Friday, 28 October 2011

No. 340/2011.

Arrowgrass Distressed Opportunities Fund Limited

Arrowgrass Master Fund Ltd.

CIG & Co Conseq Invest plc

Conseq Investment Management AS

CVI GVF (Lux) Master S. à r. l.

Fondo Latinoamericano de Reservas (F.L.A.R)

GLG European Distressed Fund

GLG Market Neutral Fund

ING Life Insurance and Annuity

ING USA Annuity and Life Insurance Co.

LMN Finance Ltd.

Lyxor/Third Point Fund Limited

Monumental Life Insurance Company

National Bank of Egypt (UK) Limited

Ohio National Life Assurance Corporation

PHL Variable Insurance Company

Phoenix Life Insurance Company

Reliastar Life Insurance Company

Security Life of Denver Insurance

Sun Life Assurance Company of Canada

Third Point Partners LP (US)

Third Point Offshore Master Fund LP

Third Point Partners Qualified LP

Third Point Ultra Master Fund LP (Cayman)

Värde Fund LP

Värde Fund V-B LP

Värde Fund VI-A LP

Värde Fund VII-B LP

The Värde Fund VIIILP

The Värde Fund IX LP/The Värde Fund IX-A LP

Värde Investment Partners (Offshore) Master LP

(Ragnar Aðalsteinsson, Supreme Court attorney)

Bayerische Landesbank

Bremer Landesbank

Commerzbank AG

Commerzbank International S.A.

Erste Europäische Pfandbrief- und

Kommunalkreditbank AG

Eurohypo AG

DekaBank Deutsche Girozentrale

DekaBank Deutsche Girozentrale Luxembourg SA

Deutsche Postbank International SA

Düsseldorfer Hypothekenbank AG

DZ BANK AG Deutsche Zentral Genossenschaftsbank

Landesbank Baden-Württemberg

LBBW Luxembourg SA

Deutsche Hypothekenbank AG

Raiffeisenbank International AG

Österreichische Volksbanken AG

Sparkasse Oberhessen

Taunus-Sparkasse

Sparkasse Pforzheim Calw

Sparkasse-Jena-Saale-Holzland

Sparkasse Hannover

Nassauische Sparkasse Anstalt des öffentlichen Rechts

Kreissparkasse Peine

Die Sparkasse Bremen AG

Sparkasse Oder-Spree

(Arnar Þór Jónsson, Supreme Court Attorney)

Skiki ehf.

Blómstri ehf.

Íslenska útflutningsmiðstöðin hf.

Óttar Yngvason

Rakel Óttarsdóttir

(Óttar Yngvason, Supreme Court attorney)

Deutsche Bank Trust Company Americas

(Eyvindur Sólnes, Supreme Court Attorney) **and**

Landsbanki Guernsey Ltd.

(Gunnar Jónsson, Supreme Court attorney)

v

Landsbanki Íslands hf. and

(Herdís Hallmarsdóttir, Supreme Court attorney)

The Financial Services Compensation Scheme Ltd.

(Andri Arnason, Supreme Court attorney

Baldvin Björn Haraldsson, District Court attorney)

and

Landsbanki Íslands hf.

(Herdís Hallmarsdóttir, Supreme Court attorney) **and**

The Financial Services Compensation Scheme Ltd.

(Andri Arnason, Supreme Court attorney

Baldvin Björn Haraldsson, District Court attorney)

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Värde Fund LP

Värde Fund V-B LP

Värde Fund VI-A LP

Värde Fund VII-B LP

The Värde Fund VIII LP

The Värde Fund IX LP/The Värde Fund IX-A LP

Värde Investment Partners LP

Värde Investment Partners (Offshore) Master LP

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Nassauische Sparkasse

Anstalt des öffentlichen Rechts

Kreissparkasse Peine

Die Sparkasse Bremen AG

Sparkasse Oder-Spree

(Arnar Þór Jónsson, Supreme Court Attorney)

WGZ Bank Luxembourg SA

Landesbank Berlin AG

Deutsche Postbank AG

Caixa Geral de Depositos

The Royal Bank of Scotland plc

ABN AMRO Bank NV, London Branch

Sparkasse zu Lübeck AG

Vereinigte Sparkassen im Landkreis Weilheim

KfW Bankengruppe

Arrowgrass Special Situations S. à r. l.

(no one)

Skiki ehf.

Blómstri ehf.

Íslenska útflutningsmiðstöðin hf.

Óttar Yngvason

Rakel Óttarsdóttir

(Óttar Yngvason, Supreme Court attorney)

Deutsche Bank Trust Company Americas

(Eyvindur Sólnes, Supreme Court Attorney) **and**

Landsbanki Guernsey Ltd.

(Gunnar Jónsson, Supreme Court attorney)

Appeal. Financial undertakings. Winding-up. Priority of claim. Priority claim. Deposit. Loan contract. Constitution. Property rights. Retroactivity. Non-discrimination. Proportionality. European Convention on Human Rights. Limits of legal applicability. Contractual interest. Penalty interest. Dissenting opinion.

A and others appealed a Ruling of the Reykjavík District Court, recognising for the most part the claim of the UK Financial Services Compensation Scheme (FSCS), which was based on claims of owners of so-called Icesave deposits, taken over by FSCS following the collapse of the bank LÍ hf., and accepting that portion of the claim as a priority claim with reference to Art. 112 of Act No. 21/1991, on Bankruptcy etc., in the bank's winding up. The plaintiffs based their case on various premises, among them that they had suffered losses resulting from the adoption of Act No. 125/2008, on the Authority for Treasury Disbursements due to Unusual Financial Market Circumstances etc., and that provisions in this Act were in violation of the Constitution of Iceland and of specifically cited international conventions to which Iceland had acceded. The Supreme Court's verdict stated that it was undisputed that following rapid growth of the Icelandic economy for several years, which was not least related to the expansion of the country's largest commercial banks following their privatisation in the early years of this century, the situation had deteriorated in 2007, and the consequences had been felt suddenly and very severely at the end of September and the first days of October2008. Furthermore, it was evident that the time available for the drafting of the main portion of the Bill which became Act No. 125/2008 had been extremely short, only a few days. The Supreme Court provided an account of the interpretative sources underlying the Act and pointed out that it was the responsibility of the courts to decide whether specific statutory provisions, which were disputed, violated the Constitution and there was no procedural necessity for the Icelandic state to be a party to the case. The Supreme Court described the circumstances which prevailed in Iceland in the autumn of 2008 and prompted the adoption of Act No. 125/2008. The verdict then stated that, if consideration was had for the major and unprecedented difficulties which had to be dealt with, and the clear objectives which had been aimed at, in resolving the question of the legality of the legislature's decisions it was necessary to grant it extensive scope in assessing what routes were to be taken to respond to the complex and perilous situation which had arisen. The Supreme Court agrees with the plaintiffs that their claims rights are considered to be property, in the meaning of the Constitution and Protocol 1 of the European Convention on Human Rights. With regard to perspectives of legitimate expectations, the Court pointed out, however, that the legislature had in many previous instances assumed that it was authorised to alter the priority of claims in liquidation without constitutional provisions limiting its scope to do so. Next the Supreme Court gave examples of such legislation, and in its verdict stated that when these were taken into consideration the plaintiffs' contention, that they could legitimately have expected the legislature not to take action in this respect to their disadvantage, could not be accepted; this applied in particular to those parties among the plaintiffs who acquired their claims after 6 October 2008, since the risk they were taking had been perfectly clear to them. The plaintiffs had also maintained that Act No. 125/2008 had infringed their rights retroactively, which was unlawful in view of cited provisions of the Constitution and international agreements. In this regard the Supreme Court verdict stated that it had pointed out above a variety of amendments to the law on the ranking of claims by priority which were to apply thenceforth. The adoption of Act No. 125/2008 had prescribed the ranking of claims against financial undertakings, which would be wound up after the entry into force of the Act. It did not provide for new arrangements in winding-up proceedings which had already commenced or had concluded. The plaintiffs' contention in this regard was accordingly rejected. The verdict also stated that Act No. 125/2008 applied substantially to all financial undertakings; upon the adoption of the Act there was high probability of the insolvency of the

three largest commercial banks. It had been demonstrated in this case that claims lodged in the winding-up of these banks totalled almost 50,000, 12,000 of them in the winding-up of the defendant LÍ hf., although no information was provided as to how large a portion of these claims would be ranked with reference to Art. 113 of Act No. 21/1991. It had also been pointed out that there was a likelihood of greater payment for general claims in the winding-up of banks other than the defendant LÍ hf. The Act had not been adopted to apply temporarily but provided for new permanent arrangements. Accordingly, it had to be assumed that the Act had determined on a general basis how claims in the winding-up of financial undertakings were to be ranked, which could alter the rights of a great number of creditors of Icelandic financial undertakings and not merely those of the plaintiffs. The verdict pointed out that prior to the adoption of Act No. 125/2008 a run had begun on the banks due to depositors' loss of confidence. New banks had been established in Iceland in direct continuation of the entry into force of the Act on the basis of the former banks and the old banks' deposits in Iceland had been transferred to the new banks. To achieve the objective of a functioning banking and payment system, the legislature had deemed it necessary to grant priority to deposits in the winding-up of financial undertakings and thereby instil in depositors confidence in the new banks and stop the run on the banks which had already begun. FSCS and LÍ had pointed out that in so doing, the run on the banks had been ended and had subsequently subsided over the course of the next two to three weeks. Their contention that the objective of Act No. 125/2008, of ensuring the functioning of banking activities and payment systems in Iceland and that deposits would be secure, was therefore unrefuted. Their argument that there were objective reasons underlying the legislature's decision to grant deposits priority was accepted, cf. Article 6 of Act No. 125/2008. The Supreme Court also rejected limiting the priority of deposit claims to EUR 20,887. The Court's verdict then stated that when consideration was given to statistical data cited, the contents of which had in this respect not been contested during the pleading of the case, it had to be deemed to have been demonstrated that, to achieve the legislature's objectives of preventing the run on and the collapse of the banks, it had been necessary to protect the deposits of domestic parties in excess of EUR 20,887, as the effect of limiting priority to this amount would likely have been contrary to the legislature's objectives of creating stability and confidence in the new banks in Iceland. On the basis of this conclusion, it had been the duty of the legislature to ensure, to the extent possible, that foreign depositors would enjoy a similar position. Bearing in mind the serious economic situation and the obligations of the state towards Icelandic society and international agreements, it could not be accepted that the principle of proportionality had been violated with the adoption of Act No. 125/2008. The Supreme Court's verdict stated that in resolving the constitutionality of the Act, it had previously referred to the legislature's extensive scope in assessing the necessity of decisions which were manifest in the Act, in circumstances where great risk had jeopardised the very existence of the society due to the chain reaction of the collapse of the largest commercial banks, which could have ended with the collapse of the country's entire economy. Under these circumstances, the legislature was not only entitled but obliged by its constitutional responsibility to ensure the welfare of the general public and the financial reckoning resulting from the banks' collapse had to be settled primarily between those parties who had direct interests at stake towards them. The contention of LÍ hf. and FSCS, that no other option had been available which would in fact had provided a probability of achieving the objective of the Act and would have been more equitable than the one chosen, was unrefuted. The plaintiffs' contention that Act No. 44/2009 had once more violated their rights was unsupported and ungrounded, as the wording of Art. 6 of Act No. 125/2008 had been amended slightly by the said Act without affecting its substance. In accordance with all of the above, it was evident that the legislature had not, in the actions which were concerned in the parties' dispute, exceeded its authority, having regard to the legal sources which have

previously been mentioned. The plaintiffs' contentions based on these premises were therefore rejected.

