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|   | Wednesday, 24 April 2013 |
| No. 612/2012.  | **Valitor hf.**(Helga Melkorka Óttarsdóttir, Supreme Court Attorney.)**versus****Datacell ehf.**(Sveinn Andri Sveinsson, Supreme Court Attorney.)Ingi Tryggvason, District Court Attorney) |

Payment Service, Revocation, Termination, Daily Fines

*D, which managed a database, storage of electronic data and computer service, including on behalf of S which conducted international operations under the name of W, made an agreement on payment services with the credit card company V on 15 June 2011. With an email dated 8 July of the same year, V revoked the agreement with reference to D having breached general conditions for business and that international credit company conglomerates did not authorise the service that D provided for W which had not been specified in the application. D brought a case against V and demanded that the company be made to open the payment gateway pursuant to their agreement on pain of daily fines. Given the events of the case the Supreme Court consider that D had subsequent to its application for service from V, provided information that clearly indicated the purposes for which D had intended to use the payment gateway. By V having decided to open access to the payment gateway, D was justified in assuming that they considered that the operations were within the limits of the description provided in the application from D and in their agreement and that they were compatible with the provisions of V’s general terms of business. According to the above it was considered that V had lacked authority to revoke the agreement between them and that there were no grounds to consider that V could not be released from the agreement on the basis of events that could invalidate the agreement. V is thus instructed to open the payment gateway pursuant to the agreement between the parties on pain of daily fines of ISK 800,000.*

**The Ruling of the Supreme Court**

This case is judged by Supreme Court judges Markús Sigurbjörnsson, Árni Kolbeinsson, Eiríkur Tómasson, Gunnlaugur Claessen and Ingibjörg Benediktsdóttir.

The appellant appealed the case to the Supreme Court on 26 September 2012 having been granted permission to appeal. He demands dismissal of the claim of the defendant and costs in the District Court and in the Supreme Court.

The defendant mainly demands that the case be dismissed from the Supreme Court and in reserve that the judgement of the District Court be confirmed. In addition he claims legal costs for the Supreme Court case.

I

According to submissions presented by the defendant, which was founded in the year 2009, it has handled the operation of a data centre, storage of electronic data and computer services including the operation of databases, mail servers, websites and what are called payment gateways. Among customers of the defendant was Sunshine Press Productions ehf., which has conducted international operations under the name of WikiLeaks, which has received information from whistleblowers on various subjects and published it to the public. After the initiation of this business relationship Sunshine Press Productions ehf made an agreement in 2010 with the defendant to receive support contributions to WikiLeaks and these have been made with credit cards through his payment gateway. For this purpose the defendant made an agreement with the Danish company which is now called Teller A/S and provided service with payments from debit cards and credit cards while Kortaþjónustan hf. represented the company in this country. The Danish company stopped these operations of the defendant in December 2010 and it seems undisputed in the case that this was done at the demand of international credit card companies, among others VISA Europe and MasterCard International which had not wished to facilitate the handling of contribution funds from credit cards to WikiLeaks. It is established in the case that Teller A/S had in its terms for agreements on payment services reserved the right for such measures in circumstances such as these.

The defendant on 14 June 2011 sent an electronic application to the appellant for a cooperation agreement by filling out a form for this purpose from the appellant. There it was specified among other things that “type of commercial operation” of the defendant was data centre, hosting and technical services and also that the application among other things concerned service with respect to a payment portal. One day later an employee of the appellant filled out the form for a cooperation agreement with the defendant when it was stated that “type of commercial operation” was “computer programming” and also that payments to the defendant could either be recurring payments or could go through the payment gateway. In the agreement it was among other things stated that with its signing the defendant was subject to the appellant’s general terms of business as they were at any given time, and that the defendant had acquainted himself with them. In Chapter 4 of these terms, which cover the duty to accept cards, it was stated among other things in Section 4.2 that the party called sales party was “unauthorised to accept cards as payment for pornography, prostitution, drugs or for any kind of illegal goods or services and/or as an action in funding terrorism or money-laundering.“Then it is stated in Section 4.3 that it was unauthorised “to accept payments for transactions between the cardholder and a third party on the basis of the agreement and of the terms.“ In Chapter 21 of the terms there were provisions for the term and cancellation of the agreement. There it was stated in Section 21.2 that either party to the agreement was authorised to terminate the agreement and that this should be done in writing and the agreement would then no longer be in force after two months from the next start of a month after receipt of the cancellation. In Section 21.3 it says among other things the following: “all abuse by a sales party of the facility provided to him by the cooperation agreement or of the equipment that he leases from the company, that is to say with unauthorised trading or repayments, is unauthorised and warrants revocation of the agreement and of special agreements by the company.“ Then in Section 21.5 the duty of the sales party was prescribed to inform the appellant of any change whatsoever in the nature of his operations from that which was described in the application and that this duty also covered the eventuality that “the sales party offered for sale new product categories, new service or that he discontinued the sale of a product or service.“Should there be negligence in notifying the appellant of significant changes of this nature he was authorised to revoke the cooperation agreement.

