Constitutional judgment 3-2-1-153-13

EN BANC

ORDER

Case number	3-2-1-153-13
Date of order	Tartu, 26 June 2014
Formation	Chairman: Priit Pikamäe; members: Tõnu Anton, Jüri Ilvest, Peeter Jerofejev, Henn Jõks, Ott Järvesaar, Eerik Kergandberg, Hannes Kiris, Lea Kivi, Indrek Koolmeister, Ants Kull, Villu Kõve, Lea Laarmaa, Saale Laos, Jaak Luik, Ivo Pilving, Jüri Põld, Harri Salmann and Tambet Tampuu
Case	Claim by Baltforce OÜ (former name HIPHOP OÜ) against Aktsiaselts Uvic for identifying the circumstances precluding the legal protection of a trademark. Request to determine procedural expenses.
Contested judicial decision	Order of the Tallinn Court of Appeal of 26 May 2013 in civil case no. 2-08-54906 Appellant and type of appeal Appeal by Aktsiaselts Uvic
Appellant and type of appeal	Appeal by Aktsiaselts Uvic

Parties to the proceedings and their representatives in the Supreme Court	Claimant: Baltforce OÜ (former name HIPHOP OÜ) (registry code 10975853), legal representative: board member Lauri Liiv Defendant: Aktsiaselts Uvic (registry code 10259621), representative: attorney-at-law Priit Lätt The Riigikogu Chancellor of Justice
Date of hearing	Minister of Justice 15 April 2014, written hearing

OPERATIVE PART

1. To declare subsection 8 of § 174 of the Code of Civil Procedure, according to which procedural expenses may be determined by an assistant judge in civil proceedings, unconstitutional and repeal it.
2. To hold that the wording of subsection 3 of § 175 of the Code of Civil Procedure, which was in force from 1 January 2006 to 31 December 2008, was unconstitutional.
3. To hold that Regulation No. 306 of the Government of the Republic of 15 December 2005 'Limits of Recovery of Expenses of Contractual Representative and Advisor from Other Parties to Proceedings,' which was in force from 1 January 2006 to 11 September 2008, was unconstitutional.
4. To declare subsection 4 of § 175 of the Code of Civil Procedure unconstitutional and repeal it.
5. To declare Regulation No. 137 of the Government of the Republic of 4 September 2008 'Limits of Recovery of Expenses of Contractual Representative from Other Parties to Proceedings' unconstitutional and repeal it.
6. To quash the order of the Tallinn Court of Appeal of 24 May 2013 and the order of the Harju County Court of 7 March 2013 in civil case no. 2-08-54906 and send the request for determining the procedural expenses back to the same county court for a new hearing.
7. To grant the appeal of Aktsiaselts Uvic in part.
8. To refund to Advokaadibüroo GLIMSTEDT OÜ (current account no. 17000681438, Estonian branch of Nordea Bank Finland Plc) the security of 50 (fifty) euros paid on 4 June 2013 on the appeal filed by Aktsiaselts Uvic.

FACTS AND COURSE OF PROCEDURE

1. On 21 August 2008, HIPHOP OÜ (current name Baltforce OÜ) (claimant) filed with the Harju County Court a claim against Aktsiaselts Uvic (defendant) for identifying circumstances precluding the legal protection of a trademark.

2. By a judgment of 12 May 2009 in civil case no. 2-08-54906, the Harju County Court upheld the claim and by a judgment of 4 March 2010 the Tallinn Circuit Court upheld the judgment of the county court.

3. By a judgment of 29 September 2010 in civil case no. 3-2-1-77-10, the Civil Chamber of the Supreme Court quashed the judgment of the Tallinn Circuit Court dated 4 March 2010 and the judgment of the Harju County Court dated 12 May 2009 and sent the case back to the Harju County Court for a new hearing. By a judgment dated 10 April 2012, the Harju County Court dismissed the claim and ordered the claimant to pay the procedural expenses. By an order dated 16 May 2012, the Tallinn Circuit Court dismissed the claimant's appeal due to the expiry of the time limit for filing an appeal.

4. On 29 June 2012, the defendant filed with the Harju County Court a request for determining the procedural expenses. According to the request, the defendant has incurred procedural expenses in the amount of 8353 euros and 77 cents (the legal assistance expenses amount to 8162 euros and 3 cents and the state fee for filing the appeal amounts to 191 euros and 74 cents) and asked that the claimant be ordered to pay the expenses. The defendant also requested that the defendant be ordered to pay late interest on the procedural expenses at the rate specified in the second sentence of subsection 1 of § 113 of the Law of Obligations Act (LOA) from the entry into force of the decision determining the procedural expenses to the compliance with the decision.

5. The claimant objected to the request for determining the procedural expenses, arguing that it is justified to order the claimant to pay the defendant procedural expenses in the amount of 381 euros (incl. the state fee of 191 euros and 74 cents).

6. An assistant judge of the Harju County Court partially granted the defendant's request for determining the procedural expenses by an order dated 7 March 2013 and ordered the claimant to pay the defendant procedural expenses in the amount of 511 euros and 29 cents. The county court decided that the claimant must pay late interest on the procedural expenses to be compensated to the defendant at the rate specified in the second sentence of subsection 1 of § 113 of the Law of Obligations Act (LOA) from the entry into force of the decision determining the procedural expenses to the compliance with the decision.

