SUPREME COURT OF NORWAY

J U D G M E N T

given on 27 February 2020 by the Supreme Court composed of

Chief Justice Toril Marie Øie
Justice Aage Thor Falkanger
Justice Ingvald Falch
Justice Espen Bergh
Justice Kine Steinsvik

case no. 19-103417SIV-HRET
Appeal against Borgarting Court of Appeal's judgment 8 May 2019

DNB Asset Management AS	(Counsel Frode Andersen Innjord)
v.	
The Norwegian Consumer Council (class representative)	(Counsel Jens-Henrik Lien and Steinar Mageli)

(1) Justice **Steinsvik**: The case concerns a class action brought by the Norwegian Consumer Council claiming a price reduction on behalf of around 180 000 unitholders in three securities funds during the period 2010–2014. The question is whether the funds have been managed contrary to the agreement with the unitholders, which constitutes breach of its contractual duties with respect to the fund management entitling the unitholders to a reduction of the management fee.

(2) **Parties to the case and management of the DNB Norge funds**

(3) The members of the class action were initially the unitholders of the three securities funds DNB Norge, DNB Norge (I) and Avanse Norge (I). In 2014, the three funds merged into one fund: DNB Norge. They are in the following jointly referred to as the DNB Norge funds or just DNB Norge.

(4) The funds invested its capital in other funds through so-called fund-in-fund structures. DNB Norge and DNB Norge (I) invested their respective capital in the receiving fund DNB Norge (IV), while Avanse Norge (I) was a fund-in-fund with Avanse Norge (II). From 2013, Avanse Norge (II) invested its capital in DNB Norge (IV). With regard to the issues raised in the case at hand, there have been no significant differences in the management of the various funds.

(5) The funds were managed by the appellant, the management company DNB Asset Management AS, in the following referred to as DNB, which is a subsidiary in the DNB group. Throughout the period the case concerns – from 2010 until, and including, 2014 – the annual management fee was 1.8 percent of the capital under management.

(6) The DNB Norge funds are equity funds, which is a subgroup of securities funds. Investments in securities funds are collective investments that, among other things, enable minor investors and small savers to invest in securities with a larger risk spreading than direct investments in individual shares. According to information provided, most unitholders in the DNB Norge funds are retail investors, and DNB has described the funds as being broadly targeted towards such investors.

(7) The DNB Norge funds were originally managed with the Oslo Børs Benchmark Index (OSEBX) as their benchmark index. From May 2013, the Oslo Børs Mutual Fund Index (OSEFX) was used. The indexes are theoretical portfolios of shares listed on Oslo Børs (the Oslo Stock Exchange) designed to reflect the Norwegian stock market. A benchmark index is a standard used to evaluate the fund's performance over time in the relevant market. The use of a benchmark index makes it easier for the investors to assess the fund's risk profile and performance, as developments may be measured against it.

(8) Fund management is divided into passive and active management.

(9) For passive management, it follows from the fund rules that investments are intended to track the composition of the benchmark index. The investment mandate leaves no room for the management company to make independent analyses and discretionary investment decisions, and the fund management may to a large extent be carried out by computers. Passively managed funds – also called index funds – will thus have the same value development as the benchmark index, less expenses. The management fee for index funds is much lower than that for actively managed funds. During the class action period, DNB offered index funds for an annual management fee equal to 0.3 percent of the capital.

(10) For active management, the objective is to outperform the benchmark index over time. Active management is characterised by the management company's freedom under the fund rules to make discretionary investment decisions within the scope of the Securities Funds Act, the stated investment mandate and the risk profile set out in the fund rules. If active management is to reach the goal of outperforming the benchmark index, the performance must exceed that of the index and the management expenses. Such outperformance is also referred to as relative performance or active return.

(11) The fund rules of the DNB Norge funds state that the funds are actively managed funds, and this is also reflected in the management fee.

(12) All investments in securities funds are associated with a high level of absolute risk; that is, a high risk that the value of the fund's assets may decrease as a result of market fluctuations. Actively managed funds also involve relative risk. In short, relative risk reflects how the fund's performance develops relative to the benchmark index. Tracking error is a measure of relative risk and is expressed as a percentage. Since relative risk is solely a measure of deviations from the benchmark index, there is no necessary correlation between relative and absolute risk, but the degree of relative risk may, depending on the circumstances, show how closely a fund tracks the benchmark index.

(13) High relative risk increases the likelihood of performance deviating from the benchmark index, but the deviations may be both positive (outperformance) and negative (underperformance).

(14) **Background to the case**

(15) In 2014, the Financial Supervisory Authority of Norway (the FSA) initiated surveys, as part of its general supervision of Norwegian securities funds, to disclose whether securities funds marketed and priced as active funds were in fact managed in a manner much like the management of index funds.

(16) During the same period, similar surveys were implemented by other countries' financial authorities. It has been said that the surveys were the result of increased international focus on the extent of active management in the fund industry, including focus on so-called "closet index funds". There exists no definition of this term, but it is used to describe securities funds that are marketed and priced as actively managed funds, while in fact the fund's portfolio to some great extent tracks its benchmark index.

(17) On 2 March 2015, the FSA issued a correction order in accordance with section 11-4 cf. section 2-15 of the Securities Funds Act. The stated reason for the correction order was that the funds, during the control period from 2009 to 2014, had been managed contrary to rules of conduct. The FSA found that the funds "in practice had a composition similar to the benchmark index", and that the unitholders had thus not received the service they had reason to expect. The correction order meant that DNB either had to "adjust the management of DNB Norge to resemble active management as reflected in the fund's prospectus and management fee" or "adjust the pricing of the fund to the management strategy that is in fact followed, and at the same time amend the fund rules and prospectuses to describe the management strategy more clearly".