The above specified cooperation agreement was sent immediately to the representatives of the defendant and was received again, signed, by the appellant - “soon” as the employee who had handled this matter said in testimony he gave after the appeal of the District Court Judgement in this case. The employee said that subsequent to this he sent information to the company Xodus ehf. which the defendant had engaged to construct its payment gateway.  Xodus ehf. subsequently sent this employee an email on 27 June 2011 which was marked such that it concerned matters relating to the defendant who said the following: “we have a gateway which is ready and needs to be inspected. Shall we talk directly to FGM or do you forward it. https://secure.xodus.is/datacellweb/default.aspx“. “FGM” in this message meant Greiðsluveitan ehf. which was owned by the Central Bank of Iceland, and according to testimony that the appellant’s employees and employees of this company provided to the District Court, was responsible for inspection “of security and technical issues in the system”, as worded by the CEO of the appellant. Then it was stated in the testimony of two employees of Xodus ehf. who worked on this task for the defendant, that the last phrase in the email to the appellant’s employee had been a web address for access to a page of that name where the defendant’s planned payment gateway could be found. The defendant has submitted in this case a printout of what he says would have been seen on this page where the text is in English and solely offers the user the opportunity of sending a donation to the amount of his own choice to WikiLeaks with debit from his credit card or payment into a specified bank account on the defendant. There one can also see a short description of the operations of WikiLeaks and of the defendant. An a statement to the District Court the previously mentioned employee of the appellant does not recall having received this email and maintains that he did not use the web address specified there to examine the defendant’s planned payment gateway as the employee complied with the rule of avoiding such a practice “because of viruses and such like”.

In the case, there is no reply from the appellant to the previously mentioned email from Xodus ehf. On the other hand a document has been submitted to the Supreme Court with the title: “request for inspection” where Xodus ehf. requested that Greiðsluveitan ehf. inspect a system with the name “Xodus Donation, version 2.0”. Aat the beginning of this document reference was made to the previously specified web address for the purposes of finding the system and the email address of the previously referenced employee of the appellant and sender of the message was specified and reference was made to the fact that it concerned the appellant and the defendant.<0} The application had been entered into an electronic form from Greiðsluveitan ehf., and in a particular item of the application form relating to description of the system it said among other things: “this is a standard sales page which is used as a donation page. Previously decided amounts are offered and after payment has been accepted the customer receives a receipt by mail (email) … Maximum donation from each credit card is Euro 1000.” Before the court, the appellant employee in question did not recall having received by email a copy of the application but on the other hand Greiðsluveitan ehf. sent to this employee and to others an email on 27 June 2011 where receipt was confirmed of “application for inspection” of a system called “Xodus Donation, version 2.0”. In the case there is no submission of notification from Greiðsluveitan ehf. regarding the result of the inspection, but an email has been submitted to the Supreme Court from the often mentioned employee of the appellant to Xodus ehf. from 29 June 2011 where among other things it says the following: “I just received from Greiðsluveitan that everything was completed … Everything in connection with Datacell is ready on our side, so it is okay to open it.”

The defendant published the notification on his webpage on 7 July 2011 where it was stated that nearly a month before he had demanded that VISA Europe, MasterCard International and Teller/S re-open the payment gateway for donations to WikiLeaks but that this demand had not been answered. On the other hand the defendant had succeeded in getting another company, with whom he had made an agreement, to open a channel to make such payments with credit cards among other things from VISA and MasterCard. Reference was made to further specified web addresses of the defendant where this could be done.

