

THE SUPREME COURT OF NORWAY

On 22 March 2013, the Supreme Court pronounced judgment in
HR-2013-00642-S, (Case no. 2011/1938), Civil Case, Appeal from Judgment,

A

The Norwegian Consumer Council (Intervenor)

(Attorney John Christian Elden)

vs

DNB Bank ASA

(Attorney Anders Ryssdal)

The final section of the judgment.

The judgment is pronounced by the Supreme Court in Grand Chamber.

Full version (in Norwegian) is available on

<http://www.lovdato.no/cgi-wift/wiftldles?doc=/app/gratis/www/docroot/hr/hr-2013-00642-s.html>

(101) The central question in the case becomes *whether this risk associated with the investment and the characteristics of the products were communicated to A to a sufficient extent at the time the agreements were made.*

(102) The bank's initiative towards A began with a telephone call from the bank manager at X. What happened next is described in this manner by the Court of Appeals:

"For A, the whole thing started when he received a telephone call from the bank manager at X, who he knew and who invited him to have a cup of coffee. At a later meeting, Customer Adviser B was also present. The subject was A's finances, and investing in stock index bonds was presented as something of interest for him. The possibility of debt-financing was brought up. In the understanding of the Court of Appeals, the bank's approach to A was based on a desire to get him to expand his customer relationship with the bank.

A was then invited to the information meeting on 5 October 2000, where the bank presented in more detail the stock index bonds Global and Sektor. After a welcome from the bank manager, B made a short introduction. In her testimony before the Court of Appeals, she was, not unreasonably, unable to remember exactly which words she used. However, she had made an aide memoire for herself containing keywords for the meeting, and the Court of Appeals regards as fact that these keywords cover the message that was conveyed. It says among other things:

As stated, there are many approaches with respect to saving/investing.

The response I've heard perhaps most often when I ask what the fundamental objective is: HIGH RETURN – NO RISK!!!!

Achieving precisely that doesn't happen very often!!!

Except with what we are going to present today – we believe!

Here, at any rate, you don't have any risk!

And the possibilities for a good return are certainly there!

Then a presentation was made of Global and Sektor accompanied by a series of slides, which have been submitted to the Court of Appeals."

(103) One of the slides which it may be assumed the bank used during the presentation showed an illustration that 30 per cent of the principal was used to purchase options.

(104) The Court of Appeals concluded with respect to the bank's presentation of the products:

"For the Court of Appeals, it appears as though the bank in a rather one-sided manner emphasised the possibilities for gain from an investment and was little concerned with the fact that the gain could fail to materialise. Slides were displayed that showed that the historic trend in the indices in the previous six-year period had clearly pointed upwards, and an impression was given that this trend would continue. The loss guarantee was mentioned, but seems only to have been a small sub-item."

(105) The overall picture of the marketing at the meetings is thus that the products were presented to A as very profitable investments, which, as the Court of Appeals notes, "gave A an impression that this was an investment on which he could not lose." Even though the chance for a decline in

the markets was mentioned, it was the possibility for a continued strong increase in the stock markets that was particularly emphasised.

(106) A also received, as mentioned, information about the investment in two six-page prospectuses for Global and Sektor respectively. The quotes I will cite are from the prospectus for Global, but similar wordings were used in the prospectus that applies to Sektor.

(107) The prospectus for Global had the following heading:

"DnB Stock Index Bond Global 2000/2006 provides you a great profit opportunity – and the security of having the invested amount repaid at maturity!"

(108) At the beginning it stated:

"DnB Stock Index Bond Global 2000/2006 is based on a bond loan which the bank itself issues. Instead of paying interest on the loan, DnB buys various financial instruments which give you as investor access to a possible increase in the stock prices in some of the world's largest companies in the Euro zone, the U.S. and Japan.

In other words: The bond sees to it that you are assured of repayment of the nominal invested amount upon maturity on 24 November 2006, while the financial instruments ensure that you participate in the increase in the selected stock markets."

(109) It is stated that the bank believes the investment "will provide a great potential for price increase on your investment." It is shown that the trend in the stock indices in the last six years has been such that Global would have had an annual return of 19.74 per cent and Sektor 25.43 per cent.

The return potential was illustrated in a table that showed "Possible return scenarios" by investing NOK 100,000 in capital in Global. The scenarios ran from a 185.44 per cent increase in the index to a 20 per cent decline. Alongside the table appeared in small letters:

"The trend has been calculated on the basis of the final value of the Global index being set as an average price in the last 12 months of the investment period. Subscription expenses have not been included as these vary with the size of the amount subscribed. The table is only for illustration of possible trends. Historic return is no guarantee of future gain from the markets to which DnB Stock Index Bond Global 2000/2006 will be tied."