(18) DNB maintained that the fund had been managed in line with the investment mandate and risk profile, but chose nonetheless to comply with the order. In its response to the FSA, DNB held that the company had increased the relative risk in the fund significantly, changed the fund's internal investment instructions and reduced the management fee from 1.8 to 1.4 percent of the capital. Another reason given for the price change was the general market situation.

(19) **The legal proceedings**

(20) In January 2016, the Consumer Council gave notice of its intention to bring an action claiming partial repayment of part of the management fees charged to unitholders in the DNB Norge funds for the period 2005–2015 due to defective management. DNB disputed the claim.

(21) On 21 June 2016, the Consumer Council brought a class action before Oslo District Court on behalf of the unitholders in the DNB Norge funds during the period 2010–2014. The Consumer Council claimed repayment of parts of the management fee, as well as compensation for loss of availability of funds (*avsavnstap*). The claim was limited upwards to NOK 690 761 112 with the addition of default interest. During the preparatory phase in the District Court, the claim was changed to repayment of up to 1.5 percent of each unitholder's investment per year. Compensation was also claimed for loss of availability of funds. DNB responded by requesting a judgment in its favour. DNB also disputed that the conditions for bringing a class action were met.

(22) Through an order of 6 January 2017, Oslo District Court decided to hear the class action as a withdrawal action in accordance with section 35-7 of the Dispute Act. DNB's appeal against this order to Borgarting Court of Appeal and further appeal to the Supreme Court were dismissed, see HR-2017-1668-U.

(23) Since the class action is brought as a withdrawal action, it does not require registration of class members. Unitholders that have decided not to participate have had the opportunity to withdraw from the action in accordance with section 35-8 of the Dispute Act and been entered in a withdrawal register. At the time of the Court of Appeal's judgment, 89 unitholders had withdrawn. No further withdrawals have been registered during the Supreme Court proceedings.

(24) Oslo District Court gave judgment on 12 January 2018 in favour of DNB. Costs were not awarded. The District Court found that the unitholders had received the level of active management to which they were entitled. Crucial to the District Court was that the management created a genuine possibility of outperformance after expenses, and that this, in the District Court's opinion, was in line with the investment mandate.

(25) The Consumer Council appealed the judgment to Borgarting Court of Appeal. The Court of Appeal gave judgment on 8 May 2019 with the following conclusion:

> "1. **DNB Asset Management AS will pay to each class action member 0.8 percent of the member's unit capital per year for the period 1 January 2010 to 31 December 2014.**
>
> 2. **DNB Asset Management AS will pay to each class action member an amount equal to the actual return that the member has lost during the period 1 January to 31 December 2010 to 31 December 2014 due to unlawful charging of amounts as set out in item 1 of the conclusion.**

3. **DNB Asset Management AS will pay costs in the Court of Appeal of NOK 5 300 651 – fivemillionthreehundredthousandsixhundredandfiftyone – to the Consumer Council within 2 – two – weeks of the service of this judgment.**

4. **DNB Asset Management AS will pay costs in the District Court of NOK 8 898 713 – eightmillioneighthundredandninetyeightthousandsevenhundredandthirteen – to the Consumer Council within 2 – two – weeks of the service of this judgment."**

(26) The Court of Appeal found that the unitholders had not received the active management to which they were entitled. The Court of Appeal did not share the District Court's view that the content of the investment mandate and concluded that the level of activity during the class action period had been lower than what the unitholders had reason to expect based on the investor information taken as a whole and the level of the management fee.

(27) The awarded price reduction of 0.8 percent per year of each unitholder's investment equals approximately NOK 286 million for the class action period, or approximately NOK 1590 per unitholder. In addition, the compensation for loss of availability of funds constitutes NOK 63 million.

(28) DNB Asset Management AS has appealed the judgment to the Supreme Court. The appeal concerns the judgment as a whole and challenges both the application of law and the findings of fact. On 30 August 2019, the Supreme Court's Appeals Selection Committee granted leave to appeal, excluding the issue of compensation for the time value of money. Before the Supreme Court, DNB has abandoned its alternative submissions on passivity, lack of complaints and time-bar. As far as leave to appeal is granted, the case stands as it did in the lower instances.

(29) **The parties' contentions**

(30) The appellant – *DNB Asset Management AS* – contends:

(31) Both during and prior to the class action period, the DNB Norge funds have been professionally and appropriately managed within the scope of the investment mandate laid down in the fund rules and other investment information. Thus, the fund management has not been carried out in a way that may justify a price reduction.

(32) The obligation of a fund manager involves a duty of best efforts. The unitholders carry the risk pertaining to the actual outcome. What can be required of the manager is that he use adequate efforts to realise the fund's investment objectives within the scope of the investment mandate.

(33) The funds were to be managed actively. The parties also agree that outperformance cannot be obtained unless the composition of the fund's share portfolio deviates from the benchmark index.

(34) The Securities Funds Act contains no specific minimum requirements for the level of deviation or relative risk for actively managed funds. However, it follows from the obligation to act in accordance with rules of conduct in section 2-15 that an actively managed fund must be managed to give the unitholders a genuine possibility of outperformance after expenses. This is also reflected in the FSA's practice.

(35) Requirements of deviation and relative risk beyond this must have a basis in the investment mandate of the individual fund. No normal expectations can be laid down for relative risk or for the level of activity, as the Court of Appeal has assumed. Nor do any general industry standards apply that make such requirements.

(36) If the manager deviates considerably from the benchmark index to obtain high outperformance, the unitholders risk considerable underperformance as a result. Different investors have different preferences with regard to the level of risk to which they want to be exposed relative to the benchmark index. Such a management strategy must therefore be clearly reflected in the fund's investment mandate.