In the morning of a July 2011 the appellant sent the following email to the defendant: You are hereby notified that Valitor hf. has decided to revoke the collaboration agreement between Valitor and Datacell ehf., dated last 15 June and the agreement on the use of the Valitor service web dated last 30 June because of a breach of general terms of business with a merchant and because of the fact that international credit cards groups do not authorise the service that Datacell provides for WikiLeaks and which was not specified in the application. The revocation takes effect immediately." The lead up to this was described by the CEO of the appellant in a deposition to the District Court such that he had been told “a few hours or a number of hours after … business had been established” that the appellant had begun “to receive entries from WikiLeaks in reality”. He had also received a telephone call from an employee of VISA Europe, who had revealed “that these entries from WikiLeaks were beginning to flow through our system” and in addition to this he pointed out that Teller A/S had some time before that decided to cancel dealings with the defendant for an analogous reason and asked what the appellant intended to do. The defendant immediately objected to the previously mentioned notification from the appellant with reference to the fact that employees of the latter had been “very well informed of what the purpose had been to open the payment gateway.“The defendant furthermore demanded an answer as to which of the appellant’s terms had been breached and a copy of the “instructions from the large credit card companies.“ This was repeated by the defendant on 11 July and 3 August 2011. In a reply that the appellant sent on 4 August of the same year it was rejected that the defendant had provided the appellant with information “on the manner in which the payment gateway was to be used” and that in the defendant’s application nothing had been said other than it had been intended to “receive cash donations.“Reference was furthermore made to the previously mentioned Sections 21.3 and 21.5 in the appellant’s general terms of business which authorise cancellation of the cooperation agreement with the defendant.

The defendant brought this case on 6 February 2012 and demanded that the appellant, on pain of daily fines to the amount of the ISK 1,000,000, open the payment gateway in accordance with the cooperation agreement between them from 15 June 2011 and pay legal costs. In the appeal judgement which was pronounced on 12 July 2012 the above mentioned claim was accepted such that the appellant was obliged to accede within 14 days from the pronouncement of the judgement on penalty of daily fines to the amount of ISK 800,000. In a letter to the attorney for the defendant from 24 July 2012 the appellant referred to the fact that he had on 8 July 2011 revoked the agreement with the defendant from 15 June of the same year but according to the District Court Judgement of 12 July 2012 the appellant was obliged to open the payment gateway that this agreement covered. The appellant did not intend to accept this judgement and would apply for permission to appeal as he considered that “the revocation had been lawful”. It was also mentioned that “because of the position taken by international credit card conglomerates” it was for the appellant “impossible to open the payment gateway.“ Having said this the appellant made the following statement in the letter: “As the District Court of Reykjavik has with its judgement dated last 12 July come to the conclusion that Valitor is obliged to open the payment gateway pursuant to the provisions of the agreement, Valitor revokes the agreement with this letter in accordance with provision 21.2 in the terms of business which are a part of this agreement”. The appellant sent the defendant’s representative a copy of this letter on 30 August 2012. On the issuing of permission to appeal the District Court Judgement as previously stated was appealed on 26 September of the same year.

II

As previously stated the defendant, in his application on 14 June 2011 for a cooperation agreement with the appellant, described his operations such that he operated a datacentre, provided what is called hosting and provided technical services. I n the case it is established that the description of operations in the cooperation agreement between the parties of the 15th of the same month that it constituted computer programming originated from an employee of the appellant who said in testimony to the court that “this mcc code" had been used for “hosting and datacentre and all kinds of computer service and technical services”. Whether one takes into account in this respect the wording of the application or the agreement it is not an obvious assumption that the receiving of donations to Sunshine Press Productions ehf. on behalf of WikiLeaks would be part of the operations of the defendant as described here, though it is true that the donations may have been made with electronic debiting through credit cards.

