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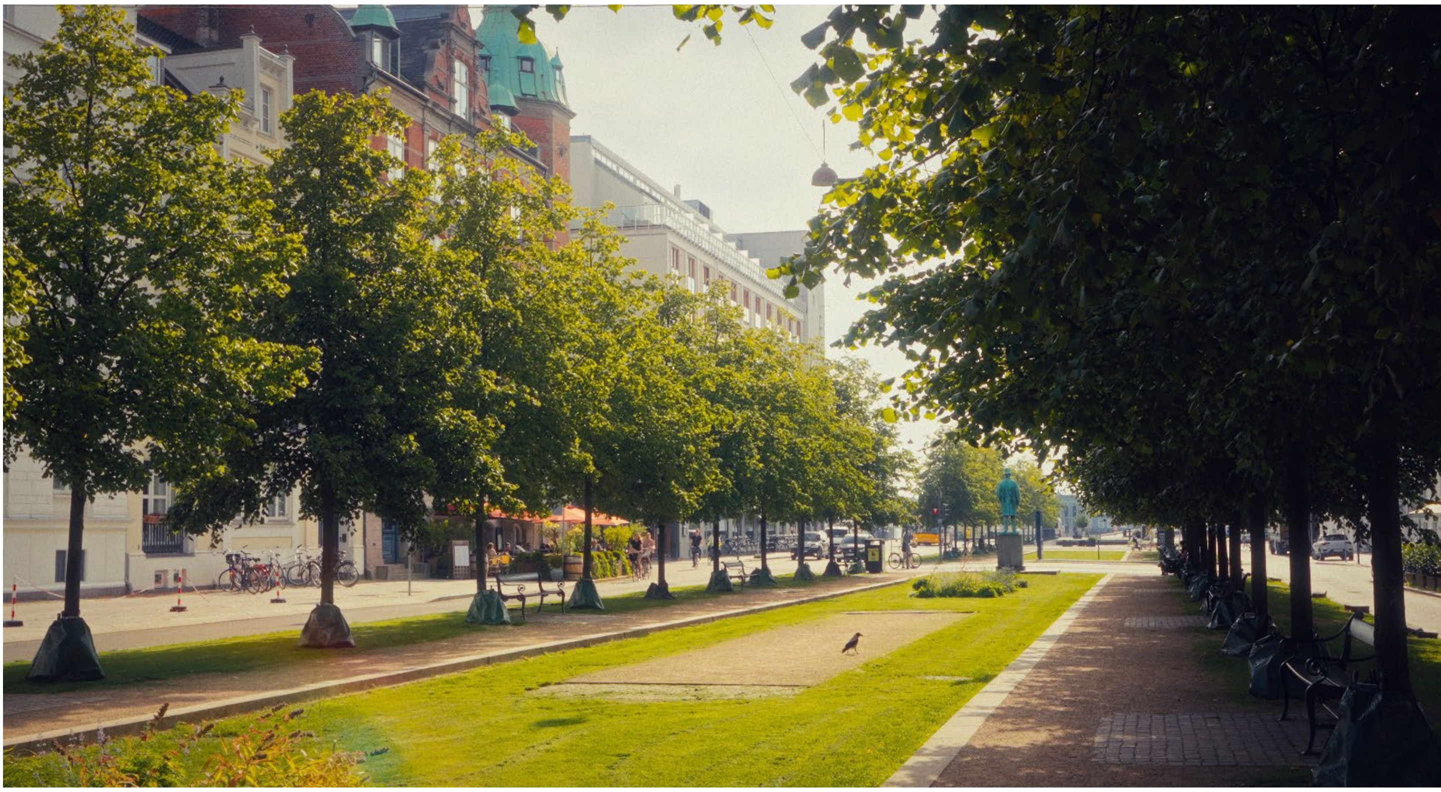


THE GRAM EQUIPMENT CASE: PRIVATE EQUITY FUND FSN CAPITAL WILL NOT BE COMPENSATED FOR LOSSES, PROCURITAS AND FORMER MANAGEMENT OF GRAM ACQUITTED

7 November 2023

Introduction

The Maritime and Commercial Court delivered its verdict last Friday, 3 November 2023, in the case concerning the sale of Gram Equipment.

The Background of the Case

In January 2018, European private equity fund FSN Capital acquired the Danish industrial company Gram Equipment through its ultimately owned subsidiary Kg BidCo. At that time, Gram Equipment was owned by Green Magnum, with Procuritas Capital Investors as the ultimate owner.

Gram Equipment was the subject of significant attention due to its considerable growth over the previous years. However, post-sale, a deficit within the company was uncovered along with inaccuracies in the financial statements. Consequently, Kg BidCo initiated arbitration proceedings against Green Magnum.

In 2020, Kg BidCo prevailed in the arbitration, with the court finding that Green Magnum and the day-to-day management were responsible for warranty breaches against Kg BidCo. On that basis, Green Magnum was ordered to pay EUR 87 million to Kg BidCo, which Green Magnum subsequently turned out to be unable to fulfil, leading to its bankruptcy.