(37) A high level of risk is not a goal in itself – it contributes, on the contrary, to increased uncertainty. Whether or not a fund overperforms over time depends on the quality of the management. Quality – accuracy in the manager's assessments – may be obtained by use of extensive resources in the analyses applied, but cannot be guaranteed.

(38) The historical performance of the DNB Norge funds shows that the management has been suited to create good outperformance after expenses, even with low relative risk. The management strategy has been the same all along. The manager's efforts cannot be measured from the level of deviation from the benchmark index, indicated by the target figures for active share and relative risk. These target figures say nothing about either the quality of or the resources put into the management.

(39) The management fee charged to the unitholders was well within normal market rates for actively managed funds. Further, no correlation has been demonstrated between price and relative risk in actively managed funds, and the unitholders could not have had any reasonable expectation regarding the level of active management based on the price.

(40) In addition, a majority of the unitholders in the DNB Norge funds have in fact benefited from excess returns on their investments for the period 2005–2015 taken as a whole. The lack of outperformance in 2010–2014 is solely due to the managers' failure to make the right investment decisions in this particular period. It is undisputed that this risk is for the unitholders' account.

(41) Moreover, immediately prior to the class action period, external assessments of the management were carried out supporting the view that there was no need for changing the management strategy. In 2010, DNB Norge was ranked one of Norway's best funds. Also, dialogues with the supervisory authorities in 2007 and 2011 provided no evidence that the fund management ought to be changed.

(42) Even if the fund management did not comply with the fund rules, it would not justify a price reduction for the unitholders. Non-compliance with the duties of the fund manager is a necessary, but not a sufficient, condition for a price reduction under general contract law. In addition, it is a requirement that the non-compliance has resulted in a monetary loss. This requirement is not met here. The value of the service received was the same as it would have been if the fund had been managed with a higher relative risk.

(43) During the class action period, the industry operated with two price segments, one for index funds and another for actively managed funds. It is the analytical work involved in the management activities that forms the basis for the price differentiation. Taking a larger

relative risk does not require more analytical work. Therefore, this cannot substantiate that the condition of a monetary loss is met.

(44) Under any circumstance, the price reduction must be smaller. The calculation must include the actual resources put into the management and the prospects of outperformance. It cannot be assumed that the level of relative risk is the only factor influencing the value of the service provided.

(45) DNB Asset Management AS invites the Supreme Court to pronounce the following judgment:

> **"1. Judgment is given in favour of DNB Asset Management AS.**
>
> **2. DNB Asset Management AS is awarded costs in the District Court, the Court of Appeal and in the Supreme Court."**

(46) The respondent – *The Consumer Council as a group representative for the unitholders in DNB Norge funds* – contends:

(47) Under the agreement with the unitholders, DNB had undertaken to provide active fund management. This involved a duty to make professionally expedient analyses by identifying shares that would perform either better or worse than the benchmark index. The Consumer Council does not have any objections to the analytical work *per se*. The weakness of the management lies in the fact that DNB operated with a lower relative risk than it had undertaken. During the class action period, the fund's composition was almost identical to that of the benchmark index.

(48) Which duty DNB had undertaken towards the unitholders, depends on the interpretation of the investor information – primarily the fund rules and the prospectus – that constitutes the agreement. If the contents are unclear, it must be borne in mind that one of the parties is a consumer. The investor information is drafted unilaterally by DNB, and the agreement regulates a service based on trust whose content a consumer is only to a small extent able to assess. The high management fee also generates a strong need for the unitholders as consumers to be able to measure and verify whether they have received the serviced that they have paid for.

(49) It is undisputed that DNB has assumed a duty of best efforts, and that the unitholders carry the risk associated with the fund's performance. When assessing the duty of best efforts, the unitholders' reasonable expectations with respect to the management are paramount. It also follows from the rules of conduct provision in the Securities Funds Act that the unitholders' interests must be safeguarded in the best manner possible, and this is only a minimum requirement.

(50) Furthermore, the parties agree that DNB had an obligation under the agreement to actively manage the DNB Norge funds. To outperform the benchmark index, the investment of the portfolio must deviate from it. Without deviating positions, it is impossible to obtain outperformance.

(51) The target figures active share and tracking error are good indicators of the level of active management. Therefore, these figures are a natural starting point for the assessment of whether DNB has fulfilled its obligations under the agreement.

(52) The investor information gave the unitholders reason to expect the same level of active management as that of other active funds. The fund rules and the prospectus must be interpreted to imply a medium high level of active fund management. It is essential that the investment objective set out in to the fund rules was to give "the highest possible relative performance".

(53) The high management fee implied that the unitholders' interests would not be safeguarded by a fund closely tracking the benchmark index. High costs and a low level of active management create a threshold for outperformance that by far exceeds the threshold prevailing in the context of a higher level of active fund management.

(54) Further, the resources put into the management cannot be measured solely by assessing historical performance figures. Whether or not the duty of best efforts is fulfilled depends on the manager's performance from time to time.

(55) During the class action period, no actively managed funds in Norway, the Nordics or Europe have been managed with a level of activity in the fund management even remotely as low as the DNB Norge funds. This shows that DNB did not operate in accordance with industry practice.

(56) The fund management during the same period was also not in accordance with DNB's own internal investment instructions stating that the fund was to be managed with a normative tracking error between 2 and 4 percent. The internal steering documents also shed light on DNB's own perception of its investment mandate.

(57) DNB has breached its obligations under the agreement, and the unitholders are entitled to a price reduction in accordance with general rules of contract law. There is a correlation between price and level of activity, and the benchmark tracking management provided by DNB had a lower value than the agreed service. It is not necessary to demonstrate a market price for the non-compliant fund management. In the absence of a market price, the courts must measure the price reduction in its discretion.

