Translation from Norwegian

NORWEGIAN SUPREME COURT

On 9 February 2017, the Supreme Court handed down judgment in

HR-2017-331-A, (case no. 2016/1128), civil action, appeal against judgment,

I.

The State represented by the Ministry of Transport	(The Attorney General represented by Mr. Ole Kristian Rigland, lawyer) (Assistant Counsel: Mr. Arne-Martin Sørli, lawyer)
v.	
Dalnave Navigation Inc. Assuranceforeningen Gard – Mutual Avena Shipping Company Ltd.	(Mr. Kaare Andreas Shetelig, lawyer) Assistant Counsel: (Mr. Trond Eilertsen, lawyer)

II.

Dalnave Navigation Inc. Assuranceforeningen Gard – Mutual Avena Shipping Company Ltd.	(Mr. Kaare Andreas Shetelig, lawyer) Assistant Counsel: Mr. Trond Eilertsen, lawyer)
v.	
The State represented by the Ministry of Transport	(The Attorney General represented by Mr. Ole Kristian Rigland, lawyer) (Assistant Counsel: Mr. Arne-Martin Sørli, lawyer)

VOTING:

(1) Justice Bull: Subject matter of the action is the clean-up efforts following a marine casualty. It raises the question as to who can be ordered to remove the wreck, whether the courts can uphold the decision to remove the wreck on a basis on which the court of appeal failed to take a position, and whether the limitation of liability rules in the Maritime Code set a limit to the owner's obligation to comply with the order to remove the wreck. It is also an issue whether

VAT may form part of the State's claim for reimbursement of the costs involved in the clean-up operation and, in that event, whether this also applies to VAT paid on goods and services not subject to VAT.

(2) On 12 January 2007, the Cyprus registered cargo vessel the MV Server ran aground at Ytre Hellisøy in the municipality of Fedje in Hordaland. Shortly after the grounding, the vessel broke in two forward of the wheelhouse. The forward section was quickly pulled off the shallow and towed to a temporary location. It has since been removed permanently. The aft section, with wheelhouse, cabins and engine room, still remains where it sank.

(3) Ytre Hellisøy and part of the sea surrounding the island constitute a nature reserve and parts of the aft section of the ship lie inside the nature reserve. During the first few years, parts of the wreck were visible above the water surface, but when the decision to remove the wreck was made, everything was under water. It does not obstruct marine traffic where it now lies.

(4) The MV Server was not carrying any cargo, but the ship's tanks contained considerable amounts of bunker oil and other oil products. Large parts of the oil flowed into the sea, and a state-organised operation to prevent pollution administered by the Norwegian Coastal Administration was immediately initiated. The Coastal Administration and a number of municipalities took part in the operation. The municipalities' efforts were partly handled by inter-municipal action control groups to prevent acute pollution.

(5) The Cyprus registered company Avena Shipping Company Ltd., hereinafter referred to as Avena, is the registered owner of the MV Server. The ship was operated by Dalnave Navigation Inc., hereinafter referred to as Dalnave, which is registered in Liberia, but has its offices in Greece. A Greek citizen, Dimitrios Sficas, is the dominant owner of both companies. The ship had taken out liability insurance – P&I Insurance – with Assuranceforeningen Gard – Mutual, hereinafter referred to as Gard. In this matter Avena, Dalnave and Gard are collectively referred to as the owners side.

(6) In identical letters to Avena and Dalnave dated 16 January 2007, the Coastal Administration informed them that a state-organised operation had been initiated, and that the companies would be held liable for the costs involved pursuant to section 76 of the Pollution Control Act for all claims related to measures taken by the Coastal Administration as a result of the grounding.

(7) On 19 January 2007, the Coastal Administration sent a letter to Dalnave ordering measures to prevent further pollution from the ship and the removal of both the forward section, which had already been pulled off the shallow, and the aft section, which was still lying there. In the further handling of the matter it is Gard which has primarily acted on behalf of Avena and Dalnave.

(8) The emptying of the remaining oil from the aft section was carried out in March 2007 and was regarded as successful.

(9) In March 2007, Gard introduced the limitation of liability rules in the Maritime Code into its communication with the Coastal Administration. Gard was of the opinion that the total costs involved in the clean-up efforts and removal of the wreck would exceed the limitation of liability amount and wanted an agreement with the Coastal Administration to ensure the owners side's rights under the Maritime Code as the owners side saw them. In July 2007, the

Coastal Administration refused to enter into such an agreement submitting that this would bind the Coastal Administration's administrative authority.

(10) In November 2007, the Coastal Administration announced that the deadline for removing the aft section would be extended until further notice and that an overall evaluation of the further follow-up as regards the aft section of the ship would be made when the complete picture of the costs involved was presented. During the spring and summer of 2008, there was renewed contact between the Coastal Administration and Gard pertaining to this issue. Methods for wreck removal and the distribution of costs were discussed.

(11) Subsequently there was no further follow-up on the part of Gard. During the period between the summer of 2008 and the autumn of 2010 there does not appear to have been any communication between Gard and the Coastal Administration concerning the matter. However, the Coastal Administration continued to work on the claim for recovery of the costs of the operation to prevent pollution.

(12) After an advance notice about the refund claim in 2009, and an advance notice for the removal of the aft section of the ship had been sent out in 2010, the Coastal Administration on 27 May 2011 sent a letter addressed to Gard concluding in a decision. The gist of this decision was first a claim for NOK 198,714,272 to cover the State's costs involved in the operation to prevent pollution and, secondly, it contained an order issued to the polluter to remove the aft section of the MV Server from the location of the casualty.

(13) On behalf of Avena, Dalnave and itself, Gard appealed against the Coastal Administration's decision to the Ministry of Trade, Industry and Fisheries. The appeal resulted in a minor downwards adjustment of the refund amount, but in a decision of 13 June 2012, the Ministry maintained the order to remove the aft section of the ship.

(14) According to a request from Gard on behalf of Avena and Dalnave, Oslo District Court on 23 May 2012 established a limitation fund according to chapter 12 of the Maritime Code. The limitation amount under section 175a of the Maritime Code is NOK 226,380,814.76. In addition, a guarantee of NOK 115 million has been provided making the total fund amount NOK 341,380,811.76. The State has received an on-account payment in the amount of NOK 130 million.

(15) During the fund proceedings a series of dispute issues arose. These were addressed in fund meetings on 24 September and 5 November 2013 based on a recommendation from the appointed fund administrator, cf. section 241 of the Maritime Code. As regards the points of dispute outstanding after the fund meetings, Oslo District Court stipulated a deadline for filing suit under section 241 fourth subsection of the Maritime Code.

(16) On 15 January 2014, Dalnave and Gard filed a writ with Oslo District Court regarding several of the points of dispute. In addition, they submitted that the decision to remove the aft section of the ship was invalid. Avena has since joined the claimants' side. The State, represented by the Ministry of Trade, Industry and Fisheries, filed a writ concerning other points of dispute in the fund proceedings. One of these was settled during the case preparation before the District Court. These two cases were consolidated for a joint hearing and a joint decision. It is these two cases that are now being heard by the Supreme Court.

(17) In addition, a dispute is pending as to what the guarantee amount of NOK 115 million may be used to cover.

(18) During the Oslo District Court hearing the Ministry of Transport took over the procedural capacity on behalf of the State. On 9 January 2015, Oslo District Court handed down judgment in the two amalgamated cases with the following conclusion:

"In case 14-009365:

1.1. The Ministry of Trade, Industry and Fisheries' decision of 13 June 2012 regarding wreck removal is invalid in relation to Dalnave Navigation Inc.