7. According to the order of the county court, it is a non-proprietary claim and the value of the claim under subsection 1 of § 132 of the Code of Civil Procedure (CCP) was 958 euros and 67 cents (15 000 kroons), as specified in the judgment of the Harju County Court 10 April 2012. According to § 1 of Regulation No. 306 of the Government of the Republic of 15 December 2005, which was in force at the time when the claim was filed with the court, the maximum costs of a contractual representative that could be recovered from the other party to the proceedings amounted to 5000 kroons (319 euros and 56 cents) in a civil case whose value was 5 000 kroons. These were the legal assistance expenses that the parties could foresee and take into account.

8. The county court held that the steps of the contractual representatives of the defendant in this case were reasoned and necessary to the extent of 40 hours and 50 minutes which, given that the contentious proceedings passed through three instances and were thereafter sent back to the county court for a new hearing, is not an excessively long time. Even though the reasoned and necessary legal assistance expenses of the defendant amounted to 5415 euros and 99 cents, the claimant must be ordered to pay the defendant the expenses of the contractual representative in the amount of 319 euros and 56 cents on the basis of Regulation No. 306 of the Government of the Republic of 15 December 2005.

9. The defendant appealed the order of the county court, requesting that the county court's order be quashed to the extent that the defendant's request for determining the procedural expenses was dismissed and that a new order be made, which awards the defendant procedural expenses in the amount of 8055 euros and 47 cents. The defendant argued that the county court unfoundedly reduced the expenses of the contractual representatives of the defendant. The defendant also argued that the limits of recovery of the expenses of the contractual representative are in conflict with the Constitution. The Legislature cannot delegate the establishment of the limits of compensation for damage to the Government of the Republic – the regulation is formally unconstitutional. The regulation is also substantively unconstitutional, because it establishes disproportionate limits for expenses in a civil case involving a non-proprietary claim.

10. The claimant opposed the appeal.

11. The Harju County Court accepted the appeal for adjudication, refused to grant the appeal and sent it to the Tallinn Circuit Court for a review.

ORDER OF THE TALLINN CIRCUIT COURT

12. By an order dated 24 May 2014, the Tallinn Circuit Court upheld the order of the county court and dismissed the appeal.

13. The circuit court agreed with the reasons given in the order of the county court and did not reiterate them. The statement of claim was filed with the court at the time when Regulation No. 306 of the Government of the Republic of 15 December 2005 was in force, allowing for the recovery of a maximum of 5000 kroons (319 euros and 56 cents) of the expenses of a contractual representative from other parties to the proceedings in a civil case whose value is 15 000 kroons. The parties to the proceedings could foresee and take into account such expenses. The position of the county court is also in compliance with the positions taken by the Supreme Court in cases no. 3-2-1-87-09 and 3-2-1-112-11. In the order made in case no. 3-2-1-112-11, the Supreme Court held the following: 'Upon filing non-proprietary claims, the parties were also able to take into account those limits of compensation of procedural expenses in force at the time of filing the claim (2 May 2007), i.e. the limits established under Regulation No. 306.'

14. The county court reasonably identified that the reasoned and necessary legal assistance expenses of the defendant amounted to 5415 euros and 99 cents, but on the basis of Regulation No. 306 of the Government of the Republic of 15 December 2005 the claimant must be ordered to pay the defendant the expenses of the contractual representative in the amount of 319 euros and 56 cents, i.e. taking into account the limit of 5000 euros. The reasoned and necessary expenses of 5415 euros and 99 cents do not considerably differ from the limit of 5000 euros. Based on the aforementioned, the circuit court held that the defendant's request seeking the non-application of the limit established in Regulation No. 306 is not reasoned, because it is in conflict with subsection 1 of § 175 of the CCP.

15. The civil case passed through three instances, but attorney-at-law Priit Lätt from Advokaadibüroo Glimstedt Straus & Partnerid OÜ and patent attorney Almar Sehver from AAA Patendibüroo OÜ started representing the defendant as of 31 March 2010, i.e. starting from the proceedings in cassation (Volume I, case file p. 157). This notice does not indicate that attorney-at-law Priit Lätt from Advokaadibüroo Glimstedt Straus & Partnerid OÜ and patent attorney Almar Sehver from AAA Patendibüroo OÜ advised or represented the defendant earlier. Until that time the county court and the court of appeal were not informed of the fact that the defendant is represented and advised by the aforementioned law firm and the county court reasonably dismissed the defendant's requests to award the procedural expenses on the basis of invoices originating from before 31 March 2010.

SUBMISSIONS OF THE PARTIES IN THE SUPREME COURT

16.-21. [Not translated.]

OPINION OF THE CIVIL CHAMBER OF THE SUPREME COURT

22. Upon reviewing the case on 18 November 2013, serious disagreements arose between the members of the three-member panel of the Civil Chamber of the Supreme Court on how subsection 4 of § 175 of the CCP (before 1 January 2009, subsection 3 of § 175 of the CCP) should be applied and interpreted. By an order dated 18 December 2013, the three-member panel referred the case to the full Chamber on the basis of subsection 2 of § 18 of the CCP.