(58) The Court of Appeal has made a discretionary calculation of the price reduction taking into account that DNB carried out analytical work during the relevant period, but also that the unitholders were deprived of the possibility of outperformance that they had paid for. Even with a price reduction of 0.8 percent of the invested capital per year, DNB Norge would still involve the highest active costs compared to all other active funds. The significant income that DNB has earned from its non-compliant management of the funds, must also be taken into account.

(59) The Consumer Council invites the Supreme Court to pronounce the following judgment:

> **"1. The appeal is dismissed.**
>
> **2. DNB Asset Management AS will pay the costs of the group representatives in the Supreme Court."**

(60) **My opinion**

(61) The question to be answered is whether the unitholders are entitled to a price reduction because the DNB Norge funds, during the class action period, were not managed in accordance with the agreement entered into.

(62) First, it must be established whether DNB's performance was defective. In this regard, the agreements entered into must be interpreted to determine the legal obligations that DNB had undertaken towards the unitholders. Essential in this regard is the content of the fund rules and other investor information forming the basis for the unitholders' subscription of fund units.

(63) If the management of DNB Norge funds did not comply with the agreement, it must also be established whether the conditions for a price reduction are met, and how a possible price reduction should be calculated.

(64) Before I address these questions further, I will give a brief presentation of the regulation of fund management in the Securities Funds Act. I will also take a closer look at the nature of the relevant agreement and the principles under which it must be interpreted.

(65) **The regulation of securities funds and securities fund management**

(66) I start by mentioning that the current Securities Funds Act entered into force on 1 January 2012 and was thus not applicable during the first part of the class action period. The provisions relevant to the case are a continuation of previous provisions without substantive amendments. I will therefore in the following only refer to the current Securities Funds Act.

(67) A securities fund is an independent pool of assets resulting from capital contributions made by an undefined group of people against the issuance of units in the fund. The fund is an independent legal entity, but does not have any corporate bodies apart from the unitholders' meeting, which mainly discusses changes to the fund rules. The law provides that necessary functions – including management of the pool of assets on behalf of the unitholders – must be exercised by a management company with a licence to engage in securities fund management under section 2-1 of the Securities Funds Act.

(68) The organisational structure is mandatory and applies to all securities funds, see section 1-3. The marketing and sale of units in the fund is considered as part of the fund management, see section 1-2 (3). The Securities Funds Act also regulates the activities of the management company, through rules regarding placement of assets, liquidity and risk spreading, as well as rules regarding mandatory information to unitholders. The FSA supervises the activities, see section 11-2.

(69) It follows from the preparatory works that the strict regulation of securities fund management is in the interest of the unitholders, see Proposition to the Storting 149 L (2010–2011) page 11:

> **"An important consideration in the regulation of securities funds is to protect the unitholders, so that saving and investment in funds becomes a suitable alternative, particularly for consumers and non-professional investors. The regulation is meant to ensure that the unitholders receive correct and understandable information about each fund, a sensible risk spreading on the securities and markets in which the fund invests, a correct valuation of fund units, safe storage of assets in the fund and the possibility of swift and simple redemption of funds units."**

(70) A key factor in the relationship between the management company and the unitholder is the fundamental obligation to act in accordance with rules of conduct, see 2-15 of the Securities Funds Act. According to this provision, the management company "shall carry on its activities in accordance with rules of conduct" and "ensure that it safeguards the interests of securities funds and unitholders and the integrity of the market in the best possible manner".

(71) The Securities Funds Act makes no requirements with respect to the content of active management or the level of risk exposure involved in active management. Hence, the specific obligations undertaken by the management company towards the unitholders must derive from the agreement between the parties. The regulation of the management activities constitutes nonetheless an important framework for the contractual relationship between the management company and the unitholder.

(72) **The nature of the agreement and principles of interpretation**

(73) A fund management agreement is entered into through the unitholder's subscription of units in the fund. Under the agreement, the management of this investment is left with the management company in return for an annual fee.

(74) No individually negotiated management agreement is entered into. However, it follows from section 8-4 subsection 1 of the Securities Funds Act that the management company shall provide key investor information prior to the subscription of units. The key investor information shall include a brief description of the investment mandate and the fund's risk and reward profile, see section 8-3 subsection 2 (2) and (5).

(75) The fund rules shall contain rules relating to the investment of the securities fund's assets and risk profile, see section 4-4 subsection 1 (2). The fund rules constitute the main steering document for the fund management and are part of the agreement with the unitholder, see Proposition to the Storting 149 L (2010–2011) page 132.

(76) The management company shall also publish a prospectus for each securities fund containing "the information needed in order to make a well-founded judgment of the fund and the risk associated with investing in the fund" and give a "clear and comprehensible explanation of the fund's risk profile", see section 8-2 subsection 1. The fund rules must be enclosed with the prospectus.

(77) Together with the prospectus, the fund rules constitute the framework for the fund's management, and both documents must be regarded as integrated parts of the agreement between the parties.

(78) The nature of the agreement entails that it must, as a starting point, be interpreted objectively. The Securities Funds Act's requirements with regard to the content of the fund rules and other investor information also entail, in my opinion, that it is crucial for the interpretation how potential investors will understand the terms and expressions used. As for funds that are meant for small savers and non-professional investors, like those in the case at hand, in-depth knowledge of more advanced financial or technical terms and expressions cannot be expected.

(79) The regulation of the management company's role and function and the interests that the Securities Funds Act is generally meant to protect are also significant in the interpretation.

Apart from that, the objective of the fund and the unitholders' reasonable expectations – also in light of any industry practice – are relevant.

(80) From these starting points, I will turn to the interpretation of the agreement between DNB and the unitholders.

