English translation

Friday, 10 June 2011
No. 201/2011.

Kaupthing Singer & Friedlander (Isle of Man) Limited
(Gunnar Jónsson, Supreme Court attorney)

v

Kaupthing Bank hf.
(Ólafur Garðarsson, Supreme Court attorney,
Þröstur Ríkharðsson, District Court attorney)

Supreme Court Verdict

This case is judged by Supreme Court judges Markús Sigurbjörnsson, Gunnlaugur Claessen, Ólafur Börkur Þorvaldsson, Páll Hreinsson and Viðar Már Matthíasson.

The plaintiff referred the case to the Supreme Court in an appeal of 24 March 2011, received by the Court together with appeal documents on the 31st of that same month. Appealed is a Ruling of the Reykjavík District Court of 10 March 2011, which rejected a claim lodged by the plaintiff in the defendant's winding-up proceedings on the basis of a declaration of guarantee of 17 September 2007. Grounds for appeal are found in the first paragraph of Art. 179 of Act No. 21/1991, on Bankruptcy etc. The plaintiff demands that its above-mentioned claim be recognised as a general claim, with reference to Art. 113 of Act No. 21/1991, in the defendant's winding-up proceedings. It also demands payment of court costs before the District Court and appeal costs.

The defendant demands that the appealed Ruling be upheld and payment of appeal costs.

According to a decision by the Supreme Court oral arguments were heard in the case on 24 May 2011.

I.

With its decision on 9 October 2008 the Financial Supervisory Authority took over the authority of the defendant's shareholders' meeting, dismissed the company's Board of Directors and appointed a Resolution Committee for the company which assumed all the authorisations of the Board of Directors. A Winding-up Committee was subsequently appointed for the defendant on 25 May 2009, which issued an invitation to the company's creditors to lodge claims by the deadline for lodging claims on 30 December 2009. On the day before that the plaintiff lodged its claim in the defendant's winding-up in the amount of GBP 463,200,000, with interest as specified in detail from 30 December 2009. The claim was lodged principally as a priority claim, with reference to Article 112 of Act No. 21/1991, and alternately as a general claim, with reference to Art. No. 113 of the same Act. The Winding-up Committee rejected the claim and the dispute on its recognition could not be resolved. As a result, the Winding-up Committee referred the parties' dispute to the District Court on 30 March 2010. When the Court heard the case on 7 January 2011 the plaintiff waived its claim for priority, with reference to Art. 112 of the Act, but

maintains its demand that it be recognised as a general claim, with reference to Art. 113.

The plaintiff's summary to the District Court states that the parties have agreed that their dispute in this case "should be limited to the validity of the guarantee" of the defendant, since it is not clear at this stage what the final recovery will be by the plaintiff, which is being wound up in the British Isles. Upon the plaintiff's winding-up, it will be established that its assets are insufficient to cover its liabilities. The defendant's summary to the District Court states that the dispute in this aspect of the case concerns exclusively whether the plaintiff has a claim against the defendant, while the parties agree to "postpone their dispute on the amount of the claim" until the above-mentioned aspect of the dispute has been resolved. The District Court's Ruling reports these arrangements with regard to the claims, making reference to the parties' summaries without further discussion.

There is no authorisation for court procedure as described above, as according to Act No. 21/1991 disputes on claims lodged in insolvency proceedings are to be determined conclusively in a single case if such a dispute is referred to the courts. On the other hand, there is provision in the first paragraph of Art. 31 of Act No. 91/1991, on Civil Procedures, that a judge may decide, upon the request of one or both parties, to divide a dispute so that a verdict is pronounced first on specific aspects of the case, while other aspects of it are allowed to wait for a judgement. This assumes that a case is brought concerning the entire question in dispute, and thereby concerns both a party's obligation to make payment and the amount it should pay, but that a judge may, either when the case is filed or when it is defended and at the request of one or both parties, decide to split the question in dispute so that only the dispute on obligation to make payment is resolved first. Cases may be handled in this manner which are brought before the court under the special rules of Chapter XXIV of Act No. 21/1991, cf. the second paragraph of Art. 178 of the Act. From the summaries of the parties to this case it is evident that the instructions of the first paragraph of Art. 31 of Act No. 91/1991 were not completely followed, but rather the parties had agreed in advance to submit only part of their dispute on the plaintiff's claim to the District Court in the form referred to. Although nothing to this effect has been entered in the court record on the decision of the District Court judge, as is anticipated in the legal provision, it must be assumed that his Ruling implies that he agreed to proceed with the case as if the division of the dispute had been properly presented, even though it was placed before him in the manner described above. Both parties have declared to the Supreme Court that they consider the District Court to have in actuality split the dispute in this case in accordance with the authorisation of the first paragraph of Art. 31 of Act No. 91/1991. Having regard to all of the above, this flaw is not quite sufficient cause to dismiss the case from the District Court.

II.

The plaintiff's claim is based on a declaration of guarantee of 17 September 2007, which was signed by Ingólfur Helgason as "an authorised signatory", as at that time he served as the defendant's CEO in Iceland. The guarantee is quoted verbatim in the Ruling of the District Court. In it the defendant declares that it guarantees fulfilment of the obligations of the plaintiff, which was a subsidiary of the former, to the extent that the plaintiff should be incapable of paying legitimate claims against it with its own assets. At the end of the guarantee it is stated that this guarantee is duly issued and delivered by the defendant. The plaintiff bases its claim on the contention that the guarantee implies an obligation which the CEO was authorised to undertake on behalf of the defendant. The defendant, on the other hand, contends that the

declaration of guarantee does not oblige it, as the document was neither presented to the company's Board of Directors for approval nor did it have knowledge of the CEO's guarantee. That it comprised an action, which the company's Board of Directors alone was competent to decide upon. That the CEO's mandate to oblige the company did not cover the action concerned in this case.

When the events concerned in this case took place, the plaintiff was reportedly a wholly owned subsidiary of the company Kaupthing Holding (Isle of Man) Limited, which was similarly owned by the defendant. The plaintiff thus was considered to be part of its group. The guarantee of 17 September 2007 arose from the acquisition by Kaupthing Holding (Isle of Man) Limited of the company The Derbyshire (Isle of Man) Limited, which was referred to as Derbyshire Offshore and was reportedly a subsidiary of Derbyshire Building Society. The subsidiary's activities involved in particular accepting customer deposits and paying interest and it enjoyed a guarantee from the parent company. The events leading up to the issuance of the guarantee on 17 September 2007 are related in the District Court's Ruling, and the plaintiff considers this to be of major significance in resolving the issue. The Ruling provides an account, for instance, of communications between the defendant and leaders of the foreign companies involved in the case and with the Financial Supervision Commission in the Isle of Man, as well as what they considered the guarantee to imply. Ingólfur Helgason also stated in testimony before a court that the acquisition of Derbyshire Offshore had been in accordance with the defendant's policy of “looking for operations with deposits and acquiring them” and that he had been told that the declaration of parental guarantee was a necessary part of the acquisition, which the bank's CEO had been fully authorised to finalise it “in this manner as was usual”. On 25 October 2007 the defendant's Board of Directors approved the purchase of all shares in The Derbyshire (Isle of Man) Limited and it is not disputed that the contract was signed on 9 November that same year between Kaupthing Holding (Isle of Man) Limited, Derbyshire Building Society and the defendant, for the purchase by the first-named of the said shares. Following the acquisition, Derbyshire Offshore was apparently merged with the plaintiff and a short time later the defendant took over the majority of the aggregate deposits of the company for use in its activities. The plaintiff's arguments maintain, among other things, that the defendant's guarantee declaration of 17 September 2007 replaced a similar guarantee of Derbyshire Building Society of the obligations of Derbyshire Offshore, and had been a prerequisite for approval of the acquisition by the seller and the Financial Supervision Commission in the Isle of Man.

III.

Among the documents in the case is a document issued by the defendant on 29 September 2006, which according to the conclusion of the heading is entitled “List of Authorised Signatories”. The text of the document begins as follows: “To our Correspondent Banks, bankers, supervisors of transfers and counterparties”, after which it states that the list specifies the mandates and authorisations of employees to handle specific transactions concerning the defendant, and that the names of these employees and their specimen signatures are included in an appendix. According to the list, the authorisations are to apply from 1 November 2006 and were divided into nine classes, indicated with the letters A to I, with the most extensive authorisations granted to those persons in class A and then diminishing in scope in alphabetical order. With regard to class A, it was stated that the signatures of five of the defendant's directors obliged it in all cases. In this same category were also three persons, who were titled “CEOs”, and whose mandate was as follows: “The Chairman

of the Board, Group CEO ... and CEO of the bank in Iceland ... hold power of procuration for the company and are authorised separately and jointly to oblige the company in all instances, including the sale and mortgaging of the company's real estate. The Chairman of the Board, Group CEO and CEO are authorised separately and jointly to designate others to exercise on their behalf the authorisations listed here." This was accompanied by specimen signatures of these three persons, including that of Ingólfur Helgason, the defendant's CEO in Iceland. The list was sent to the Registrar of Companies at the Directorate of Internal Revenue and received on 17 October 2007.