23. By an order dated 26 February 2014, the full Civil Chamber of the Supreme Court placed the claimant's request before the Supreme Court en banc on the basis of clause 3 of subsection 4 of § 19 and the first sentence of subsection 1 of § 690 of the CCP and the second sentence of subsection 3 of § 3 of the Judicial Constitutional Review Procedure Act (JCRPA). Upon reviewing the case, the Chamber came to suspect that subsection 3 of § 175 of the CCP, which was in force before 1 January 2009 and according to which the Government of the Republic establishes the limits of recovery of the expenses of a contractual representative and advisor from other parties to proceedings, as well as Regulation No. 306 of the Government of the Republic of 15 December 2005 established on the basis thereof may be unconstitutional.

24. The Chamber noted that, according to the wording of the first sentence of subsection 1 of § 175 of the CCP in force before 1 January 2013, if a party to proceedings must, in accordance with a judicial decision determining the division of procedural expenses, bear the expenses of the contractual representative who represented the other party to the proceedings, the court will award the expenses to a reasoned and necessary extent. Subsection 3 of § 175 of the CCP in force before the 1 January 2009 (at the time of filing the statement of claim on 21 August 2008) stated that the Government of the Republic would establish the limits of recovery of the expenses of a contractual representative and advisor from other parties to proceedings. The same is provided for in subsection 4 of § 175 of the CCP, which is currently in force and according to which the Government of the Republic will establish the limits of recovery of the expenses of a contractual representative from other parties to proceedings. On the basis of subsection 3 of § 175 of the CCP, the Government of the Republic established Regulation No. 306 of 15 December 2005.

25. The Chamber held that the division of and determining procedural expenses interfere with the parties' fundamental right to property secured by § 32 of the Constitution and, possibly, the general right of recourse to the court provided for in subsection 1 of § 15 and subsection 5 of § 24 of the Constitution. Upon determining the procedural expenses, a proprietary obligation is imposed on a party to proceedings in favour of the other party or it is done partially or it is not done. The proceedings of determining procedural expenses resemble those of compensation for damage, because in the proceedings of determining procedural expenses, in essence, damages arising from the judicial proceedings (legal assistance expenses) are awarded in accordance with the procedure established in the Code of Civil Procedure.

26. The Chamber suspected that the establishment of limits of recovery of the expenses of a contractual representative from other parties to proceedings might be such an important issue in terms of the fundamental rights, that it calls for the establishment of the maximum and minimum limits of compensation of the expenses of a contractual representative by an act of Parliament (the Riigikogu).

27. Under clause 6 of § 87 of the Constitution, the Government of the Republic issues regulations and directives on the basis of and for the implementation of laws. The first sentence of subsection 1 of § 3 of the Constitution provides for the general principle of statutory reservation, according to which governmental authority is exercised solely on the basis of the Constitution and laws that are in conformity therewith. According to the principle, a body ranking lower than the Legislature needs the Legislature's authorisation in order to restrict fundamental rights. Under subsection 1 of § 90 of the Administrative Procedure Act, a regulation can be issued on the basis of a provision delegating authority and in accordance with the limits, spirit and purpose of the provision. Thus, the prerequisite for the constitutionality of a regulation is the existence of a provision delegating authority in a law (act of the Riigikogu). If a provision delegating authority is unconstitutional, a regulation issued on the basis thereof is unconstitutional as well (see the judgment of the Constitutional Review Chamber of the Supreme Court of 26 November 2007 in case no. 3-4-1-18-07, point 20). The provision delegating authority specifies the administrative authority competent to issue the instrument and the clear purpose, substance and scope of the regulatory powers granted to the administrative authority (see the judgment of the Constitutional Review Chamber of the Supreme Court of 20 December 1996 in case no. 3-4-1-3-96). According to the Chamber, the issue is whether the Legislature has determined the scope of authorisation sufficiently in the relevant provision delegating authority (subsection 3 of § 175 of the CCP in force before 1 January 2009). According to the case law of the Supreme Court, the Legislature itself must decide on all issues that are of importance from the point of view of fundamental rights and cannot delegate their regulation to the Executive. The Executive may merely clarify restrictions of fundamental rights and liberties established by law, but cannot establish any additional restrictions besides those established by law (see the judgment of the Constitutional Review Chamber of the Supreme Court of 24 December 2002 in case no. 3-4-1-10-02, point 24). The Court en banc has noted that the Executive is allowed to impose less intensive restrictions by a regulation based on a provision delegating authority, which is accurate, clear and in conformity with the intensity of the restriction (the Supreme Court en banc judgment of 16 March 2010 in case no. 3-4-1-8-09, point 160).

28. In addition, the Civil Chamber noted that if the Court en banc finds that subsection 3 of § 175 of the CCP

is formally constitutional, it should be examined whether subsection 1 of § 1 of Regulation No. 306 of the Government of the Republic, which was established on the basis of subsection 3 of § 175 of the CCP and according to which the limit of recovery of the expenses of a contractual representative and advisor from other parties to proceedings in a civil case having a value of up to 15 000 kroons was 5000 kroons, is substantively constitutional (whether the limit of 5000 kroons established on the basis of the regulation in a non-proprietary claim may disproportionately interfere with the fundamental right to property (§ 32 of the Constitution)).