1.2. The Ministry of Trade, Industry and Fisheries' decision of 13 June 2012 regarding wreck removal is valid in relation to Avena Shipping Co. Ltd.

1.3. The obligation to remove the wreck is valid irrespective of the limitation of liability in chapter 9 of the Maritime Code.

2. The claims for a refund of operating costs incurred in the use of the State's vessels, the emergency response supplement for the crews on the vessels of the Coastal Administration's Shipping Company and the Coastal Administration's Shipping Company's administration costs in connection with the operation to prevent oil pollution following the casualty of the MV Server will be approved in the limitation fund.

3. The claim for a refund of input VAT which the Coastal Administration has paid will be approved in the limitation fund.

4. The Coastal Administration is entitled to default interest on approved claims in the limitation fund from the establishment of the limitation fund until payment is made.

5. Dalnave Navigation Inc., Avena Shipping Co. Ltd. and Assuranceforeningen Gard – Mutual shall jointly and severally pay the State represented by the Ministry of Transport NOK 1,461,449 – onemillionfourhundredandsixtyonethousandfourhundredandfourtynine – by way of costs within 2 – two – weeks from service of this judgment.

In case 14-011646:

1. The claim for a refund of VAT in the amount of NOK 10,644,928.22 – tenmillionsixhundredandfourtyfourthousandninehundredandtwentyeight 22/100 – which the Coastal Administration has paid to municipalities and inter-municipal action control groups in connection with the operation to prevent oil pollution following the casualty of the MV Server will not be approved in the limitation fund.

2. The State represented by the Ministry of Transport shall pay to Dalnave Navigation Inc., Avena Shipping Co. Ltd. and Assuranceforeningen Gard –

Mutual a total amount of NOK 250,000 – twohundredandfiftythousand – by way of costs within 2 – two – weeks from service of this judgment."

(19) Avena, Dalnave and Gard appealed to Borgarting Court of Appeal against the conclusion of judgment in case no. 14-009365 with the exception of point 1.1. This action was filed by them. The State, which had filed action no. 14-011646, appealed against the judgment in that matter, as well as against point 1.1 of the conclusion of judgment in case no. 14-009365. During the preparation of the appeal proceedings, a few further points of dispute were waived or settled.

(20) On 4 March 2016, the Borgarting Court of Appeal handed down judgment with the following conclusion:

"Oslo District Court case no. 14-009365TVI-OTIR/04:

1. **The court finds for the State represented by the Ministry of Transport regarding the submission that the Ministry of Trade, Industry and Fisheries' decision of 13 June 2012 relating to wreck removal is invalid in relation to Dalnave Navigation Inc.**

2. **The Appeal from Avena Shipping Co. Ltd., Dalnave Navigation Inc. and Assuranceforeningen Gard – Mutual – is dismissed.**

3. **By way of costs before the Court of Appeal Avena Shipping Co. Ltd., Dalnave Navigation Inc. and Assuranceforeningen Gard – Mutual – shall pay jointly and severally NOK 3,698,131 – threemillionsixhundredandninetyeightthousandonehundredandthirtyone – to the State represented by the Ministry of Transport within two weeks from service of judgment.**

Oslo District Court case no. 14-011646TVI-OTIR/04:

1. **The appeal from the State represented by the Ministry of Transport is dismissed.**

2. **By way of costs before the Court of Appeal the State represented by the Ministry of Transport shall pay NOK 250,000 – twohundredandfiftythousand – to Avena Shipping Co. Ltd., Dalnave Navigation Inc. and Assuranceforeningen Gard – Mutual – within two weeks from service of judgment."**

(21) The State appealed against the Court of Appeal's judgment in respect of case 14-011646TVI-OTIR/04 to the Supreme Court. The appeal concerns the application of the law and assessment of evidence as regards the issue whether the State is entitled to claim that the owners side shall cover VAT which – the Court of Appeal found – had been erroneously added to the claims from municipalities and inter-municipal action control groups, but which the Coastal Administration has refunded. Avena, Dalnave and Gard appealed against the judgment insofar as it concerns Oslo District Court case no. 14-0009365TVI-OTIR/04. The appeal concerns the application of the law and on one point also the assessment of evidence.

(22) On 29 July 2016, the Appeal Committee of the Supreme Court decided to allow the State's appeal to go forward for a hearing. The appeal from Avena, Dalnave and Gard was referred for a hearing as regards the courts' right to apply a different statutory condition than the one on which the Ministry's order to remove the wreck was based, whether Dalnave can be the liable party as regards the wreck removal obligation, whether the limitation of liability rules of the Maritime Code comprise an imposed duty to act under the Pollution Control Act and whether paid VAT may form part of the State's refund claim.

(23) A written statement has been submitted to the Supreme Court from Alkiviadis Sficas, who at the time when the statement was made was part of the Dalnave management and who has earlier held various different positions in the company. He is the son of Dimitrios Sficas. Otherwise, the case is in essentially the same position before the Supreme Court as before the Court of Appeal.

(24) The appellants in the part of the case before the Court of Appeal and the Supreme Court which concerns case no. 14-009365TVI-OTIR/04, and the respondents in the part of the case which concerns case no. 14-011646TVI-OTIR/04 – *Avena Shipping Company Ltd., Dalnave Navigation Inc. and Assuranceforeningen Gard – Mutual* – have essentially submitted:

(25) The Court of Appeal erred in its conclusion that the Coastal Administration is entitled to include VAT, which the Coastal Administration has paid on goods and services procured from traders in its refund claim against the owners side. This VAT has already been paid to the Treasury according to the rules relating to VAT, and the State cannot claim payment once again, now as a refund claim according to the Pollution Control Act. One cannot distinguish between the State as a body entitled to VAT and the State as a pollution control authority. The State is a legal person. VAT consequently does not constitute part of "the public authorities' costs, damage or loss", which may be claimed under section 76 of the Pollution Control Act.

(26) Decisive weight cannot be attached to Rt.[1] 2004 page 723 where the Appeal Committee, without giving any further grounds, accepted that the State, when it has bought external legal services, is also entitled to claim the VAT imposed on the lawyer's fee. The decision concerned the rules of the Dispute Act relating to litigation costs, not section 76 of the Pollution Control Act.

(27) In this respect VAT cannot be compared with special taxes or income tax on wages or salaries, which form part of the calculation of remuneration for services procured by the Pollution Control Authority. Income tax is a subject tax collected from a third party. VAT is an object tax that applies to transactions. Special taxes are end-user taxes without any system for input and output tax.

(28) The State's appeal, which concerns a different VAT issue, cannot be allowed. The Coastal Administration cannot claim VAT which has erroneously been incorporated in a refund claim from the municipalities and inter-municipal action control groups thereby having erroneously been paid by the Coastal Administration. The fact that the tax authorities at one point relied on a different view of the tax issue is irrelevant.

[1] Rt. is a publication containing Norwegian Supreme Court judgments

(29) Section 76 first subsection of the Pollution Control Act provides an objective refund obligation to the public authorities and in return it is subject to the condition that it applies only to objectively speaking correct costs. Whether or not the State has acted with due care in the processing of this issue is irrelevant.

(30) To see the State's refund claim as a claim for damages provided in section 191 of the Maritime Code does not lead to a different result.

(31) Should the State nevertheless be considered to be entitled to claim reimbursement for the erroneous VAT claims from the municipalities, this must be subject to the condition that the State has acted with due care. This the State has failed to do.

