English translation

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