29. The Chamber also drew attention to the fact that the order of 7 March 2013, by which the defendant's request for determining the procedural expenses was granted in part and by which procedural expenses were awarded to the defendant in the amount of 511 euros and 29 cents, was made by an assistant judge. By a judgment made on 4 February 2014 in case no. 3-4-1-29-13 the Supreme Court en banc declared subsection 2 of § 1251 of the Courts Act (CA) and subsection 8 of § 174 of the CCP unconstitutional and repealed them to the extent that a judicial clerk is allowed to determine procedural expenses in civil proceedings. The Chamber is of the opinion that, given the reasons stated in the referred judgment of the Court en banc, it should be assessed whether and how the solution of the case is affected by the fact that not a judge but an assistant judge signed the first order determining the procedural expenses.

OPINIONS OF PARTIES

30. The **Constitutional Committee of the Riigikogu** is of the opinion that subsection 3 of § 175 of the CCP in force before 1 January 2009 and Regulation No. 306 of the Government of the Republic of 15 December 2005 were in line with the Constitution. [Not translated.]

33. The **Legal Affairs Committee of the Riigikogu** is of the opinion that subsection 3 of § 175 of the CCP in force before 1 January 2009 and Regulation No. 306 of the Government of the Republic of 15 December 2005 were in line with the Constitution. [Not translated.]

34. The **claimant** is of the opinion that subsection 3 of § 175 of the CCP in force before 1 January 2009 and Regulation No. 306 of the Government of the Republic of 15 December 2005 were in line with the Constitution. [Not translated.]

35. The **defendant** is of the opinion that subsection 3 of § 175 of the CCP in force before 1 January 2009 and Regulation No. 306 of the Government of the Republic of 15 December 2005 issued on the basis thereof were formally unconstitutional. [Not translated.]

37. The **Chancellor of Justice** is of the opinion that subsection 3 of § 175 of the CCP in force at the time of filing the claim on 21 August 2008 was, to the extent that it authorised the Government of the Republic to establish the limits of recovery of the expenses of a contractual representative from other parties to proceedings, in conflict with subsection 1 of § 3 of the Constitution as well as with § 32 of the Constitution in conjunction with subsection 1 of § 15 and subsection 5 of § 24 of the Constitution.

38.-40. [Not translated.]

41. The **Minister of Justice** is of the opinion that subsection 3 of § 175 of the CCP and Regulation No. 306 established on the basis thereof are formally and substantively in accordance with the Constitution.

42.-43. [Not translated.]

DISPUTED PROVISIONS

44. Subsection 8 of § 174 'Determination of procedural expenses' of the CCP:

'(8) An order on determining procedural expenses may also be made by an assistant judge.'

45. Subsection 3 of § 175 ‘Compensation of expenses of attorney, other contractual representative and advisor’ of the CCP in force from 1 January 2006 to 31 December 2008:

‘(3) The Government of the Republic will establish the limits of recovery of the expenses of a contractual representative and advisor from other parties to proceedings.’

46. Regulation No. 306 of the Government of the Republic of 15 December 2005 ‘Limits of Recovery of Expenses of Contractual Representative and Advisor from Other Parties to Proceedings’ established on the basis of subsection 3 of § 175 of the CCP, which was in force from 1 January 2006 to 31 December 2008.

47. Subsection 4 of § 175 ‘Compensation of expenses of contractual representative’ of the CCP:

‘(4) The Government of the Republic will establish the limits of recovery of the expenses of a contractual representative from other parties to proceedings.’

48. Regulation No. 137 of the Government of the Republic of 4 September 2008 ‘Limits of Recovery of Expenses of Contractual Representative from Other Parties to Proceedings’ established on the basis of subsection 4 of § 175 of the CCP.

OPINION OF COURT EN BANC

49. The Court en banc is adjudicating an appeal filed by Aktsiaselts Uvic where the appellant requests that the orders of the Tallinn Circuit Court and of the Harju County Court, which partially granted the defendant’s request for determining the procedural expenses, be quashed. In the Harju County Court the order was made by an assistant judge.

50. First, the Court en banc will assess the constitutionality of subsection 8 of § 174 of the CCP (I), then the Court en banc will express an opinion on the relevance (II) and constitutionality (III) of subsection 3 of § 175 of the CCP in force from 1 January 2006 to 31 December 2008, Regulation No. 306 of the Government of the Republic of 15 December 2005, subsection 4 of § 175 of the CCP and Regulation No. 137 of the Government of the Republic of 4 September 2008, and thereafter the Court en banc will make a decision on the appeal filed by Aktsiaselts Uvic (IV).

I

51. According to the second sentence § 15 of the Constitution, everyone can demand upon a hearing of their case in court that any relevant law, other legal instrument or step be declared unconstitutional. Under subsection 2 of § 152 of the Constitution, the Supreme Court will repeal any law or other legal instrument if it is in conflict with a provision and the spirit of the Constitution. According to the second sentence of subsection 3 of § 3 of the Judicial Constitutional Review Procedure Act (JCRPA), a case referred by the Administrative, Civil or Criminal Chamber or Special Panel of the Supreme Court will be adjudicated by the Supreme Court en banc if the chamber or the Special Panel has a reasonable doubt about the constitutionality of a legislative act of relevance in adjudicating the case, non-adoption of such act or an international agreement.

52. A provision is relevant if the court, upon adjudicating a case, should, in the event of the unconstitutionality of the provision, decide otherwise than in the event of the constitutionality of the provision or if these procedural rules had to be applied in the given proceedings in order to reach a judgment (the judgment of the Constitutional Review Chamber of the Supreme Court of 18 June 2010 in case no. 3-4-1-5-10, points 34 and 19).