(32) The Court of Appeal did not have competence to hear the issue whether the wreck-removal order was valid based on the requirement "may cause damage or nuisance to the environment" in section 28 cf. section 37 of the Pollution Control Act. This is due to the fact that the Ministry failed to take a stand on this issue, relying instead on the alternative requirement "being unsightly… for the environment". A wreck-removal order is something that the Pollution Control Authority "may" impose under section 37 second subsection of the act. Here it is necessary to exercise discretion where the advantages of a removal must be compared to the disadvantages and costs. The assumption that such discretion is unaffected by which statutory requirement it shall be based on cannot be accepted. The courts' review of administrative decisions is limited to a review of legality. They are not entitled to try the administration's exercise of discretion beyond what follows from the principles of "abuse of authority" and, even less, exercise the discretion themselves.

(33) It is irrelevant that the State, represented by the responsible Ministry, during the fund proceedings has argued that the decision is valid also based on the requirement "cause damage or nuisance to the environment".

(34) Under any circumstances, the courts would in that respect have been required to conduct a far more thorough review of this requirement than what the Court of Appeal has done.

(35) The Court of Appeal also erred when finding that the wreck-removal order could be addressed to Dalnave. Pursuant to section 37 second subsection of the Pollution Control Act such an order can only be addressed to the ship's "owner", which is Avena. There is no basis for regarding Dalnave as "owner" in the sense of this provision, even if Dalnave according to the management agreement with Avena exercises such powers as are otherwise regarded as typical owner's powers. The management agreement between Avena and Dalnave was an ordinary management agreement and it was still Avena that carried the financial risk for the ship's earnings and value in the event of a resale.

(36) As the case now stands, Dalnave furthermore cannot be regarded as "the responsible party" under section 7 of the Pollution Control Act to remove pollution, and accordingly the aft section of the vessel, as alleged by the State. And, section 7 can in any event not apply if the removal of the wreck is based on it being "unsightly" rather than "causing damage or nuisance" to the environment.

(37) Finally, the limitation rules in the Maritime Code must also, contrary to what the Court of Appeal has found, limit the duty to comply with an order from the Pollution Authority to remove the wreck. This follows from the wording of the limitation provision in section 172a

of the Maritime Code, which concerns "claims in connection with… removal". Such an understanding also follows from the wording of earlier provisions on this issue, and from the wording of the international conventions on which these provisions are based.

(38) If the wreck-removal duty is not subject to the limitation rules, non-compliance would result in the possibility of making a financial gain. The Coastal Administration's refund claim after it has been forced to clean up is clearly comprised by the limitation rule.

(39) An attempt by the Ministry of the Environment in 2001 to incorporate a provision in the Pollution Control Act to the effect that the wreck-removal duty was unaffected by the limitation rules of the Maritime Code encountered strong resistance in the round of consultations. Several pointed out that it was wrong of the Ministry to assume that this was already current law. The amendment was not enacted. When the rules of the Maritime Code relating to limitation of liability were later amended, it was admittedly stated in the preparatory works that the limitation rules did not apply to the wreck-removal duty. But the statements concerned current law before the amendment and were incorrect. These statements accordingly cannot form the basis of the interpretation of the new section 172a as to which requirements are comprised by the limitation right. The wording of what has now become section 172a was maintained more or less unchanged as compared to the earlier provision. It cannot be assumed that there was a wish to change the prevailing state of the law.

(40) *Avena Shipping Company Ltd., Dalnave Navigation Inc. and Assuranceforeningen Gard – Mutual* – have submitted the following statement of claim/defence:

"I The State's appeal

1. The appeal to be dismissed.

2. Avena Shipping Co. Ltd., Dalnave Navigation Inc. and Assuranceforeningen Gard – Mutual – to be awarded costs before the Supreme Court.

II The owners side's appeal

<u>On behalf of Dalnave Navigation Inc.</u>

1.1 The District Court's conclusion point 1.1 to be affirmed.

1.2 In the alternative, the Court of Appeal's judgment to be dismissed.

1.3 In the further alternative, Dalnave Navigation Inc. to be granted the right to limit its liability according to the wreck-removal order laid down in the decision by the Ministry of Trade, Industry and Fisheries on 13 June 2012.

<u>On behalf of Avena Shipping Co. Ltd.</u>

2.1 The Court of Appeal's judgment to be dismissed.

2.2 In the alternative, Avena Shipping Co. Ltd. to be granted the right to limit its liability according to the wreck-removal order laid down in the decision by the Ministry of Trade, Industry and Fisheries on 13 June 2012.

On behalf of Dalnave Navigation Inc., Avena Shipping Co. Ltd. and Assuranceforeningen Gard – Mutual –

3. The decision by the Ministry of Trade, Industry and Fisheries dated 13 June 2012 to be found invalid as regards the claim for state VAT. The claim not to be approved in the limitation fund.

4. Avena Shipping Co. Ltd., Dalnave Navigation Inc. and Assuranceforeningen Gard – Mutual – to be awarded costs before all courts."

(41) The appellant in case 14-011646TVI-OTIR/04 and respondent in the part of the case that concerns case 14-009365TVI-OTIR/04 – *the State represented by the Ministry of Transport* – has essentially submitted:

(42) The court cannot allow the owners side's submission that the State is prevented from claiming a refund of VAT which has been paid by the Coastal Administration to commercial suppliers. It follows from Rt. 2004 page 723 that it is necessary to distinguish between the State as a party entitled to VAT and the State as a buyer subject to VAT. VAT is charged to all final end-users, also the State itself. VAT is therefore part of "public authorities' costs, damage or loss" which is claimed under section 76 of the Pollution Control Act.

(43) However, the Court of Appeal erred in its finding that the State is not entitled to a refund of the VAT which some of the municipalities have, partly through inter-municipal action control groups, added to their claims for remuneration from the Coastal Administration. This is VAT which the State, represented by the Coastal Administration, has paid according to invoices from municipalities and action control groups.

(44) The Supreme Court must decide whether it was correct to charge VAT in these cases. Even if the Supreme Court were to find that this was incorrect, the State is entitled to have the VAT refunded from the owners side. The State is not subrogated to the municipalities' claim. It is the Coastal Administration's operation, and it follows from section 76 of the Pollution Control Act that the Coastal Administration is entitled to a refund of its costs incurred in such an operation.

(45) If section 76 of the Pollution Control Act should not give the State a right to a refund of the VAT which formed part of municipal claims, the State's claim for a refund of the VAT has an alternative basis in the compensation rule in section 191, cf. section 208, of the Maritime Code. This is something the Court of Appeal has overlooked.

(46) The only basis for exempting the VAT which formed part of municipal claims against the State, must be negligence on the part of the State, cf. Rt. 2010 page 291 relating to the State's responsibility for misinterpretation of the law. The Coastal Administration has not acted negligently. To assume that t sale subject to VAT had taken place was a justifiable interpretation of the law, which was also in accordance with the Tax Authorities' own position until 2013.

(47) The Court of Appeal was entitled to assess the validity of the wreck-removal order on the basis of the requirement "damage or nuisance to the environment" in section 28, cf. section 37, of the Pollution Control Act. Even if the Ministry as an appellate authority did not take a stand

on this requirement, the Coastal Administration as first instance authority had concluded that it had been satisfied. The courts are free when it comes to application of the law. The "may discretion" which must be exercised with regard to whether a wreck-removal order shall be issued is not influenced by the condition on which the decision is based.

(48) Under any circumstances, any deficiency in this respect must be considered to have been remedied by the responsible ministry during the fund process having argued that the decision is valid also on the basis of the condition "harm or nuisance".