(110) Also included in the prospectuses was a supplementary review of the stock markets to which the stock index bonds were tied.

(111) The following is stated in the prospectus regarding debt-financing:

"If you desire even higher return potential on invested equity, you have an opportunity to debt-finance the investment. Since an investor is assured of repayment of 100% of the nominal amount at maturity, the investments can be mortgaged with a mortgage on the bond. Financing can be provided for 100% of the nominal invested amount, along with subscription and setting-up expenses, with a term identical to the bond.

If you debt-finance, and subscribe, for example, 200,000.00 at a fixed interest rate of 7.95%, the monthly interest amount will be NOK 1,325, after tax deductions the monthly interest cost will be NOK 954.00. You thus have an opportunity to participate in an investment in the stock market without using capital. The only thing you risk losing is the monthly interest costs – and that assumes that the stock markets we participate in stay the same or develop negatively over the next 6 years. From a historical perspective that is extremely unlikely."

(112) The beginning of the quote can give the impression that it is an advantage to debt-finance the investment. The information is meant to communicate that only the interest costs are invested by debt-financing, in contrast to capital investment, and that the relative profit thereby becomes greater. But this is, however, an inapt description of the consequences of debt-financing the products with regard to an ordinary bank customer. Rather than presenting debt-financing in a one-sided manner as an opportunity to increase the return, the information should have provided a realistic picture that such financing also results in greater risk of loss. In this context the last sentence in the quote – that from a historical perspective a decline is extremely unlikely – is particularly suited to draw attention away from the risk element in debt-financing.

(113) The bank has forcefully contended that there is no fundamental distinction between capital-financing and debt-financing of the investments, and that an agreement cannot be found to be unreasonable merely on the grounds that it is debt-financed. I am in agreement with that, in and of itself. As pointed out in, among other things, the C-judgment, Rt. 2012 page 355 paragraph 79, using capital also has a price. But the difference is that the real cost of the product increases with debt-financing, and the risk element thus becomes greater. Such financing also increases the complexity in the contractual relationship, something which has significance for the information the bank must provide the customers. For A's part, capital-financing was moreover not an alternative. He was dependent on loans to be able to invest in the products. The bank understood this.

(114) The information connected with debt-financing has other defects as well. I point to the next to last sentence in the quoted passage about an investor only risks losing the monthly interest costs if "*the stock markets we participate in stay the same or develop negatively over the next 6 years.*" The parties agree that if A were to have interest outlays and expenses covered, the *indices* would have to increase on average by more than 7.47 per cent each year of these six years. The sentence is therefore misleading, as an impression is given that the investment would be profitable as long as the stock markets did not decline.

(115) A table has also been included in the prospectus which shows "the return that can be achieved with different trends in the stock market". The assumption is 100 per cent debt-financing with the same fixed interest as A was offered. The table shows correct figures for what would be paid out "at maturity in NOK". But otherwise there are several errors in the table. They result generally in the return being set too high for the scenarios that show little growth in the index, and too low for the scenarios that show large growth in the index.

(116) Among other things, the table shows that if the index increases by 50 per cent in the course of the six years, i.e., with an annual growth of around 7 per cent, an investor will have a net return of NOK 39,985 at maturity and an annual return of 7.37 per cent. This is wrong. The correct result was that he would have had a net return of NOK 542 and an annual return of 0.21 per cent. Even with a 50 per cent increase in the indices, the return would thus be minimal, in contrast to the impression given by these figures in the prospectus.

(117) For Sektor there were also calculation errors, but less serious ones. For example, net return at 77 per cent was stated at NOK 79,144 and annual return at 12.74 per cent. The correct figures were NOK 35,937 and 11.46 per cent.

(118) I have found no reason to attach importance to the errors in the table which showed too low a return with a large increase in the indices. Even if the focus among the investors certainly has been on what they would earn with an increase, the figures that show the assumptions for a return being achieved at all are important nonetheless. I therefore find it hard to see that the errors that resulted in figures that were too negative can outweigh the errors that went the opposite way.