53. The right of an assistant judge to determine procedural expenses in civil case no. 2-08-54906 arose from subsection 8 of § 174 of the CCP. Since in the event of the unconstitutionality and ineffectiveness of the provision an assistant judge would not have the right to determine procedural expenses and the order of the

assistant judge would therefore have to be quashed, subsection 8 of § 174 of the CCP is, in the opinion of the Court en banc, a relevant provision upon adjudicating this case.

54. The determination of procedural expenses interferes with the fundamental right to property of parties to proceedings, which is secured by § 32 of the Constitution, because it imposes a proprietary obligation on one party to proceedings in favour of another party to proceedings or imposes it partially or does not impose it. In addition, it must be taken into account that the interference with the fundamental right to property currently arises from the fact that the fundamental right of recourse to the court secured by subsection 1 of § 15 of the Constitution as well as the fundamental right of appeal secured by subsection 5 of § 24 of the Constitution are being exercised for the purpose of protecting one's rights.

55. According to the first sentence of § 11 of the Constitution, rights and freedoms may be restricted only in accordance with the Constitution. Interference with a fundamental right must be formally and substantively unconstitutional (see the judgment of the Constitutional Review Chamber of the Supreme Court of 13 June 2005 in case no. 3-4-1-5-05, point 7). Formal constitutionality means that a legislative act restricting fundamental rights must comply with the competence, procedural and formal requirements of the Constitution as well as with the principles of determination and statutory reservation (see the judgment of the Constitutional Review Chamber of the Supreme Court of 13 June 2005 in case no. 3-4-1-5-05, point 8).

56. According to the first sentence of § 146 of the Constitution, justice is administered exclusively by the courts. In case no. 3-4-1-29-13, the Supreme Court en banc held that determining procedural expenses in civil proceedings in a county court constitutes administration of justice for the purposes of the first sentence of § 146 of the Constitution. Determining procedural expenses in a county court on the basis the Code of Civil procedure cannot be deemed as an activity preparing or arranging the administration of justice or as a technical or calculation step. In essence, this is the adjudication of a claim for the compensation of damage for which a special procedure has been set out in the Code of Civil Procedure; Upon determining procedural expenses, the county court must also assess whether the expenses of the contractual representative are reasoned and necessary (incl. the complexity of the civil case and the time spent on the proceedings). The court has an extensive margin of discretion when determining the expenses of a contractual representative. It qualifies as the settlement of a dispute between two private persons in an independent and impartial institution, i.e. a court. At one instance, a substantive decision that qualifies as an enforcement title is made on the matter of dispute, thereby creating, altering or terminating the rights and obligations of the parties to the proceedings (see the Supreme Court en banc judgment of 4 February 2014 in case no. 3-4-1-29-13, point 43 and the sub-points thereof). Subsection 2 of § 178 of the CCP, which also applies to an assistant judge, states that if the value of an appeal of a court order does not exceed 200 euros, the person who requested the determination of the procedural expenses and is obligated to bear the procedural expenses cannot file an appeal of the order determining the procedural expenses or an order supplementing such order.

57. In case no. 3-4-1-29-13, the Court en banc held that in court justice can be administered for the purposes of the first sentence of § 146 of the Constitution only by a judge for the purposes of §§ 147, 150 and 153 of the Constitution. Sections 147, 150 and 153 of the Constitution specify, for the purpose of the Constitution, a special-type official (i.e. a judge) whose main function is to administer justice and thus exercise the governmental authority. Only judges, for the purposes of §§ 147, 150 and 153, have been provided with constitutional guarantees, such as the appointment to office for life, removal from office only by a judgment, the requirement that the grounds and procedure for release of judges from office as well as the legal status of judges and guarantees for their independence are to be provided by law (§ 147 of the Constitution), incl. special procedure for appointment to office (§ 150 of the Constitution) and bringing criminal charges against judges (§ 153 of the Constitution). The Constitution also provides additional restrictions for judges; for instance, judges may not hold any other elected or appointed office (subsection 3 of § 147 of the Constitution). The Constitution does not set out such guarantees or restrictions for any other officials working in the court system. The Legislature cannot change the constitutional guarantees and restrictions with any legal instrument of lower authority. Presumably, a person who is a judge for the purposes of §§ 147, 150 and 153 of the Constitution complies with the requirements of independent and impartiality arising from § 15 of the Constitution. The guarantees and restrictions of judges established by the Constitution are

related to the independence and impartiality of the courts and judges (the Supreme Court en banc judgment of 4 February 2014 in case no. 3-4-1-29-13, points 44.4–44.6).

58. In case no. 3-4-1-29-13, the Supreme Court en banc took the view that a judicial clear is not a judge for the purposes of §§ 147, 150 and 153 of the Constitution, because for the purpose of the Constitution a judicial clear is not appointed to office for life, no judgment is required for removing a judicial clerk from office, the prohibition on holding an elected or appointed office does not apply to a judicial clear and a judicial clear does not enjoy the guarantee that they can be prosecuted only on a proposal of the Supreme Court and with the consent of the President of the Republic (the Supreme Court en banc judgment of 4 February 2014 in case no. 3-4-1-29-13, point 45).