The plaintiff's premises are, among other things, that Ingólfur Helgason held an unambiguous mandate towards external parties to oblige the defendant through the guarantee upon which the claim is based. He held authorisation to sign for the company, power of procuration and a mandate by virtue of his position as the defendant's CEO in Iceland, and the defendant's contracting party could trust that his authorisation was not subject to limitations which it did not specify. The authorisation to sign for the company is said to confer the most extensive authorisation to oblige the client, apart from that the defendant would be obliged by the parental guarantee of 17 September 2007 because of the CEO's power of procuration or his mandate by virtue of his position.

The defendant's summary to the District Court pointed out, for instance, that according to the list of authorised signatories, the CEO in Iceland was authorised to oblige the defendant in any matter whatsoever. It maintains that the defendant's Board of Directors, however, had not been authorised to assign its decision-making power in any type of unspecified actions without limitations. The list of authorised signatories had not been subject to any restrictions as far as the defendant's CEO in Iceland was concerned, to the effect that the assessment of the Board of Directors was required of specific obligations, but assessment of measures which are unusual or major cannot be entrusted to a CEO but must be the responsibility of a company's Board of Directors. There is no doubt [it maintains] that the CEO's action in issuing the guarantee without the approval of the defendant's Board of Directors was unusual and major, which is clearly evident from the plaintiff's claim based upon it in the defendant's winding-up, which amounts to almost ISK 90,000,000,000. Authorisation to grant the guarantee, therefore, was not included in the mandate which the CEO held to direct the day-to-day operations which he was to handle in Iceland. In support of this contention, the defendant also refers to the Supreme Court verdict of 24 September 2009 in case no. 678/2008. The defendant explained to the Court its premise concerning statutory limitations to the CEO's mandate in more detail by maintaining that this was implied by Point 1 of the first paragraph of Art. 77 of Act No. 2/1995, on Public Limited Companies, which must be construed having regard to the first and second paragraphs of Art. 74 of the same Act and the limitations on the CEO's mandate implied by the second paragraph of Art. 68 of the Act.

IV.

Point 1 of the first paragraph of Art. 77 of Act No. 2/1995 states that if a party representing a company, as provided for in Articles 74 or 75, concludes a legal instrument on behalf of the company, such instrument is binding upon the company unless the party has exceeded the limitations on his/her authority set by the same Act. The first paragraph of Art. 74 referred to above provides for the Board of Directors of a company to represent the company towards external parties and to sign for the company and, according to the second paragraph of the same Article, a company's Board of Directors may grant directors, CEOs or others authority to sign for the

company, provided its Articles of Association do not specify otherwise. Art. 75 then states that the CEO can always represent the company in those matters within the scope of his responsibility, as provided for in Art. 68 of the Act.

As previously mentioned, the parties dispute whether Ingólfur Helgason's mandate to sign for the defendant obliges the latter under the parental guarantee of 17 September 2007 with reference to Point 1 of the first paragraph of Art. 77 of Act No. 2/1995. It should be noted that this provision was amended to its current form by Art. 60 of Act No. 137/1994, amending Act No. 32/1978, on Limited-liability Companies, and the Act as amended was republished as Act No. 2/1995. The Explanatory Notes to the bill which was adopted as Act No. 137/1994 state that it was part of Iceland's transposition of the provisions of the Agreement on a European Economic Area, specifically its provisions on company law. Art. 77 of the Agreement refers in this respect to Annex XXII to the Agreement, which contains a list of the EC Directives intended to harmonise the legal provisions of Member States in the field of company law. The notes concerning Art. 60 of the previously mentioned Bill stated that it proposed to set more specific provisions on the rules of authorisation than had previously been contained in the Act on Limited-liability Companies, to accord with the first and second paragraphs of Art. 9 of the currently applicable First Council Directive 68/151/EEC on company law, which was one of the Directives referred to in Annex XXII of the EEA Agreement. The contents of Art. 9 of this Directive were aimed at ensuring legal certainty for contracting parties of a limited company in transactions with the company, and at limiting to the greatest possible extent those circumstances which could cause the invalidity of a contract concluded on the company's behalf. This background must be borne in mind in construing those provisions of Act No. 2/1995 which are tested here.

V.

The defendant's Articles of Association are among the documents in this case; they provided for the authorisations of the company's Board of Directors and specific employees to oblige the company. The defendant does not contend that the authorisations of individual employees, as granted in the List of Authorised Signatories of 29 September 2006, did not accord with instructions in the Articles of Association and went beyond what was stated there. This point does not therefore come into consideration in resolving whether the CEO's signature on the parental guarantee of 17 September 2007 complies with Articles 74 and 77 of Act No. 2/1995.

According to the third paragraph of Art. 74 of Act No. 2/1995, the right to sign for a company may be limited by making it a joint authorisation, but no other restrictions may be registered to the right to sign. The substance of the mandate granted to Ingólfur Helgason in the defendant's List of Authorised Signatures was mentioned previously; it states specifically that those three persons referred to as “CEOs” were authorised jointly and separately to sign for the company. Ingólfur [Helgason]'s mandate to sign for the defendant was therefore not limited in this manner which would, however, have been authorised.

According to the principle in the first paragraph of Art. 77 of Act No. 2/1995 it is clear that a legal instrument, concluded by a person who represents the company through authorisation to sign for the company, is binding upon it, as the exception provision in Point 1 of this paragraph applies only to limitations on the authority of the agent set in the same Act. They do not include a limitation on the agent's authorisation to sign for the firm which is based upon the nature or scope of his actions, as contended by the defendant in this case. The defendant's contention is therefore groundless, nor does the Act contain other restrictions on the authorisation

of an agent to sign for the company which would absolve the defendant from the obligation undertaken with the parental guarantee of 17 September 2007. Nor is the defendant's premise, that limitations on the CEO's mandate were implied by his employment contract and by internal credit rules as laid down in the defendant's credit policy manual, of consequence, as the obligation cannot be placed on the contracting party of a limited company that it acquaint itself with internal documents that are not part of the authorisation presented externally. In the District Court hearing, the defendant did not make reference to provisions of Point 2 of the first paragraph of Art. 77 of Act No. 2/1995, which for this reason alone is of no significance for the outcome of this case.

Finally, the defendant contends that the restrictions on the authorisation of an agent, which are found in the second paragraph of Art. 68 of Act No. 2/1995, should by analogy apply to the right to sign for the company, and refers in this connection to a verdict of the Supreme Court of 24 September 2009 in case no. 678/2008. The dispute resolved in this case did not concern restrictions on an agent's authorisation towards the contracting party of a limited company, cf. Articles 74 and 77 of the Act, but rather how extensive an authorisation a company's Board of Directors could grant an agent which would create an obligation towards individual shareholders in the company. The dispute therefore concerned the internal affairs of the company concerned and limitations on the authority of the Board of Directors to grant the CEO authorisation as provided for in Art. 68 of Act No. 2/1995, and a special mandate, but not to limitations on the right to sign for the company. Accordingly, the defendant's contention cannot be accepted, that the said Supreme Court verdict is of significance as a precedent for resolving the parties' dispute. Having regard for all of the above, the defendant's guarantee declaration of 17 September 2007 placed a binding obligation upon the defendant towards the plaintiff, with the result that the latter's claim in the case must be recognised.

The defendant shall be ordered to pay the plaintiff costs before the District Court and appeal costs, which are determined together as stated in the verdict.

Verdict:

The claim of the plaintiff, Kaupthing Singer & Friedlander (Isle of Man) Limited, based on a parental guarantee of 17 September 2007, as lodged in the winding-up proceedings of the defendant, Kaupthing Bank hf., is recognised as a claim ranked with reference to Art. 113 of Act No. 21/1991, on Bankruptcy etc.

The defendant shall pay the plaintiff a total of ISK 2,000,000 for court costs before the District Court and appeal costs.

Ruling of the District Court of Reykjavik 10 March 2011.

I.

On 25 May 2009, the Reykjavík District Court appointed a Winding-up Board for the defendant. The Winding-up Board issued an invitation to lodge claims, which was published in the first instance in the Legal Gazette (Icel. *Lögbirtingablaðið*) on 30 June 2009. The deadline for lodging claims was set at six months and therefore expired on 30 December that same year. The plaintiff, Kaupthing Singer & Friedlander Isle of Man Limited, of Douglas, Isle of Man, lodged a claim against the defendant's estate, which was received on 29 December and entered in the list as claim no. 20000000-0000. The claim was lodged as a priority claim, with reference to Article 112 of Act No. 21/1991, for a total amount of GBP 463.2 million, based on a so-called “parental guarantee”, prepared by Kaupthing Bank hf. and signed on 17 September 2007. According to the parental guarantee, Kaupthing Bank hf. guaranteed the legitimate obligations of Kaupthing Singer & Friedlander Isle of Man Limited, which could not be paid with the assets of the latter.

The defendant's Winding-up Board rejected the claim in a letter of 18 January 2010, and the plaintiff objected to this decision. At a meeting held on 2 March 2010, for the purpose of resolving the parties' dispute on the claim, the Winding-up Board reiterated its previous decision and its opinion that there was substantial doubt as to whether the parental guarantee was binding upon Kaupthing Bank hf., since it involved a measure which was both unusual and of major significance. Since the bank's Board of Directors had neither discussed nor approved the measure involved in the guarantee, the Winding-up Board considered the guarantee non-binding upon it, in accordance with Point 1 of the first paragraph of Art. 77 of Act No. 2/1995 on Public Limited Companies. It was also the Winding-up Board's opinion that, even if the parental guarantee were considered to be binding upon the bank, the claim could not enjoy higher priority than a general claim, as referred to in Art. 113 of Act No. 21/1991. Since the parties' dispute could not be resolved, the case was referred to the District Court for resolution, as provided for in Art. 120, cf. Art. 171 of Act No. 21/1991 on Bankruptcy etc. The case was filed with the court on 14 June 2010.