(49) The Court of Appeal's application of the law is correct also in its conclusion that the wreck-removal order could be addressed to Dalnave as the management company for the MV Server. The term "owner" in section 37 second subsection of the Pollution Control Act relating to shipwrecks and certain other particularly large objects must be interpreted in light of the fact that a removal order regarding waste under section 37 first subsection can be issued to anyone who has left waste. Over time there has been a development in the waste concept so that now, in contrast to when the Pollution Control Act was new, it also comprises shipwrecks. It must also be taken into consideration that in legislation in general flexible owner concepts are frequently used. Under any circumstances, the wreck removal order can be addressed to Dalnave as "the responsible party" for the pollution pursuant to section 7 of the Pollution Control Act.

(50) As the Court of Appeal has concluded, the duty to comply with the wreck removal order is not limited by the liability limitation rules in the Maritime Code. The amendment to the rules in the Maritime Code relating to limitation of liability in the removal of wreck and cargo enacted in 2005 is explicitly based on an assumption on the part of the legislator that an order to the owner to remove the wreck himself falls outside the limitation rules. Even if this is expressed as an interpretation of already prevailing law, it is a legislator's statement regarding the understanding of the new rules of law and must be relied on as such. Also as an interpretation of former law this statement is furthermore correct. That the limitation rules become applicable if the public authorities carry out the wreck-removal and claim the costs involved from the owner is another matter.

(51) *The State, represented by the Ministry of Transport*, has submitted the following statement of claim/defence:

"I. The owners side's appeal, Oslo District Court's case no. 14-009365TVI-OTIR/04:

1. The appeal to be dismissed.

2. Avena Shipping Co. Ltd, Dalnave Navigation Inc. and Assuranceforeningen Gard – Mutual – to pay jointly and severally the costs of the State represented by the Ministry of Transport before the Supreme Court.

II. The State's appeal, Oslo District Court case no. 14-011646TVI-OTIR/04

1. The Coastal Administration's claim for a refund of or compensation for VAT paid to municipalities and action control groups in connection with the Server operation to be approved in the amount of NOK 10,644,928.22 in the limitation fund.

2. Avena Shipping Co. Ltd, Dalnave Navigation Inc. and Assuranceforeningen Gard – Mutual – to pay jointly and severally the costs of the State represented by the Ministry of Transport before the District Court, the Court of Appeal and the Supreme Court."

(52) My view of the case

(53) The case gives rise to several issues arisen in connection with the processing of the financial settlement after the casualty of the MV Server on 12 January 2007. Some of these, which concern the validity of the wreck removal order, are significant also outside the fund proceedings.

(54) The value added tax issues

(55) The case gives rise to two VAT issues. I shall first address what has in the case, for example in point II.3 in the owners side's statement of claim before the Supreme Court, been referred to as "state" VAT, and to which I will refer as "state paid VAT". It is in this context only meant as a simple description of VAT that has been paid by the Coastal Administration to business enterprises and self-employed persons subject to registration who have supplied goods and services directly to the Coastal Administration. The opposite is "municipal" VAT used as a simplified description of VAT that has formed part of some of the refund claims which municipalities and inter-municipal action control groups have presented to the Coastal Administration. I will be referring to this as "VAT on municipal refund claims". The owners side has appealed against the Court of Appeal's decision on the state paid VAT, while the State has appealed against the Court of Appeals's judgment as regards the VAT on municipal refund claims.

(56) State paid VAT

(57) It has not been disputed that the Coastal Administration was obliged to pay VAT on the goods and services which the Coastal Administration bought from business enterprises and self-employed persons subject to registration. The Coastal Administration is not involved in sales subject to VAT and does not have any right to claim deduction for input VAT. The gross amount paid consequently constituted an accounting cost for the State.

(58) The VAT paid by the Coastal Administration has reached the Treasury through the usual system for the collection of VAT. If the VAT forms part of the amount which the owners side has to refund to the Coastal Administration after the pollution operation it is, financially speaking, clear that the State will receive the amount in question in the Treasury once again. The question is whether this is right.

(59) I would first like to mention that the introduction of the net recording system in 2015 does not have any bearing on the answer. Up until 2015 VAT was paid by state agencies and charged to these agencies in budgets and accounts. From 2015, VAT is entered in budgets and accounts in a central chapter for VAT. On the other hand, the allocations to state enterprises have been adjusted downwards corresponding to anticipated VAT costs. It is specified in Prop.1 S (2014-2015), page 85, that this is an administrative system within the public administration and not part of the VAT system. The State thus pays VAT on the purchase of goods and services to the same extent as before, and VAT is still recorded as an expense.

(60) As the owners side has emphasised, the State is in principle regarded as one legal person. It is furthermore a fundamental principle in the law of damages that one and the same loss shall only be compensated once. This principle must also apply to section 76 of the Pollution Control Act to the effect that the public authorities' "costs, damage or loss" in the implementation of interventions to prevent pollution under section 74 shall be covered by the persons responsible for the pollution.

(61) In Rt. 2004 page 723 paragraph 23 the Appeal Committee concluded that it is necessary to distinguish between the State as a consumer of services subject to VAT and the State as a VAT collector. Concretely the case concerned VAT on a claim for fees from a lawyer in private practice whom the State had retained. The State had included the VAT in a claim for costs according to the Dispute Act.

(62) The arguments that support that the State cannot include VAT on the Coastal Administration's own purchases during the intervention to prevent pollution – the State as a legal person and the financial effect of including VAT – are similarly applicable to costs in the form of expenses for external lawyers.

(63) The decision from 2004 was later applied in case law, even though the introduction of the net recording principle in 2015 allegedly resulted in some uncertainty concerning this issue. However, as I have explained, the net recording principle does not entail a relevant change. I hesitate to change something that has now become an established system.

(64) The decision is also reasonable. A consistent implementation of the views emphasised in support of claiming deduction for taxes to the Treasury would lead to major practical problems. It is not only as a creditor for VAT that the State may easily end up with "the same" amount twice in refund or compensation settlements. The same would apply for example to income tax on payroll expenses which form part of claims which the State has had to satisfy and subsequently claimed refunded or compensated. Admittedly, there are many fundamental and practical differences between income tax and VAT and, for that matter, between VAT and other state taxes and it is, technically speaking, considerably easier to make deductions for VAT than for income tax. But the views about the State as one legal person and double payment also apply to these cases.

(65) For anyone who has to indemnify or refund the State's expenses, including VAT, such a system means that the level of expenditure will be the same as if a person had paid the expenses himself the first time around, unless he was entitled to claim deduction or refund for input VAT on the expenditure.

(66) Accordingly, the State has in my view the right to include VAT which the Coastal Administration has paid to business enterprises and self-employed persons in its claim under section 76 of the Pollution Control Act, and the owners side's appeal on this point must be dismissed.

(67) VAT on municipal refund claims

(68) The second VAT issue in the matter concerns VAT that has formed part of claims from municipalities and inter-municipal action control groups against the Coastal Administration according to section 75 second subsection, cf. section 47 second subsection, of the Pollution

Control Act, and which the Coastal Administration has paid without making any reservation. The Court of Appeal concluded that the State could not claim this VAT from the owners side pursuant to section 76 first subsection second sentence of the Pollution Control Act relating to the claiming of costs under section 75. The State's appeal against this point in the Court of Appeal's judgment gives rise to two issues.

(69) The first issue is whether the municipalities' and the action control groups' efforts during the State organised operation to prevent pollution must be regarded as "sales" in the sense of the VAT Act, section 3-1 of the current VAT Act and section 13 of the former act. If the municipal effort, directly or through inter-municipal action control groups, means "sales", output VAT will be charged to the Coastal Administration, while input VAT shall be deducted. If this effort shall not be regarded as "sales", the municipalities shall not charge output VAT but they may on the other hand claim their gross expenditure refunded by the Coastal Administration. In principle, this includes input VAT, the purchase of goods and services, but input VAT shall nevertheless be deducted to the extent that it is covered by VAT compensation from the State.