FSCS and LÍ hf. appealed the District Court's Ruling on their part due to disputes between them on interest and as to whether part of the claim of FSCS, which arose from claims of 76 customers of LÍ hf., could be considered to be based on deposits, which thereby would enjoy priority in the winding-up of the latter. The Supreme Court accepted that a claim by FSCS on behalf of 76 customers, who had delivered funds to LÍ hf. to establish deposit accounts when the bank collapsed, should be recognised as a priority claim. The Ruling of the District Court, however, had rejected that the claim on behalf of the said 76 customers of LÍ hf. should be recognised. FSCS also claimed penalty interest, as provided for in Act No. 38/2001, on Interest and Inflation Indexation, on demand deposits from 8 October 2008 until 22 April 2009, which was the date on which the bank was placed in winding-up, and on term deposits maturing after 8 October 2008 from their maturity until 22 April 2009. The Winding-up Board of LÍ hf. had rejected FSCS's claims for this interest but recognised its right to contractual interest on its claims until 22 April 2009. The Supreme Court's verdict stated that, with reference to the premises of the appealed Ruling, its conclusion was upheld that UK law applied to the contractual obligations between Icesave depositors and the branch of LÍ hf. in London. In accordance with this and with reference to subparagraph c of the third paragraph of Article 10 of Act No. 43/2000, on limits of legal applicability in the law of contracts, the conclusion in the appealed ruling, that the rules of UK law applied to the right of the defendant FSCS to claim interest on the transferred claims, was also upheld. As a result, neither the primary claim of FSCS, for Icelandic penalty interest, as provided for in the first paragraph of Article 6 of Act No. 38/2001, nor its first alternate claim for interest equivalent to the base rate of the Bank of England plus a default premium, as provided for in Art. 6 of Act No 38/2001, was accepted. The Court's verdict then stated that there was no dispute between FSCS and LÍ hf. that, if UK rules of law were applied concerning penalty interest in this case, the applicable provision there would be Rule 4.93 in the UK Insolvency Rules 1986. It was evident from the General Terms and Conditions of the Icesave accounts of LÍ hf. that deposits in the accounts were to bear interest “""until the last day prior to their withdrawal”, as stated in Art. 10j of the Terms and Conditions. The view of LÍ hf., that the requirements of paragraph 1 of Rule 4.93 of the UK Insolvency Rules were satisfied, should therefore be accepted. For this reason alone, and since FSCS had not provided any arguments that it was on another legal basis entitled to penalty interest on its claim, no such interest would be awarded. As a result FSCS's second alternate claim should be rejected and the claim of LÍ hf. accepted, that interest in accordance with the Icesave Terms and Conditions should apply during the period from 8 October 2008 to 22 April 2009; this was the interest rate recognised on the claim by the Winding-up Board of LÍ hf. and which enjoyed priority as did the claim principal. The Ruling of the Reykjavík District Court, however, accepted FSCS's claim for payment of 8% penalty interest during the said period in accordance with UK law. Finally, the Supreme Court rejected FSCS's claim for costs incurred up until 22 April 2009, with reference to the premises of the appealed Ruling. In accordance with all of the above, the outcome of the case was that FSCS's claim in the amount of ISK 852,130,797,089 was recognised with priority with reference to Art. 112 of Act No. 21/1991.

Supreme Court Verdict

This case is judged by Supreme Court Judges Ingibjörg Benediktsdóttir, Garðar Gíslason, Gunnlaugur Claessen, Jón Steinar Gunnlaugsson and Þorgeir Örlygsson, and

Eggert Óskarsson, District Court Judge, and Hjördís Hákonardóttir, former Supreme Court Judge.

The plaintiffs referred the case to the Supreme Court in appeals on 10 and 11 May 2011, received by the Court together with appeal documents on the 30th of that same month. Appealed is a Ruling by the Reykjavík District Court of 27 April 2011, upholding the decision of the Winding-up Board of the defendant Landsbanki Íslands hf. to recognise the claim of the defendant the Financial Services Compensation Scheme Ltd., hereafter referred to as FSCS, the principal of which is GBP 4,308,422,006.78 or ISK 823,253,277,056. The Ruling provided for the term deposits to bear contractual interest from 8 October 2008 until their due date, then 8% annual interest from the due date until 22 April 2009, and for demand deposits to bear 8% annual interest from 8 October 2008 until 22 April 2009. Finally, the claim was recognised as a priority claim in the winding-up of the defendant Landsbanki Íslands hf., as provided for in Art. 112 of Act No. 21/1991, on Bankruptcy etc. Grounds for appeal are found in the first paragraph of Art. 179 of the same Act.

The plaintiff Arrowgrass Distressed Opportunities Fund Limited, together with 32 others in the same group, demand principally that the claim of the defendant FSCS, "lodged in the amount of ISK 925,799,952,976", be rejected as a priority claim as referred to in the first paragraph of Art. 112 of Act No. 21/1991 in the winding-up of the defendant Landsbanki Íslands hf. Alternately the same plaintiffs demand that, if it is accepted that some portion of the claim should enjoy priority, as provided for in the statutory provision cited, this amount should be a maximum of EUR 20,887 for each depositor from whom the defendant has derived its rights, and that interest which the claim bears from 6 October 2008 should not enjoy priority under this same statutory provision. Failing this they demand that the defendant's claim for interest from 6 October 2008 should not enjoy priority under this statutory provision. They also demand that all claims of the defendant FSCS concerning recognition of claims amounts exceeding what has been recognised by the Winding-up Board of Landsbanki Íslands hf., be rejected, including claims for the priority of such amounts. These plaintiffs furthermore demand payment of court costs before the District Court and appeal costs *in solidum* from the defendants.

The plaintiff Bayerische Landesbank and 24 others in the same group make the same demands as the plaintiff Arrowgrass Distressed Opportunities Fund Limited et al. as previously related.

The plaintiff Skiki ehf. and four other plaintiffs demand primarily that "the recognition be invalidated" granted by the Winding-up Board of Landsbanki Íslands hf. to the claim by the defendant FSCS with reference to Art. 112 of Act No. 21/1991, and that it be recognised as a general claim with reference to Art. 113 of the same Act in the bank's winding-up. Alternately, they demand that, if it is accepted that some portion of the claim should enjoy priority, then this amount should be a maximum of EUR 20,887 for each account owner. They also demand payment of court costs before the District Court and appeal costs.

The plaintiff Deutsche Bank Trust Company Americas demands that the District Court's conclusion that the claim of the defendant FSCS enjoy priority with reference to Art. 112 of Act No. 21/1991 be overturned. It also demands payment of court costs before the District Court and appeal costs.

The plaintiff Landsbanki Guernsey Ltd. demands principally that the appealed Ruling be altered so that the claim by the defendant FSCS is recognised as a general claim with reference to Art. 113 of Act No. 21/1991 in the winding-up of Landsbanki Íslands hf., and alternately that it be recognised only as a priority claim with reference to Art. 112 of the Act to a maximum of EUR 20,887 for each deposit covered by the claim lodged by the above-mentioned defendant. It also demands payment of court costs before the District Court and appeal costs.

The defendant Landsbanki Íslands hf. appealed the District Court's Ruling on its part on 10 May 2011. It demands that the Ruling be upheld, with the exception that the recognition of 8% annual interest on term deposits, from their due date until 22 April 2009, and on demand deposits from 8 October 2008 until 22 April 2009 be overturned, and the decision by the defendant's Winding-up Board to recognise contractual interest until 22 April 2009 in the amount of GBP 149,752,178.76, be upheld. It demands furthermore that claims that it pay court costs at both court levels be rejected.

The defendant FSCS appealed the District Court's Ruling for its part on 11 May 2011. It demands that its principal claim against the defendant Landsbanki Íslands hf. in the amount of GBP 4,775,401,576.97, alternate claim of GBP 4,532,354,386.42, or second alternate claim of GBP 4,494,599,659.53 be recognised and that it enjoy priority ranking in the winding-up of the defendant Landsbanki Íslands hf. as provided for in Art. 112 of Act No. 21/1991. Failing this, it demands that the appealed Ruling be upheld on all points except court costs. It also demands that in all instances the plaintiffs be ordered to pay it *in solidum* court costs before the District Court and appeal costs.

The defendants WGZ Bank Luxembourg SA, Landesbank Berlin AG, Deutsche Postbank AG, Caixa Geral de Depositos, The Royal Bank of Scotland plc, ABN AMRO Bank NV, London Branch, Sparkasse zu Lübeck AG, Vereinigte Sparkassen im Landkreis Weilheim, KfW Bankengruppe and Arrowgrass Special Situations S. à r. l. did not make representations to the Supreme Court.

Before the District Court the plaintiffs Arrowgrass Distressed Opportunities Fund Limited et al. and Bayerische Landesbank et al. demanded that the claims of the defendant FSCS be dismissed by the court in other respects "than concern the dispute between FSCS and the Winding-up Board concerning amounts in excess of what the Winding-up Board has recognised as priority claims." The District Court's premises for the appealed Ruling rejected this claim, but in the appeals of these plaintiffs to the Supreme Court this claim was still made. In letters from these plaintiffs to the Supreme Court of 25 August 2011 this claim was withdrawn and the conclusion of the District Court on this point will not therefore be treated by this Court.

According to a decision by the Supreme Court oral pleadings were heard in the case on 8 September 2011.

I.

According to an authorisation in Article 100 a of Act No. 161/2002, on Financial Undertakings, cf. Art. 5 of Act No. 125/2008, on the Authority for Treasury Disbursements due to Unusual Financial Market Circumstances etc., on 7 October 2008 the Financial Supervisory Authority took over the power of the shareholders' meeting of the defendant Landsbanki Íslands hf., dismissed its Board of Directors and appointed it a Resolution Committee. Thereafter the bank was granted a moratorium with a ruling of the Reykjavík District Court on 5 December that same year. Adoption of Act No. 44/2009, which amended several provisions of the above-mentioned Acts, placed the bank in winding-up, with its commencement dated to 22 April 2009, when the Act came into force. On 29th of that same month the Reykjavík District Court appointed a Winding-up Board for the bank which handles, among other things, processing of claims against the bank. The Board issued an invitation to the company's creditors to lodge claims on 30 April 2009; the deadline for lodging claims was 30 October that same year. A large number of parties lodged their claims as a result, among them the plaintiffs in this case or in some instances creditors from whom the plaintiffs subsequently acquired their rights. The claims of almost all of these parties, furthermore, shared the status of general claims, as referred to in Art. 113 of Act No. 21/1991.