On the other hand one must take into account the fact that in this case the appellant has neither explained the importance for him of the operations of his counterparty being described precisely in documents of this nature, nor how this has generally been done in other instances and the comments of his employee before the court do not indicate that this had been given significant weight. One must however take even more into account that before the appellant opened access to business of other parties with the defendant on the basis of their cooperation agreement, Xodus ehf. sent the previously referenced emailed to an employee of the appellant on 27 June 2011 which showed the web address of the defendant’s planned payment gateway. In this case as it stands it is proven that the material to which the web address pointed is the same as the defendant has submitted in the case and as has been previously referred to. Had the appellant used the address to acquaint himself with this material, which would have been easy, it would have been obvious that the only purpose of the payment gateway was to receive donations to WikiLeaks. One must further assume that Xodus ehf. must have sent the appellant a copy of the email to Greiðsluveitan ehf., where the former requested, as previously described, an inspection of the proposed system for the defendant’s payment gateway. The name of the system specified there, indicated that it was made to receive donations and in addition to this it was clearly shown there in the short description of the system. This name of the system was in addition specified in the previously mentioned Greiðsluveitan ehf. confirmation of receipt of the application for inspection which was among other things sent to the appellant’s employee in an email dated 27 June 2011. In the main hearing of the case in the District Court a reply was sought from the appellant’s CEO as to which issues were generally examined, on the one hand by the appellant and on the other hand by Greiðsluveitan ehf., before access was open to the payment gateway and he said that the appellant’s employees “just go over the cases as they are” and also that they examined “matters concerning the customers themselves”. The CEO’s furthermore answered when asked “it did not of course escape our attention” that Teller A/S had closed the defendant’s payment gateway with them in December 2010. Taking this into account one could not assume otherwise than that the appellant would have been cautious when the defendant applied for a cooperation agreement between them. Material which the appellant received subsequent to the application according to the above, indicated clearly the purpose for which the defendant intended to use the planned payment gateway. There is nothing to indicate that the defendant could assume otherwise than that this material would be examined before the cooperation agreement came into force. When the appellant opened access to the payment gateway the defendant according to this could assume that the appellant considered that the reception of donations to WikiLeaks fell within the boundaries of the description of the defendant’s operations which was stated in his application and in their cooperation agreement and that it was compatible with the appellant’s general terms of business. One cannot thus agree with the appellant that the defendant had contrary to what he had been authorised, received payments through his payment gateway for transactions of a cardholder with a third party in the understanding of the previously referenced Section 4.3 in these terms, abused in another manner the position afforded by the cooperation agreement as referred to in Section 21.3, or failed to fulfil obligations pursuant to Section 21.52 to notify the appellant of changes that had taken place in the defendant’s operations from that which was specified in his application.

According to the above the appellant was unauthorised to revoke on 8 July 2011 the cooperation agreement with the defendant from 15 June of the same year. The court furthermore concurs with the District Court that there is no reason to consider that the appellant can be released from the agreement because of events that could result in its revocation.

Before the Supreme Court the appellant pleads that regardless of other considerations he should be found not liable to the claims of the defendant because the appellant with the previously cited letter of 24 July 2012 revoked their cooperation agreement pursuant to the provisions of item 21.2 in the appellant’s general terms of business and the notice to revoke has now expired. There are thus no longer any grounds for accepting the defendant’s claim concerning the duty of the appellant to open the payment gateway covered by their agreement. With respect to this plea in law from the appellant one must take into account the fact that he revoked, as previously stated, the cooperation agreement on 8 July 2011 which means that the agreement was thus not in force on 24 July 2012 when the appellant wrote the letter of revocation as its revocation was then not impacted by the District Court judgement from the 12th of the same month as neither had the notice to appeal nor the judgement expired and nor had the appellant declared that he would accept the judgement. The appellant’s revocation must therefore for this reason alone be considered void. Nor can the revocation cause the defendant’s main claim in the case to be dismissed from the Supreme Court.

Given all of the above the conclusion of the appealed judgement that the appellant is obliged to open the payment gateway according to its cooperation agreement with the defendant from 15 June 2011 is confirmed. The amount of daily fines to the defendant from the appellant is reasonably decided in the appealed judgement and they shall come into effect after a period of 15 days from the pronouncement of this judgement should the appellant then not have met the above-mentioned obligation. There is no basis for pronouncing that this notice begin to expire with publication of judgement, as was done in the appeal judgement, see Paragraph 4 of Article 115 of the Act on Civil Procedure number 91/1991.

The provisions of the District Court judgement on legal costs shall remain unchanged. The appellant is judged to pay legal costs in the Supreme Court to the defendant as stated in the text of the judgement.

The Judgement:

The District Court Judgement shall remain unchanged in all respects except that the daily fine specified from the appellant, Valitor hf., to the defendant, DataCell ehf., shall become active after a period of 15 days from the pronouncement of this judgement should the appellant then not have met the obligation to open the payment gateway according to his cooperation agreement with the defendant from 15 June 2011.

The appellant pays the defendant ISK 1,200,000 in legal costs in the Supreme Court.