorav kr 34 105 utgjør utgifter tilknyttet møtet på Leknes. Sistnevnte kostnader påløp fordi Johansen ikke dokumenterte finansieringen som avtalt. Annonseutgifter ved dekningssalget er påløpt med kr 33 379. Beløpene som nevnt er utlegg påført ved kontraktsbruddet som selger kan kreve erstattet etter kjøpsloven § 67 første ledd.

Lagmannsretten kan ikke se at selger har forsømt tapsbegrensingsplikten. Hvorvidt selger var forpliktet til å betale meglerprovisjon av kjøpesummen på kr 12,2 millioner må vurderes ut fra (dagjeldende) lov om eiendomsmegling av 16. juni 1989 § 4-2 første og fjerde ledd, hvor det fremgår at megler har krav på provisjon når partene er endelig bundet. Bestemmelsen er inntatt på side 3 i oppdragsavtalen.

Lagmannsretten bemerker at de erstatningsrettslige vurderingene blir de samme som etter alminnelige kontraktsrettslige prinsipper påberopt av partene.

Selger har etter dette krav på erstatning med kr 3 393 109. Det er ikke lagt ned påstand om forsinkelsesrenter av dette beløpet.

Selger har krav på forsinkelsesrenter av kjøpesummen fra forfallsdato, jf. forsinkelsesrenteloven § 2 første ledd annet punktum, som var 02.01.2008, frem til gjennomføringen av dekningssalget den 01.03.2008. Selger har lagt ned påstand om krav på forsinkelsesrenter med kr 1 772 520 for denne perioden. Det er ikke fremmet innsigelser mot utregningen av beløpet, basert på 02.01.2008 som forfallsdato. Selger har ikke krav på forsinkelsesrenter av kr 1 772 520.