(70) Here the involved municipalities and inter-municipal action control groups have adopted different positions, and certain municipalities moreover do not appear to have had a consistent position on the issue. Regardless whether the efforts of the municipalities and the action control groups shall be regarded as "sales" or not, some of the relevant municipalities and inter-municipal action control groups have adopted an incorrect position. However, there is agreement between the owners side and the State that if the effort shall *not* be regarded as sales, the Coastal Administration has refunded an excess amount of NOK 10, 644,928.22 to the municipalities. The second issue on which the Supreme Court must in that case take a position is whether this amount can nevertheless be included in the State's claim against the owners side.

(71) The uncertainty in the municipalities may be attributable to the fact that the VAT authorities and the State Pollution Control Authority have from the outset not had any clear position on this issue. The Tax Directorate has issued a notification dated 24 April 1978 that a municipal effort is not subject to VAT. The reason was that the work must be regarded as carried out for the municipality itself even if remuneration was paid in the form of a refund from the polluter's insurance company. The situation in the event of a state organised operation was not expressly addressed. The same can be said about an information letter from the State Pollution Control Authority from 1995, while a circular from the Coastal Administration in 2008 about "current practice" seems to assume that nor is there any VAT liability if the effort is the result of a request or an order from the State or another municipality.

(72) After the owners side raised the issue, the Coastal Administration presented the issue to Tax Mid-Norway, which on 12 November 2010 stated that the services which municipalities and inter-municipal action control groups provide in return for a refund of expenses relating to assistance and clean-up in connection with state operations shall be regarded as sales subject to VAT. This position was maintained by the Tax Directorate in a letter to the Ministry of Finance dated 4 March 2011. The Tax Directorate distinguished between the municipalities' obligation to assist in state operations pursuant to section 47 second paragraph of the Pollution Control Act, which triggers an obligation for the State under section 75 to pay "remuneration", and the municipalities' duty under section 46 second subsection of the Pollution Control Act to take action on their own initiative, which under section 76 first subsection first sentence triggers a right for the public authorities to claim the expenses "covered" by the person

responsible for the pollution. The Tax Directorate asserted that the latter only entailed a recourse claim which, in contrast to a claim for "remuneration", did not entail "sales". The VAT compensation system nevertheless meant that input VAT had to be deducted in those cases. In a letter of 23 June 2011, the Ministry of Finance had "no comments" on the Tax Directorate's view.

(73) However, after the matter was raised again, the Ministry of Finance changed its view. In a letter dated 29 May 2012 the Ministry stated that "the sales concept must be restricted so as to exclude cases that would have triggered an independent duty of action for the relevant municipality, possibly represented by an inter-municipal control group, if the State had not taken charge of the operation". In other words: In the event of pollution accidents which trigger a duty of action under the Pollution Control Act for the municipality or the inter-municipal action control group in question, there are no sales and accordingly no VAT liability either, even if the State takes charge of the operation.

(74) The reasons for this given by the Ministry is that when a municipality is struck by an acute pollution accident or an accident with a potential for polluting the municipality, a series of obligations are triggered for the municipality under the Pollution Control Act. The core of these obligations is that the pollution shall be fought, and the municipality's resources form part of the emergency plans also at national level. Whether the use of resources is controlled by the municipalities themselves or is subjected to a state headed operation will depend on a partly discretionary evaluation. It is conceivable that the State would head parts of an operation in parallel and in co-operation with measures headed by a municipality. A distinction between state and municipal operations might lead to random consequences.

(75) The Ministry also points to the fact that the distinction in the Pollution Control Act between "remuneration" and refund is not sharp – under section 75 fourth subsection, municipalities that have incurred substantial costs in dealing with acute pollution in a non-state headed operation will receive "remuneration" from the State. In the preparatory works, the comments in Ot.prp. no. 11 (1979-90) on what became section 75 of the act, this is referred to as "refund".

(76) I find the reasons given by the Ministry convincing and agree with the Court of Appeal that it reflects current law also for the period of time before they were given.

(77) It is not disputed that the MV Server's casualty resulted in a pollution accident which triggered the duty of action for the municipalities affected. Admittedly, municipalities that were not themselves directly affected participated in some of the inter-municipal action control groups that took part in the operation. But the system itself of inter-municipal action control groups must mean that also these municipalities must be regarded as having a duty to participate through the relevant inter-municipal action control group.

(78) Municipalities and inter-municipal action control groups should accordingly not have treated their participation in the operation as sales subject to VAT, and the Coastal Administration has refunded an excess amount of NOK 10,644,928.22 to the municipalities. The next question will be whether the State may nevertheless include this amount in its claim against the owners side.

(79) The Court of Appeal has interpreted section 76 first subsection of the Pollution Control Act providing that the public authorities' "costs" may be claimed to mean that it is only *de facto*

and necessary costs that can be claimed. From this the Court of Appeal has concluded that it must be a question of payments founded on a factually and legally correct basis. This shall apply even if the Coastal Administration has not been negligent in the processing of the claims.

(80) I agree with the Court of Appeal. The refund obligation under section 76 is through section 74 linked to section 7 concerning the polluter's own responsibility for initiating measures, which must be regarded as restricted to reasonable and necessary measures, cf. NOU 1977:11 page 19, and Bugge, The Pollution Responsibility – The financial responsibility for preventing, repairing and indemnifying damages in case of pollution, page 364. As emphasised in NOU 1977:11 as well as by Bugge, there may be professional doubt as to what measures are reasonable and necessary to initiate following a pollution. In a pressured and confused situation measures may be initiated which later prove to have gone too far without this having any impact on the extent of the refund duty as long as the pollution authority has acted with due care. This is nevertheless a situation of an entirely different nature than an erroneous application of the VAT legislation in the subsequent financial settlement. Here there is no reason to let the public authority's right to a refund include incorrect VAT claims.

(81) The State has submitted that the refund claim against the owners side also has a legal basis in section 191 of the Maritime Code relating to strict liability for pollution damage. However, I am of the opinion that the solution must be the same and refer to NOU 1977:11 pages 12 and 19: Also if general principles in the law of damages are applied, liability must be limited to reasonable and necessary – sensible – costs. This was an, objectively speaking, unnecessary cost for the State, and the point of departure must therefore be that it cannot be claimed.

(82) The State has referred to Rt. 2010 page 291, where the Supreme Court found that the public authorities are not strictly liable for damages for unauthorised exercise of authority based on a misinterpretation of the authorising statute. But there is a difference between the question when the public authorities shall be liable for a loss caused to private persons in such a connection and the question whether the public authorities in their capacity as the injured party shall bear the risk of an unnecessary cost which the public authorities have incurred themselves due to a misinterpretation of the law.

(83) In this light the State's appeal must be dismissed.

(84) Can the courts try the validity of the wreck removal order on the basis of another condition in the law than the one on which the decision is based?

(85) The order to remove the aft section of the ship from the location of the casualty is abased on section 37 second subsection of the Pollution Control Act, where it states that an order "may" be given to remove wrecks abandoned in violation of section 28. It is prohibited to abandon for example shipwrecks that may "appear unsightly or cause damage or nuisance to the environment".