(119) In addition to a prospectus and invitation to subscribe, A was informed of the possibility for a return in the so-called "*loose sheet*" that he received in connection with the bank's meeting about the stock index bonds. The sheet showed the return potential of investing NOK 500,000 in Global. The same type of error occurs here as in the prospectus. In addition, "break even" (the point where the growth in the indices is such that the return covers the costs) is stated to be 5.29 per cent annual increase in the index. This was wrong. The indices as mentioned had to increase by more than 7.47 per cent per year to yield a profit for A. This was also the only place in the written material where "break even" with debt-financing was expressly quantified.

(120) Both the prospectus and the loose sheet thus contained errors that made the investment appear to yield a return at a lower increase in the indices than what was correct. This is a circumstance of central importance for the risk assessment. The bank has contended that the errors were partially obvious, something which would reveal itself upon comparison with the correct figures that had been included. I cannot agree with this. The prospectuses were used in the marketing without the bank's employees themselves having discovered the errors. And neither at the Board of Complaints for Consumers in Banking and Finance Matters nor at the District Court were the errors entirely uncovered, despite a comprehensive hearing of the case. It cannot thus be expected that an ordinary bank customer would discover them.

(121) I move now to *the overall assessment* of the contractual relationship.

(122) The question is whether the agreements between A and the bank – seen against the background of the circumstances surrounding the making of the agreements and the content of the agreements – are affected by the Norwegian Agreement Act, § 36. As I have pointed out, consideration must be given in this assessment to the fact that the agreements involved a speculative investment, where the profit was dependent on developments in the stocks to which the indices were tied. The fact that the stock market did not develop as assumed cannot lead to subsequent revision of the agreements.

(123) I note further that this type of product can still be legally offered – after all the attention there has been about these cases – provided that the information is adequate, see the Norwegian Disclosure Obligation Regulation. Composite or structured products have also been on the market for a long time and have been discussed frequently in the media and are well known to the regulators. That also applies to debt-financing of the products. Based on an overall assessment of the agreements between A and the bank, and despite the objections that I have pointed to concerning the balance in the contractual relationship, I have come to the conclusion that there is no basis for setting aside the agreements under § 36 of the Agreements Act solely on the basis of their content. A different matter is the fact that the balance in the contractual relationship has significance for the information which the bank had to provide about the products.

(124) Agreements regarding complex financial instruments that are made with consumers without special prior knowledge impose special requirements on those who offer these products. The requirements are stricter today than they were in 2000. But Section 9-2, second paragraph, of the Norwegian Securities Trading Act, requiring that the information must be adapted to an investor's experience, and Article 5 of the Consumer Agreement Directive, requiring that written terms and conditions shall "be worded in a clear and understandable manner", also applied in 2000. And the core of the requirement for good business practice was the same under the Securities Trading Act of 1997 as under current law, see the Fokus Bank judgment, Rt. 2012 page 1926, paragraph 49.

(125) A was a non-professional investor. It was the bank that contacted him and suggested investing in the products. The bank's disclosure obligation must therefore – in 2000 as well – be

evaluated strictly. It does not mean a requirement that all conceivable situations must be described. But in the sale of risky and complex products to non-professional investors, the bank must assure itself that the customer understands the content of the transaction he is entering into, and not provide misleading or erroneous information about important circumstances of significance for the investment decision. In the Fokus Bank judgment the information requirement is specified in this manner in paragraphs 51 and 52:

"The bank was obligated to provide the necessary information about the financial product, among other things in light of the customer's investment experience.

Among the required information must be included information about the risk that is connected with an investment, see Rt. 2000 page 679, at page 688. ..."

(126) The bank's marketing was based on the extremely favourable trend that had existed in the stock market in the last few years. It is certainly the case that in the prospectuses a balanced review was also provided of the prospects for growth for the stock markets in question. But the other marketing did not reflect this. Global and Sektor were sold by the bank as extremely safe and favourable investment opportunities, and debt-financing by the bank was offered and recommended.

(127) As the bank has pointed out, there was generally great confidence at this time in continued growth on the stock exchanges. Various newspaper clippings have been submitted which show this. The media recommended investing in stock index bonds, and that also applied in part to debt-financing of such investments.

(128) But in such times as well, the bank has a responsibility to provide correct, level-headed and realistic information when it enters into agreements with small savers and inexperienced investors. The bank should have, as the professional party, emphasised to a greater degree that continued uninterrupted and strong growth in the stock market was an uncertain scenario, and not satisfied itself with noting this in small type in the prospectus. Moreover, the bank should have – in marketing complicated products such as this – explained the risk with the products and the consequences of debt-financing in a way that was suited to non-professional investors.