(81) **Was the management of the DNB Norge funds compliant with the contract?**

(82) ***Starting points***

(83) The Consumer Council contends that the services during the class action period were non-compliant with a lower level of activity and with a smaller relative risk than what DNB had undertaken. The Consumer Council also contends that it followed from the agreement with the unitholders that the fund was to be managed with a medium level of activity, or with a medium level of relative risk, and, as a result, that the management company did not have a mandate to manage the fund so as to closely track the composition of the benchmark index.

(84) DNB agrees that there is a lower limit for the level of activity, but contends that its obligation under the agreement with the unitholders was to manage the funds in a way that created a genuine possibility of outperformance of the benchmark index after expenses. The investment strategy was to provide high-quality management and thereby provide the unitholders with good outperformance maintaining low relative risk. In DNB's opinion, this type of management was within the framework of the agreement.

(85) For purposes of the class action, the parties have agreed to apply that version of the fund rules and the investor information that is most favourable to DNB during the class action period. As DNB has chosen to take DNB Norge's investor information as per November 2011 as its starting point, this forms the basis for the assessment of whether the management complied with the relevant contractual framework.

(86) ***Which management had DNB undertaken to carry out?***

(87) *The investor information*

(88) I will first consider the fund rules and the prospectus.

(89) Article 3 of the fund rules describes the fund's "investment strategy, character etc.". It is initially set out that the fund's capital is invested in a sub-fund classified an equity fund. The fund's overall goal is formulated as follows:

> **"The objective of the fund management is to obtain the highest possible relative performance.**
>
> **The fund's benchmark index is the Oslo Børs Benchmark Index (OSEBX)."**

(90) The wording "highest possible relative performance" can only be interpreted to mean that the objective is to achieve the highest returns possible as compared with the benchmark index. Considered in isolation, a non-professional investor with such an investment objective will not have any reason to assume that the fund's investment portfolio closely tracks the benchmark index or is managed with a particularly low level of relative risk.

(91) However, the investment goal must be read in context with the stated investment strategy, indicating how the fund's goal is to be reached. DNB has emphasised the following statement in article 3 of the fund rules, describing the composition of the fund in more detail:

> **"The sub-fund has a composition that largely reflects the total market. Most of the capital is invested in a broad selection of the dominant companies listed on Oslo Børs. The portfolio is well spread among companies and industries."**

(92) DNB contends that the investment strategy set out in the fund rules clearly communicates that the fund management will largely correspond to the benchmark index and thus involve a low relative risk. And, since "dominant companies" refers to the most traded companies on Oslo Børs, this entails that the fund's portfolio will also overlap with the benchmark index. In DNB's opinion, this is further clarified by the formulation that the fund's composition "largely reflects the total market", as the Oslo Børs Benchmark Index reflects the same total market.

(93) I agree with DNB that the formulation of the investment strategy gives clear instructions on how to interpret the objective of achieving the "highest possible relative performance". Oslo Børs is a relatively small and concentrated market, and the companies included in the Oslo Børs Benchmark Index constitute the predominant part of the total market value. Since the fund was to "reflect the total market" and most of the investments were to be made in "the dominant companies", it limited the managers' freedom to deviate from the benchmark index. Although the "total market" comprises more than the around 60 companies included in the Benchmark Index during the class action period, the unitholders could not, in light of the investment strategy, have a reasonable expectation that the composition of the fund's portfolio would differ substantially from the benchmark index, or that the fund would be managed with a particularly high level of relative risk.

(94) On the other hand, the investment mandate's formulations can hardly be interpreted to mean that the investment strategy was to track the benchmark index, or that the management strategy was to create outperformance only by deviating slightly from the benchmark index to keep the relative risk as low as possible. I repeat that the starting point for the interpretation is how a non-professional investor would understand the formulations used.

(95) Even with the limitations that derive from the references to the total market and the dominant companies on Oslo Børs, I find that the investment mandate is formulated rather widely. The portfolio was to be well spread between companies and industries, and the formulation that "most of the capital" would be invested in dominant companies leaves room for discretion and says only that most of the portfolio would be invested in this way.

(96) Article 3 of the fund rules states that the fund's risk profile is high. However, this formulation must be interpreted to point at the absolute risk, and therefore sheds no light on the level of relative risk or the management itself over and above what follows from the fact that the capital would be invested in shares.

(97) The fund's prospectus repeats the investment goal set out in the fund rules, although it uses the term "performance" instead of "relative performance", a difference that, in my view, is not significant. In the event of any conflict between the fund rules and the prospectus, the fund rules prevail.

(98) The investment strategy is also repeated in the prospectus. In addition, it contains a formulation that the fund "apart from this [may] invest up to 20 percent in foreign companies that are not listed or traded in a Norwegian market". In a written submission to the Supreme Court, DNB portfolio manager Odd Einar Lillebostad has stated that this cap was introduced to equalise all funds in the fund class Norwegian funds, but that this right is scarcely exercised in practice. However, no such cap is set out in the prospectus itself. On the other hand, this formulation could not create any expectation to the effect that the right would be exercised at all times.

(99) In addition, the prospectus contains the following description of the management:

> **"Our own analyses form the basis for the investment decisions that are taken. Through a well-defined and structured investment process, the management team analyses macroeconomic trends, sectors and companies, with the aim of generating investment ideas that generally outperform the benchmark index. Most of the capital is invested in companies listed on Oslo Børs."**

(100) Although the wording repeats that most of the capital is invested in companies on Oslo Børs, I agree with the Consumer Council that this description created an expectation that the fund's composition would reflect the managers' own analyses. This is particularly supported by the fact that the objective of the management is described by the goal of generating investment ideas that "generally outperform the benchmark index".