In by far the greatest number of instances, the plaintiffs are international financial undertakings, which hold bonds and other securities issued by the defendant Landsbanki Íslands hf.; they also include several Icelandic creditors. There have been some changes to the original group of plaintiffs in this case: several of them withdrew from the action when the case was being heard by the District Court, another ten of them accepted the outcome of the District Court and have not for their part appealed it to the Supreme Court. Due to the defendants' appeal of the District Court's Ruling, these ten creditors are party to the case before the Supreme Court.

The defendant FSCS also lodged a claim which it demanded be accorded the ranking of a priority claim with reference to Art. 112 of Act No. 21/1991. This defendant's involvement in the case is connected with events in 2006 when the defendant Landsbanki Íslands hf. began accepting deposits in so-called Icesave deposit accounts which were intended for individual savers in a branch of the bank in the UK. The total amounts on deposit in such accounts, or retail savings accounts as they are sometimes referred to, totalled very high amounts at the beginning of October 2008 when the bank became insolvent and the accounts were closed without settlement being made with their owners. After this the defendant FSCS acquired the claims of depositors, which each of them transferred to it, including claims for interest. The appealed Ruling accounts in more detail for the activities of the defendant Landsbanki Íslands hf. in the UK with regard to the UK Icesave accounts, and the decisions of UK authorities to exercise powers against the bank in early October 2008 when it faced failure. It also describes the transfer by account owners of claims to the defendant FSCS and verification of the amounts in individual accounts resulting from this, and explains that deposits were either term deposits or demand deposits when electronic access to the Icesave accounts in the UK was closed on 6 October 2008.

Following the expiration of the time limit for lodging claims, the Winding-up Board of Landsbanki Íslands hf. announced its decisions on individual claims. The claim of the defendant FSCS was recognised in respects other than interest, cost and amounts arising from 76 of the bank's customers. It was also recognised that the claim should be ranked as a priority claim with reference to Art. 112 of Act No. 21/1991. The plaintiffs and others who had lodged their claims objected to the claim being accorded priority with reference to the above-mentioned statutory provision, and also to its amount and interest. The defendant FSCS objected to the decisions by the Winding-up Board on that portion of the claim which arose from the 76 customers of the bank and on interest and costs. In processing the claim, the Winding-up Board attempted to resolve the dispute without success. It thereupon referred the

case to the Reykjavík District Court in a letter of 24 March 2010, with reference to the second paragraph of Art. 120, cf. Art. 171 of Act No. 21/1991.

The parties' dispute is multifaceted, but traces its roots to the above-mentioned Act No. 125/2008, which was adopted on 6 October 2008 and entered into force on the following day. It amended previous legislation in a manner which the plaintiffs consider invalid and significantly damaging to their interests in the anticipated distributions to creditors from the assets of the defendant Landsbanki Íslands hf. upon its winding-up. It has also been suggested by the plaintiffs that their rights were further infringed with the adoption of the above-mentioned Act No. 44/2009. The dispute in the case is for the most part between the plaintiffs and the defendants, but the defendants also disagree between themselves on the resolution of certain limited aspects of the claim of the defendant FSCS. Further details of the parties' premises will be referred to hereafter as necessary for the resolution of the case.

In their presentations to the District Court, the plaintiffs Arrowgrass Distressed Opportunities Fund Limited et al. and Bayerische Landesbank et al. maintained, inter alia, that the transfers of owners of Icesave accounts to the defendant FSCS were subject to shortcomings which should result in their being deemed invalid and without legal effect, in addition to which insufficient explanations had been provided of the verification of amounts in individual accounts, as is explained in more detail in the District Court's Ruling. In their presentation to the Supreme Court the plaintiffs have withdrawn these premises and they are no longer under consideration in the case.

II.

On 6 October 2008, the Prime Minister submitted to the Icelandic parliament *Althingi* a bill Authorising Treasury Disbursements due to Unusual Financial Market Circumstances etc. and introduced the bill himself. The bill was a response to economic difficulties which had arisen and are explained in more detail in the next section of the verdict. Parliamentary handling of the bill began immediately and it was approved that same day as Act No. 125/2008, as previously mentioned.

The Act has six chapters, and the provisions from which the parties' disputes arise in particular are in Chapters II and IV. Chapter I of the Act provided for disbursements from the Treasury, including an authorisation to allocate funds under extraordinary and very unusual circumstances on the financial market to establish new financial undertakings or to take over such undertakings or their estates in full or in part. Chapter II amended several provisions of and added new ones to Act No. 161/2002, on Financial Undertakings, which among other things authorised the Financial Supervisory Authority to take special measures if it

considered this necessary due to exceptional circumstances or events, with the aim of limiting loss or risk of loss on the financial market. Art. 6 in the same chapter of the Act added a new first paragraph to Art. 103 of Act No. 161/2002, which read as follows: “Upon the winding-up of a financial undertaking claims to deposits, as defined in the Act on Deposit Guarantees and an Investor Compensation Scheme, shall enjoy priority as referred to in the first paragraph of Art. 112 of the Act on Bankruptcy etc.” In addition, Chapter IV of Act No. 125/2008 added several new provisions to Act No. 98/1999, on Deposit Guarantees and an Investor-Compensation Scheme, as subsequently amended. Among these was a provision in Art. 9 of the above-mentioned Act which concerned the Depositors' and Investors' Guarantee Scheme and instructed that a new sentence be added to the third paragraph of Art. 10 of the last-named Act, which read as follows: “Claims of the Fund shall enjoy priority in accordance with the first paragraph of Art. 112 of the Act on Bankruptcy etc. upon liquidation, otherwise it is enforceable without prior court judgement or conciliation.” Adoption of Act No. 44/2009 amended Act No. 161/2002, including a slight modification in Art. 6 to the wording of the first paragraph of Art. 103, cf. Art. 6 of Act No. 125/2008. Following this amendment, provision is made for the priority ranking of deposits upon the winding-up of financial undertakings in the third paragraph of Art. 102 of Act No. 161/2002.

The authorities availed themselves of the authorisations provided in Act No. 125/2008, for instance, with the takeover by the Financial Supervisory Authority over the following three days of the powers of shareholders' meetings in all the country's largest commercial banks; in addition to Landsbanki Íslands hf. these were Glitnir banki hf. and Kaupthing Bank hf. Their Boards of Directors were also dismissed and a Resolution Committee appointed for each of them. At the same time three new banks were established on the basis of the collapsed banks, which bore the names of the older ones prefixed by "New". Their financial basis was laid in particular with the transfer of assets to them from the old banks but also with financial allocations from the Treasury. On the other hand, the new banks took over certain obligations of the old ones, primarily deposits in the banks in Iceland. Deposits in their branches abroad, which were especially in the UK and the Netherlands in the case of the defendant Landsbanki Íslands hf., were not transferred to the new banks, however. All three older banks were placed in liquidation on 22 April 2009. After the adoption of Act No. 125/2008, the Financial Supervisory Authority has taken over the direction of additional financial undertakings due to their poor financial situation, including the country's largest savings banks and one of the two remaining commercial banks.

The plaintiffs consider themselves to have sustained losses resulting from the adoption of Act No. 125/2008, and that some of its provisions are incompatible with the Constitution of Iceland and specifically cited international agreements to which Iceland has acceded. They refer in particular to the agreement on protection of human rights and freedoms which was enshrined in law with the adoption of Act No. 62/1994, on the European Convention on Human Rights, and the EEA Agreement, cf. Act No. 2/1993, on the European Economic Area. The plaintiffs' premises are described in detail in the District Court's Ruling, but basically all of them build their case on the same premises, although their emphases on individual points differ in some respects. These are principally that they are of the opinion that Art. 6 of the Act violates Art. 72 of the Constitution on protection of private property, cf. also Art. 1 of Protocol 1 to the European Convention on Human Rights, and Art. 65 of the Constitution on non-discrimination, cf. also Art. 14 of the said Convention and the EEA Agreement. The objective in adopting the Act was unclear and there was no logical connection between the cause and the remedy applied by means of the Act. It had not, for instance, been demonstrated that it had been necessary to grant deposits priority ranking in the winding-up of financial undertakings as a measure towards stopping a bank run and ensuring the functioning of the banking system in Iceland. In any case, to achieve these objectives it had not been necessary to do more than grant priority to deposits in banks in Iceland, as a run on the deposits in branches of the defendant Landsbanki Íslands hf. abroad would not have occurred simply because electronic access to deposits there had been closed on 6 and 7 October 2008. Statements by leaders on the state's guarantee of deposits in banks in Iceland were of no consequence, since there was no legal basis for such. The plaintiffs are also of the opinion that Art. 6 of the Act had a retroactive effect and violated the plaintiffs' legitimate expectations in an unlawful manner. Prior to the adoption of the Act by far the greatest number of creditors of Landsbanki Íslands hf. were ranked in accordance with Art. 113 of Act No. 21/1991 and in this respect there was no difference between deposit holders and other creditors. The plaintiffs could expect that, should the bank not prove capable of fulfilling its obligations, their legal status in this respect would be the same as when the obligations were undertaken, so that they would receive the same proportion of their claims paid as other creditors, including depositors. This equality was overturned by the Act and depositors given preference over other general creditors. The plaintiffs maintain that based on previous legislation, they could have expected close to one-third of their claims against the defendant Landsbanki Íslands hf. to have been paid from the bank's assets and depositors

would have been in the same position. The legislature's intervention, on the other hand, resulted in the plaintiffs and other general creditors receiving nothing towards their claims. The principle of proportionality had not been respected, as other, less onerous remedies would have been sufficient in the economic difficulties faced by the state in 2008 and in October of that year in particular. To ensure proportionality, the Treasury would have had to contribute the funds necessary for payment of deposits. If the Treasury were deemed to be incapable of such, other remedies should have been sought to ensure proportionality. The plaintiffs' interpretation of the substance of Act No. 125/2008, that priority was limited to a specific maximum, i.e. EUR 20,887 for each account, they maintain, accords with recognised perspectives on proportionality. They are also of the opinion that the owners of deposits in banks in Iceland have enjoyed unnecessary legal protection by making deposits priority claims, since they have not been subject to winding-up proceedings with the split up of the old banks and refinancing of the new. This had not therefore resulted in any benefit to the Icelandic banking system. Depositors therefore have not only been given preference over general creditors in ranking but have also been accorded another and better status than depositors in the foreign branches of Landsbanki Íslands hf., which have not had immediate access to their funds, regardless of the priority which the law granted them when distributions are made from the bank's estate. The Act also implies indirect discrimination on the basis of nationality, as the bank's creditors, in particular foreign creditors, will bear an immoderate burden because their nationality is not Icelandic. The plaintiffs do not, however, contest that the state was authorised to take measures in October 2008 to protect the banking system and to prevent the conceivable collapse of the Icelandic economy, including preventing a run on the banks. Nor do they maintain that they should have been completely protected from sustaining foreseeable losses in connection with the collapse of Landsbanki Íslands hf. The legislature's actions, on the other hand, they claim, went farther than could be considered authorised and there is no doubt that these have caused damage to the plaintiffs. Regard must be had for the fact that no other state had attempted to prevent a bank run by granting deposits priority in the winding-up of financial undertakings.