59. Similar issues are raised also regarding the competence of an assistant judge to determine procedural expenses. Likewise, an assistant judge is not appointed for life, it is not done by the President of the Republic on a proposal of the Supreme Court, no judgment is required for removing an assistant judge from office and an assistant judge does not enjoy the guarantee of being prosecuted only on a proposal of the Supreme Court and with the consent of the President of the Republic. Unlike a judicial clear, however, an assistant judge is subject to the office-related restrictions of a judge (§§ 116 and 49 of the CA) and, thus, the prohibition on holding another elected or appointed office. In spite of the latter difference when compared to a judicial clear, an assistance judge lacks, according to the estimate of the Court en banc, guarantees comparable to those of a judge, which would allow for considering an assistant judge to be a judge for the purposes of §§ 147, 150 and 153 of the Constitution, and the institutional independence of an assistant judge from the Executive is not ensured. Thus, for instance, the salary of assistant judges is established by the Government of the Republic (subsection 1 of § 122 of the CA) and an assistant judge is appointed by the Minister of Justice (subsection 5 of § 120 of the CA) and the minister also has disciplinary authority over assistant judges.

60. In view of the above, the Court en banc is of the opinion that subsection 8 of § 174 of the CCP, which authorises an assistant judge to determine procedural expenses in civil proceedings, is in conflict with the first sentence of § 146 of the Constitution. Following clause 2 of subsection 1 of § 15 of the JCRPA, the Court en banc herewith declares subsection 8 of § 174 of the CCP unconstitutional and repeals it.

II

61. The Civil Chamber of the Supreme Court found that subsection 3 of § 175 of the CCP in force before 1 January 2009, which authorised the Government of the Republic to establish the limits of recovery of the procedural expenses of an attorney, other contractual representative and advisor from other parties to proceedings, as well as Regulation No. 306 of the Government of the Republic of 15 December 2005 issued on the basis of this provision delegating authority, may be unconstitutional.

62. The compensation of the expenses of a contractual representative was regulated by § 175 ‘Compensation of expenses of attorney, other contractual representative and advisor’ of the CCP in force from 1 January 2006 to 31 December 2008; according to subsection 1 of this section, if a party to proceedings must, in accordance with a judicial decision determining the division of procedural expenses, bear the expenses of the contractual representative or advisor of the other party to the proceedings, the court will, upon determining the expenses, award the expenses of the representative or advisor to a reasoned and necessary extent. A contractual representative means an attorney or another representative determined by a transaction who represents a party to proceedings. Subsection 3 of § 175 of the CCP authorised the Government of the Republic to establish the limits of recovery of the expenses of a contractual representative and advisor from other parties to proceedings.

63. On the basis of subsection 3 of § 175 of the CCP in force from 1 January 2006 to 31 December 2008, the Government of the Republic issued Regulation No. 306 ‘Recovery of Expenses of Contractual Representative and Advisor from Other Parties to Proceedings’ on 15 December 2005, which entered into force on 1 January 2006. This regulation was repealed by Regulation No. 137 ‘Limits of Recovery of

Expenses of Contractual Representative and Advisor from Other Parties to Proceedings' of the Government of the Republic of 4 September 2008, which entered into force on 12 September 2008. Regulation No. 137 was also established on the basis of subsection 3 of § 175 of the CCP in force from 1 January 2006 to 31 December 2008.

64. As of 1 January 2009, § 175 of the CCP was amended in such a manner that the provision delegating authority to the Government of the Republic formerly set out in subsection 3 of § 175 of the CCP was transferred to the fourth subsection of the same section. Accordingly, Regulation No. 137 of the Government of the Republic of 4 September 2008 was amended in 2010 so that as of 6 December 2012 the header of the regulation referred to subsection 4 of § 175 of the CCP as the provision delegating authority and also the title of the regulation was amended to 'Limits of Recovery of Expenses of Contractual Representative from Other Parties to Proceedings.' By an act passed on 7 May 2014, the Riigikogu amended the wording of subsection 4 of § 175 of the CCP. Subsection 4 of § 175 of the CCP will enter into force in the new wording on 1 January 2015.

65. In the present civil case the claimant filed a claim against the defendant on 21 August 2008 for identifying circumstances precluding the legal protection of a trademark. It was a non-proprietary claim whose value under subsection 1 of § 132 of the CCP in force at the time of filing the claim was 15 000 kroons (985 euros and 67 cents). By a judgment of 10 April 2012, the Harju County Court dismissed the claim and ordered the claimant to bear the procedural expenses. On 29 June 2012, the defendant submitted to the Harju County Court a request for determining the procedural expenses, incl. legal assistance expenses amounting to 8162 euros and 3 cents. By its order dated 7 March 2013, the Harju County Court partially granted the defendant's request. According to the assistant judge, the reasoned and necessary expenses of the steps of the contractual representatives of the defendant in the case amounted to 5419 euros and 99 cents, but the assistant judge awarded to the defendant 319 euros and 56 cents for covering the expenses of the contractual representative. Thereby the assistant judge relied on Regulation No. 306 of the Government of the Republic of 15 December 2005, according to which the expenses of a contractual representative could be recovered from other parties to proceedings to the maximum extent of 5000 kroons (i.e. 319 euros and 56 cents) in a civil case having a value of 15 000 kroons. By an order dated 24 May 2013, the Tallinn Circuit Court dismissed the defendant's appeal.