(101) Although the key information may shed light on the interpretation, I cannot see that the key information concerning DNB Norge in 2011 is relevant in the case at hand.

(102) I find no support in the key investor information for interpreting the agreement as DNB contends – that the obligations would be met if the management had been arranged to create a genuine possibility of outperformance after expenses. When the investment strategy described in the fund rules and in the prospectus is considered in context – and in light of the objective of the highest possible relative performance – I find that a more likely interpretation is that DNB was to provide active fund management with a relative risk which, measured against the benchmark index, was neither in the upper nor the lower end of the scale.

(103) The Court of Appeal concluded that DNB had assumed an obligation to provide management where the "fund's investment portfolio over time deviated significantly from the benchmark index". This formulation, reflects my view of the content of the investor information.

(104) *DNB's own opinion of the scope of the management*

(105) In his written submission to the Supreme Court, portfolio manager Lillebostad has presented the background to the management strategy that was followed by the DNB Norge funds. DNB, being a major player, considered it important to divide its portfolio of funds into various product groups with various risk classes. DNB Norge was a broad fund with relatively low risk measured against the benchmark index. It was a fund suitable for investors seeking the possibility of outperformance without risking a large underperformance, and the fund management was conducted accordingly.

(106) As I interpret the content of the fund rules and the other investor information, the management approached described here has not been clearly expressed. If the main objective of DNB's investment strategy was to keep the relative risk low in order to protect the

unitholders against underperformance, this should have been stated more clearly in the fund rules and the other investor information. Here, I emphasise that the investor information was drafted by DNB. Fund management is a specialised service, and retail and non-professional investors have little other choice than to trust that the information provided regarding the individual fund is adequate and that the manager will safeguard the unitholders' interests in the best possible manner.

(107) *The significance of the management fee in light of the fund's goal*

(108) The parties agree that the annual management fee during the class action period of 1.8 percent of the capital was within the range of ordinary market prices for actively managed funds. Nor is it disputed that the unitholders, considering the price, had a clear expectation to receive active fund management as opposed to index management.

(109) Overviews have been presented showing relatively large price variations among actively managed funds. However, no direct correlation has been demonstrated between the management fee and the level of active management. Against this background, I agree with DNB that the unitholders could not have any reasonable expectation of a specific level of active management or relative risk based on the price alone.

(110) However, this does not mean that the price is irrelevant in the clarification of DNB's specific obligations under the agreement.

(111) In addition to the fund's risk profile, the management fee is generally an important piece of information for an investor who wishes to compare various securities funds offered in the market. The price will thus be one of several factors determining an investor's expectations to the service.

(112) As mentioned, during the class action period, DNB also offered index funds with an annual management fee of 0.3 percent. For the active management to be profitable at all, the fund first had to outperform by a margin exceeding the actively managed funds the index funds. As far as DNB was concerned, this price difference was 1.5 percent of the investment capital during the class action period.

(113) The very objective of buying active management services is, as mentioned, to obtain better performance through the manager's beating the benchmark index. From the unitholders' point of view, it is the possibility of such outperformance that justifies the price difference, and it is the sole motivation for choosing actively managed funds instead of index funds. Actively managed funds that in fact track the benchmark index therefore give the investor a reason to consider whether he or she would be better served by choosing an index fund.

(114) As stressed by DNB, the unitholder does not benefit from the risk of underperformance in itself. However, the objective of active management – to create outperformance – may only be fulfilled if the manager takes deviating positions that in aggregate beat the benchmark index. At the same time, deviations that enable outperformance involve an exposure to relative. In my opinion, it follows that choosing active management implies accepting such a risk exposure tin order to have the possibility of obtaining outperformance.

(115) For funds with a composition similar to that of the benchmark index, high expenses will be an impediment to outperformance. The simple explanation for this is that excess returns can only

be achieved on that part of the portfolio that differs from the composition of the benchmark index, while the management fee is calculated on the basis of the entire capital invested. The correlations between the price and the level of deviations from the benchmark index – which retail and non-professional investors cannot be reasonably expected to know – generally suggest that the investor information must be formulated in a way that enables the customers to assess whether they will get the risk exposure they seek by investing in the relevant fund.

(116) When interpreting the agreement in the case at hand, some importance must be attached to the fact that price itself did not give reason to expect that the level of activity in the management and the relative risk exposure would deviate considerably from other comparable funds in the same price segment.

(117) *The significance of section 2-15 of the Securities Funds Act and rules of conduct*

(118) As mentioned, the management company must carry on its business activities in accordance with "rules of conduct" and thereby ensure that the unitholders' interests are safeguarded in "the best possible manner", see section 2-15 of the Securities Funds Act. The Consumer Council contends that this provision, too, is relevant for the interpretation of the agreement.

(119) In practice, the obligation to act in accordance with "rules of conduct" set out in section 2-15 is closely connected to the expectations that the investor, in the contractual relationship, may reasonably have to the fund management. Industry standards may express the further implications of this obligation. However, no standards have been developed that articulate concrete substantive requirements applicable to actively managed funds.

(120) As regards the content of the obligation to act in accordance with rules of conduct, the preparatory works state that "[t]he supervisory authorities' opinion at any time of what the rules of conduct are, will be guiding to the contents of the standard", see the comments to the similar provision in the 1981 act in Proposition to the Odelsting No. 15 (1993–1994) page 39. No general rules or statements containing specific requirements with respect to the portfolio management of actively managed funds have been issued by the supervisory authorities...

(121) DNB refers to the FSA's correction order and maintains that a key factor in the assessment of DNB's management is whether it gave the unitholders a genuine chance of obtaining outperformance after expenses. However, when reading the statements in the correction order in context, I cannot see that the FSA has intended to formulate a general minimum requirement of a genuine chance of obtaining outperformance after expenses.