The defendants maintain that Act No. 125/2008 and Act No. 44/2009 comply with the Constitution and that on this the winding-up of Landsbanki Íslands hf. must be based. The economic difficulties faced by the legislature in October 2008 were enormous, as the collapse of the entire Icelandic economy was imminent if the government had not intervened with measures as radical as those involved in Act No. 125/2008. The circumstances in Iceland had

been unique, and nowhere else had they been as serious, according to those verdicts of the European Court of Human Rights to which the plaintiffs refer. The legislation was prompted by general concerns which were aimed at rescuing the Icelandic financial and payments system in an emergency situation, as there was a real risk of sovereign default and Iceland's isolation internationally. The granting of priority to depositors had been a necessary and unavoidable aspect of the state's actions, which was aimed at stopping a run on the banks, ensuring public interests and re-establishing stability. The complete collapse of the Icelandic economy had been imminent and the legislature had extensive leeway to assess the scope of actions which had to be taken. If regard is had for the size of the banking system at this time and to the fact that deposits in domestic bank accounts had amounted to ISK 2,700,000,000,000, it is inconceivable that the Treasury could have intervened and recapitalised the banks. Banks have a social responsibility where deposits are concerned, which is manifest in various forms, giving deposits a different status than general claims against banks. A new bank would have had to assume this social responsibility. Priority of deposits which was limited to EUR 20,887 for each bank account would not have stopped a run on the bank. To ensure non-discrimination, it had come into consideration to grant deposits in the bank in Iceland a different and better status than deposits in its branches abroad. The defendants also protest contentions that the status of depositors and lenders is the same since, due to the nature of their respective claims, there are a variety of differences in their ability to ensure their interests towards the debtor, with lenders being considerably better off. Therefore the Act had not discriminated between creditors of equal status. The Act also did not infringe against property rights as defined by the Constitution and the European Convention on Human Rights. Although it is generally recognised that according to these sources the concept should be interpreted broadly, the very extensive sense it is given by the plaintiffs is not supported by case law. What they refer to as the right of creditors to equal status in the distribution of funds in winding-up is not an asset which they can expect to retain forever unchanged and which will not be altered; the legislator had previously modified what claims enjoy priority upon winding-up. Furthermore the amendment made by Act No. 125/2008 to the priority ranking upon the winding-up of financial undertakings was not retroactive but rather effective for the future and generally applicable; the Financial Supervisory Authority had appointed a Resolution Committee for Landsbanki Íslands hf. after the adoption of the Act and the bank had not been placed in liquidation until 22 April 2009. It is recognised that the legislature may set restrictions on property rights by various means if all the conditions are satisfied. If this was done in this instance the restriction on

property rights made by Act No. 125/2008 was generally applicable and applied to many. The Act did not comprise expropriation and no transfer of ownership was enforced. Some of the original creditors still hold their claims while others have sold them for a low value and some of the creditors are the buyers of such claims. They would clearly profit greatly if their claims in this case were recognised. Finally it has been not proven that the plaintiffs have suffered losses and it is unclear at this stage what the recovery will be on the assets of the defendant Landsbanki Íslands hf. The defendant's premises are described in other respects in the premises of the appealed Ruling.

III.

It was mentioned above that the plaintiffs are of the opinion that the objectives with the adoption of Act No. 125/2008 were unclear and that a logical connection was lacking between the cause and the remedy it provided, and that interpretative sources were of no use in illuminating this. Contrary to this, the defendants are of the opinion that the reason for and objectives of the Act are evident, as the difficulties facing the Icelandic economy, which were related to difficult circumstances in many Western economies, were such that there was no other choice but that which the Act provided for. The above-mentioned premises of the plaintiffs, as others which they presented, make it necessary to explain as much as possible the scope and nature of the difficulties which had arisen in the Icelandic economy at the beginning of October 2008. On the other hand, it is undisputed that following rapid growth of the Icelandic economy for several years, which was not least related to the expansion of the country's largest commercial banks following their privatisation in the early years of this century, the situation had deteriorated in 2007, and the consequences had been felt suddenly and very severely at the end of September and the first days of October 2008. Furthermore, it is evident that the time available was extremely short, only a few days, for the drafting of the main portion of the Bill which became Act No. 125/2008.

The general Explanatory Notes, which accompanied the bill which became the above-mentioned Act, are brief. They begin by stating that financial markets had recently been beset by major shocks, which were visible in particular in a shortage of credit due to limited availability of the same. Icelandic financial undertakings had not escaped these shocks any more than similar undertakings in other countries. Under these difficult circumstances, governments in many countries had been forced to take measures aimed at ensuring the functioning of the financial system and reinforcing public confidence in it. The bill proposed amendments to Acts to enable the government to respond to the prevailing situation on financial markets. The notes concerning individual articles of the bill are also

brief, with the exception of that on Art. 5, which concerns the authorisation to the Financial Supervisory Authority to intervene in the operations of financial undertakings in various ways. Concerning the first paragraph of Art. 5 it is stated that the authorisations granted to the Authority will only be applied under extraordinary circumstances and, in particular, when there is a risk that difficulties facing financial undertakings "may have a wide-reaching impact on the operations and performance of financial undertakings (contagion)." Additional requirements in this respect were made in the final version of the bill adopted by the Althingi. The notes, however, do not include discussion of Art. 6 nor Art. 9 of the bill, which the dispute of the parties concerns especially.

When introducing the bill to the parliament, the Prime Minister said concerning the above-mentioned articles that it was proposed to make deposits priority claims in liquidation, which was an important aspect of underlining the government's statements that deposits in Icelandic banks and savings banks were guaranteed and "if the guarantee fund is not sufficiently robust to fulfil this obligation the Treasury will do so." In his address, the Minister of Commerce stated, among other things, that the nation now faced what had long been known, that "the problem of proportion between the banks and the society could create a situation which has now arisen, although no one could have even imagined that the situation would become as serious as it now is." He described the situation as "credit lines are closing and sources of capital drying up". It was not possible to place the nation itself at risk in the actions which were taken, as everyone knew "that we have only limited reserves, we are a small nation and cannot, in a crisis, take extreme risks with the interests and funds of the general public." He referred to the proposed legislation as emergency legislation, with which a number of other parliamentarians subsequently concurred in the parliamentary debate; action had to be taken to prevent "the banks from closing, the payment system from freezing or collapsing and ceasing to function". In addition to granting the Financial Supervisory Authority wide-reaching authorisations the principal objectives of the bill were to ensure the interests of the general public and to re-establish financial stability. Furthermore, all deposits in Icelandic banks in Iceland were fully guaranteed with no maximum.

The majority of the Economic and Trade Committee of the *Althingi* moved that amendments be made to specific articles of the bill, which were adopted but did not alter its principal contents. The majority pointed out that the provisions of the bill were conceived as emergency measures and in view of the extraordinary circumstances on financial markets it was authorised to take such radical actions as were proposed and thereby prevent a chain reaction on the financial market and the Icelandic economy. The spokesman for the

Committee expressed the view that this represented the adoption of emergency legislation "to respond to the economic catastrophe which the nation is now experiencing". By this means they were ensuring both the interests of the general public, the continued functioning of banking activities and payment systems in the country, that all deposits of citizens would be secure and that the state would be authorised to intervene in the management of financial undertakings if they were heading for failure.

At the end of 2008, Act No. 142/2008, on Investigation of the Causes of and Events Leading to the Collapse of the Icelandic Banks in 2008 and Related Events, was adopted and entered into force on 18 December that same year. The beginning of Art. 1 states that a Special Investigation Commission (SIC) under the auspices of *Althingi* is to seek to establish the truth of the events leading up to and the causes of the Icelandic banks' collapse in 2008 and related events, and to evaluate certain specific aspects. To this end, it was *inter alia* to shed as clear a light as possible on the events leading up to and causes of the difficulties of the Icelandic banking system which prompted the Icelandic parliament *Althingi* to adopt Act No. 125/2008. The commission members were subsequently appointed and delivered a detailed report to *Althingi* on 12 April 2010. Part of this Report has been submitted as evidence in this case, parties have referred to the Report in their pleadings to the Supreme Court and the commission's descriptions of the facts have not been contested.

The SIC Report described the reasons why the situation of the three largest commercial banks deteriorated steadily from 2007 onwards and criticised both the banks and country's government, the government for its failure to take action towards the banks, which expanded very rapidly, and for various decisions on economic management. The report also provided explanations of the economic difficulties facing the three banks and the entire society at the beginning of October 2008. Among other things it pointed out that the total obligations of these banks in the first half of 2004 had amounted to the equivalent of over 1½ times Iceland's GDP that year, but had increased enormously in just four years to the equivalent of over nine times GDP at mid-2008. During this period the banks' access to credit on international financial markets had mostly been good and their credit ratings high. This had gradually changed, in part due to the problems of many foreign financial undertakings, which faced financial difficulties, many of them very serious, in September 2008. Around the same time Glitnir banki hf. had been struggling to obtain funding, which created uncertainty as to whether it could meet large maturities on loans in October 2008. The bank's leaders therefore turned to the Central Bank of Iceland for a loan on 24 September 2008. The result was that on Monday, 29 September, it had been decided that instead of granting a loan the Treasury

would take over 75% of equity in Glitnir banki hf. for a specified price. At this time the sequence of events was rapid, as the bank's credit rating dropped and its position towards foreign lenders deteriorated greatly as a result of various actions taken by them, such as accelerating loans. The Central Bank's action apparently added to distrust towards the three banks which grew with each passing day, both within and outside of Iceland. To judge by the SIC Report, the government had expected Glitnir banki hf. to become insolvent and that there was a danger that Landsbanki Íslands hf. and even Kaupthing Bank hf. would meet the same fate, since there was no confidence on financial markets that the Icelandic state had the financial capacity to assist them. At this time the Central Bank of Iceland refused a request from Landsbanki Íslands hf. for a loan but did agree to a request from Kaupthing Bank hf. for credit. In addition, nothing came of the state's takeover of 75% of share capital in Glitnir banki hf. previously referred to. Around this time a run had begun on the Icelandic banks and, according to the Report, on Friday, 3 October 2008, cash withdrawals from banks in Iceland amounted to ISK 5,500,000,000, compared to normal withdrawals of ISK 200,000,000 on a Friday. Runs had also begun on their branches abroad and the UK authorities raised strong objections to their activities and those of the Icelandic banks' subsidiaries there, and took actions against them on 6 October 2008. This ended with the conclusion by the government and *Althingi* that there was no alternative but to take emergency measures, as previously related.

IV.