In its summary to the court, the plaintiff's principal claim was that the defendant's decision be overturned in such manner that its claim would be recognised as a priority claim, with reference to Art. 112 of Act No. 21/1991, in the defendant's winding-up proceedings. Its alternate claim was that the claim be recognised as a general claim, with reference to Art. 113 of the same Act. When the case was heard on 7 January this year the plaintiff decided to waive its principal claim but retain its alternate claim that the claim be recognised as a general claim with reference to Art. 113 of Act No. 21/1991. Furthermore, it reiterated its claim for court costs from the defendant as assessed by the court.

The defendant's final claim is that the plaintiff's claims be rejected and that the plaintiff be made to pay it court costs as assessed by the court.

According to the summaries of both parties, they agree to set aside their disagreement on the amount of the claim and instead to refer to the court only the dispute as to whether the plaintiff has a claim against the defendant on the basis of the above-mentioned parental guarantee.

A letter from the Winding-up Board to the court stated that in addition to the plaintiff and the defendant various creditors were party to the case who had opposed the recognition of the plaintiff's claim as a priority claim. When the case was heard on 7 and 8 January this year the last-mentioned withdrew as parties to the case. The case was accepted for a ruling following the presentation of oral arguments on 28 February this year.

II.

According to the documentation in this case, the circumstances are primarily as follows:

The plaintiff, Kaupthing Singer & Friedlander Isle of Man Limited, is a financial undertaking in winding-up proceedings, domiciled in the Isle of Man. The company is part of the group of the defendant, Kaupthing Bank hf., as it is fully owned by the company Kaupthing Holding (Isle of Man), which in turn is fully owned by the defendant. The defendant's winding-up proceedings have revealed that the company's assets are insufficient to pay its outstanding liabilities. As a result the plaintiff has lodged a claim against the defendant for the difference, maintaining that the defendant is responsible for all of the company's outstanding liabilities based on a certain guarantee to this effect. The defendant's Winding-up Board, however, has rejected any responsibility on the defendant's part for the plaintiff's obligations.

In the summer of 2007 the defendant wished to increase its operations and competition for customers with other financial undertakings in the Isle of Man. As part of this it intended, for instance, to take over the activities of other financial undertakings. Originally it was to take over the activities of Nationwide International, a subsidiary of Nationwide Building Society, and from various e-mail communications of the plaintiff's employees submitted it can be seen that preparations had begun to acquire Nationwide International. In one of the e-mail messages, dated 24 August 2007, from Henrik Gustafsson, an employee of the defendant, to the plaintiff's CEO, Aidan Doherty, it is stated that Kaupthing Bank hf. will issue the same sort of guarantee which then existed from Nationwide Building Society, in part to guarantee customers' deposits. The plaintiff alleges that the defendant had to issue such a guarantee for the takeover to be concluded.

According to e-mail messages during the first half of September 2007, between Guðni Níels Aðalsteinsson, managing director of the defendant's treasury, and Aidan Doherty, the plaintiff's CEO, as well as specific members of the defendant's legal division, the parental guarantee was finalised and signed on 17 September 2007 by the defendant's CEO in Iceland, Ingólfur Helgason. The plaintiff, which provided the first draft of the guarantee, is of the opinion that its wording was obtained from a parental guarantee of Derbyshire Building Society, which was valid prior to the plaintiff's subsequent takeover of deposits in the financial undertaking Derbyshire Offshore. The parental guarantee was issued in English, but reads as follows in Icelandic translation:

"With this guarantee, Kaupthing Bank hf. (a company registered in Iceland with the Reg. No. 5000000-0000), with headquarters at Borgartún 19, 105 Reykjavík, assumes responsibility for the

obligations of its subsidiary, Kaupthing Singer & Friedlander (Isle of Man) Limited, (Reg. No. 3519), which has its registered office at 5-11 St. Georges Street, Douglas, Isle of Man, IM99 1SN, to such extent as Kaupthing Singer & Friedlander (Isle of Man) Limited is unable to pay liabilities based on legitimate claims against the company with its own assets. This guarantee shall be valid while Kaupthing Singer & Friedlander (Isle of Man) Limited is a wholly owned subsidiary of Kaupthing Bank hf. and shall be cancelled immediately should Kaupthing Bank hf. sell it holding in Kaupthing Singer & Friedlander (Isle of Man) in full or in part.

In confirmation of the above, this guarantee has been duly signed and delivered on behalf of Kaupthing Bank hf. on 17 September 2007."

Above Ingólfur Helgason's signature it is written that the document is signed by a holder of power of procuration of Kaupthing Bank hf.

The parental guarantee was sent to the plaintiff, following which Aidan Doherty notified the Financial Supervision Commission in the Isle of Man thereof in a letter of 1 October 2007. Attached to the letter was a photocopy of the parental guarantee. The defendant maintains that the guarantee was neither submitted to the defendant's Board of Directors for approval, nor was it discussed at meetings of the Board of Directors.

Nothing came of the takeover of Nationwide International. The defendant then turned to another financial undertaking in the Isle of Man, Derbyshire Offshore, a subsidiary of Derbyshire Building Society. Preparations for the sale of this company had also been underway in the summer of 2007. In August that year, the plaintiff received presentation material concerning the sale of the company. In an e-mail message from an employee of the plaintiff of 8 October 2007, Sigurður Einarsson, the defendant's Chairman of the Board; Hreiðar Már Sigurðsson, the defendant's group CEO; Guðni Aðalsteinsson, managing director of the defendant's treasury; Steingrímur Kárason, the defendant's chief risk officer; Guðný Arna Sveinsdóttir, the defendant's CFO; and Ármann Þorvaldsson, managing director of Kaupthing Singer & Friedlander UK, received presentation material and information on a proposed offer for Derbyshire Offshore.

Employees of the plaintiff met with employees of the Financial Supervision Commission in the Isle of Man concerning the proposed acquisition and takeover of this company on 22 October 2007. A memorandum from the meeting shows that a parental guarantee was discussed, and it was pointed out that such a guarantee was in effect for the plaintiff. At a meeting of the defendant's Board of Directors on 25 October 2007, the acquisition of all shares in Derbyshire Offshore was approved and Sigurður Einarsson and Hreiðar Már Sigurðsson were entrusted jointly, and fully authorised to appoint another in their stead, with authority to submit a binding offer and to sign all documents in connection with the offer. At this same meeting the defendant's Board of Directors was presented with promotional material connected with the takeover of the company. No mention is made in the presentation material, nor in the minutes of the meeting of the defendant's Board of Directors of 25 October 2007, that the defendant needed to have or to provide a guarantee from the parent company for the proposed acquisition. A purchase contract was signed on 9 November 2007 between Derbyshire Building Society, Kaupthing Holdings (Isle of Man) Limited and the defendant for the purchase by Kaupthing Holdings (Isle of Man) Limited of all share capital in Derbyshire Offshore. Neither the purchase contract nor the defendant's offer are included in the documents of the case, but the defendant alleges that the purchase contract makes no mention that the purchaser needs to have or to provide a parental guarantee.

In a letter from an employee of the plaintiff, which was sent to the Financial Supervision Commission in the Isle of Man on 5 November 2007, in order to obtain approval of the acquisition and takeover of the deposits of Derbyshire Offshore, it was stated that the defendant guaranteed, for instance, all deposits in the company taken over and that this guarantee would replace the guarantee which previously had been provided by Derbyshire Building Society. The same is stated in a letter to the Financial Supervisory Authority in Iceland of 8 November 2007, which is signed by the defendant's chief legal officer and head of its legal advisory. E-mail messages between the employees of the defendant and of the plaintiff, discussing the preparation of notifications concerning the takeover, also reveal that it was assumed that in them mention would be made of the defendant's parental guarantee of the plaintiff's obligations. Information material sent by the plaintiff to customers concerning the takeover later in November that same year, as well as a news announcement from the defendant on the same occasion, states clearly that the defendant's parental guarantee will replace the parental guarantee of Derbyshire Building Society.

A number of e-mail communications were exchanged between the plaintiff and the defendant in April 2008 which concerned the information material for a marketing campaign by the defendant in the Isle of Man and its wording. They indicate that the defendant's employees hesitated at the plaintiff's statement that all deposits with the plaintiff were fully guaranteed by the defendant and requested explanations of this wording. In the end, however, an employee of the defendant's legal advisory approved a specific wording which implied that all the plaintiff's deposits also enjoyed a guarantee

from the defendant. Among the documents in the case are also e-mail messages between employees of the plaintiff and the defendant of 7 October 2008, concerning the parental guarantee. In them an employee of the defendant's legal advisory confirms that the guarantee is valid and that the defendant ensures, in accordance with it, all the plaintiff's obligations. The following day, 8 October 2008, the plaintiff sent its customers an announcement, stating among other things that customer deposits were guaranteed by the parental guarantee. The defendant's activities were subsequently taken over in accordance with a decision by the Financial Supervisory Authority on 9 October 2008.