(86) In the Coastal Administration's letter of 27 May 2011 the reasons given for the order to remove the aft section of the ship from the location of the casualty were that the wreck might cause damage or nuisance to the environment. In the reasons the Coastal Administration stated that a shipwreck which is located in a nature reserve may in practical terms always cause nuisance to the environment. It had therefore not been found necessary to initiate any major

environmental investigation; the experience which the Coastal Administration had with other shipwrecks provided sufficient grounds for the decision.

(87) The owners side appealed to the Ministry of Trade, Industry and Fisheries. In the owners side's view, the failure to conduct any investigations constituted a procedural error. The owners side also alleged that the situation at the location of the casualty indicated that there was no risk of any damage or nuisance to the environment so that the Coastal Administration's decision in this respect was also based on a misapplication of the law.

(88) In its submission of the appeal to the Ministry, the Coastal Administration pointed out that a shipwreck which is left in a nature reserve will also be unsightly even if it is not visible above the water. The Ministry referred to this statement and maintained the order to remove the aft section of the ship on the basis of the following application of the law:

> **"The Ministry thus finds that the aft section of the Server is a shipwreck which is clearly unsightly for the environment and that the conditions for issuing an order pursuant to section 37, cf. section 28, of the Pollution Control Act were accordingly satisfied. In this light the Ministry sees no need to consider whether the aft section may cause damage or nuisance to the environment."**

(89) The Ministry thus explicitly omitted to take a position on the question whether the aft section constituted damage or nuisance to the environment.

(90) During the fund proceedings the State has argued that also the condition regarding damage or nuisance to the environment is satisfied. Both the owners side and the State have invested considerable resources in clarifying the environmental situation at the location of the casualty. The parties still disagree whether this condition is satisfied.

(91) In its judgment the District Court found that the condition "unsightly … for the environment" was not satisfied, but that the District Court was also competent to decide whether the decision was valid based on the condition regarding damage or nuisance. The District Court found that this condition was satisfied, and did not review the issues of the reasonableness or proportionality of a removal order on this basis, beyond what follows from what is known as the abuse-of-authority doctrine. The District Court concluded that the Ministry's decision was valid.

(92) The Court of Appeal reached the same conclusion as the District Court regarding its competence to try the validity based on the condition related to damage or nuisance to the environment. Also the Court of Appeal found that the condition was satisfied, that proportionality could not be tried beyond the parameters for "abuse-of-authority", and that the decision was valid. The Court of Appeal did not take a position on the question whether the condition "unsightly... for the environment" was also satisfied.

(93) In the referral decision from the Appeal Committee of the Supreme Court the owners side's appeal on this point was only referred for hearing as regards the issue whether the court is competent to evaluate the validity of the decision on the basis of a different condition under the law than the one on which the appellate court has relied. If the Supreme Court should conclude that the court does not have such competence, the Court of Appeal's judgment will in

that respect have to be overturned so that the Court of Appeal can decide on the validity based on the condition on which the Ministry relied.

(94) Under section 37 of the Pollution Control Act it does not follow automatically that a removal order shall be issued if one of the conditions in section 28 is satisfied. This is something that the Pollution Authority "may" do. The exercise of discretion based on such "may-rules" is something that the courts as a main rule do not review beyond the principles for so-called abuse-of-authority.

(95) The State has submitted that the result of the exercise of discretion must be the same regardless of whether the decision is based on the wreck being "unsightly" or whether it "causes damage or nuisance". The public administration shall, in any event, weigh all pros and cons and there are no indications that the Ministry excluded certain considerations because it based the decision on another of the statutory conditions than what the Coastal Administration did, it is alleged.

(96) I do not agree that the courts can automatically rely on such an assumption. There may be a certain difference both in terms of what considerations are relevant and – at any rate – in terms of how the pros and cons shall be weighed depending on whether the exercise of discretion is based on one or the other of the statutory conditions.

(97) In my view, the main rule must therefore be that when an administrative decision has to be made on a discretionary basis which the courts do not review, the courts' hearing on the validity of the decision must be based on the same statutory condition as the public administration has applied. Otherwise, the courts may end up maintaining a decision which the public administration would not have made. In this connection I refer to Rt. 1964 page 93, which must be considered to be based on this view, see Eckhoff and Smith, *"Forvaltningsrett"* (Administrative Law), 10th edition, page 462.

(98) There are examples in case law that administrative decisions have been reviewed and found valid on the basis of other conditions in the authorising statute than what the public administration has applied. This is for example the case in Rt. 1979 page 246. However, in that event, the case must be in such a position that the courts do not thereby put themselves in the place of the public administration as regards the exercise of discretion presupposed by the law.

(99) When the Ministry in the decision explicitly states that it does not take a position on the condition "damage or nuisance", it must in my view be clear that the courts cannot base the review of the validity of the decision on this condition. In this case, the appellate court had not even taken a stand on the extent to which the wreck would lead to damage or nuisance.

(100) The State has further pointed out that the State, represented by the Ministry, has during the fund proceedings argued in favour of the removal order being valid also on the basis that the aft section may cause damage or nuisance to the environment. This shows that the Ministry wants the aft section removed also on this basis, it is submitted. However, I fail to see that a position which the State adopts in a dispute can replace the exercise of discretion which is required in the administrative hearing of the case. During the dispute other considerations come into play and may have an influence on the positions adopted. This will also apply during the fund proceedings.

(101) As I see it, the owners side's appeal must thus be upheld on this point.

(102) Can a wreck-removal order be addressed to the ship's management company?

(103) In contrast to the District Court, the Court of Appeal concluded that the wreck-removal order was in fact addressed to Dalnave, the management company of the MV Server, not just to Avena, which is the ship's registered owner. The Court of Appeal further concluded that the wreck-removal order could be addressed to Dalnave. The Supreme Court is only required to take a position on the latter.

(104) Section 37 of the Pollution Control Act constitutes the legal basis for the order. First and second subsections read as follows:

> **"The municipality may order any person that has discarded, emptied or stored waste in contravention of section 28 to remove it, clear it up within a specified time limit, or pay reasonable costs incurred by others in removing or clearing up the waste. Such an order may also be issued to any person that has contravened the first or third subsection of section 35 if this has resulted in the spread of waste.**
>
> **The Pollution Control Authority may also issue an order to any person that was the owner of a motor vehicle, ship, aircraft or other similar large object when it was discarded in contravention of section 28, or to any person that is the owner when the order is issued, to clear up and remove the same object."**

(105) While the first subsection concerns waste in general, the removal of "ship, aircraft or other similar large object" is regulated by the second subsection. In Ot.prp. no. 11 (1979-80) page 149, the reason given for the special rule is that these are such large objects that it is not natural to refer to them as "waste".

(106) Section 28 first subsection provides that no person may empty, discard, store or transport waste in such a way that it is unsightly or may cause damage or nuisance to the environment. Until an amendment in 2016, the first subsection contained a second sentence to the effect that the provision in the first sentence "also [applies to] shipwrecks, aircraft wrecks and other similar large objects". The reason was also here that these objects were too large to be regarded as "waste".

(107) In other words, the legislative history shows that the reason why it is provided in section 37 second subsection that the Pollution Control Authority may "also" issue an order to the owner to remove a ship was that the first subsection was not considered to provide a legal basis for the removal of such large objects. The intention was thus not primarily to identify the duty subject in a different manner than under the first subsection or to place competence with other agencies.

(108) In 2016, section 28 first subsection second sentence was rescinded on the grounds that the concept of waste had developed in such a way as to now naturally comprise shipwrecks and similar large objects, cf. Pro. 89 L (2015-2016) page 14. It was also pointed out that this was in accordance with the waste concept in EU/EEA law. However, section 37 second subsection was retained unchanged because the provision "has independent significance". The independence significance referred to must then in the first place be that the duty subject is

identified differently in section 37 first and second subsections – any person that has discarded, emptied or stored waste in the first subsection – in contrast to the owner when the object was discarded or when the order is issued in the second subsection. Secondly, competence under the first subsection is placed with the municipality, while under the second subsection it is placed with "the Pollution Control Authority". For shipwrecks the competence is delegated to the Coastal Administration.