66. According to the case law of the Civil Chamber of the Supreme Court, upon determining and awarding procedural expenses it must be taken into account which expenses were foreseeable for the person (see the Supreme Court order of 15 October 2009 in civil case no. 3-2-1-87-09, point 15; the order of 9 November 2009 in civil case no. 3-2-1-112-09, point 14). Both the claimant and the defendant could take into account the limits of compensation of procedural expenses in force at the time of filing the claim (see also the Supreme Court order of 6 January 2010 in civil case no. 3-2-1-154-09, point 9; the order of 18 December 2012 in civil case no. 3-2-1-171-12, point 11; the order of 23 November 2011 in civil case no. 3-2-1-112-11, point 17). The claim was filed with the county court on 21 August 2008 and therefore Regulation No. 306 of the Government of the Republic of 15 December 2005 had to be followed upon awarding the expenses of the contractual representative.

67. The Supreme Court has held that, for the purpose of ensuring legal clarity, 'provisions that are closely connected to the contested provision and that, provided they remain in force, may cause confusion about the legal situation' must be considered relevant (see the judgment of the Constitutional Review Chamber of the Supreme Court of 13 February 2007 in case no. 3-4-1-16-06, point 18; the judgment of 9 April 2008 in case no. 3-4-1-20-07, point 16). In addition, upon assessing the relevance of the provisions, the Supreme Court has kept in mind the purpose of procedural economy (cf. the Supreme Court en banc judgment of 12 April 2011 in case no. 3-2-1-62-10, point 33; the Constitutional Review Chamber judgment of 10 December 2013 in case no. 3-4-1-20-13, points 45–46). Based on the aforementioned the Court en banc finds that in the present case the constitutionality of Regulation No. 306 of the Government of the Republic of 15 December 2005 must be assessed.

68. To assess the constitutionality of Regulation No. 306 of the Government of the Republic of 15 December

2005, the constitutionality of the authority-delegating provision serving as the basis thereof (i.e. subsection 3 of § 175 of the CCP in force from 1 January 2006 to 31 December 2008) must be assessed as well.

69. It follows from the first sentence of subsection 1 of § 3 of the Constitution that governmental authority is exercised solely on the basis of the Constitution and the laws that are in conformity therewith. Subsection 6 of § 87 of the Constitution provides for the same requirement for regulations of the Government of the Republic. Under subsection 1 of § 90 of the Administrative Procedure Act (APA), a regulation can be issued on the basis of a provision delegating authority and in accordance with the limits, spirit and purpose of the provision. Under subsection 1 of § 89 of the APA, a regulation is lawful if it is in accordance with the law in force, complies with the formal requirements and if it has been issued on the basis of the authority-delegating provision by the administrative authority specified in the authority-delegating provision in accordance with the procedure provided by law. The first sentence of subsection 1 of § 3 of the Constitution establishes the requirement of a lawful ground, according to which each interference with a fundamental right must have a lawful ground. A regulation is constitutional only if it is in conformity with the authority-delegating provision provided by law. A regulation is lawful if it is in accordance with the law in force, complies with the formal requirements and if it has been issued on the basis of the authority-delegating provision by the administrative authority specified in the authority-delegating provision in accordance with the procedure provided by law. If a provision delegating authority is unconstitutional, a regulation issued on the basis thereof is unconstitutional as well (see the Supreme Court judgment of 26 November 2007 in case no. 3-4-1-18-07, point 20). For the purpose of legal clarity, the entire subsection 3 of § 175 of the CCP in force from 1 January 2006 to 31 December 2008, not merely the part concerning compensation of the expenses of a contractual representative, as suggested by the Chancellor of Justice, must be assessed.

70. The constitutionality of the wording of subsection 4 of § 175 of the CCP in force until 31 December 2014 as well as the constitutionality of Regulation No. 137 of the Government of the Republic of 4 September 2008 based thereon must be assessed in the present constitutional review proceedings. The Court en banc is of the opinion that the legislation regulating compensation of the expenses of a contractual representative currently in force, subsection 3 of § 175 of the CCP (the wording in force from 1 January 2006 to 31 December 2008) and Regulation No. 306 of the Government of the Republic of 15 December 2005 are inseparably connected. This is so, above all, because Regulation No. 137 of the Government of the Republic was initially established on the basis of subsection 3 of § 175 of the CCP (the wording in force from 1 January 2006 to 31 December 2008). It is also important that subsection 4 of § 175 of the CCP currently in force and subsection 3 of § 175 of the CCP have such an overlapping wording that they substantively constitute the same provision.

III

71. Under the first sentence of subsection 1 of § 3 of the Constitution, governmental authority is exercised solely on the basis of the Constitution and laws that are in conformity therewith. This provision of the Constitution expresses the parliamentary reservation, i.e. the principle of importance, according to which the Legislature must ‘decide all matters of importance from the point of view of fundamental rights itself and must not delegate their regulation to the Executive’ (the judgment of the Constitutional Review Chamber of the Supreme Court of 24 December 2002 in case no. 3-4-1-10-02, p. 24). The Supreme Court has admitted that the Executive is allowed to impose less intensive restrictions of fundamental rights by a regulation based on a provision delegating authority, which is accurate, clear and in conformity with the intensity of the restriction (the Supreme Court en banc judgment of 16 March 2010 in case no. 3-4-1-8-09, point 160).