Upon the commencement of the court's hearing of the case, witnesses Bjarnfreður Heiðar Ólafsson, Gunnar Páll Pálsson and Brynja Halldórsdóttir, all directors of Kaupthing Bank hf. in 2007, gave testimony. On this same occasion, Ingólfur Helgason, the defendant's former CEO, also testified via telephone. Reference will be made to their testimony as deemed necessary.

III.

The plaintiff maintains that its claim is based on the contention that Ingólfur Helgason, at that time the defendant's CEO in Iceland, in signing the parental guarantee on behalf of the defendant obliged the defendant in accordance with the substance of the guarantee in legally binding manner, since he held satisfactory authority to take this measure. The plaintiff is of the opinion that the defendant must demonstrate the opposite and that any doubt in this regard should be interpreted in the plaintiff's favour.

In support of its claim the plaintiff refers, firstly to the fact that Ingólfur Helgason had satisfactory authority to sign the guarantee on the basis of his authority to sign for the defendant, according to an Authorised Signatory List which the defendant's Board of Directors had signed and entered into effect on 1 November 2006. It is not challenged in the case that the Authorised Signatory List was in effect when the parental guarantee was signed.

According to the second paragraph of Art. 74 of Act No. 2/1995, on Public Limited Companies, a company's Board of Directors may grant directors, managers or others authority to sign for the company, provided its Articles of Association do not specify otherwise. The third paragraph of the same article states that the right to sign can only be limited by requiring that two or more parties must exercise it jointly. The right to sign may therefore not be restricted by other means. Section II of the defendant's Authorised Signatory List grants the defendant's Chairman of the Board, the Group CEO and the CEO in Iceland, firstly, power of procuration and, secondly, authorisation to oblige the defendant in a legally binding manner, either jointly or separately. In other words, the defendant's Board of Directors thereby granted the said employees, firstly, power of procuration and, secondly, authorisation to sign for the company. Since Ingólfur Helgason was the defendant's CEO in Iceland when the parental guarantee was signed, the plaintiff maintains it is clear that Ingólfur [Helgason] held authorisation to oblige the company as stated in Section II of the Authorised Signatory List.

On the basis of his authorisation to sign for the defendant, Ingólfur obliged the defendant in a legally binding manner in accordance with the substance of the parental guarantee, since the right to sign granted him authority to do so in every respect. According to the Act on Public Limited Companies, the Board would not have been authorised to limit Ingólfur's authorisation in other respects than to link it to the right to sign of other individuals. The Board did not, however, avail itself of this option but instead it is specifically stated that the directors [sic] listed there could either sign for the firm jointly or each individually. The plaintiff also maintains that this action did not concern other possible restrictions on Ingólfur's right to sign for the company, such as on the basis that another operating unit of the defendant should have taken this decision in accordance with the Act on Public Limited Companies. In this connection the plaintiff points out especially that it appears that Ingólfur was not the defendant's actual CEO as understood by Act No. 2/1995. His right to sign for the firm was therefore not limited, for instance, by the provisions of Art. 68 of that Act. On the other hand, Ingólfur did in fact act as the defendant's CEO towards the plaintiff in signing the parental guarantee, in addition to which the arrangement and wording of the Authorised Signatory List indicated this, since he is listed there as CEO. In consideration of the events leading up to the signing of the parental guarantee, the plaintiff considers it evident that it had acted in good faith and was completely unsuspecting otherwise than that Ingólfur held the said authorisation in accordance with the signatory list. It is stated specifically in the guarantee that Ingólfur was signing on behalf of the defendant and was authorised to do so. Beside the signature it was stated that Ingólfur was competent to sign and oblige the defendant in a binding manner. Below the signature Ingólfur's position is described as the defendant's CEO.

The plaintiff points out that originally the defendant was to draft the guarantee, but following a query from the defendant's legal advisory, the plaintiff provided a draft of the wording of the guarantee which apparently was based on the wording of the parental guarantee of Derbyshire Building Society. After that the draft had been modified by legal advisory to its final form and sent for signing to the defendant's competent employee. The parental guarantee was subsequently sent to the defendant, who saw no reason to doubt the authorisation to sign. Members of the defendant's senior management

have also been of the opinion that Ingólfur was authorised to sign the guarantee in a manner binding upon the defendant, since he would otherwise hardly have been entrusted with doing so. In this connection the plaintiff refers, among other things, to the testimony of Guðni Aðalsteinsson before the "Select Committee of Tynwald on Kaupthing Singer & Friedlander and the Depositors' Compensation Scheme" on 4 March 2010.

The plaintiff is of the opinion that all its subsequent actions, such as news announcements and notifications to the Financial Supervision Commission in the Isle of Man and to its customers, show clearly that it was in good faith and absolutely unsuspecting otherwise than that Ingólfur Helgason had the said authorisation, and thereby in good faith understood the guarantee to be legally binding upon both parties. In view of the purpose of the right to sign for the company, the plaintiff's right was secure, and he could trust that Ingólfur Helgason had satisfactory authorisation to oblige the defendant. The plaintiff had no further obligation to assess independently whether Ingólfur held the said authorisation to conclude a contract. In this regard the plaintiff also points out that any conceivable flaws in the defendant's notification of the right to sign for the firm to the Registrar of Companies cannot limit the plaintiff's right as an unsuspecting third party and contracting party of the defendant.

In addition to the above, the plaintiff says that it considers that the defendant's Board of Directors knew or at least should have known that the defendant would undertake the obligation provided for in the parental guarantee. The reason for this is that the defendant had planned to take over the activities of Nationwide International in the Isle of Man in the summer of 2007. Nothing had come of this takeover, however, and it was subsequently decided to make a takeover bid for the activities of Derbyshire Offshore. The defendant's Board of Directors formally approved this takeover at a Board meeting on 25 October 2007 and, in the estimation of the plaintiff, with this approval the Board in fact approved the parental guarantee. The plaintiff maintains that according to UK law, building societies, such as Nationwide Building Society (the parent company of Nationwide International in the Isle of Man) and Derbyshire Building Society (the parent company of Derbyshire Offshore in the Isle of Man) must have a valid parental guarantee. On this basis the defendant had provided its parental guarantee, since it was a key prerequisite for the takeover to be concluded. If such a guarantee had not been provided, the plaintiff is of the opinion that it is not certain that the Financial Supervision Commission in the Isle of Man and the Financial Supervisory Authority in Iceland would have approved the takeover for their part, since they had placed greatest emphasis on having customer deposits enjoy satisfactory guarantees prior to and after the takeover. It should also be evident that the defendant's marketing efforts in the Isle of Man would have been doomed if it had been apparent that its deposits enjoyed poorer protection than was customary with the parties with which it competed. The plaintiff is of the opinion that the defendant's Board of Directors knew or at least should have known of the significance of all these factors for the plaintiff's operations following the takeover. It makes no difference, however, though the parental guarantee was initially granted in connection with the proposed takeover of the activities of Nationwide International, since it could be utilised in the takeover of Derbyshire Offshore, making it unnecessary to issue it again. The plaintiff also considers it likely that these matters were discussed by the defendant's Board of Directors in connection with its proposed takeover of Nationwide International. It is no less likely that this was part of the discussion by the defendant's Board of Directors in connection with the proposed takeover of Derbyshire Offshore. Due to the nature of the case, however, the plaintiff has difficulty in proving this, since all the information is in the hands of the defendant. The only information which the plaintiff has concerning meetings by the defendant's Board of Directors on the above-mentioned transaction is that the Board approved the takeover at its meeting on 25 October 2007 and that at this meeting promotional material was made available on the situation of so-called "Project Dragnet", i.e. the takeover of Derbyshire Offshore. It is especially noteworthy, however, that the promotional material also bears the heading "Progress Update". Therefore it must be concluded that the takeover had been previously discussed by the Board. In light of the above, the Plaintiff is of the opinion that the defendant's Board of Directors had in fact taken a decision to grant the plaintiff the parental guarantee. In addition, the plaintiff points out that many high-ranking employees of the defendant were fully aware that a parental guarantee was to be issued or had been issued for the defendant's obligations. It refers in this connection to documentation submitted and points out especially that the employees of the defendant's legal division determined the final version of the parental guarantee and sent it to the competent party for signing, declared its validity as a binding obligation to the Financial Supervisory Authority in Iceland and later repeatedly confirmed in communications to the plaintiff that such a guarantee was valid. The plaintiff maintains that no employee of the defendant had cast any doubt as to the value of the guarantee as a binding obligation.

Secondly, the plaintiff bases its claim on the contention that Ingólfur Helgason had, in signing the parental guarantee, obliged the defendant in a legally binding manner in accordance with the substance of the guarantee, since he had been competent to do so and held satisfactory authorisation to do so based on his power of procuration according to the defendant's Authorised Signatory List. In this

connection the plaintiff refers to Art. 25 of Act No. 42/1903, on a Registry of Merchants, Firm Designations and Power of Procuration, which provides for the substance of the power of procuration. There it is stated that the holder of power of procuration shall be empowered to take all actions on behalf of the principal concerning its commercial operations and sign the firm designation. The procurator may not, however, sell or mortgage real estate of the principal unless granted specific authority to do so.