(129) When the material A received as the basis for his investment decision also contained directly misleading information about essential parameters, it must as a whole have consequences for the validity of the agreements. The most important of these was an incorrect indication of "break even" and incorrect information about the return potential with moderate increase in the indices. The errors together with the bank's one-sided picture of the profit possibilities provided in sum a distorted picture of the prospects for profit on the investment in the stock index bonds. With a more level-headed tone on the part of the bank – and with correct information about the return potential with debt-financing – I suspect that A would have refrained from making the investment. When fundamental assumptions for the investment – which the bank has control of – have failed in this manner, the agreements must be set aside under § 36 of the Agreements Act.

(130) It is provided in § 36 of the Agreements Act that the legal effect of it being unreasonable or in conflict with good business practice to make the agreement valid is that the agreement "wholly or partially is set aside or modified". The bank has contended that only a partial revision to restore the balance in the contractual relationship may be considered and has further pointed out that the bank's performance has already been delivered and cannot be returned. I have come to the conclusion that the legal effect in our case must be that the agreements are set aside in their entirety. Decisive in this respect is that I have concluded that A would not have entered into the agreements if he had received sufficient level-headed and correct information about the contractual relationship. The result must therefore be that the agreements are set aside and that A

is given back his part of the performance, i.e., the amount he paid the bank during the term of the agreements. The amount has been calculated by the parties at NOK 230,000.

(131) A has prevailed in the case and as a starting point shall have his legal costs covered by the bank under the basic principle in the Norwegian Act relating to mediation and procedure in civil disputes, § 20-2. He has not prevailed with his original principal claim related to expected return on the products. It is furthermore primarily the bank that has uncovered the errors in the prospectus and the loose sheet. I have considered against this background whether the exception rule in § 20-2, paragraph three (a), but have nonetheless come to the conclusion that the bank, as the professional party, must cover the costs of A and the Norwegian Consumer Council.

(132) Attorney Elden has submitted a cost schedule. For the District Court, NOK 1,305,272 is claimed for fees and expenses. In addition are court fees of NOK 31,820. For the Court of Appeals, NOK 1,148,125 is claimed and for the Supreme Court NOK 2,050,169 for fees and expenses. The court fee for the Supreme Court comes to NOK 44,720.

(133) The total is thus NOK 4,580,106 including VAT, which with the addition of interest for loss of use comprises in total NOK 4,758,000. This covers fees and expenses for witnesses and experts, among other things. The amount is extremely high. However, this involves a very demanding case which has been tried over the course of ten court days in each of the two preceding courts, along with a total of 8 ½ days in the Supreme Court. The case has been tried as a "pilot case" and has been broadly prepared, among other things with many expert reports. Against the background that the Board of Complaints for Consumers in Banking and Finance Matters based its decision on the experts' conclusion with respect to expected return, it is difficult to say anything about this. The bank has not had objections to the cost schedule, and I find with hesitation that the claim must be allowed.

(134) I vote for this

JUDGMENT:

1. DnB Bank ASA will pay to A 230,000 – two hundred and thirty thousand – Norwegian kroner within 2 – two – weeks from the service of this judgment, with the addition of late payment interest under the Norwegian Act relating to Interest on Overdue Payments, etc, from 23 November 2006 until payment occurs.

2. DnB Bank ASA will pay to A and the Norwegian Consumer Council jointly as legal costs for the District Court, the Court of Appeals and the Supreme Court 4,758,000 – four million seven hundred and fifty-eight thousand – Norwegian kroner within 2 – two – weeks from the service of this judgment.

(135) Judge Skoghøy: I agree essentially with the first-voting judge and agree with the result.

(136) Judge Stabel: The same.

(137) Judge Tønder: The same.

(138) Judge Indreberg: The same.

(139) Judge Bårdsen: The same.

(140) Judge Webster: The same.

(141) Judge Falkanger: The same.

(142) Judge Bull: The same.

(143) Judge Kallerud: The same.

(144) Judge Gjølstad: The same.

(145) After the voting the Supreme Court pronounced this

JUDGMENT:

1. DnB Bank ASA will pay to A 230,000 – two hundred and thirty thousand – Norwegian kroner within 2 – two – weeks from the service of this judgment, with the addition of late payment interest under the Norwegian Act relating to Interest on Overdue Payments, etc. from 23 November 2006 until payment occurs.

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A true and correct copy is attested:

This translation is made available by The Norwegian Consumer Council – Forbrukerrådet – which also acted as intervenor in the case.