(122) As I interpret the fund rules and other investor information, DNB had nonetheless undertaken a wider obligation towards the unitholders than what DNB contends. Against this background, it is not necessary for me to elaborate on what may constitute minimum requirements applicable to the composition of the investment portfolio of actively managed funds.

(123) *Other aspects of the interpretation of the agreement*

(124) DNB has mentioned that the unitholders during the entire class action period have been kept informed of the fund management and its results as they emerge.

(125) I cannot see that the subsequent conduct by the parties is relevant for the clarification of the obligations under the agreement.

(126) *Summary*

(127) In my opinion, DNB's obligations under the agreement with the unitholders may be summarised as follows:

(128) The fund rules and other investor information implied that DNB was obliged to manage the DNB Norge funds with a relative risk measured against the benchmark index that, over time, was neither in the upper nor in the lower end of the scale. This entailed that the fund's investment portfolio, over time, had to deviate considerably from the composition of the benchmark index to give the unitholders the financial risk – and thus the possibility of outperformance – to which they were entitled. The size of the management fee, too, suggested that the unitholders had a reasonable expectation of the fund being managed in such a manner. Based on the wording of the investor information, the unitholders did not have any reason to expect that the investment portfolio would in terms of deviations from the benchmark index differ materially from that of other comparable actively managed funds.

(129) **Which management did DNB provide during the class action period?**

(130) ***The starting point for the assessment and the significance of various target figures and criteria for actively managed funds***

(131) I will now discuss how the DNB Norge funds were in fact managed during the class action period, and whether the management was carried out in accordance with the agreement with the unitholders. I start by giving a brief presentation of the starting points for this assessment and of the use of various target figures or criteria for assessing the level of active management.

(132) Fund management is largely based on professional knowledge and discretion. In principle, this means that the court should be careful about challenging the managers' professional analyses. The issue in the case at hand is, however, whether DNB has acted in accordance with the agreement with the unitholders. It is thus not a question of reviewing the professional discretion exercised by the managers. I cannot see that there is any basis for exercising restraint in the determination of whether DNB has provided its management services in accordance with the agreement.

(133) The use of various target figures to determine the level of active management has been crucial in the case at hand. The Consumer Council's main view is that the level of deviation from the benchmark index – and thus the level of active management – in the day-to-day fund management can be measured by the fund's active share in addition to the relative risk, as the latter has been expressed through the target figure tracking error. The fund's active cost has also been highlighted as a suitable criterion for measurement.

(134) In their written submission before the Supreme Court, the expert witnesses – professors Petter Bjerksund and Trond Døskeland – have used the term active cost for the outperformance that must be created in the active share to earn back the management fee. Active share indicates the part of the share portfolio that at any given time has been invested contrary to the benchmark index.

(135) DNB contends that the various criteria in themselves are not suited to determine whether the manager's duty of best efforts has been fulfilled, but that a more nuanced and complex assessment is required. DNB has highlighted the scope and quality of the management carried out and the historical performance figures to support that the management has been carried out within the investment mandate.

(136) In my view, there is no reason to limit the assessment of the fund management to specific target figures or more quantitative criteria. Here, as in other contexts, the assessment of whether the duty of best efforts has been fulfilled in accordance with the agreement should be based on a broad assessment comprising a number of factors and circumstances.

(137) In my opinion, the criteria active share and relative risk – normally used to assess the level of active management – may be important factors, but historical performance figures and the more specific aspects of the management may also be key to the assessment.

(138) ***Individual assessment of DNB's management during the class action period***

(139) Calculations have been presented showing active share and tracking error for the DNB Norge funds during both the class action period and the preceding period. It is stated here that DNB Norge during the class action period had an average tracking error of 1.28 percent and an active share of 12.25 percent. These are very low figures, which in aggregate demonstrate a significant match between the fund's investment portfolio and the composition of the benchmark index.

(140) The Consumer Council has presented an overview showing similar figures for a number of actively managed securities funds during the period 2004–2013. In this overview, the DNB Norge funds have both the lowest active share and the lowest tracking error of all Norwegian funds. Presented overviews for the class action period show the same.

(141) Also overviews of actively managed funds in the Nordics for the period 2007–2016 shows that DNB Norge (I) was the fund with the lowest active share and tracking error. This overview also shows that the fund's active cost by far exceeded that of all Nordic funds in the overview during the same period. The various overviews say nothing about the investment mandates for the individual funds and must therefore be used with care. Nonetheless, I find that they clearly indicate that the management of the DNB Norge funds stood out with its very low level of deviation from the benchmark index. I add that DNB also in its internal guidelines applicable during the class action period had stipulated 2 to 4 percent as a normative tracking error goal.

(142) DNB's only explanation for the low target figures is that it considered the management to be in accordance with its investment mandate.

(143) DNB has referred to relative performance figures, both for the class action period and preceding period, and contends that the relative performance in aggregate implies that the management – despite the low target figures for active share and tracking error – gave the unitholders the management they had reason to expect.

(144) When assessing the performance figures as an indication of active management, one must bear in mind that individual deviations with both positive and negative results may equalise each other. The parties agree that such an equalising effect manifested itself during the class

action period. During the period 2005–2009, the management of DNB Norge gave an annual average outperformance of 2.13 percent after expenses. During the first two years of this period, the management fee was also somewhat greater – 2.0 percent. Considered in isolation, the performance during this period supports DNB's view that it is possible to obtain outperformance with a low active share and a low tracking error. At the same time, I agree with the Consumer Council that the results during this period to some extent must be seen in light of the financial crisis and its extraordinary effects. A large part of the outperformance – as much as 5.67 percent – relates to 2009, and contribution analyses show that almost half of the 25 most successful deviating positions during the period 2004–2014 were taken in 2008 and 2009, the years of the financial crisis. In my opinion, this shows that the performance figures for this period, which is also prior to the class action period, have limited value in the overall assessment.