According to section II of the above-mentioned Authorised Signatory List, the defendant's Board of Directors had granted Ingólfur Helgason, as the defendant's CEO in Iceland, power of procuration, cf. the fourth paragraph of Art. 68 of the Public Limited Companies Act. On this basis Ingólfur was authorised to undertake all actions concerning the defendant's operations and to sign for the company. The restriction of the power of procuration provided for in Article 25 of Act No. 42/1903 was not applicable, since Ingólfur had been granted direct authorisation according to the Authorised Signatory List, among other things, to sell and mortgage the defendant's real estate. The defendant's Board of Directors could not place further restrictions on his authorisation, as provided for in Art. 27 of the same Act, either substantially of temporarily, if it were to be valid towards an unsuspecting third party. This was not done and it is therefore obvious that the Authorised Signatory List was intended to be valid in this respect towards an unsuspecting third party. The plaintiff is of the opinion that Ingólfur's action, in signing the parental guarantee on the defendant's behalf, was within his authorisation under the power of procuration. The guarantee had been related to the defendant's commercial operations, since its purpose according to the Articles of Association which were in effect when the parental guarantee was signed was "financial services and other such activities as are normally carried out in connection with them," as stated in the company's Articles of Association. The guarantee was signed in accordance with this purpose, as the objective in issuing it was to increase the defendant's financial services and other activities normally connected with it and thereby open the way for the defendant's increased activities in the Isle of Man in order to reinforce its liquidity position.

Thirdly, the plaintiff contends that with his signature Ingólfur Helgason obliged the defendant in a legally binding manner on the basis of his position and mandate as the defendant's CEO. The plaintiff had been unsuspecting otherwise than that the guarantee was signed by an individual fulfilling the position of the company's CEO, since Ingólfur had signed it as an employee competent to do so and the defendant's CEO. Since the mandate by virtue of his position has to be demarcated from the plaintiff's perspective, it must be examined whether the said action, i.e. signing the parental guarantee and its validity as a binding obligation upon the plaintiff, fell within the mandate of his position as the defendant's CEO.

In the plaintiff's estimation, the signing of the parental guarantee falls under a traditional and usual action by a CEO, in the sense of the second paragraph of Art. 68 of the Act on Public Limited Companies, No. 2/1995. In this connection it places special emphasis on the fact that at this time the defendant was by far the largest company in Iceland and among the largest financial undertakings in the Nordic countries. It must therefore be evident that all actions by its CEO were of a greater magnitude than actions in other companies in Iceland. The measure involved a financial obligation for the defendant which was in accordance with its purpose and in signing the parental guarantee the CEO was guided by the interests of the defendant. This measure cannot be considered unusual, considering the nature, type and scope of the defendant's activities. Nor can it be considered major, in comparison to the scope of the defendant's overall activities and operating basis, as according to its annual financial statements for 2007 the company's gross assets were over ISK 5,000 billion. The plaintiff's claim under the parental guarantee, however, amounts to GBP 463.2 million, or the equivalent of just over ISK 59 billion, based on the quoted mid rate of the Central Bank of Iceland for sterling in 2007. The obligation therefore was equivalent to around 1% of the defendant's total assets, which can hardly be considered major in the sense of the second paragraph of Art. 68 of Act No. Art. 2 of the Act on Public Limited Companies, or to have been of considerable significance for the defendant. In this perspective, the plaintiff underlines that the measure fell within the limits of Ingólfur Helgason's mandate.

Fourthly, the plaintiff bases its claims on the fact that Ingólfur Helgason obliged the defendant in accordance with the contents of the guarantee in legally binding manner, based on his mandate by virtue of his position, as referred to in the second paragraph of Art. 10 of Act No. 7/1936, on Conclusion of Contracts, Power of Attorney and Invalidity of Legal Instruments. The plaintiff is of the opinion that the said action was not unusual, given the strategy adopted for the company by the defendant and the position in which Ingólfur [Helgason] served within the defendant, since he was one of the key employees in by far the largest company in Iceland. The measure was also within reasonable limits, having regard to the company's balance sheet, and therefore was not of substantial significance for its activities.

Even if the measure were considered not to have been usual, the plaintiff considers it would nonetheless fall within Ingólfur [Helgason's] mandate by virtue of his position, on the basis of the plaintiff's legitimate expectations of the binding obligation inherent in the parental guarantee. Should

the conclusion be, however, that the requirements are not satisfied for mandate by virtue of position, as provided for by Art. 10 of Act No. 7/1936, the plaintiff maintains that Ingólfur Helgason nonetheless was mandated by virtue of his position since as a result of the defendant's preceding, concurrent and subsequent behaviour the plaintiff had legitimate reason to assume that Ingólfur actually had this mandate and thereby authority to oblige the defendant in the manner he did by his signature. In this connection the plaintiff points out that the defendant raised no objections to his mandate or the obligation prior to a letter sent by the defendant's Winding-up Board on 18 January 2010, or two and a half years after the guarantee was signed. In this manner the defendant did not interfere with Ingólfur's action, and it makes no difference then whether this was done consciously or unconsciously. In so doing the defendant approved the action, and thereby the obligation inherent in the parental guarantee.

If the above-mentioned arguments are not accepted, the plaintiff also maintains that the defendant is responsible for all the plaintiff's obligations according to a statement by Hreiðar Már Sigurðsson, at that time the defendant's Group CEO, to the Financial Supervision Commission in the Isle of Man on 29 June 2005. In the opinion of the plaintiff, Hreiðar Már was authorised to oblige the company in this manner and it refers in this context to all of the above perspectives and legal premises concerning the mandate and authorisation of Ingólfur Helgason to oblige the defendant in a legally binding manner.

Should the judge reach the conclusion that Ingólfur Helgason's signing of the parental guarantee did not fall within his mandate, or consider the action not to have been usual, the plaintiff contends that Ingólfur should be liable for damages towards the plaintiff, an unsuspecting third party, for the losses it has suffered. In support of its claim the plaintiff refers to the first paragraph of Art. 25 of Act No. 7/1936 and general rules of tort. If the defendant's Board of Directors, however, was unauthorised to grant Ingólfur the mandate indicated in the defendant's Authorised Signatory List, it is contended that those directors, who signed the Authorised Signatory List, are liable for damages to the plaintiff due to their unlawful decision, cf. the first paragraph of Art. 134 of Act No. 2/1995 and general rules of tort. In both instances, the plaintiff's losses are equivalent to the amount of its claim against the defendant's estate. The defendant, however, bears the ultimate responsibility for the damage caused, and thereby the plaintiff's losses, on the basis of the principle of tort concerning employer liability.

Finally, the plaintiff's claim is based on the contention that the parental guarantee resulted in unjustified financial gain to the defendant, which it should duly remit to the plaintiff. In explanation of this, the plaintiff points out that the guarantee was a basic prerequisite for the takeover of Derbyshire Offshore, which resulted in a major improvement to the defendant's liquidity position. By this action a large amount of funding in the form of deposits flowed from the plaintiff to the defendant following the takeover and in its wake. As an example one could mention a transfer, in the amount of GBP 321 million from the plaintiff to the defendant on 27 December 2007, which was directly connected to the takeover. In addition, the parental guarantee also resulted in the plaintiff's existing customers continuing their business relationship, as well as having unquestionably resulted in increasing the number of customers. The defendant had profited from this and its gains were at least equivalent to the amount of the claim lodged by the plaintiff. Because of the nature of the case, however, it is more the defendant’s responsibility to demonstrate its real gain or, as the case may be, that its gain was little or none.

The plaintiff is of the opinion that its claim should enjoy the priority of a general claim as referred to in Art. 113 of Act No. 21/1991 on Bankruptcy etc.

IV.

The defendant states that it is undisputed that Ingólfur Helgason, its CEO in Iceland, held both power of procuration from the defendant's Board of Directors and authorisation to sign for the company. The authorisations they conferred, however, were restricted by law to day-to-day operations and therefore did not cover measures considered unusual or major. In various ways, therefore, the CEO's authorisations to act on behalf of and to oblige the defendant were limited.

Ingólfur Helgason's employment contract stated that he was responsible for the operations of Kaupthing Bank hf. in Iceland and as such for its day-to-day operations in Iceland, and to implement the policy and instructions of the Board of Directors. It is stated specifically that day-to-day operations did not involve unusual of special actions, and that the CEO could only take such actions after obtaining specific authorisation from the bank's Board of Directors. It is established in this case that no such authorisation was available when the parental guarantee was signed, nor was such subsequently obtained. Attention should also be drawn to the fact that, according to his employment contract and the organisational chart, Ingólfur was subordinate to the Group CEO, Hreiðar Már Sigurðsson. In addition, foreign subsidiaries and their activities did not fall under the bank's day-to-day operations in Iceland; such activities were rather completely the province of the Group CEO, as can be seen from the employment contract of Hreiðar Már Sigurðsson. The plaintiff's activities in the Isle of Man were

therefore not within Ingólfur Helgason's field of responsibility, but were under the Group CEO, Hreiðar Már Sigurðsson.

