Thursday, 16 January 2014

No. 359/2013.

LBI hf.

(Jóhannes Sigurðsson, Supreme Court attorney)

v

Goldman Sachs International

(Óttar Pálsson, Supreme Court attorney)

Financial undertakings. Winding-up. Voiding. Payment.

L hf. (formerly LÍ hf.) demanded that a judgement confirm the voiding of payment by LÍ hf. of a money market deposit to G on 9 October 2008 and that G be ordered to repay the amount paid. The payment was made after the Financial Supervisory Authority had appointed a Resolution Committee for L hf. L hf. based its claim on the first paragraph of Art. 134 and on Art. 141 of Act No. 21/1991 on Bankruptcy etc., cf. Art. 103 of Act No. 161/2002, on Financial Undertakings. It was recounted in the Supreme Court's conclusion that the judgements of the Supreme Court in cases nos. 441/2011 and 112/2012 had affirmed that during the period from 7 October 2008 to 22 April 2009 L hf. had been placed in a position which must be equated to one where liquidation of its estate had commenced with regard to the events concerned in this case. The Supreme Court was also of the opinion that the position of the Resolution Committee with regard to the measure disputed in the case, had to be equated with that of a measure [sic] taken by a liquidator of an insolvent estate. The voiding rules of Chapter XX of Act No. 21/1991 could not be applied to overturn measures of a liquidator which had been taken after the commencement of liquidation, his authorisations being provided for in the first paragraph of Art. 122 of the Act. Similarly, those rules could not be applied to overturn measures taken by or on the responsibility of the Resolution Committee which was appointed for L hf. on 7 October 2008. It made no difference that the measure for which voiding was demanded had been taken prior to the reference date determined by law for the bank's winding-up proceedings. For this reason alone the conclusion of the District Court to absolve G was upheld.

Supreme Court Judgement

This case is judged by Supreme Court Justices Markús Sigurbjörnsson, Árni Kolbeinsson, Eiríkur Tómasson, Viðar Már Matthíasson and Þorgeir Örlygsson.

The Appellant referred the case to the Supreme Court on 28 May 2013. It demands that "voiding be confirmed of a payment, made by Landsbanki Íslands hf. of a money market deposit" in the amount of ISK 174,076,125 to the Respondent on 9 October 2008, and that the Respondent be ordered to pay it this amount with interest, primarily with reference to Art. 8 and alternately with reference to Art. 4 of Act No. 38/2001, on Interest and Inflation Indexation, from 9 October 2008 until 15 September 2011 and with penalty interest as provided for in the first paragraph of Art. 6 of the same Act from that date until the date payment is made. The Appellant also demands payment of court costs before the District Court and the Supreme Court.

The Respondent primarily demands that the District Court's judgement be upheld, and alternately that the Appellant's claim be reduced. In both instances it demands court costs before the Supreme Court.

I

According to the parties' pleadings, Landsbanki Íslands hf. which now bears the name of the Appellant, for years provided the Respondent, which maintains it is an international financial undertaking, services as a settlement bank for transactions in ISK between the Respondent and its clients; these allegedly went through its deposit account with the Appellant. The Respondent states that these transactions have for a long time been arranged so that at closing each day it received from the Appellant details on the balance on its account and that it subsequently gave instructions, as appropriate, as to what should be done with the balance in it, such as to use this for purchase of foreign currency or place it in a so-called money market deposit with the Appellant. In the latter instances, their transaction had been confirmed with electronic messages without any additional written contracts being concluded.

On the morning of 29 September 2008, it was announced publicly that due to financial difficulties Glitnir Bank hf. had a short time earlier applied for credit from the Central Bank of Iceland, with the result that the afore-mentioned bank had been offered an equity contribution from the Treasury in the amount of EUR 600,000,000 in return for a 75% holding in the bank; this offer the company's Board of Directors and leading shareholders had accepted. In the Summons to the District Court the Appellant states that the Board of Directors of Landsbanki Íslands hf. had held a meeting that same day and had there discussed that the "decision by the state had had a negative impact on the equity" of the company, and that "all rational means would be sought to strengthen and reinforce the bank's equity position"; according to this it was established at this point in time that the bank "did not fulfil the requirements made of it as to the position of its risk-weighted asset base". According to the documentation in the case, however, that same day the Appellant issued a news announcement on this occasion, which expressed a positive view of the above-mentioned measure in connection with Glitnir Bank hf. stating that the Appellant was in a strong position due to the scope of its customer deposits, the burden of its debt repayments was moderate until mid-2009 and its payment capacity solid, as the value of its liquid assets amounted to around EUR 8,000,000,000. According to the Appellant's pleading, on 3 October 2008 the UK Financial Services Agency (FSA) demanded that it deposit GBP 400,000,000 into an account with the Bank of England no later than the morning of 6 October as reserves for deposits in a branch of the Appellant in that country. In tandem with this the European Central Bank (ECB) notified the Appellant of changes to the terms of repurchase agreements between them which increased its need for liquid funds by EUR 400,000,000. Although on 5 October 2008 the FSA reduced its claims for a contribution to reserves from the Appellant to GBP 200,000,000, the Appellant could not manage this and therefore sought assistance from the Central Bank of Iceland which was refused.