(109) The amendment to the law in 2016 shows that today it would not have been considered necessary to have a separate provision relating to ships in section 37 only out of consideration for the waste concept. But whether the removal order could be addressed to Dalnave must be decided on the basis of the act as it read when the Ministry made its decision in 2012. Even if there may already at that time have been an evolution of opinions on the waste concept, the act was at that time still based on the principle that shipwrecks fell outside the concept.

(110) I fail to see that the relevant EU/EEA rules regulate the persons who can be ordered to remove waste in the form of shipwrecks.

(111) Accordingly, it becomes decisive for the question whether the wreck removal order could be addressed to Dalnave that the company falls within the owner concept in section 37 second subsection.

(112) The choice of the owner as duty subject in section 37 second subsection rather than "any person that has discarded, emptied or stored waste" in the first subsection is not commented on in any detail in the preparatory works. The fact that the provision does not use the term "registered owner" must in my view be interpreted to mean that it is not limited to "registered" owner if the real owner is someone else. In this connection, I refer to the fact that section 35 of the Harbour Act has a more or less parallel rule relating to the Harbour Authorities' right to demand the removal of shipwrecks, where the duty subject is stated as the "registered owner or owner".

(113) The agreement between Avena and Dalnave is called a "management agreement". The name cannot be decisive in itself. It is necessary to look at the content of the agreement entered into and the general circumstances.

(114) The Court of Appeal has taken as its point of departure that "Dalnave was not the owner of the ship", and that "what is described as the relationship between Avena and Dalnave is [not]… sufficient for the general corporate relationships to be set aside with the effect that Dalnave can be regarded as the owner of the MV Server in every context". The reason why the Court of Appeal has nevertheless concluded that also Dalnave must be regarded as "owner", as this concept must be understood in section 37 second subsection of the Pollution Control Act, is that Dalnave "was and is… in a position to exercise a number of the powers which an owner normally holds".

(115) Here I cannot follow the Court of Appeal. It is typical in shipping that some of the powers which an owner normally holds are sourced out to different companies. This was also the case when the Pollution Control Act was adopted. If the intention had been that also such companies were to be regarded as "owner" in the sense of this provision, it would have been natural to specify this in the act. This is especially the case because the responsible party in

section 37 first subsection is stated to be "any person that has discarded, emptied or stored waste" and can accordingly and clearly comprise such operating companies.

(116) In this case a very comprehensive management agreement was entered into, but it has not been submitted, nor can I see, that the agreement in itself goes beyond what may reasonably follow from a management agreement.

(117) It transpires from the Court of Appeal's judgment and from the statement from Alkiviadis Sficas which the owners side has submitted to the Supreme Court that the relationship between Dalnave and Avena was characterised by a lack of formalities to an extent that is likely to surprise. To some degree depending on how you interpret the statement, it may, in combination with the management agreement, open the door to regarding Dalnave as the real owner. But I fail to see that this submission has in actual fact been made by the State, and the Court of Appeal has restricted itself to ascertaining that Dalnave must be regarded as owner by virtue of the transfer of owner's powers in the management agreement. In view of my opinion as to how the owner concept in section 37 second subsection of the Pollution Control Act must be understood, the conclusion is that the wreck removal order cannot be addressed to Dalnave on the basis of this provision, and that the owners side's appeal on this point is allowed.

(118) In the alternative, the State has submitted that the management company may, regardless, be ordered to remove the wreck under section 7 fourth subsection, cf. second subsection, of the Pollution Control Act, which provides that "the Pollution Authority may order the person responsible" to mitigate any "damage or nuisance" resulting from the pollution, and that the Coastal Administration's removal order was also mandated by this provision. However, the Ministry as the appellate body based its decision only on section 37 second subsection, cf. section 28 of the Pollution Control Act. As mentioned earlier, the Ministry based its decision on the shipwreck being unsightly and failed explicitly to take a position on the issue whether damage or nuisance has been caused. The condition "unsightly" is not found in section 7 second subsection, and section 7 fourth subsection leaves it to the authorites' free discretion to decide whether or not an order shall be issued. I refer to what I have said about the courts' right to rely on a statutory authority on which the decision up for review is not based. The conclusion must be the same as in respect of section 37 second subparagraph, cf. section 28 of the Pollution Control Act: The courts' review of the wreck-removal order cannot be based on the condition "damage or nuisance" in section 7 of the Pollution Control Act.

(119) The relationship between the wreck-removal order and the limitation of liability rules in the Maritime Code

(120) As mentioned initially, a limitation fund was established after the MV Server's casualty pursuant to the rules in chapter 12 of the Maritime Code. The parties disagree whether the financial parameters for the fund limit the owner's duty to take action that follows from the wreck-removal order pursuant to the Pollution Control Act, or whether the limitation only applies to financial claims.

(121) The answer depends on an interpretation of section 172a of the Maritime Code related to the limitation of claims in connection with clean-up measures following marine accidents etc. It is stated here that if the ship's tonnage exceeds three hundred tons, the right to limitation of liability under section 175a – which stipulates the liability limits – "regardless of the basis of

the liability, for claims on the occasion of: 1) … removal … of a ship that has gone down… or been wrecked".

(122) The wording in itself does not provide any clear answer here. The same wording, or more or less corresponding wording, was found in earlier provisions. Nor do these, or the wording in the conventions on which they are based, provide any clear answer.

(123) I nevertheless understand the 1976 Convention relating to limitation of maritime claims, on which section 172a of the Maritime Code is based, to mean that it does not entail any obligation to make a clean-up duty under public law subject to the limitation rules. During the diplomatic conference on the 1976 Convention, a motion for the owner to be entitled to file his own costs for the prevention and limitation of loss to which the limitation rules apply in the fund did not gain a majority. The grounds given for excluding such claims were that the owner had a duty to reduce the effect of his own damage-causing actions, and that it would therefore be immoral if he were to be allowed to file such claims in the fund, I here refer to NOU 2002:15 pages 15-16, which I shall shortly revert to. It would not be consistent with the rules and regulations if the convention were to be interpreted to mean that the limitation of liability rules nevertheless set a limit to the duty to comply with orders for clean-up measures under public law.

(124) In my view, the decisive factor will be the preparatory works to section 172a.

(125) In a consultative paper from the Ministry of the Environment dated 27 February 2001, the Ministry suggested incorporating a provision in section 5 of the Pollution Control Act to the effect that the limitation of liability rules in the Maritime Code do not limit the responsible person's duty to take measures under i.a. section 46, cf. section 7, of the Pollution Control Act. This was in accordance with what the legislative department of the Ministry of Justice had assumed was already existing law in a statement to the Ministry of the Environment following a marine casualty in December 2000, and the Ministry of the Environment stated that the proposal was a clarification of existing law. The refund duty of the person responsible to the State under section 76 was, however – as in the past – to be comprised by the limitation of liability.