The defendant also points out that Art. 22 of the Articles of Association of Kaupthing Bank hf. states that the CEO shall look after day-to-day operations. It states also that day-to-day operations do not include major or unusual measures, and that the CEO may only take such measures in accordance with specific authorisation from the Board of Directors. As previously mentioned, no such authorisation was available from the defendant's Board of Directors. The defendant also draws attention to the fact that the Articles of Association are the supreme authority within each company and cannot be altered except by a quorate annual general meeting or extraordinary general meeting with the approval of [at least] 2/3 of votes cast by shareholders controlling at least 2/3 of share capital, and also that the company's Articles of Association were accessible to everyone on its website, in both Icelandic and English. The plaintiff cannot therefore claim that it should not have been aware of or could not acquaint itself with the division of responsibility between the defendant's Board of Directors and its CEO. In this connection the defendant points to an e-mail message from the defendant's CEO of 13 September 2007, where the latter requests that the parental guarantee be sent to the defendant's Board of Directors for signing. In accordance thereof, it can be considered probable that the plaintiff knew or should have known that the defendant's Board of Directors alone was competent to sign the parental guarantee.

The defendant is of the opinion that the plaintiff can in this case hardly be considered to be in the position of an unsuspecting third-party. In this connection it points out that the plaintiff was an operating financial undertaking licensed by the Financial Supervision Commission in the Isle of Man. An established, reputable financial undertaking, which was receiving such an obligation as was involved in the parental guarantee, should have been aware that it was only the province of the Board of Directors to grant such an obligation, and therefore should have ensured that authorisation from the Board was available before the company based any rights on the obligation. It is maintained that it was at least negligent on the part of the plaintiff not to ensure that this authorisation from the Board of Directors was available.

In the defendant's estimation there is no doubt that the disputed parental guarantee was both unusual and major, and not part of the defendant's day-to-day operations. Its signing was therefore not covered by the authorisation granted to the defendant's CEO in Iceland by its Board of Directors based on the second paragraph of Art. 74 of Act No. 2/1995 on Public Limited Companies. The defendant also objects to, as incorrect and without a basis in law, the plaintiff's contention that the right to sign for the firm grants a company's CEO unlimited authorisation to oblige the company in every respect, as the CEO's mandate is clearly restricted to day-to-day operations in the second paragraph of Art. 68 of the same Act.

To further support its claim, the defendant maintains that in Art. 21 of the Articles of Association of Kaupthing Bank hf. it is stated that the Board of Directors is to adopt rules on the division of responsibilities between the Board and the CEO, including the limits of the CEO's lending authorisations. These rules are found in the defendant's Internal Control and Procedural Handbook, which was approved by the defendant's Board of Directors. They include mandatory rules for the bank's employees, for instance, concerning credit policy and risk management. Section 3.3 discussed credit risk, and guarantees are part of credit risk, according to Section 3.3.1. Section 3.3.3 discusses the authorisations to grant loans, but does not mention a special credit authorisation limit for the defendant's CEO in Iceland. Section 3.3.4.4, which discusses the credit authorisations of Corporate Banking's credit committee, does state, however, that the defendant's CEO in Iceland is authorised to grant credit authorisations to certain parties of up to ISK 40,000,000. It is specifically stated there that all lending in excess of ISK 40,000,000 has to be referred to the committee. In accordance with the definition of credit risk in Art. 3.3.1, the defendant considers it evident that Ingólfur Helgason's authorisation, if he in fact was authorised to approve and/or grant a guarantee, was also limited to the ISK 40,000,000 maximum. This conclusion is also supported by new credit rules which entered into force on 27 September 2007. Section 3.3.3.3.4 of the rules deals specifically with the credit authorisation of the defendant's CEO in Iceland, stating that his authorisation to grant credit to individual parties is limited to a maximum of ISK 40,000,000. In signing the parental guarantee on 17 September 2007, the defendant is of the opinion that Ingólfur Helgason not only exceeded the limits of his authority, as the Public Limited Companies Act, No. 2/1995, provides for but also clearly exceeded the limits set for him by the defendant's internal credit rules. This should have been evident to the plaintiff.

The defendant rejects the claim that the so-called Authorised Signatory List of 1 November 2006 implied a lawful mandate to the bank's CEO in Iceland to oblige the defendant through unusual or major actions without the approval of the Board of Directors. It maintains that the defendant is not obliged by such actions according to Point 1 of the first paragraph of Art. 77 of the Act on Public Limited Companies, No. 2/1995.

The said list [it contends] specified the authorisations of individual employees of the defendant to sign documents and legal instruments on defendant's behalf. Accordingly, the bank's CEO in Iceland would have held the same authorisations as its Chairman of the Board of Directors and Group CEO to oblige the company in any matter whatsoever, including selling and mortgaging the company's real estate. Despite Ingólfur Helgason being, on this list, granted very broad authorisation on behalf of the Board of Directors, the defendant emphasises that the bank's Board could by law delegate its power to take decisions on any sort of unspecified actions. The Authorised Signatory List was not subject to any limits with regard to the bank's CEO in Iceland and thereby in fact implied an open authorisation to oblige the bank, without an assessment by the Board of Directors of these obligations being available. In the defendant's view, an assessment of actions considered unusual or major was not entrusted to the CEO alone, but instead such an assessment was to be made by the Board of the company in question. It makes no difference whether the party concerned bore the title of managing director or CEO, as the area of responsibility was the same. In this respect reference is made to the Supreme Court verdict in case no. 678/2008, which it considers serves as a clear precedent in resolving the case.

It is contended that the issuance and signing of a parental guarantee in 17 September 2007, whereby the defendant guarantees all the plaintiff's obligations, was an unusual and major action in the sense of the second paragraph of Art. 68 of Act No. 2/1995. In this connection the defendant points out that the guarantee was in fact an open cheque which was to guarantee all the plaintiff's obligations, without any restrictions. The plaintiff lodged a claim against the defendant's estate in the amount of ISK 88,508,256,000, making it obvious that the issue and signing of the guarantee was an unusual and major action, and at the same time this action was not part of the day-to-day operations which the defendant's CEO in Iceland was to direct. The plaintiff's claim in other words amounts to over two thousand two hundred times the maximum amount of Ingólfur Helgason's lending authorisation according to the defendant's previously mentioned Procedural Handbook. Here it should also be considered that the said parental guarantee is the only one of its kind within the bank; no other similar guarantees were provided to other subsidiaries of the defendant companies within the group, never mind to third parties. Nor was the guarantee recorded in any of the defendant's credit systems or mentioned in the company's annual financial statements. The defendant is of the opinion that in no sense of the word was this a traditional guarantee, as were common in the defendant's everyday activities as a commercial bank. The defendant also objects to the plaintiff's claim that the parental guarantee was a basis and prerequisite for the conclusion of the acquisition by the defendant of Derbyshire Offshore. On the contrary, it was clearly evident from the memorandum of a meeting of the Financial Supervision Commission in the Isle of Man with representatives of Derbyshire Offshore that a parental guarantee from the purchaser was not a prerequisite for the sale, but would depend upon the purchaser's situation. As the plaintiff always maintained, however, towards the Financial Supervision Commission in the Isle of Man that such a valid guarantee existed from the defendant, the question of whether the Commission made such a guarantee a condition for the acquisition of Derbyshire Offshore was never tested. The defendant maintains that the plaintiff bears the burden of proof to demonstrate that this was the case.

The defendant also objects to, as incorrect, the plaintiff's statement that the issuance of the parental guarantee was not considered a major action, since it represented only a small fraction of the defendant's assets. On the contrary, it maintains that it could be rightly contended that the issue of the parental guarantee corresponded to a large exposure for the bank, and even exceeded the maximum set for such exposures by law. In this respect it refers to the fact that an exposure is defined in the second paragraph of Art. 30 of the Act on Financial Undertakings, No. 161/2002, and includes a guarantee granted to individual customers or financially connected parties. A large exposure is an exposure equivalent to 10% of a financial undertaking's risk-weighted asset base. Based on the defendant's risk-weighted asset base as of 30 September 2007, i.e. ISK 464,851,925,000, the plaintiff's claim is equivalent to 19% of the risk-weighted asset base. It is therefore clear that the defendant's exposure as a result of the parental guarantee was considerable. If, on the other hand, this is measured against the plaintiff's total obligations, which according to its claim as of 30 December 2009 were approximately GBP 221,996,744,000, the defendant's exposure would be 47.7% of its risk-weighted asset base, and therefore far above the permitted maximum for large exposures. The maximum for such an exposure is 25% towards one or more internally connected customers, cf. the first paragraph of Art. 30 of Act No. 161/2002. It makes no difference here whether the parental guarantee as such was possibly not covered by the provisions of Art. 30 of the Act, since this concerns a risk within the group. In the defendant's estimation, due to the enormous commitment which it involved there is no doubt that it should be considered unusual and major. At the same time the defendant maintains that it fails to see how an obligation of some ISK 88 billion could be considered usual and/or minor.

In assessing the action as such, the defendant is of the opinion that consideration needs to be given to the fact that the parental guarantee was in fact unlimited and lacked a designated amount.

Therefore the plaintiff's losses, which the parental guarantee was intended to compensate, could just have easily been a higher amount than the ISK 88 billion for which the plaintiff has lodged a claim against the defendant's estate. The defendant, however, had no direct control or opportunity to limit the obligations which the plaintiff undertook in its operations. Nonetheless, it was intended to bear direct and unconditional responsibility for all of them. This is yet again an indication of how unusual and major this action was for the defendant.

In this connection the defendant is of the opinion that regard should also be had for the bank's lending rules. The only party within the bank, apart from the Board of Directors, who could possibly have loaned such an amount was the Board Credit Committee, which was to deal with granting of credit (including guarantees) amounting to over EUR 165,000,000 (ISK 27,922,950,000) and up to the mandatory maximum, i.e. 25% of its risk-weighted asset base. It is clear, however, that the said parental guarantee was never discussed or approved at a meeting of the defendant's Board Credit Committee in 2007.