This case and ten others in addition which were heard by the Supreme Court, either with oral or written arguments, test the constitutionality of Art. 6 of Act No. 125/2008, and the issues at dispute are described above. The Icelandic state has not been a party to these cases. It is the responsibility of the courts to decide whether specific statutory provisions, which are disputed, violate the Constitution and there is no procedural necessity for the Icelandic state to be a party to the case. A conclusion by courts to the effect that the Act was deemed to be in violation of the Constitution would result, in such circumstances, in the Act being disregarded but could not imply a decision on the possible liability of the state for damages, cf. for reference the Supreme Court's verdict of 25 November 2010 in case no. 274/2010.

In the premises for its Ruling, the District Court states that part of the plaintiffs based their pleadings on premises concerning the transfer of wide-reaching powers to the Financial Supervisory Authority and various actions by the state following the adoption of Act No. 125/2008 and by virtue of it, which are not connected to those issues to be resolved here. It

was regarded as completely unnecessary to discuss specifically these points and the speculations of some plaintiffs that the Icelandic state had failed to fulfil some of its responsibilities in the period preceding the financial crisis and banks' collapse and while this was on-going. It is agreed with the District Court that these aspects are not of special significance in resolving this case.

Given the pleadings of the parties, it is necessary to analyse as closely as possible what the difficulties were which gave rise to the adoption of Act No. 125/2008, and to assess in this regard the objectives and actions which the legislature decided to undertake. It has previously been pointed out that the three large commercial banks proved to be incapable of withstanding the shocks when they came. They were no longer viewed with confidence and their formerly easy access to credit was now closed. Depositors' distrust of the banks had furthermore reached the stage where a run had started on the banks. Mention was made previously of the size of the banks in comparison to the country's GDP and their total deposits, according to the SIC Report, amounted to ISK 3,100,000,000,000. It is evident that the government and the *Althingi* considered it impossible to refinance the banks with Treasury funds, and thereby enable them to continue operation. The situation on financial markets, furthermore, meant that the state's possibility of obtaining financing abroad quickly became practically non-existent. In accordance with the above, the defendants' contention is accepted that without a rapid response by the legislature and government, a collapse of banking activities and breakdown of the country's payment systems was imminent. Nor is there any doubt that such a situation would immediately or very soon have had disastrous consequences for the general public and all economic activities in the country. Act No. 125/2008 was therefore adopted under very serious and pressing circumstances for the entire Icelandic society when it became clear that the banks, including Landsbanki Íslands hf., could not in all probability be rescued and that enormous losses resulting from their collapse could not be avoided. Although the interpretative sources are limited, they nonetheless give a picture of those objectives aimed at with the legislation. They were, as previously mentioned, stated in the address by the Minister of Commerce in the parliamentary debate and the opinion of the majority of the parliamentary Economic and Trade Committee described the objectives above all to be “to ensure the interests of the general public and create conditions for stability in the economy”. The majority's spokesman said further in his address that the objectives were to ensure the interests of the general public, the continued functioning of banking activities and payment systems in the country, that all deposits of citizens would be

secure and that the state would be authorised to intervene in the management of financial undertakings if they were heading for failure. In addition to the three commercial banks, most of the country's major financial undertakings also were in difficult financial straits by this time. If consideration is given to the major and unprecedented difficulties which had to be dealt with, and the clear objectives which were aimed at, in resolving the question of the legality of the legislature's decisions it is necessary to grant it extensive scope in assessing what routes were to be taken to respond to the complex and perilous situation which had arisen.

The parties dispute both whether the plaintiffs have demonstrated that they will suffer losses due to the adoption of Act No. 125/2008 and, if it were proven that this did cause losses, how great they were. The defendants, in other words, maintain that the plaintiffs have not demonstrated that they will suffer a loss. Here it must be borne in mind that prior to the adoption of the Act Landsbanki Íslands hf. was deemed to be in all probability incapable of meeting its obligations and the Act granted claims of depositors greater priority in ranking than before and not claims of other creditors. For this reason it was unavoidable that the foreseeable losses of general creditors would be greater than they otherwise would have been. Having regard thereto, the defendants' contention is rejected, that it has not been satisfactorily demonstrated that those of the plaintiffs who acquired their claims prior to the adoption of Act No. 125/2008 will receive, due to the adoption of the Act, less than they would have otherwise in distributions towards recognised claims against the defendant Landsbanki Íslands hf.

The plaintiffs maintain, contrary to the objections of the defendants, that they will receive nothing on their claims and that their losses therefore amount to the one-third of the claims which otherwise could have been expected to be paid in accordance with the law as it existed prior to 6 October 2008. In oral proceedings before the Supreme Court, reference was made to a statement by the Winding-up Board of the defendant Landsbanki Íslands hf. on 19 May 2011, concerning a meeting with creditors that same day, which announced an assessment by the Winding-up Board as to what extent recognised claims against the defendant would be paid once its assets had been realised. It stated that 99% of priority claims could be expected to be paid, assuming that so-called wholesale deposits were included in priority claims. It was also stated by the defendant that it had exercised caution in making this evaluation of assets and also that it was now assumed that a larger proportion of priority claims would be paid than had been anticipated at earlier stages of the winding-up proceedings. It has also been pointed out that the defendant Landsbanki Íslands hf. has

brought a number of actions for damages and voiding, but at this stage it is not certain whether they will result in any success and if so what success. It has been pointed out that some of the original creditors have sold their claims since 6 October 2008 and that these have had some value in transactions although it is undisputed that this was low. No further details are available on this point. Having regard for all of the above, the plaintiffs are not deemed to have provided support for their contentions that their claims have been or will be completely lost due to the adoption of Act No. 125/2008, although it is impossible at this stage to reach a conclusion as to how much will be paid towards them in the end.

The plaintiffs maintain that their funds have been used to pay the cost of preventing losses to depositors or reducing these losses as far as possible. The property rights of the former have thereby been violated, in an unlawful manner; they could rightly have expected to receive equal treatment with depositors in ranking, as they would have prior to the adoption of Act No. 125/2008 in the eventuality that Landsbanki Íslands hf. could not fulfil its obligations. On the other hand, the defendants are of the opinion that the plaintiffs' claims against the defendant Landsbanki Íslands hf. cannot be considered property in the sense referred to in the Constitution and international agreements previously cited, or enjoy legal protection as such. This comprises a contingent and uncertain claim right, the priority of which in a liquidation the legislature is fully entitled to determine at any time. In this regard the contention of the plaintiffs, that their claims rights are considered to be property, in the meaning of the Constitution and Protocol 1 of the European Convention on Human Rights, is accepted.

The plaintiffs support their arguments in part with the protection of property rights and non-discrimination, as explained in section II above and in the appealed Ruling. The conclusion was reached previously that their claims enjoy protection as property rights in the meaning of Art. 72 of the Constitution and that they have demonstrated losses, although not as extensive as they themselves maintain. After this conclusion is reached, it must be resolved whether the provisions of Art. 6 of Act No. 125/2008 involve such violation of the plaintiffs' rights as is considered to be expropriation or such restriction on property rights that it violates Article 72 or 65 of the Constitution. In resolving this regard must be had for a number of aspects concurrently, such as the cause of the actions taken, their objectives and consequences, the nature of these measures and how general and widespread was their application. The reasons have previously been discussed which prompted the decisions involved in Act No. 125/2008 and the objectives they were aimed at; these objectives will nonetheless be discussed in more detail below.

With regard to the plaintiffs' contentions on legitimate expectations, it should be remembered that the legislature had assumed that it was authorised to alter the priority of claims in liquidation without constitutional provisions limiting its scope to do so. This assumption has repeatedly been manifest in legislation, from 1974 onwards, when statutory provisions were amended on priority ranking of claims in insolvency liquidation and probate so that priority claims have been variously broadened or narrowed, with the resulting impact on the ranking of other claims, to the advantage or disadvantage of their owners. In addition, rules on the priority ranking of tax claims have also been amended in a similar manner, for instance, as in Act No. 45/1987 on Withholding of Public Levies at Source, where claims arising from the Act were for a time given priority in ranking over general claims, which had not previously been the case, with obvious and even very substantial impact on other creditors. Furthermore, the legislature has many times granted certain claims statutory lien rights or altered the status of such claims, which similarly was liable to affect the status of general claims in winding-up estates. Accordingly, the legislature has not considered the rules in this area to be immutable. Having regard thereto, the plaintiffs' claims cannot be accepted, that they could rightly have expected the legislature not to take action in this respect to their disadvantage; this applies especially to those in the group of plaintiffs who acquired their claims after 6 October 2008, as they were fully aware of the risk they assumed.

The plaintiffs also maintain that Act No. 125/2008 infringed their rights retroactively, which would be unlawful in view of the cited provisions of the Constitution and international agreements. Reference was made above to a variety of amendments to laws on the ranking of claims by priority, which were to apply thenceforth in winding-up. Adoption of Act No. 125/2008 prescribed the ranking of claims against financial undertakings, which would be wound up after the entry into force of the Act. It did not provide for new arrangements in winding-up proceedings which had already commenced or had concluded. The plaintiffs' contention in this regard is accordingly rejected.

Act No. 125/2008 applied substantially to all financial undertakings; upon the adoption of the Act there was high probability of the insolvency of the three largest commercial banks. It has been demonstrated in this case that claims lodged in the winding-up of these banks are almost 50,000 in number, around 12,000 of them in the winding-up of the defendant LÍ hf., although no information is available as to how large a portion of these claims will be ranked with reference to Art. 113 of Act No. 21/1991. It has also been pointed out that there is a likelihood of greater payment for general claims in the winding-up of banks other than the defendant LÍ hf. The Act was not adopted to apply temporarily but provides for new

permanent arrangements. Accordingly, it must be assumed that the Act has determined on a general basis how claims in the winding-up of financial undertakings are to be ranked, which could alter the rights of a great number of creditors of Icelandic financial undertakings and not merely those of the plaintiffs.

The plaintiffs maintain that equal treatment of creditors has been distorted by Act No. 125/2008, as Art. 6 of the Act implied direct and indirect discrimination against general creditors who, prior to the adoption of the Act, had the same ranking in priority as depositors. The legislation had also discriminated between creditors on the basis of nationality or their status in other respects. The appealed Ruling concluded that claims of deposit holders and general creditors were not comparable, for reasons explained in detail there, and that the legislature had not discriminated between creditors on the basis of nationality or their status in other respects. This claim is upheld with reference to the premises of the appealed Ruling.