This prompted Kg BidCo to initiate a new case with the same claim at the Maritime and Commercial Court, but this time against both the former CEO and CFO of Gram Equipment as well as Procuritas Capital Investors and Procuritas Partners, including its former Managing Partner.

Key Points of the Decision

In its judgment, the Maritime and Commercial Court addresses the fundamental question of the basis of liability for the former members of Gram Equipment's management, and whether Procuritas Capital Investors can be held liable for the actions taken by the day-to-day management of Gram Equipment.

The Maritime and Commercial Court established that Gram Equipment’s financial figures were grossly manipulated with the aim of improving Gram Equipment's financial results.

As for the former members of Gram Equipment’s day-to-day management, the Court found that they had contributed to, and were aware of, the gross manipulation of the financial figures, and thus had acted with liability. Despite this, the former members of the day-to-day management were acquitted, as the Court did not find that Kg BidCo had provided evidence of having suffered a loss (more on this below).

In relation to Procuritas Capital Investors, the Court found that Procuritas Capital Investors were not liable for the actions conducted by Gram Equipment’s day-to-day management. In this connection, the Maritime and Commercial Court attached importance to the fact that the corporate structure of Procuritas Capital Investors was not considered unusual for private equity funds, and that there were no special circumstances in the case that might justify disregarding the corporate structure and hence the limitation of liability, which the corporate structure entails.

The court also emphasised the fact that Kg BidCo itself is part of a private equity fund structure, that Kg BidCo was assisted by various professional advisers during the conclusion of the transfer agreement with Green Magnum, and that Kg BidCo accordingly should have been aware of the corporate structure and its implications for liability.

In relation to the former Managing Partner at Procuritas Partners, the Court found that he neither had knowledge of nor should have known about the manipulation of the financial figures, and that he had not failed to meet his loyal disclosure obligations towards Kg BidCo. The former Managing Partner and Procuritas Partners were therefore acquitted. The Court took into account the lack of evidence indicating that the former Managing Partner had knowingly failed to disclose material information to Kg BidCo.

As for the calculation of the direct loss, Kg BidCo had claimed that the value of Gram Equipment at the time of the transfer was in fact EUR 16.3 million. This was, however, dismissed by the Court based on an expert report prepared during the case which established that Gram Equipment had a value of EUR 60.2 million at the time of the transfer. Taking into consideration that Kg BidCo had already received a payout of EUR 50 million from the W&I insurance, the Court found that Kg BidCo had not suffered any loss.

Furthermore, the Court determined that certain claims of approx. EUR 16.2 million based on the transfer agreement could not be asserted against the former day-to-day management of Gram Equipment, as the claims were based on the contractual relationship between Kg BidCo and Green Magnum, to which the former day-to-day management of Gram Equipment were not party. The same applied to the claims of approx. EUR 8.5 million for legal costs and approx. EUR 8.9 million for unpaid process interest related to the arbitration case.

Finally, the Court dismissed an unjust enrichment claim against Procuritas Capital Investors IV, citing the absence of actual enrichment as a fundamental requirement for such a claim.

In summary, the Maritime and Commercial Court acquitted all defendants of the claims made by Kg BidCo. The judgment was delivered with dissent (2-3) as 2 members voted in favour of awarding Kg BidCo approx. EUR 18 million in compensation. The two judges asserted that, beyond the basis for liability, the remaining conditions for damages were also fulfilled. Consequently, they partially upheld Kg BidCo's claim, determining that the defendants were jointly to pay EUR 18,309,890. They further found that there was no basis for mitigating or reducing the claim for damages.

Kg BidCo has publicly indicated that the case will be appealed.

Our Remarks

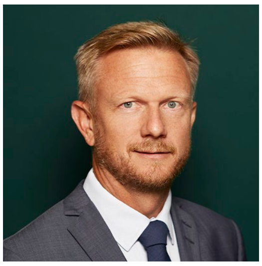
The verdict addresses a broad spectrum of significant matters pertaining to M&A transactions as well as the responsibilities of management and advisors, especially in terms of the loyal duty of disclosure and the general legal prerequisites for imposing liability claims within and beyond contractual obligations.

The verdict cements the legal position that extraordinary circumstances are necessary to establish that the management of a parent company is legally responsible for actions or omissions made by the day-to-day management of a subsidiary.

Similarly, the verdict affirms that the corporate structure commonly used by private equity funds cannot be disregarded without special circumstances, with the consequence that a basis of liability piercing through the corporate structure can be established.

Finally, it can be concluded from the verdict that, in practice, it is highly challenging to prove that a contracting party has neglected its duty of loyal disclosure, particularly when the parties involved have engaged professional advisors.

If you have any questions or require further information regarding any of the above, please do not hesitate to contact us.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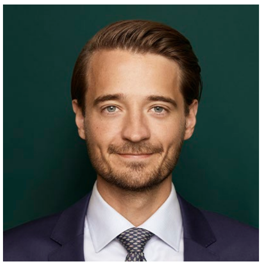
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