In assessing whether the said action should be considered unusual and major, the defendant is of the opinion that consideration should also be given to the situation of the defendant's creditors. Those creditors who loaned funds to the parent company, i.e. the defendant, had to trust that its obligations did not exceed what was stated in its annual financial statements. They also had to trust that the defendant was only responsible for the obligations of its branches, and that all its subsidiaries were independent and there was no direct obligation between them [and the parent company]. One of the principal arguments for having activities abroad in a subsidiary is precisely to reduce the direct obligations of the parent company in Iceland. All exceptions from the main rules that the parent company does not bear direct responsibility for the obligations of a subsidiary must therefore be considered unusual and major. This applies especially in this instance, since it concerns a claim from the defendant of some ISK 88 billion.

Having regard for all of the above, the defendant considers itself not obliged by the action involved in the signing of the parental guarantee, since the defendant's CEO in Iceland at that time had exceeded his authorisations as prescribed by law, cf. Point 1 of the first paragraph of Art. 77 of Act No. 2/1995.

Furthermore, the defendant objects to, as incorrect and without basis in law, the plaintiff's argument that the defendant was obliged by the contents of the parental guarantee on the basis of failure to act. In this regard, it refers to previous arguments and emphasises that the competent parties within the bank neither prior to nor after its issuance approved the parental guarantee in any manner. It sees nothing abnormal in the lack of any objections to the parental guarantee until the decision was taken by the Winding-up Board, since it was nowhere registered in the bank's systems and, it would appear, had only gone through the hands of a few of its employees. The defendant also underlines that the said parental guarantee was never submitted to the defendant's Board of Directors nor to the Board Credit Committee for discussion and approval. The defendant's Board of Directors had no knowledge of it and therefore had no reason to take action. It can in no respect oblige the defendant due to alleged failure to act. The fact that the defendant's employees, including employees of the defendant's legal division, raised no objections to its validity makes no difference here.

The defendant also strongly objects that the letter from Hreiðar Már Sigurðsson to the Financial Supervision Commission in the Isle of Man could imply any sort of guarantee to the plaintiff for all the company's obligations. It is of the opinion that the said letter does not represent any more than a statement of intent towards the authorities concerned that the defendant will provide support for the plaintiff, should such prove necessary. It should be evident that such a statement of intent is of no validity when the defendant itself is incapable of meeting its own financial obligations and is being wound up. It is also pointed out that the said letter was written around the middle of 2005 and has no connection with the question in dispute here, i.e. the validity of the parental guarantee to the plaintiff of 17 September 2007. Should the said letter, however, be considered to imply any sort of commitment on the defendant's part, the defendant considers it evident that such an obligation is directed exclusively to the Financial Supervision Commission in the Isle of Man and/or the authorities concerned, and not towards the plaintiff itself, which cannot therefore base any rights on the letter.

The plaintiff's argument, that the defendant should be liable for damages on the basis of employers' responsibility, should the parental guarantee not be considered binding upon the defendant, is also objected to by the defendant, which considers it both improperly presented and unsupported. The basic requirements for liability are not satisfied in the case. It has not been established that the plaintiff has suffered a loss, what this loss is and how it could be attributed to culpable behaviour by the defendant's employees, for which the defendant should bear responsibility. In addition no direct causal relationship has been established between the alleged culpable behaviour and the plaintiff's alleged loss. Nor has it been established that the alleged loss is a direct consequence of the defendant's behaviour nor that of its employees. Finally, the defendant objects to the plaintiff being considered an unsuspecting third party, as it maintains, and refers in this connection to its previous pleadings. The

defendant also contends that it would contradict the purpose of the provision in Art. 77 of Act No. 2/1995, on Public Limited Companies, if a company which was not considered to be obliged by a certain legal instrument based on Point 1 of the first paragraph of the provision, were considered to be liable for damages because the legal instrument was not effected. If such were recognised, the provisions of Art. 77 of Act No. 2/1995, on Public Limited Companies, would have no purpose or at least very limited purpose.

Finally, the defendant objects to the plaintiff's argument based upon unjustified financial gain, which it considers improperly presented and incorrect on basic accounts. The plaintiff has in no way demonstrated how the defendant is supposed to have profited, should the parental guarantee be considered unbinding upon it. The plaintiff also has not provided grounds to support or demonstrated that such gain had be at the plaintiff's cost. In this connection the defendant points out that the plaintiff links this gain completely to the deposits of its customers, i.e. that they increased on the basis of the parental guarantee. However, the plaintiff has done nothing to demonstrate or explain how its claim, which represents all of the plaintiff's obligations (i.e. the difference between its assets and liabilities), can be attributed solely to parties who placed funds on deposit with the plaintiff relying on the parental guarantee. On the contrary, the plaintiff's claim is for payment of all the company's obligations, regardless of how they have arisen and regardless of whether they arose prior to or after the issuance of the parental guarantee. The defendant also reiterates its previous objections to the plaintiff's statement that the parental guarantee was a prerequisite for the takeover of Derbyshire Offshore, as it is incorrect.

With regard to legal arguments, the defendant refers in particular to Articles 68, 74 and 77 of the Act on Public Limited Companies, No. 2/1995, and also generally to codified and uncodified principles of tort, especially the principle of non-contractual compensation, cf. the principle of legal responsibility. The claim for court costs is based on the first paragraph of Art. 130 of Act No. 91/1991.

V.

The parties in this case contest the validity of a guarantee issued by Ingólfur Helgason, at that time CEO of Kaupthing Bank hf. in Iceland, on 17 September 2007. The substance of the guarantee and events leading up to its issue have been related above. The plaintiff maintains in particular that Ingólfur [Helgason] held satisfactory authorisation to oblige the defendant in accordance with the substance of the guarantee in a lawfully binding manner, as he held the position of CEO and had both power to oblige the company and was authorised to sign on behalf of the company. The defendant, however, rejects that Ingólfur had been authorised to oblige the company in the manner provided for by the guarantee.

According to his employment contract Ingólfur Helgason was engaged as CEO of Kaupthing Bank hf. in Iceland and, together with the bank's Board of Directors, was responsible for the bank's operations in Iceland. The position of the CEO as described in his employment contract includes the following: "The bank's CEO and Board of Directors shall be jointly responsible for its direction. The CEO shall be responsible for day-to-day operations and in so doing shall enforce the instructions and policy of the Board of Directors. Day-to-day operations do not include unusual or special actions. The CEO may only take such actions after obtaining specific authorisation from the bank's Board of Directors, unless it proves impossible to await decisions by the Board without resulting in major damage to the bank's operations. In such instances the bank's Board of Directors must be notified without delay of such actions." It also states that Ingólfur is responsible to the Board of Directors of Kaupthing Bank hf. in Iceland and to the CEO of Kaupthing Group. In other respects his duties are as prescribed in the company's Articles of Association. The position of CEO is discussed in Art. 22 of the Articles of Association of Kaupthing Bank hf. and is substantially equivalent to the above.

Documents in the case also include the employment contract of Hreiðar Már Sigurðsson, CEO of Kaupthing Group. His principal task was to look after the bank's day-to-day activities, as a group, and to co-ordinate the activities of various units within the group. It is stated in the contract that in addition to its activities in Iceland the bank operates international offices and subsidiaries in Europe and the US. This employment contract states, in the same manner as Ingólfur Helgason's, that the CEO's day-to-day operations do not include unusual or special measures, for which he requires special authorisation from the Board of Directors.

In his testimony to the court, Ingólfur Helgason confirmed that he had been responsible for the domestic activities of Kaupthing Bank hf., which had been operated as a division of the parent company, i.e. Kaupthing Group. His immediate superior was Group CEO Hreiðar Már Sigurðsson, who had furthermore been responsible for the bank's activities abroad. He said that he had not been directly involved in activities abroad, although he considered himself nonetheless to have been authorised to sign the guarantee on the basis of the existing list of authorised signatures from the bank's Board of Directors. He said that the company's Board of Directors had added his name to this list due to Hreiðar Már's frequent travels. He also stated that he was absolutely sure that he had referred the contents of the guarantee to Hreiðar Már before signing it. However, he said he was not aware that the

guarantee had been referred to the company's Board of Directors. Nor did any of the directors who testified to the court remember the company's Board of Directors having discussed or approved the guarantee. It is undisputed that in the minutes of Kaupthing Bank hf. there is no approval by the Board of Directors of the said guarantee.

It has been demonstrated that the plaintiff's CEO at that time, Aidan Doherty, and the defendant's employees exchanged e-mail communications at the beginning of September 2007, discussing the significance of a parental guarantee for the defendant's proposed acquisition of financial undertakings in the Isle of Man, as well as the wording of the proposed guarantee. As far as can be determined, the first draft of its wording was based on a guarantee issued by Derbyshire Building Society. This guarantee is among the documents in the case but differs from the guarantee which is concerned here as in the former instance it is specifically stated that it is authorised by the Board of Directors. From the e-mail communications provided it is also evident that originally it was assumed that the defendant's Board of Directors would approve the guarantee. For reasons unknown, however, this was then abandoned at later stages. However, an e-mail message from Aidan Doherty on 13 September 2007 to Guðni Aðalsteinsson, managing director of the Defendant's Treasury, states that he approves the wording of the guarantee, then adds that it could take effect once he [i.e. Guðni] had obtained the approval of the Board of Directors in Reykjavík. This would appear to indicate that the then CEO of the plaintiff had at least been conscious that the company's Board of Directors had to approve the guarantee for it to take effect. This did not happen, however, since Ingólfur Helgason alone signed the guarantee without it being referred to the defendant's Board of Directors.