It was previously mentioned that the stated objective in adopting Act No. 125/2008 was. *inter alia,* to ensure that banking activities in the country continued and payment systems functioned. The defendants contend that this objective would not have been achieved, as the situation was at that time, except by providing for the priority of deposits upon the winding-up of financial undertakings, as was done. Deposits have a social role, as they are the means of payment of the entire general public and also businesses to a large extent. Depositors can only depend on confidence in their commercial banks and, if this fails, their premise for entrusting the bank with preserving their funds concurrently disappears. There were tangible reasons for giving deposits special status in the inescapable settlement among those parties with direct interests at stake in the indebted financial undertakings. In this regard, it was previously demonstrated that, prior to the adoption of the Act, a run on the banks had begun due to depositors' loss of confidence. New banks were established in Iceland on the basis of the former banks in direct continuation of the entry into force of the Act and the old banks' deposits in Iceland had been transferred to the new banks. To achieve the objective of a functioning banking and payment system, the legislature deemed it necessary to grant priority to deposits in the winding-up of financial undertakings and thereby instil in depositors confidence in the new banks and stop the run on the banks which had already begun. The defendants point out that in so doing, the run on the banks had been stopped and had subsequently subsided over the course of the next two to three weeks. Their contention that the objective of Act No. 125/2008, of maintaining functioning banking activities and payment systems in Iceland, and of securing deposits in banks in Iceland, had

been achieved remains unrefuted. The defendants' argument is accepted that there were objective reasons underlying the legislature's decision to grant deposits priority, cf. Art. 6 of Act No. 125/2008. This applies equally to deposits in Landsbanki Íslands hf. in Iceland and in its branches abroad and the objection of part of the plaintiffs is rejected, that this had been unnecessary regarding deposits in Iceland, since they had been given “shelter” in new banks.

The plaintiffs maintain that other routes could have been followed to achieve the same objective rather than those decided upon. It would have thereby been possible to avoid disturbing the ranking of claims, and instead choose an option which would have reduced the plaintiffs' losses. In support of this, they have presented an opinion which they requested from two economists, which casts doubt as to the efficacy of the decisions which were implemented with Act No. 125/2008 and actions by the government on their basis. The defendants have also submitted an economic opinion, which includes criticism of the above-mentioned, and also reached the conclusion that the actions of the legislature and the government had proved as useful as was possible. Both of these expert opinions agreed that the circumstances had been very special and unusually difficult, and that it had been urgent to take action, for instance to secure deposits. They also state that various views had been presented as to what options were available and likely to prove successful when Act No. 125/2008 was adopted and, furthermore, that to their knowledge no economic research is available showing how extensive deposit protection has to be to stop a bank run and restore confidence in a collapsed banking system. The contention of the plaintiffs, that with this presentation they have supported the view that better options had been available to achieve the legitimate objectives of the legislature and government, cannot be accepted.

The plaintiffs maintain that proportionality was not exercised, and that they have suffered losses due to the excessive actions of the legislature and government. In support of this one group of plaintiffs has mentioned, for instance, that to achieve the above-mentioned objectives of stopping a run on the banks and ensuring the functioning of the banking system in Iceland it would have been sufficient to grant priority to deposits in banks in Iceland and not to touch the status of such claims in the branches of the defendant Landsbanki Íslands hf. abroad, since they had been closed on 6 and 7 October 2008, thereby avoiding a bank run there. These plaintiffs also suggested that the Icelandic state itself should have contributed funds for depositors if it wanted their deposits to be paid in full, as otherwise proportionality was not observed towards the plaintiffs. With regard to the former of these two suggestions from the plaintiffs, it would have meant dividing depositors into two groups which would

have been given a completely different legal status, determined to a considerable extent by residence and nationality. Such action, under the circumstances existing at the time, would have violated non-discrimination according to practically all those legal sources on which the plaintiffs have based their pleadings and could clearly not have been considered at all. It makes no difference whether the route which was taken resulted in only depositors in Iceland receiving immediate access to their funds, with the exception of accounts in foreign currency which are still subject to restrictions, whereas depositors in foreign branches did not receive their funds until later - which in most cases in fact proved to be a few weeks later. With regard to the latter option suggested by the plaintiffs, it would have meant that both depositors in banks in Iceland as well as their branches abroad would be compensated for the difference between their full deposits and what they would have received upon the winding-up of the defendant Landsbanki Íslands hf. and other Icelandic financial undertakings with no changes to the priority ranking of creditors. While it is impossible at this stage to reach a conclusion as to what amounts this would have involved, it can be safely assumed from the data in the case that they would be enormously high. Mention was made previously of the threat posed to the entire society by the collapse of the Icelandic banks and the size of the banking system, and that the Icelandic state's possibilities of obtaining financing abroad had become non-existent. Mention was also made previously of the assessment by the government and the legislature that the Icelandic state had no possibility of refinancing the banks and the broad scope for assessment which the legislature had to be given under the extraordinary and perilous circumstances which had arisen. Having regard thereto, the objections of the plaintiffs are rejected, that the decision by the legislature manifest in the Act No. 125/2008, as opposed to the route they refer to, comprised a violation of the principle of proportionality.

Part of the plaintiffs make the alternate claim that, if it is accepted that the claim of the defendant FSCS should enjoy priority in ranking, the amount should be limited to EUR 20,887 for each depositor from whom the defendant has derived its rights. The arguments for this claim are of two types. Firstly, they are of the opinion that the provisions of Art. 6 of Act No. 125/2008 should be construed to mean that its reference to Act No. 98/1999, on Deposit Guarantees and an Investor-Compensation Scheme, implies that the priority ranking of deposit claims should only apply to the above-mentioned maximum. This interpretation coincides with the premise that the guarantee provided for deposits by the latter Act covered only this amount. Secondly, they refer in this regard to legitimate expectations of depositors and to proportionality, and that the objectives of the Act could have been achieved without going as far as the defendants claim was done, and that it was unnecessary to grant priority to

deposits exceeding EUR 20,887 for each depositor. The defendants object to the plaintiffs' interpretation of Art. 6 of Act No. 125/2008, and to views on their own expectations and proportionality. They maintain that the reference in Art. 6 of Act No. 125/2008 to Act No. 98/1999 implies that the concept of deposits applies to the definition in the latter Act thereof, and that in the former Act the priority ranking of deposits is not at all limited to the guaranteed minimum claims which Act No. 98/1999 provides for in circumstances where the assets of the Depositors' and Investors' Guarantee Fund do not suffice to pay the total amount of insured deposits. The plaintiffs' interpretation of the substance of Act No. 125/2008 furthermore contradicts clear intentions to provide for priority of deposits in full, which are evident in the interpretative sources. If priority covered only the minimum amounts referred to in Act No. 98/1999 the provisions of Art. 6 of Act No. 125/2008, would have had no real significance, as deposit holders would in any case always receive the minimum amount from the Depositors' and Investors' Guarantee Fund, since all the deposits were guaranteed regardless of the amount except those of undertakings which are parties to the fund. The latter applies to the plaintiff Landsbanki Guernsey Ltd., whose claim is a deposit claim of this sort. With regard to considerations of proportionality, the defendants maintain that restricting granting priority in this manner would have resulted in the objective of Act No. 125/2008 not being achieved and its adoption would have made no difference to the bank run which had already begun.

The appealed Ruling rejected the former argument, upon which the plaintiffs base their alternate claim and consists of interpretation of Act No. 125/2008. This conclusion is upheld with reference to the premises of the District Court. The plaintiffs' argument concerning the assumed legitimate expectations of their counterparties or depositors is ungrounded and will not be given further consideration. With regard to the latter consideration of proportionality, data provided by part of the plaintiffs, to which no objection has been raised in this respect, has shown that around 92% of the total number of domestic deposits in Icelandic were, during the period referred to, less that the above-mentioned amount, EUR 20,887. On the other hand, this same number of accounts only comprised a small portion of the total amount of domestic deposits in accounts with financial undertakings. According to the data, this is based on information from Table 5 in Chapter 17.9 of the SIC Report. This indicates that deposits in the above-mentioned accounts totalled almost ISK 91,000,000,000 while at the same time deposits of domestic parties containing amounts in excess of EUR 20,887 totalled over ISK 974,000,000,000, or over ten times the former amount. The SIC report states that the table in question is based on information which a committee under the auspices of the

Ministry of Commerce compiled as of September 2007. When consideration is given to this statistical data, the contents of which have not in this respect been contested during the pleading of the case, it must to be deemed to be demonstrated that, to achieve the legislature's objectives of preventing the run on the banks and the collapse, it had been necessary to protect the deposits of domestic parties in excess of EUR 20,887, as the effect of limiting priority to this amount would likely have been contrary to the legislature's objectives of creating stability and confidence in the new banks in Iceland. On the basis of this conclusion, it was the duty of the legislature to ensure, to the extent possible, that foreign depositors would enjoy a similar position. Bearing in mind the serious economic situation and the obligations of the state towards Icelandic society and international agreements, it cannot be accepted that the principle of proportionality was violated with the adoption of Act No. 125/2008.

In resolving the aspect of the case concerning the constitutionality of Act No. 125/2008, reference was previously made to the legislature's extensive scope in assessing the necessity of those decisions which were manifest in the Act, in circumstances where great risk had jeopardised the existence of the entire society due to the chain reaction of the collapse of the largest commercial banks, which could have ended with the collapse of the country's entire economy. Under these circumstances, the legislature was not only entitled but above all obliged by its constitutional responsibility to ensure the welfare of the general public; the financial reckoning resulting from the banks' collapse had to be settled primarily between those parties who had direct interests at stake towards them. The contention of the defendants, that no other option had been available which would in fact have provided a probability of achieving the objective of the Act and would have been more equitable than the one chosen, remains unrefuted. The plaintiffs' contention that Act No. 44/2009 had once more violated their rights is unsupported and ungrounded, as the wording of Art. 6 of Act No. 125/2008 was amended slightly by the said Act without affecting its substance. In accordance with all of the above, it is evident that the legislature did not, in the actions which were concerned in parties' dispute, exceed its authority, having regard to the legal sources which have previously been mentioned. The plaintiffs' contentions based on this are therefore rejected.

V.

The defendant FSCS has appealed that aspect of the District Court's Ruling, which concerns 76 specific accounts which the Winding-up Board of Landsbanki Íslands hf. refused

to rank in priority with reference to Art. 112 of Act No. 21/1991, and which was upheld by the District Court. The principal of the claim was, however, recognised as a general claim with reference to Art. 113 of the Act. The former defendant states the claim has arisen from deposits in the latter's branch in the UK and therefore concerns deposits in the meaning of the third paragraph of Art. 9 of Act No. 98/1999. It describes the procedure for establishing Icesave accounts as consisting of eleven individual steps and in the case of these 76 accounts eight steps had been concluded, the applications of customers approved and the bank had requested and accepted funds from them. The application procedure had in fact been concluded at this stage, as the three final steps consisted of technical implementation on the part of the bank before the accounts became "active". Applicants had at this stage already agreed to the bank's Icesave terms and conditions, which meant that the bank had agreed to accept funds regardless of whether applicants had satisfied in all respects the obligation to provide the most detailed information. The defendant Landsbanki Íslands hf. bases its decision on the contention that in these 76 instances the parties concerned had transferred funds to the bank before the accounts in their names were opened. The terms and conditions of Icesave accounts were thereby not fulfilled and therefore no deposits were created in the meaning of Act No. 98/1999. The application procedure was still in progress and the bank had not approved these applicants; in the meantime it had held their funds but not in accounts. The defendant's pleading states furthermore that the applicants had transferred funds to the bank "for various reasons" before deposit accounts were opened in their name and in some instances the transfers were made by mistake. It maintains that it is not demonstrated that these comprise deposits or transfers as in traditional retail banking activities which the bank would have been obliged to repay in accordance with the terms applicable to these accounts. The plaintiffs support the decision by the defendant Landsbanki Íslands hf. regarding this aspect of the case.

In resolving this dispute, regard must be had for the fact that the said 76 customers of Landsbanki Íslands hf. delivered the funds to it on the assumption that their agreements were for deposits. If the bank did not wish to approve the applicants and establish Icesave accounts, according to the terms and conditions of such accounts it should have refunded the money. The bank accepted the funds and did not return them and as the events developed there is no reason not to regard these as comprising deposits in traditional banking activities, cf. Act No. 98/1999. The outcome cannot be determined by whether or not the bank has opened an account for each of these applicants or preserved their funds by other means. In accordance

with the above the claim of the defendant FSCS in this aspect of the case is accepted with interest as specified in the subsequent section VI.

VI.

The appealed Ruling states that the claim lodged by the defendant FSCS in the winding-up of the defendant Landsbanki Íslands hf. arose from the decision of the former to pay depositors in the bank's Icesave accounts in the UK the value of their deposits in accordance with so-called "COMP" rules. Furthermore, it is described that payments by the defendant FSCS to depositors was based on the balance on their accounts at closing on 7 October 2008. The deposit claims were, however, transferred in full, including the right to interest from 8 October 2008 until the date the original depositor received payment from the defendant FSCS, as well as interest which may have accrued after payment to the depositor. In its claim lodged with the Winding-up Board of Landsbanki Íslands hf. the defendant calculated contractual interest on all types of deposits taken over until 8 October 2008 and claimed penalty interest as provided for in Act No. 38/2001 on demand deposits from 8 October 2008 until 22 April 2009, and on term deposits falling due after 8 October 2008 from their due date until 22 April 2009. The Winding-up Board of LÍ hf. rejected FSCS's claims for this interest but recognised its right to contractual interest on its claims until 22 April 2009. The recognised amount of the contractual interest is based on the base rate according to the terms and conditions of Icesave deposits in the branch of Landsbanki Íslands hf. in London.

Among the documents which the defendant Landsbanki Íslands hf. submitted to the Supreme Court are the general terms and conditions which applied "on the opening and operation of all Icesave accounts which form the basis of the contract" between the depositors and the bank. These state in section 10j, which is entitled "Miscellaneous provisions", that the account "will continue to accrue interest until the last day prior to withdrawal (but not including that day). In general, it can be expected to take three working days to transfer funds to another account which you specify." Section 14d in the chapter entitled "Terms and conditions of fixed interest rate savings accounts" states that "we will contact you prior to the end of the fixed term to inform you of the options open to you. If we do not receive a reply from you before the fixed term of the account expires, we will place the funds on deposit there in a savings account with immediate access. If you do not have an immediate access account we will open such an account on your behalf."

The appealed Ruling concluded that the right of the defendant FSCS to interest on its claim until 22 April 2009, which is the reference date for the winding-up of the defendant

Landsbanki Íslands hf., is determined by UK rules of law and not Icelandic ones. With reference to the provisions of those rules, the Ruling considered that the claim of the defendant FSCS concerning term deposits should bear 8% annual interest from their due date until 22 April 2009 and the claim concerning demand deposits should bear 8% annual interest from 8 October 2008 until 22 April 2009. The defendant FSCS did not accept this conclusion, but if its principal claim for Icelandic penalty interest is not accepted, it demands alternately that the Supreme Court uphold the Ruling on UK interest. Before the Supreme Court the defendant Landsbanki Íslands hf. demands that the appealed Ruling be amended by rejecting the 8% annual interest on the amounts redeemed until 22 April 2009 and instead upholding the decision of the Winding-up Board to recognise contractual interest for this same period.

With reference to the premises of the appealed Ruling, its conclusion is upheld that UK law applies to the contractual obligations between Icesave depositors and the branch of LÍ hf. in London. In accordance with this and with reference to subparagraph c of the third paragraph of Art. 10 of Act No. 43/2000, on limits of legal applicability in the law of contracts, the resolution of the appealed Ruling, that the rules of UK law apply to the right of the defendant FSCS to claim interest on the transferred claims, is also upheld, even though their handling and priority in winding-up and deposit protection is governed by Icelandic law. It makes no difference in this connection though the provisions of UK law on interest are considered to be procedural rules in that country, since the classification by legal field is subject to Icelandic law. As a result of this, as the appealed Ruling explains, neither the principal claim of the defendant FSCS, for Icelandic penalty interest as provided for in the first paragraph of Art. 6 of Act No. 38/2001, nor its first alternate claim, for interest equivalent to the Bank Rate of the Bank of England plus a default premium, as provided for in Art. 6 of Act No 38/2001, can be accepted.

The defendants do not dispute that if UK procedural rules on penalty interest are to be applied in this case, then the relevant provisions are those of Rule 4.93 of the UK *Insolvency Rules 1986,* and during their pleading of this case, as referred to in the appealed Ruling, the defendants have submitted documentation on these rules. If these legal provisions are to apply in this case, the defendants do not dispute their substance but only whether the conditions for awarding the interest stated therein are satisfied. In accordance with this and having regard for the documentation in the case, both the existence and substance of these rules is deemed to have been sufficiently demonstrated, in the sense of the second paragraph of Art. 44 of Act No. 91/1991, on Civil Proceedings.

In the appealed Ruling the substance of Rule 4.93 of the UK Insolvency Rules is described. The defendant FSCS states that its second alternate claim is that the conclusion of the ruling of 8% annual interest be upheld. From the documentation in the case it should be evident that deposit claims which have not fallen due bear interest according to their contract terms until their due date or the commencement of the winding-up proceedings, depending upon which occurs first, cf. Paragraph 1 of Rule 4.93. If a deposit claim has, however, fallen due prior to the date of the commencement of winding-up and no rights reserved or agreement reached on interest after the due date, it should be clear that the defendant FSCS is entitled to the interest which is specified in Paragraph 6 of Rule 4.93), cf. Paragraphs 2 and 3 of that Rule. This is the interest which applies according to Section 17 of the UK *Judgments Act 1838* which is 8% annual interest. The defendant FSCS also rejects the contention of the defendant Landsbanki Íslands hf. that it had not presented a document which fulfils the requirement of being considered a written instrument, as referred to in Paragraph 3 of Rule 4.93, and the former refers to the Icesave Terms and Conditions in this connection.

The defendant Landsbanki Íslands hf. maintains that the right to interest after a claim became payable and until the commencement date of winding-up can arise in three ways. Firstly, if interest during this period was reserved or agreed upon in advance; secondly, if the claim became payable pursuant to a written instrument; and in the third place if the creditor demand payment of the debt from the debtor in writing, stating that the claim would accrue interest until the date of payment. If none of these conditions is fulfilled, interest from the time the claim was payable until the commencement date of winding-up will not be recognised. The condition of Paragraph 1 of Rule 4.93 is satisfied, that the said deposit claims should bear interest in accordance with the contractual terms and conditions which apply to them. It is maintained that the interest which the defendant Landsbanki Íslands hf. has recognised accords with this contract, as there is no provision in the General Terms and Conditions for the Icesave accounts that depositors shall be entitled to other interest than the agreed deposit interest rates after a deposit is payable. It should be obvious that the second and third conditions are not fulfilled, as the defendant FSCS has neither presented a document which could be regarded as a written instrument in the sense of Paragraph 3 of Rule 4.93, nor has it maintained that payment of the debt was demanded in writing from Landsbanki Íslands hf. with notification that interest would accrue on the claim until the date of payment, cf. the provision of Paragraph 4 of Rule 4.93. It is stated in Paragraph 2 of Rule 4.93 that the provisions of Paragraphs 3 to 6 only come into consideration if interest was not

previously reserved or agreed. For the sole reason that the requirements of Paragraph 1 are satisfied, the provisions of Paragraphs 3 to 6 do not come into consideration in this case. Other rules of UK law on interest should not apply in the instance to be resolved here.

It is evident from the General Terms and Conditions of the Icesave accounts of Landsbanki Íslands hf. that deposits in the accounts bore interest "until the last day prior to their withdrawal", as stated in Art. 10j of the Terms and Conditions. The view of Landsbanki Íslands hf., that the requirements of paragraph 1 of Rule 4.93 of the UK Insolvency Rules are satisfied, should therefore be accepted. For this reason alone, and since FSCS has not provided any arguments that it is on another legal basis entitled to penalty interest on its claim, no such interest should be awarded. As a result the second alternate claim of the defendant FSCS should be rejected and the claim of the defendant Landsbanki Íslands hf. accepted, that interest in accordance with the Icesave Terms and Conditions should apply during the period from 8 October 2008 to 22 April 2009; this was, as previously mentioned, the interest rate recognised on the claim by the Winding-up Board of LÍ hf. and which enjoyed priority as did the claim principal.

VII.

The defendant FSCS furthermore maintains its claim that its accrued costs incurred up until 22 April 2009 be recognised as a priority claim in the winding-up of the defendant Landsbanki Íslands hf. This aspect of its claim was rejected in the appealed Ruling and this outcome is upheld with reference to the premises of the District Court.

According to all of the above, the conclusion in the case is that the claim of the defendant FSCS, of which the total principal is GBP 4,309,797,732.74, is recognised and ranked in priority with reference to Art. 112 of Act No. 21/1991; this amount includes a claim for the 76 accounts discussed previously. This amount is to be converted to ISK according to the quoted exchange rate on 22 April 2009, cf. the third paragraph of Art. 99 of the same Act, and amounts to ISK 823,516,150,772. The claim of the defendant Landsbanki Íslands hf. is also accepted, that the claim of the defendant FSCS should bear interest in accordance with the terms and conditions of Icesave accounts on term deposits and demand deposits until 22 April 2009, the amount of which is not disputed at GBP 149,752,178.76 or ISK 28.614.646.317. This aspect of the claim shall similarly be ranked in priority with reference to Art. 112 of Act No. 21/1991. The recognised amount will be awarded in a lump sum and specified in the verdict in ISK.

Each of the parties was ordered by the District Court to bear its own cost of litigation with explanations as detailed in the premises of the appealed Ruling. This conclusion is upheld, with reference to the premises of the District Court's verdict. The same perspectives also apply in the main concerning court costs before the Supreme Court. With regard thereto, each party shall bear its own court costs before the Supreme Court.

Verdict:

The claim of the defendant, the Financial Services Compensation Scheme Ltd., in the amount of ISK 852,130,797,089, against the defendant, Landsbanki Íslands hf., is recognised in the latter's winding-up. The claim is ranked in priority pursuant to Article 112 of Act No. 21/1991, on Bankruptcy etc.

The provisions of the appealed Ruling on court costs are upheld.

Appeal costs are waived.

D i s s e n t i n g o p i n i o n of Jón Steinar Gunnlaugsson.

I

The main appellants are divided, on the one hand, into three groups, each of which stands jointly behind claims and pleading in this case: Arrowgrass Master Fund Limited et al., Bayerische Landesbank et al., and Skiki ehf. et al. On the other hand, the main appellants also include Deutsche Bank Trust Company Americas and Landsbanki Guernsey Ltd. I will refer to all of the above-mentioned parties in this dissenting opinion as the plaintiffs, and the counter-appellants, the Financial Services Compensation Scheme Ltd. (hereafter FSCS) and Landsbanki Íslands hf., as the defendants.

Before the District Court the plaintiffs Arrowgrass Master Fund Ltd. et al. and Bayerische Landesbank et al. demanded that the claims of the defendant FSCS be dismissed by the court to the extent that these were congruent with the claims of the defendant Landsbanki Íslands hf. for recognition of the priority of FSCS's claim. They based their claim for dismissal on the contention that the defendant FSCS had not objected to the decision by the Winding-up Board on its claim in this respect and could not therefore be a party to a court action disputing the legitimacy of this decision. As is stated in the appealed Ruling, in support of this claim the plaintiff referred to a verdict by the Supreme Court on 24 January 2011 in case no. 638/2010. This verdict concluded that a creditor, which had not objected to a decision by the Winding-up Board on the claim of another creditor, but on the contrary had accepted it, could not be party to a dispute in the courts between the latter creditor and the

Winding-up Board. The majority of the Supreme Court reached the same conclusion on this in a verdict of 15 April 2011 in case no. 142/2011. The above-mentioned plaintiffs have withdrawn this claim for dismissal in their appeal to the Supreme Court.

Courts are to check on their own initiative whether the defendant FSCS can be party to a dispute in court on the Winding-up Board's decision on the priority of its claim when this decision has been, in accordance with the first paragraph of Art. 120 and Art. 171 of Act No. 21/1991 on Bankruptcy etc., referred to the courts due to objections from other creditors. Although a party which accepts a decision by the Winding-up Board cannot, according to the cited statutory provisions, itself take the initiative in referring it to the courts, this does not mean that it cannot involve itself in the dispute of another creditor concerning the Winding-up Board's decision when such a dispute is referred to the courts and the party which seeks to be involved has legitimate interests at stake in the courts' conclusion on the the dispute. In the case concerned here it is evident that the defendant FSCS has legitimate interests at stake in the court's conclusion on the priority of its claim, which was accepted by the Winding-up Board. As the majority of the Supreme Court is now of the opinion that this defendant can be a party to the case in this respect, this in fact represents a retraction of the court's position in this regard in the above-mentioned verdicts, cf. also the court's more recent verdict of 12 October 2011 in case no. 398/2011. I declare myself in agreement with this.

II.

The events leading up to the adoption of Act No. 125/2008, Authorising Treasury Disbursements due to Unusual Financial Market Circumstances etc., and actions in connection with the adoption of this Act are described in the opinion of the majority of judges. The Act was intended to respond to the very serious situation which had arisen in the country and is described there. These actions involved protecting deposits in the banks in particular. In Iceland new banks were established to replace the three large commercial banks and their deposits transferred to the new banks. Decisions thereupon were supported by Art. 5 of the said Act, which added a new Article, Art. 100 a, to Act No. 161/2002, on Financial Undertakings. Art. 6 of the Act, which added a new first paragraph to Art. 103 of Act No. 161/2002, stated that in winding-up the estate of a financial undertaking claims in connection with deposits, as defined by the Act on Deposit Guarantees and an Investors Compensation Scheme, should enjoy priority as provided for in the first paragraph of Art. 112 of Act No. 21/1991. This meant that deposits were granted priority in the winding-up of a financial undertaking over general claims, whereas until the adoption of the Act deposit claims had belonged in this class. Assets were transferred from the old banks to the new banks to balance

against the obligations involved in accepting the deposits transferred to them.The actions meant that these deposits were in fact granted priority above that of other claims which the banks had borne. Deposits in the banks' foreign branches, primarily in the UK and the Netherlands in the case of Landsbanki Íslands hf., remained in the old banks. The Winding-up Board decided that these deposits, including the claim of the defendant FSCS, should enjoy priority in the winding-up of the bank. The plaintiffs are among the general creditors in the winding-up and have objected to this decision. The case considers the dispute of the parties in this regard.

Adoption of Act No. 44/2009, amending Act No. 161/2002, on Financial Undertakings, made amendments to Art. 103 of the Act, among other things. The provision on the priority of deposits was now, with Art. 6 of Act No. 44/2009 placed in the third paragraph of Art. 102 of Act No. 161/2002 and a minor change made from the wording of Art. 6 of Act No. 125/2008, which cannot be considered to be of significance for the dispute to be resolved here.

The plaintiffs contend, among other things, that the need to respond to the imminent threat posed to the economy and general payment system in Iceland was not connected with the winding-up of the old banks after domestic deposits had been given shelter in the new banks in the manner described. This case is not testing whether it was authorised to transfer to the new banks, which were established in Iceland, assets from the old banks to balance against the domestic deposits which were transferred to these new banks. As this case now stands, it need only be resolved whether it was authorised to grant deposits priority over general claims, so that this would determine distributions to creditors in the winding-up of the defendant Landsbanki Íslands hf., as deposits in its foreign branches were left in this bank.

III.

The plaintiffs' claims against the defendant Landsbanki Íslands hf. are considered property rights which enjoy protection pursuant to Art. 72 of the Constitution of the Republic of Iceland, Act No. 33/1944. In my estimation there is no doubt that these property rights were infringed by the above-mentioned actions, including the adoption of Art. 6 of Act No. 125/2008 and subsequently the third paragraph of Art. 6 of Act No. 44/2009, on priority of deposits. The statutory provision which is examined here was directly intended to ensure that the banks' assets would be used to cover deposit claims ahead of other claims and thereby comprised a reduction to the latter, as it was clear upon the adoption of the Act that these assets would not suffice to cover all claims. This case is to decide whether the plaintiffs will have to bear this reduction without compensation in the winding-up of Landsbanki Íslands hf.

It must be agreed that a serious situation had arisen in the country, where there was a substantial risk that both individuals and businesses would lose access to daily means of payment, with obvious detrimental impact for the general public and business and industry. The government and the *Althingi* chose to respond with actions intended to keep the economy in operation and ensure that domestic payment systems functioned. The actions described above in fact obtained funds to cover their cost from the banks' general creditors. This will be discussed in more detail in section IV.

Although the ordinary legislature can, as a rule, set the legal provisions determining priority of claims upon insolvency, which can at least to some extent apply to claims established prior to the entry into force of such rules, consideration must be given here to the fact that the Act was adopted precisely because of the serious situation which had arisen and affected the activities of specific undertakings, primarily the three large Icelandic banks. The opinion of the majority of judges can be accepted, that claims for deposits in banks are in many respects of a different nature than claims arising from loans granted to banks or other types of transactions. Perspectives in this regard, however, are in my estimation of such type that they can only effect decisions by the legislature as to whether deposits should be granted priority by law so that this will apply in the future. They can neither provide the legislature nor the courts with authorisation to retroactively rank claims in priority. What is of significance for resolution of this case is that deposit claims did not enjoy, prior to the entry into force of Act No. 125/2008, greater rights according to law upon the winding-up of banks than did other general claims. In my opinion there is no doubt that statutory provisions are necessary to give certain claims priority over others. Here it is not sufficient to refer afterwards to the fact that some claims have intrinsic value giving them priority over others. Adoption of legislation which has such specific objectives as is the case here, and which completely alters the legal status of those parties concerned, in fact has a retroactive effect infringing property rights which enjoy the protection of Art. 72 of the Constitution. It cannot, in my estimation, be justified by maintaining that the general legislature can as a rule adopt statutory rules on the priority of claims in insolvency which shall apply thenceforth.

IV.

As previously stated, there is no doubt that the property rights of general creditors of the old banks were infringed for the purpose of ensuring the status of deposits in their winding-up, by granting deposits priority over claims of general creditors. Thus the property rights of the plaintiffs and others in a comparable position were actually used directly to cover the costs resulting from this action. It could therefore be said that adoption of Act No.

125/2008 simply transferred assets from the plaintiffs and other general creditors to deposit holders, for the purpose of responding to the serious situation which had arisen and was previously described. The provision of Art. 72 of the Constitution does not allow the transfer of property rights between persons except under strict conditions, which are listed, for instance, in the provision; this includes the condition that full compensation be made for the loss of the asset. Nor in my estimation can the measures taken be considered general restrictions on property rights, which are considered authorised without compensation, since only the claims rights against specific debtors were limited and not claims rights or other property rights in general.

The defendants maintain that the legislature was authorised to adopt the legislation in question here due to the imminent emergency situation. The defendant FSCS refers, for instance, to the fact that the plaintiffs did not point out other routes which would have infringed less against their interests but sufficed to avoid the emergency situation. The plaintiffs consider themselves entitled to enjoy protection of their property rights without it being conditional upon their pointing to such routes.

If legislative power is applied to respond to an emergency situation, as is considered to be the case here, the general rule must be that the funds to cover the cost of such actions are acquired in a general manner. In my opinion it is not lawful to place this cost practically exclusively on the plaintiffs and other general creditors of the banks, even though their assets which are reduced to this end are connected to the banks specifically by being comprised of claims rights against them. Such remedies discriminate against these parties, both compared to those who held deposits in the banks and also others whom the defendants consider to have benefited from the actions, although this is in a more general manner. Courts must evaluate whether actions of the sort examined here, exceed the authorised infringement of property rights. On the other hand, it cannot be a condition for the recognition that infringement was excessive, that courts specify how funds could have been obtained to cover the cost of actions which were considered necessary to undertake to avoid an imminent emergency situation.

V.

Property rights are protected in Art. 72 of the Constitution . The substantial aspect of the provision includes a rule on non-discrimination, similar to that enshrined in Art. 65 of the Constitution. With reference to the above, it is my conclusion that it does not comply with the protection of property rights, which is ensured by Art. 72 of the Constitution, to infringe on the plaintiffs' claims rights in the winding-up of the defendant Landsbanki Íslands hf. by

granting the claim of the defendant FSCS priority as provided for in Art. 6 of Act No. 125/2008, cf. now the third paragraph of Art. 102 of Act No. 161/2002, as was accepted in the appealed Ruling. I emphasise specifically that this view does not imply that the statutory provision is invalid as law in the country, so that deposits in banks will enjoy on its basis in the future legal status with reference to the first paragraph of Art. 112 of Act No. 21/1991 upon the winding-up of a financial undertaking. It implies only that in adopting this provision those property rights of the plaintiffs comprised by their claims against the defendant Landsbanki Íslands hf. were infringed in a manner incompatible with the said provision of the Constitution. In my estimation, according to this the claims of the plaintiffs should be accepted, that recognition of the priority of the claim of the defendant FSCS in the winding-up should be overturned and the defendants ordered to pay the plaintiffs *in solidum* court costs before the District Court and appeal costs.

Certified true copy, 28/10/2011 Fee: ISK 10,000.