On the morning of 6 October 2008, the Icelandic government issued the following statement: “The Icelandic government emphasises that deposits in domestic commercial banks and savings banks and their branches in Iceland will be fully guaranteed. Deposits refers to all deposits by individual savers and enterprises which are insured by the deposit division of the Depositors' and Investors' Guarantee Fund.” According to the documentation in the case, the Respondent appears to have sent an offer to the Appellant at 2:41 pm that same day to provide it with a money market deposit in the amount of ISK 174,000,000, which would bear 15.75% annual interest and with a due date the following day; interest according to this would amount to ISK 76,125. It appears that the Appellant agreed to this offer shortly after that. On that same day at 4 pm the Icelandic Prime Minister delivered an address giving an account of the large-scale difficulties faced by the Icelandic commercial banks and giving notice that a Bill would be submitted to the Icelandic parliament Althingi enabling the state to respond to the financial market situation. On the evening of that day a Bill to this effect was adopted as Act No. 125/2008, which resulted *inter alia* in changes in Act No. 161/2002, on Financial Undertakings. On the basis of Art. 100 a of the latter Act, cf. Art. 5 of the former, the Financial Supervisory Authority decided on 7 October 2008 to take over the authority of the shareholders' meeting of the Appellant, dismiss its Board of Directors and appoint it a Resolution Committee. A news announcement issued by the Appellant that same day stated that it was the Resolution Committee's objective to ensure that its commercial banking activities continued and that it had not been placed in winding-up even though it enjoyed as a result of this measure protection from enforcement actions by creditors. That same day the Respondent sent notification to the Appellant of its rescission of their Master Agreement of 12 February 2007 on Derivative Transactions; for authorisation to do so the Respondent referred to a provision in the Agreement which, according to the translation provided, applied in the event of “bankruptcy” of one of the contracting parties.

It is established that the Appellant did not deliver the above-mentioned money market deposit on its due date of 7 October 2008. A Decision of the Financial Supervisory Authority of 9 October that same year, which was implemented at 9 am on that day, transferred specifically defined assets and liabilities of the Appellant to New Landsbanki Íslands hf., which is now called Landsbankinn hf. and which took over from thenceforth the Appellant's activities in connection with this. Among those assets which were transferred in this manner from the Appellant were its claims rights and all its cash; regarding the obligations which the new bank assumed, the following was stated in the Decision for instance: “New Landsbanki Íslands hf. will take over the obligations in branches of Landsbanki Íslands hf. in Iceland in connection with deposits from financial undertakings, the Central Bank of Iceland and other clients ... Domestic deposits with Landsbanki Íslands hf. will be transferred to New Landsbanki Íslands hf. based on the balance and accrued interest at the point in time of the transfer.” According to the documentation in the case, a deposit account was established for

the Respondent with the new bank on 9 October 2008. On that date, ISK 174,076,125 was deposited into the account with the explanation “transferred”; the so-called interest date was specified as 7 October. It is undisputed that by this means the Respondent's money market deposit to the Appellant was repaid, and that this had occurred because the deposit had been treated as if it had been transferred to the new bank by the above-mentioned Decision of the Financial Supervisory Authority.

A letter of 11 November 2008 from the Financial Supervisory Authority to the Appellant states that the Board of the Authority had “examined what impact the Authority's Decisions on the disposition of assets and liabilities of Landsbanki Íslands hf. ... have on ... so-called money market facilities/deposits from financial undertakings ... At a meeting of the Board of the Financial Supervisory Authority today it was decided to emphasise that obligations regarding such loans from financial undertakings are not transferred to ... New Landsbanki Íslands hf. ... Accountants who handle the final preparation of initial balance sheets are apprised to pay special attention to this and, furthermore, Resolution Committees and the Boards of the Companies are to comply with the same, as it is important to ensure consistency in the implementation of the matter.” Another letter from the Financial Supervisory Authority on 21 November reiterated and provided grounds for this position.