According to the first paragraph of Art. 68 of Act No. 2/1995 on Public Limited Companies, the Board of Directors directs the company and is to ensure that the company's organisation and activities are generally adequate and effective. It states that the Board of Directors and CEO are to direct the company. The second paragraph of this same Article provides for the CEO to handle the company's day-to-day operations, and in so doing to comply with the policy and instructions laid down by the Board. There it is stated that day-to-day operations do not include major or unusual measures, and the CEO may only take such measures in accordance with specific authority from the Board of Directors unless it be impossible to await the decisions of the Board without considerable inconvenience for the company's operations. In such instances, however, the company's Board shall be advised about the measure without delay. In this respect Art. 22 of the Articles of Association of Kaupthing Bank hf. is identical to the quoted provision of the second paragraph of Art. 68 of Act No. 2/1995.

It is undisputed that the Board of Directors of Kaupthing Bank hf. had granted Ingólfur Helgason both power to oblige the company and authority to sign on its behalf, cf. the fourth paragraph of Article 68 and the second paragraph of Art. 74 of Act No. 2/1995. This was done in placing him on the list of authorised signatures issued by the company's Board of Directors on 1 November 2006. Chapter II of this list states that the Chairman of the Board of Directors, the Group CEO and the CEO in Iceland shall have power to oblige the company and shall jointly or individually be authorised to oblige the company in all affairs, including selling and mortgaging the company's real estate. Despite the CEO's extensive authorisations, they were nonetheless subject to the restriction that they did not cover major or unusual measures, cf. the previously mentioned second paragraph of Art. 68 of Act No. 2/1995 and Art. 22 of the company's Articles of Association. In such instances the CEO should have sought authorisation from the Board of Directors or have notified the Board without delay of the measure, if there was no opportunity to do so in advance. The company's Board of Directors could neither delegate its authority to take decisions on such measures, nor was it authorised to entrust the CEO with assessing whether these measures were within his area of responsibility. In this respect reference is made to the Supreme Court verdict in case no. 678/2008, pronounced on 24 September 2009. This verdict is a clear precedent for the resolution of this case.

The said guarantee provided for the defendant to guarantee to fulfil the plaintiff's obligations insofar as the plaintiff were to become incapable of paying debts based on legitimate claims against the company with its own assets. No information is provided on the plaintiff's assets and liabilities at the time the guarantee was issued, nor of the scope of its activities. However, it has been stated that the guarantee was intended to be part of actions to increase clients' confidence in the security of deposits in view of the defendant's plans to increase the scope of its banking activities in the Isle of Man. If these plans were carried out, as in fact was the case with the defendant's purchase and takeover of the financial undertaking Derbyshire Offshore, the risk involved in the guarantee would inevitably increase accordingly. The guarantee was, furthermore, not specifically limited to the acquisition or takeover of one specific financial undertaking but rather involved any type of obligations which the plaintiff could undertake in the future, whether by acquiring an unspecified number of financial undertakings or by other means. In view thereof, it is the court's assessment that the guarantee is both a major and unusual measure which only the defendant's Board of Directors could authorise. In signing the said guarantee Ingólfur Helgason therefore exceeded the authorisation he held to sign for the company on the basis of Art. 74 and 75 of Act No. 2/1995, cf. also Point 2 of Art. 68 of the same Act. He concurrently

exceeded his authorisation to oblige the company, as this mandate was limited both by the instructions of the second paragraph of Art. 68 of Act No. 2/1995 and also of Art. 22 of the Articles of Association of Kaupthing Bank hf. and his employment contract. It therefore makes no difference whether Ingólfur may have previously consulted with the Group CEO, since the latter did not have authority either to approve such a measure without the approval of the Board of Directors. It is in fact completely unproven that Ingólfur previously consulted with the Group CEO. Nor is the plaintiff's contention considered significant that due to the preceding, concurrent and subsequent failure of the defendant to act the plaintiff had legitimate reason to assume that Ingólfur was authorised to oblige the defendant in accordance with the substance of the guarantee. Here special regard is had for the fact that nothing in the evidence in the case suggests that the defendant's Board of Directors was aware of the guarantee. The Board therefore had no opportunity to discuss it or respond to it, if it came to that. In accordance thereof it cannot be accepted that the said guarantee is binding upon the defendant, cf. Point 1 of the first paragraph of Art. 77 of Act No. 2/1995 on Public Limited Companies.

The plaintiff also maintains that the defendant is liable for the plaintiff's obligations on the basis of a statement by Hreiðar Már Sigurðsson, Group CEO of Kaupthing Bank hf., to the Financial Supervision Commission in the Isle of Man on 29 June 2005. This states that it is in accordance with the business interests of Kaupthing Bank hf. that Singer & Friedlander (Isle of Man) Limited continue to pay its debts as they mature and fulfil its obligations towards its clients. Therefore Kaupthing Bank hf. recognises that the bank is responsible, in addition to the legal obligations which it may bear, to protect its financial stability and to ensure that the company is always in a position to fulfil its obligations.

No information has been provided as to the reason for issuing this statement. However, the statement is evidently directed to the Financial Supervision Commission in the Isle of Man and concerns only the obligations of Singer & Friedlander, and not the plaintiff in this case. For this reason alone the plaintiff cannot base its right on the statement. It therefore has no significance in the resolution of the case.

The plaintiff's claim is also based on the defendant's alleged liability for damages for the losses suffered by the plaintiff, if the court deems that the guarantee is not binding upon the defendant because Ingólfur Helgason exceeded his mandate in signing it. In such case the plaintiff's loss is equivalent to the amount of its claim upon the defendant's winding-up. In support of its claim the plaintiff refers to the first paragraph of Art. 25 of Act No. 7/1936, on Conclusion of Contracts, Power of Attorney and Invalidity of Legal Instruments, as subsequently amended, and general rules of tort.

According to the second paragraph of Art. 25 of Act No. 7/1936, it is a condition for liability for damages based on the first paragraph of that same Article, that a third person was unsuspecting that the party concluding the legal instrument lacked sufficient authorisation to conclude the same. Mention was made previously of an e-mail message from the plaintiff's CEO at the time, Aidan Doherty, indicating that he assumed that the defendant's Board of Directors would have to approve the guarantee for it to come into effect. He must therefore also have been aware that the bank's foreign activities were not included under the responsibilities of Ingólfur Helgason, but were the province of the Group CEO, Hreiðar Már Sigurðsson. Both gave the then CEO [of the plaintiff] legitimate reason to verify the validity of the guarantee. This he did not do, however. As a result it is considered incautious to conclude that the plaintiff had been unsuspecting of Ingólfur's lack of authority in signing the statement. Liability for damages can therefore neither be based on the first paragraph of Art. 25 of Act No. 7/1936, nor general rules of tort. Furthermore, in the estimation of the court, conditions for the defendant's liability for damages based on general rules of tort are not fulfilled, especially having regard for the fact that it has not been demonstrated that the alleged losses are the result of the defendant's behaviour or that of employees for which it is responsible. There is therefore no reason to accept that the defendant should be liable to compensate the plaintiff's alleged losses due to Ingólfur Helgason's lack of authorisation in signing the guarantee. Even less reason is there to consider the defendant liable for damages due to the decision of the bank's Board of Directors to grant Ingólfur Helgason the right to oblige the company and to sign for the company in its list of authorised signatures of 1 November 2006.

The court agrees with the defendant that the plaintiff's claim that the parental guarantee resulted in illegitimate gains is insufficiently substantiated. The plaintiff has not in this respect presented evidence for its claims that the guarantee was a prerequisite for the defendant's takeover and acquisition of the financial undertaking Derbyshire Offshore and for continued and growing transactions by clients. Nor has it demonstrated that the parental guarantee was a necessary prerequisite for the defendant to transfer to itself large amounts following the takeover. Finally, the amount of the claim and its breakdown in the claim as lodged indicates that in its claim the plaintiff is demanding payment of all obligations which cannot be paid with the plaintiff's assets, and not only of the deposits which it maintains that the defendant transferred following the takeover. In view thereof this contention of the plaintiff is rejected.

In accordance with the above, the court concludes that the plaintiff's claim, as lodged in the winding-up proceedings of the defendant, should be rejected. According to the outcome in this case, and with reference to the first paragraph of Art. 130 of Act No. 91/1991, on Civil Proceedings, cf. also the second paragraph of Art. 178 of Act No. 21/1991, on Bankruptcy etc., the plaintiff shall pay the defendant litigation costs, reasonably assessed at ISK 1,100,000.

District Court Judge Ingimundur Einarsson pronounced this ruling.

R U L I N G

The claim of the plaintiff, Kaupthing Singer & Friedlander Isle of Man Limited, lodged on the basis of a guarantee of 17 September 2007 in the winding-up proceedings of the defendant, Kaupthing Bank hf., is rejected.

The plaintiff shall pay the defendant ISK 1,100,000 in litigation costs.

Ingimundur Einarsson