(126) The proposal encountered strong opposition during the round of consultations, both in terms of whether this was existing law and whether it was a good solution. The proposal was therefore dropped, but it was left to the Maritime Act Committee to review the issues relating to the limitation of liability rules and the costs of clean-up measures. In NOU 2002:15, On the clean-up duty under the Pollution Control Act, the Maritime Act Committee stated under section 2.3 on page 15 about existing law at the time:

> **"Section 172 first subsection 4. and 5. (of the Maritime Code [corresponding to the current section 172a 1. and 2.] only comprises claims from third parties, including public authorities, who have incurred costs relating to removal and clean-up measures, and who may claim these costs from the owner…**
>
> **Costs which the owner incurs if the owner himself initiates removal and clean-up measures or other damage-limiting measures as mentioned in section 172 first subsection 4. to 6. are thus not subject to limitation of liability. The owner's and the costs of others entitled to limitation relating to such measures are quite simply not comprised by the enumeration in section 172 of claims subject to**

limitation of liability and are furthermore not taken into consideration in any other way in the application of the rules relating to limitation of liability. The owner must himself cover any such costs in addition to claims by third parties resulting from the marine casualty."

(127) In section 8.5 on page 40, the committee pointed out that this is hardly a good solution. In the first place, it might lead to the owner failing to comply with the clean-up obligation and instead leaving the clean-up to the public authorities in order to benefit from the fact that the public authorities' refund claim would be subject to the limitation of liability. Secondly, this complicates the evaluation of what the level of the limitation of liability should be for the claims that were in actual fact subject to [limitation].

(128) However, the Maritime Code Committee's solution was not to let the duty to take action under public law be subject to the limitation of liability rules. Instead, the committee suggested increasing the limitation amount in combination with letting any person who had incurred reasonable costs in carrying out the clean-up operation, and which was comprised by the limitation of liability rules, claim these costs in the fund. This would mean that the ship's owner would in practical terms at least obtain some sort of "discount" on the costs by letting these compete with other claims in the fund. The committee also suggested certain other changes which it is not necessary to go into here.

(129) In Ot.prp. no. 79 (2004-2005), pages 26-27, the Ministry repeated the Maritime Code Committee's view on existing law and on page 9 endorsed the proposals, the content of which I have described.

(130) In the amendment in 2005 the rules relating to limitation of liability for claims arising from for example the raising and removal of shipwrecks, were transferred from section 172 of the Maritime Code to the new section 172a. The special liability limits for claims comprised by section 172a are laid down in section 175a, and the right for an owner to claim his own costs arising from clean-up efforts in the limitation fund is set out in section 179.

(131) The Committee's statement that the wreck-removal duty according to public law rules falls outside the limitation of liability rules are thus a prerequisite for the amendments that were enacted. Even if they apply directly to the prevailing state of the law before the amendments suggested by the Committee, they must carry the same weight in the interpretation of section 172a as ordinary preparatory work statements relating to new statutory provisions.

(132) This leads me to the conclusion that the owners side's claim that the duty to comply with the wreck-removal order is limited by the financial parameters in the limitation fund cannot be upheld and that the appeal on this point must be dismissed.

(133) Costs

(134) When two actions are consolidated into one case under section 15-6 of the Dispute Act, costs shall be determined separately for each action.

(135) The State has lost its appeal in Oslo District Court case no. 14-011646TVI-OTIR/04, where the subject matter is VAT on municipal refund claims. This means that the owners side is entitled to claim compensation for necessary legal costs, cf. section 20-2 first subsection of the Dispute Act. The owners side has claimed NOK 765,200 by way of legal fees before the Supreme Court in this matter. The State has argued that the claim is too high and, in my view, the amount is higher than what can be considered necessary. In the Court of Appeal, where the owners side submitted a statement of fees amounting to NOK 562,963 in case no. 14-011646TVI-OTIR/04, the necessary costs were on a discretionary basis set at NOK 250,000 with a comment that the hearing by the Court of Appeal had to a large extent related to legal issues. I find that before the Supreme Court the necessary costs cannot be set higher than NOK 300,000, cf. section 20-5 of the Dispute Act.

(136) In addition, NOK 100,306 has been claimed for the printing of the trial bundles without any specification as to how large a proportion is attributable to this matter. The matter has raised five issues and, in the absence of other indications, it is natural to charge one fifth of these costs to the issue of VAT on municipal refund claims. This will be roughly NOK 20,000. On this basis the owners side shall be awarded a total of NOK 320,000.

(137) In Oslo District Court case no. 14-009365TVI-OTIR/04, which was the owners side's appeal and concerned the other issues, the parties have partly won and partly lost before the Supreme Court. The owners side has won in respect of the issue whether the wreck removal order can be addressed to Dalnave and whether the courts have competence to examine the validity of the order on a different basis than the one on which the Court of Appeal relied, but has lost the issues regarding state paid VAT and the relationship between the wreck removal duty under the Pollution Control Act and the limitation of liability rules in the Maritime Code.

(138) Accordingly, neither of the parties has won in the whole or in the main in this matter. There are no circumstances to suggest any exemptions from the rule that the parties must in that case absorb their own costs of the Supreme Court hearing, cf. section 20-2 of the Dispute Act. A decision as to the question of costs in the case in general is postponed until the Court of Appeal's new hearing, cf. section 20-8 third subsection and 20-9 of the Dispute Act.

(139) I vote in favour of the following

J U D G M E N T:

I In Oslo District Court case no. 14-011646TVI-OTIR/04:

1. The appeal is dismissed.

2. By way of costs before the Supreme Court the State represented by the Ministry of Transport shall pay to Avena Shipping Company Ltd., Dalnave Navigation Inc. and Assuranceforeningen Gard – Mutual – jointly and severally NOK 320,000 – threehundredandtwentythousand – Norwegian kroner within 2 – two – weeks of service of this judgment.

II In Oslo District Court case no. 14-009365TVI-OTIR/04:

1. The Ministry of Trade, Industry and Fisheries' decision of 13 June 2012 relating to wreck-removal cannot be invoked against Dalnave Navigation Inc.

2. The Court of Appeal's judgment is overturned in respect of the review of the Ministry of Trade, Industry and Fisheries' decision of 13 June 2012 relating to wreck-removal.

3. The Court of Appeal's judgment, point 3 of the conclusion, is quashed. The decision of the claim for costs before the District Court and the Court of Appeal is postponed until the Court of Appeal's new hearing.

4. The appeal is otherwise dismissed.

5. Costs before the Supreme Court are not awarded.

(140) Justice **Arntzen**: I concur in all essentials and as regards the conclusion with the first-voting justice.

(141) Justice **Bergsjø**: Likewise.

(142) Justice **Webster**: Likewise.

(143) Justice **Endresen**: Likewise

(144) After the voting the Supreme Court handed down the following

J U D G M E N T:

I In Oslo District Court case no. 14-011646TVI-OTIR/04:

1. The appeal is dismissed.

2. By way of costs before the Supreme Court the State represented by the Ministry of Transport shall pay to Avena Shipping Company Ltd., Dalnave Navigation Inc. and Assuranceforeningen Gard – Mutual – jointly and severally NOK 320,000 – threehundredandtwentythousand – Norwegian kroner within 2 – two – weeks of service of this judgment.

II In Oslo District Court case no. 14-009365TVI-OTIR/04:

1. The Ministry of Trade, Industry and Fisheries' decision of 13 June 2012 relating to wreck-removal cannot be invoked against Dalnave Navigation Inc.

2. The Court of Appeal's judgment is overturned in respect of the review of the Ministry of Trade, Industry and Fisheries' decision of 13 June 2012 relating to wreck-removal.

3. The Court of Appeal's judgment, point 3 of the conclusion, is overturned. The decision of the claim for costs before the District Court and the Court of Appeal is postponed until the Court of Appeal's new hearing.

4. The appeal is otherwise dismissed.

5. Costs before the Supreme Court are not awarded.

True transcript certified:

True translation certified: