Monday, 10 November 2014

No. 707/2014

Kaupthing hf.

(Supreme Court attorney Þröstur Ríkharðsson)

v

Aresbank SA

(Baldvin Björn Haraldsson, Supreme Court attorney)

Appeal. Financial undertakings. Winding-up. Payment. Currencies. Exchange rates.

Appealed was a Ruling of the District Court which upheld A's claim that it be recognised that K hf., in making payment of three claims of A on 16 August 2013, should have based this on the selling rate of the Central Bank of Iceland for EUR as quoted on that date in converting the payment to that currency. The parties disputed whether K hf., in making the payment, should have based this on the quoted exchange rate for the EUR on 22 April 2009, when K hf. was placed in winding-up, or on 16 August 2013, when payment was made to the custody account specified; A had signed a special form from K hf. in which it requested to receive payment in EUR based on the quoted EUR exchange rate as of 22 April 2009. The Supreme Court's judgement stated that according to the third paragraph of Art. 99 of Act No. 21/1991, claims against an insolvent estate in foreign currencies should be converted to ISK at the quoted selling rate on the date the Ruling on liquidation was issued, provided these claims did not satisfy requirements for ranking in priority in the winding-up with reference to Articles 109-11 of the same Act. According to this rule the claims which were covered by the provision were converted to claims in ISK once and for all and in every respect with regard to the liquidation. Distributions towards claims upon the conclusion of liquidation would therefore be made according to their amount in ISK and payment made in this currency. An administrator, however, was authorised in specified instances, but not obliged, to make payment in a foreign currency. There was found to be no legal basis for calculating the amount of payments to creditors of an insolvent estate, made in foreign currencies in such instances, according to the quoted exchange rate on the date of the Ruling on liquidation. These rules applied to the winding up of K hf. Therefore K hf. should have determined the amount which was deposited into the custody account on 16 August 2013 by converting the amount from ISK to EUR using the exchange rate quoted on that date. It was also found that K hf. could not maintain that A had in a binding manner agreed to the arrangements which K hf. proposed and which would have been contrary to the proper interpretation of the law by signing a declaration requesting payment of its claims in EUR. The appealed Ruling was therefore upheld.

Supreme Court Judgement

This case is judged by Supreme Court Justices Markús Sigurbjörnsson and Benedikt Bogason and Guðrún Erlendsdóttir, acting Supreme Court Justice.

The Appellant referred the case to the Supreme Court in an appeal of 27 October 2014, received by the Court together with appeal documents on the 31st of that same month. Appealed was a Ruling of the Reykjavík District Court of 13 October 2014 which upheld the Respondent's claim that it be recognised that the Appellant, in making payment of three specifically designated claims on 16 August 2013, should have based this on the selling rate of the Central Bank of Iceland for EUR as quoted on that date in converting the payment to that currency. Grounds for the appeal are found in the first paragraph of Art. 179 of Act No. 21/1991, on Bankruptcy etc. The Appellant demands that the above-mentioned claim of the Respondent be rejected. It also demands payment of court costs before the District Court and appeal costs.

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

I

As explained in the appealed Ruling, the Financial Supervisory Authority availed itself of an authorisation in Art. 100 a of Act No. 161/2002, on Financial Undertakings, cf. Art. 5 of Act No. 125/2008, to take over the authority of the shareholders' meeting of the Appellant, which was then called Kaupthing Bank hf., dismiss its Board of Directors and appoint it a Resolution Committee. The Appellant's winding-up began on 22 April 2009 with the entry into force of Act No. 44/2009, amending the previously mentioned Act. The Respondent lodged three claims in the winding-up for a total amount of EUR 55,007,807.63, demanding that they be granted priority with reference to Art. 112 of Act No. 21/1991. As provided for in the third paragraph of Art. 99 of the last-mentioned Act, cf. the first paragraph and the third paragraph of Art. 102 of Act No. 161/2002, the Appellant converted the amount of the Respondent's claims to ISK according to the selling rate quoted by the Central Bank of Iceland on 22 April 2009; they thereby amounted to a total of ISK 9,308,971,348, Disagreement arose concerning the recognition of these claims, both with regard to their amount and their priority ranking; as it did not prove possible to resolve the dispute it was

referred to the District Court, where three cases were filed on 26 January 2011 to have this resolved.

At a creditors' meeting on 5 June 2013 the Appellant announced its intention to utilise an authorisation in the sixth paragraph of Art. 102 of Act No. 161/2002 to pay in full recognised claims against it enjoying priority with reference to Art. 112 of Act No. 21/1991. The Appellant assumed that creditors would receive payment in ISK but could elect to receive payment in EUR. Those who selected this option would receive payment calculated on the basis of the quoted exchange rate of 22 April 2009, however, with the proviso that if the EUR exchange rate should prove to be higher on the date of payment the distribution would be calculated according to that rate. The dispute concerning the Respondent's claims remained yet unresolved, but all the same it declared that it elected to receive payment in EUR. To this end it signed a statement on a form provided by the Appellant, the substance of which is described in detail in the appealed Ruling. On this basis the Appellant states that on 16 August 2013 it deposited EUR 55,007,808 into a special custody account for the Respondent as provided for in the provisions of the sixth paragraph of Art. 102 of Act No. 161/2002; this amount was equivalent to the total amount of claims lodged by the Respondent, the previously mentioned ISK 9,308,971,348, based on the quoted exchange rate of 22 April 2009.

According to the Appellant's pleading, it decided on 23 September 2013, following the Supreme Court's judgements of the 12th of that same month in cases nos. 438/2013 and 454/2013, to recognise the Respondent's claims in the amount of ISK 8,781,677,575 and with priority with reference to Art. 112 of Act No. 21/1991. On this basis the Appellant paid to the Respondent on 16 October 2013 EUR 51,891,967 from the custody account, which was equivalent to the previously mentioned ISK amount based on the quoted exchange rate of 22 April 2009.

A judgement by the Supreme Court of 24 September 2013 in case no. 553/2013, concerning the winding-up of another former financial undertaking than the Appellant, confirmed that in making distributions to creditors holding claims which were originally in foreign currencies this undertaking should have based payments made in a foreign currency on its exchange rate on the date of payment. It was there rejected that the basis should be the quoted exchange rate on 22 April 2009, as that financial undertaking had considered appropriate. On the basis of this judgement, the Respondent demanded, in a letter of 7 November 2013, that the Appellant adjust the amount of its previously mentioned deposit to

the custody account on 16 August that year by depositing an additional EUR 3,064,377.57; this amount comprised the shortfall to make up the equivalent of ISK 9,308,971,348 based on the quoted exchange rate of 16 August 2013 in the account. The Appellant rejected this demand, and as the parties' dispute could not be reconciled it was referred to the District Court on 11 November 2013, where it was filed for this purpose on 31 January 2014.

During the progress of the case the Supreme Court pronounced judgements in cases between the parties which were filed with the District Court on 26 January 2011, cases nos. 276, 277 and 278/2014. In these judgements the Respondent's claims in the Appellant's winding-up were recognised in a total amount of ISK 9,287,911,011 with priority with reference to Art. 112 of Act No. 21/1991. Claims of the Respondent were thereby recognised in an amount which was ISK 506,233,436 higher than the Appellant had previously used as a basis. In accordance with this the Appellant states that it had withdrawn from the custody account the equivalent of this amount based on the quoted exchange rate of 22 April 2009, EUR 2,991,393.32, and paid this to the Respondent on 13 October 2014. In so doing the Appellant considered itself to have finally settled the Respondent's recognised claims with payments amounting to a total of EUR 54,883,360.32, or the equivalent of ISK 9,287,911,011 based on the quoted exchange rate of 22 April 2009. The Respondent maintains, on the other hand, that payments to it should properly amount to the equivalent of ISK 9,287,911,011 in EUR based on the quoted exchange rate of 16 August 2013, when the Appellant deposited funds into the custody account to cover the Respondent's claims.

II

According to the above-mentioned third paragraph of Art. 99 of Act No. 21/1991, the rule applies in liquidation that claims against an insolvent estate in foreign currencies are to be converted to ISK at the quoted selling rate on the date the Ruling on liquidation was issued, provided these claims did not satisfy requirements for ranking in priority in the winding-up with reference to Articles 109, 110 or 111 of the same Act. In accordance with this rule the claims, to which the third paragraph of Art. 99 of the Act applies, were converted to claims in ISK once and for all and in every respect with regard to the liquidation. Accordingly, distributions towards claims upon the conclusion of liquidation are to be made according to their amount in ISK and payment made in this currency. Should the insolvent estate, however, upon the conclusion of liquidation still own funds in foreign currency the provisions of Act No. 21/1991 do not prevent, although there is no obligation to do so either, an administrator

from making distributions to creditors holding claims which were originally in a foreign currency in that currency or another upon conclusion of liquidation. The underlying determination of such a distribution would as usual be made in ISK, and by converting the assets of the insolvent estate in foreign currency to ISK based on the quoted exchange rate at the time and the distribution to the creditors concerned similarly. Furthermore, the administrator of an insolvent estate which holds assets exclusively in domestic currency can act to benefit its creditors in excess of its obligations upon conclusion of liquidation by purchasing foreign currency on the market for a distribution to them, however, which is determined in ISK. Such purchases would be, by their nature, concluded based on the exchange rate of the currency which applied on the date of payment. Having regard thereto, there is no legal basis for calculating the amount of payments to creditors of an insolvent estate, made in foreign currencies for either of the two above-mentioned reasons, according to the quoted exchange rate on the date of the Ruling on liquidation. These rules apply *mutatis mutandis* in the Appellant's winding-up according to provisions of Chapter XII of Act No. 161/2002. As the Appellant has elected to provide its foreign creditors the convenience, in the instances concerned in this case, of making distributions towards their claims in a foreign currency these distributions must unavoidably be based on the fact that these creditors' claims are in ISK and accordingly the amount of the payments must be based on the exchange rate of the currency in question on the date they are made. In accordance with this the Appellant should have determined the amount which was deposited into the custody account on 16 August 2013 to cover the Respondent's potential claims by converting the amount from ISK to EUR using the exchange rate quoted on that date.

According to the fourth paragraph of Art. 101 of Act No. 161/2002 the provisions on administrators of Act No. 21/1991 apply in principle to Winding-up Boards appointed for financial undertakings. On this basis, cf. also the third paragraph of Art. 77 of Act No. 21/1991, the Winding-up Board in its legal actions must comply with the appropriate statutes. According to the above, there was no legal ground for the decision by the Appellant's Winding-up Board to base payment in EUR to a custody account on behalf of the Respondent on the quoted exchange rate of 22 April 2009; instead it should have applied in this respect the exchange rate on the date of payment. Having regard thereto, the Appellant cannot maintain that the Respondent had in a binding manner agreed to the arrangements which the Appellant proposed and which would have been contrary to the proper interpretation of the

law by signing the previously mentioned declaration requesting payment of its claims in EUR. In consideration of all of the above, the conclusion of the appealed Ruling is upheld.

The Appellant is ordered to pay the Respondent costs of appeal as stated in the judgement.

Judgement:

The appealed Ruling is upheld.

The Appellant, Kaupthing hf., shall pay the Respondent, Aresbank SA, ISK 500,000 for appeal costs.