72. One of the manifestations of the parliamentary reservation (the principle of importance) is also subsection 2 of § 104 of the Constitution, according to which certain laws can be passed and amended solely by the majority of the members of the Riigikogu. This also means that matters falling within the scope of application of subsection 2 of § 104 of the Constitution can be regulated by law and they cannot be delegated to the Executive. Under clause 14 of subsection 2 of § 104 of the Constitution, acts governing court procedure must be passed by the majority of the members of the Riigikogu as well.

73. The establishment of a limit to the compensation of the expenses of a contractual representative interferes with the fundamental right to property of a party to proceedings (§ 32 of the Constitution) and the right of recourse to the court (subsection 1 of § 15 of the Constitution) and may also interfere with the right of appeal (subsection 5 of § 24 of the Constitution). The universal right of recourse to the court is a fundamental right as well as a central principle of the rule of law (the order of the Constitutional Review Chamber of the Supreme Court of 5 February 2008 in case no. 3-4-1-1-08, point 3). Setting a limit to the compensation of the expenses of a contractual representative thus interferes with multiple fundamental rights and, depending on the circumstances, the interference may be serious. Therefore, the establishment of the limits of compensation of the expenses of a contractual representative may be considered an important matter for the purpose of the parliamentary reservation expressed in the first sentence of subsection 1 of § 3 of the Constitution.

74. Additionally, it must be taken into account that since the matter concerns compensation of expenses incurred in judicial proceedings, the issue falls, according to the estimate of the Court en banc, within the scope of application of an act governing court procedure (clause 14 of subsection 2 of § 104 of the Constitution). Under subsection 2 of § 104 of the Constitution, the issue of compensation of expenses incurred in judicial proceedings must thus be regulated by an act passed by the majority of the members of the Riigikogu.

75. Therefore, the Court en banc, based on clause 5 of subsection 1 of § 15 of the Constitution, declares that Regulation No. 306 of the Government of the Republic of 15 December 2005 and subsection 3 of § 175 of the CCP in force from 1 January 2006 to 31 December 2008 were in conflict with the first sentence of subsection 1 of § 3, clause 14 of subsection 2 of § 104, § 32, the first sentence of subsection 1 of § 15 and subsection 5 of § 24 of the Constitution.

76. For the same reasons and based on clause 2 of subsection 1 of § 15 of the Constitution, the Court en banc also declares Regulation No. 137 of the Government of the Republic of 4 September 2008 and subsection 4 of § 175 of the CCP unconstitutional and repeals them.

IV

77. The appeal must be partially granted on the basis of subsection 3 of § 701 of the CCP, the orders of the county court and the circuit court must be quashed and the case must be sent back to the same county court for a new hearing.

78. Since the county court’s order regarding determining procedural expenses has been made by an assistant judge and the Court en banc declares subsection 8 of § 174 of the CCP (in the wording in force as of 1 January 2009) unconstitutional and repeals it to the extent that an assistant judge is authorised to determine procedural expenses in civil proceedings, the county court’s order has been made by an unlawful formation of the court. Under clause 3 of subsection 1 of § 656 of the CCP, the adjudication of a case by an unlawful formation of the court constitutes a fundamental breach of a provision of procedural law, which serves as the basis for quashing the order. Under clause 3 of subsection 1 of § 669 of the CCP, the circuit court has fundamentally breached a provision of procedural law upon making a decision if the case has been adjudicated by an unlawful formation of the court. Under subsection 5 of § 692 of the CCP, if the county court has breached a provision of procedural law specified in subsection 1 of § 669 of the CCP and the circuit court has not quashed the judgment or sent the case back for a new hearing, the Supreme Court will quash the judgments of the courts of lower instances and send the case back to the county court for a new hearing. Along with the judgment of the circuit court, the Supreme Court may also quash the judgment of the county court in another event if it is clear that the circuit court must, upon a new hearing of the case, send the case back to the county court or if it is otherwise necessary for faster adjudication of the case. Since the breach cannot be eliminated in the Supreme Court, the orders of the circuit court and county court must be quashed on the basis of subsection 3 of § 701 of the CCP and the case must be sent back to the same county court for a new hearing so the request for determining the procedural expenses would be adjudicated

by a judge.

79. In the order dated 24 May 2013 the Tallinn Circuit Court held that the reasoned and necessary expenses amounting to 5415 euros and 99 cents, as identified by the county court, do not considerably differ from the limit of 5000 euros. The Court en banc points out that the limit specified in Regulation No. 306 of the Government of the Republic of 15 December 2005 is 5000 kroons, not 5000 euros.

80. Since the defendant's appeal is granted in part, the security paid on the defendant's appeal must be refunded in accordance with the first sentence of subsection 4 of § 149 of the CCP. Under subsection 8 of § 149 of the CCP, the security is, on the basis of an order of the court that adjudicated the request, refunded to the party to the proceedings who has paid it or for whom it has been paid or, at the request of the party, to another person. The defendant has requested that the security be refunded to the law firm that represented the defendant at the cassation instance and that paid the security for the party to the proceedings upon filing the appeal.

81. Under subsection 3 of § 178 of the CCP, expenses incurred upon hearing an appeal filed in proceedings of determining procedural expenses are not subject to compensation.