Act No. 129/2008 once more amended Act No. 161/2002 and on its basis the Appellant was granted a moratorium on 5 December 2008. The amending Act also provided for the reference date of those financial undertakings, for which the Financial Supervisory Authority had appointed a Resolution Committee, to be based on the date of effect of the amending Act, which was 15 November 2008. Act No. 44/2009 amended yet again various provisions of Act 161/2002. With this amendment the Appellant, which still enjoyed a moratorium, was placed in winding-up, with special provisions on this process set in the last-mentioned Act. In particular these provided for the rules of Act No. 21/1991, on Bankruptcy etc., to apply, among other things, to the lodging and handling of claims, and that a Winding-up Board, its work and the persons comprising it should be subject to statutory rules on liquidators. The commencement of winding-up should be based on 22 April 2009, the day of the entry into force of Act No. 44/2009.

The Appellant's Winding-up Board notified the Respondent in a letter of 15 August 2011 that it was voiding the above-mentioned payment made to it on 9 October 2008 based on the first paragraph of Art. 134 and Art. 141 of Act No. 21/1991, cf. Art. 103 of Act No. 161/2002. It urged the Respondent to pay the Appellant ISK 174,076,125 with interest, primarily with reference to Art. 8 and alternately with reference to Art. 4 of Act No. 38/2001, from 9 October 2008 until the date payment was made. When the Respondent did not comply with this demand the Appellant brought this action on 17 October 2011.

II

In accordance with the above, with this action the Appellant seeks to void the measure which it claims is comprised by the payment of the Respondent's money market deposit to the Respondent on 9 October 2008, when this amount together with interest was placed in an account of the Respondent with New Landsbanki Íslands hf. This had happened due to uncertainty concerning whether money market deposits were considered deposits, which were taken over by the new bank according to the Decision of the Financial Supervisory Authority of 9 October 2008. If the claim for voiding is upheld, the Defendant should repay the amount which was deposited into its account.

A judgement by the Supreme Court of 28 November 2011 in case no. 441/2011 affirmed that the Decision of the Financial Supervisory Authority of 7 October 2008 and the appointment of a Resolution Committee for the Appellant, which took over all the company's authorisations and all its affairs, including managing its assets and operations, placed the Appellant in a position which can be equated with one where liquidation of its estate had commenced, with regard to the entitlement of others to funds in its custody on the basis of ownership rights. This situation was only ended on 22 April 2009 when Act No. 44/2009 entered into force, and the Appellant was placed in winding-up as previously described. A judgement by the Supreme Court of 22 March 2012 in case no. 112/2012 reaffirmed the Plaintiff's above-mentioned situation during the specified period, as that case resolved the Appellant's obligation to repay funds which it had been overpaid in a settlement at the end of October and beginning of November 2007.

The Resolution Committee, which was placed in charge of the Appellant was appointed by a public authority and was intended as its name indicated to prepare actions for settlement of the Appellant's debts. The position of the Resolution Committee with regard to this measure, which the Appellant demands should be voided and which was the responsibility of the Committee, must be equated with that of a measure [sic] of a liquidator of an insolvent estate. The rules of Chapter XX of Act No. 21/1991 on voiding of measures of an insolvent are intended to correct retroactively measures of an insolvent party which in actuality comprised discrimination between its creditors. The voiding rules and rules on repayment upon voiding are intended to ensure equal treatment of creditors to the extent possible by law in liquidation of and distributions from an insolvent estate. Once liquidation has commenced, on the other hand, other rules apply on authorisations to dispose of the funds of an insolvent estate, which the liquidator exercises, cf. the first paragraph of Art. 122 of the Act. The above-mentioned voiding rules cannot be applied to overturn measures taken by a liquidator after the commencement of liquidation. Similarly, they cannot be applied to overturn measures taken by or on the responsibility of the Resolution Committee which was appointed for the Appellant on 7 October 2008. Although the reference date in the Appellant's winding-up proceedings was determined, as previously mentioned, by law as 15 November 2008, and the measure for which voiding is demanded was therefore taken prior to that date, this does

not alter the above-mentioned conclusion. For this reason alone the Respondent can be absolved of the Appellant's claims. In accordance with all of the above, the conclusion of the appealed Judgement is therefore upheld and the Appellant ordered to pay the Respondent court costs before the Supreme Court as specified in the Judgement.

Judgement:

The appealed judgement shall stand unaltered.

The Appellant, LBI hf., shall pay the Respondent, Goldman Sachs International, ISK 1,000,000 in court costs before the Supreme Court,