(145) It is undisputed that DNB put considerable resources into the management of the DNB Norge funds, and the Consumer Council has not questioned the quality of the analytical work *per se*. As long as the efforts did not result in management involving a higher active share and relative risk, which DNB was obliged to provide under the agreement, this is also of less relevance.

(146) Altogether, I have concluded that the management provided by DNB during the class action period was not in accordance with the agreement with the unitholders, and that the service is therefore not in compliance with the agreement. To arrive at this result, I have most of all attributed weight to the fact that the DNB funds over time were managed such that only a small part of the investment portfolio varied from the composition of the benchmark index, and that the managers, systematically, took very low relative risk. The level of active management was therefore decidedly lower than what the unitholders had reason to expect based on the investor information provided, without DNB having stated any reason justifying this.

(147) **Are the conditions for a price reduction met?**

(148) A price reduction for breach of fund management agreements is not regulated in the Securities Funds Act. The claim must therefore be assessed based on general principles of the law of contract.

(149) When a non-compliant service has been provided, the contractual party is, as a starting point, entitled to a price reduction if the non-compliance results in a monetary loss. A price reduction is not conditional on the debtor's subjective liability. However, the requirement that the non-compliance must result in a monetary loss is also not absolute, and some rulings make way for taking more subjective value losses into consideration, see the Supreme Court judgment HR-2018-392-A, which concerned a price reduction under the House Building Act. A central consideration in the context of price reduction as a contractual remedy is the restoring of the balance of the contractual relationship.

(150) The parties agree that it is impossible to demonstrate a market price for the non-compliant service provided by DNB. The market contained two price segments, one for actively managed funds and one for passively managed funds. As mentioned, no clear correlation between the price and the level of relative risk in the management has been demonstrated to shed light on a possible alternative market value.

(151) In my opinion, this cannot be decisive for the right to a price reduction, as long as it is substantiated that the service, objectively, had a lower value for the unitholders than contractual performance would have had. In such cases, the monetary loss that the non-compliant service represented can only be assessed on the basis of discretion, see the Supreme Court judgment HR-2017-2102-A paragraphs 47 and 61.

(152) I find that a starting point for this assessment must be that the management provided by DNB during the class action period was much less active than what the unitholders had reason to expect. The high active cost – the impediment to outperformance created by the ratio between price and the active share – clearly suggests that the service entailed a monetary loss for the unitholders, although the results of the management are irrelevant. An informed investor that only sought a low level of active management, could have split his or her investment between an index fund and a more actively managed fund, and thus paid a reduced aggregate management fee. This indicates that a too low level of active management constitutes a monetary loss for the unitholder.

(153) I also attach some importance to the statement in DNB's group audit that there should be a reasonable correlation between the leeway in the management and the management fee for the individual fund. DNB had significant income from the management during the class action period, also when considering the resource input. The importance of not letting the non-compliant service remain unsanctioned should also be emphasised to some extent.

(154) Against this background, I find that the conditions for a price reduction are met.

(155) **Calculation of the price reduction**

(156) The further calculation of the price reduction must also be discretionary. The Court of Appeal calculated the price reduction by reducing the annual management fee by an amount equal to 0.8 percent of the assets.

(157) I agree that such a price reduction is appropriate. On the one hand, the price reduction takes into account that DNB has put in large resources during the period and to some extent has converted such analyses into deviating investment positions. On the other hand, the price reduction sufficiently reflects that the unitholders during the class action period did not receive the services to which they were entitled under the agreement.

(158) **Costs**

(159) The Consumer Council has won the appeal and is, according to the main rule in section 20-2 subsection 1 of the Dispute Act, cf. section 35-12 subsection 1, entitled to full compensation for costs in the Supreme Court. There is no basis for deviating from the main rule in section 20-2 subsection 3.

(160) The Consumer Council has submitted a statement of costs claiming a total of NOK 4 029 843 including VAT for the Supreme Court hearing. DNB has made no objections.

(161) The submitted costs claim is high. I find nonetheless, after an overall assessment, that the costs have been necessary and that the conditions for compensation in section 20-5 subsection 1 of the Dispute Act for accepting the claim are met. Here, I have emphasised the scope and complexity of the case. The Supreme Court hearing was held over more than six court days,

and the case has raised issues that have not previously been dealt with by the courts. I have also emphasised the fact that the financial aspects of the case have made it necessary to call for expert assistance. Around a fourth of the costs incurred in the Supreme Court related to such assistance. The costs of the use of internal experts in the Consumer Council are considered necessary and are compensated by NOK 250 000 under section subsection 1 of the Dispute Act. In my opinion, the legal fees of a total of NOK 3 024 608 for 1080 hours' work have also been necessary for an appropriate hearing of the case.

(162) I vote for the following

J U D G M E N T :

1. The appeal is dismissed.

2. DNB Asset Management AS will pay costs in the Supreme Court of NOK 4 029 843 – fourmillionandtwentyninethousandeighthundredandfortythree – to the Consumer Council within 2 – two – of the service of this judgment.

(163) Justice **Bergh:** I agree with Justice Steinsvik in all material respects and with her conclusion.

(164) Justice **Falkanger:** Likewise.

(165) Justice **Falch:** Likewise.

(166) Justice **Øie:** Likewise.

(167) Following the voting, the Supreme Court pronounced this

J U D G M E N T :

1. The appeal is dismissed.

2. DNB Asset Management AS will pay costs in the Supreme Court of NOK 4 029 843 – fourmillionandtwentyninethousandeighthundredandfortythree – to the Consumer Council within 2 – two – of the service of this judgment.