



Court of Appeal to decide whether English Court has jurisdiction in a dispute involving the Bank of Portugal's exercise of powers pursuant to the European Bank Recovery and Resolution Directive 2014/59/EU ("the EBRRD")

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Background

On 30 July 2014, Banco Espírito Santo S.A ("BES"), Portugal's second largest private bank, announced first half losses of over €3.5bn. On 3 August 2014, Bank of Portugal ("BdP"), acting in its capacity as a resolution authority under the EBRRD, issued a decision ("the August 2014 Decision") that confirmed the formation of Novo Banco ("NB"). As a "bridge bank", NB was to assume certain of the assets and liabilities of BES so as to achieve the resolution objectives identified in both the EBRRD and the relevant Portuguese legislation ("the Portuguese Banking Law"). Annex 2 of the August 2014 Decision defined which assets and liabilities would transfer from BES to NB by reference to a number of classes of excluded liabilities. One class of excluded liabilities was any liability owed to a third party acting on behalf of an entity which at any time in the two year period preceding the application of the reorganisation measure had held a participation equal to or higher than 2% of the share capital of BES.

At the time of the August 2014 Decision, BES owed approximately \$835m to Oak Finance Luxembourg S.A. ("Oak" and the "Oak Liability") pursuant to a facility letter dated 30 June 2014 ("the Oak Facility") which included an English law and exclusive English jurisdiction clause. The Oak Facility was the culmination of a proposal first made by Goldman Sachs International ("GSI") to BES in March 2014. On 22 December 2014, BdP issued a "ruling", acting as the Portuguese resolution authority, that the Oak Liability had not transferred to NB on the basis that Oak had acted on behalf of GSI in relation to the Oak Facility and that GSI had previously held a 2% or more stake in BES ("the December 2014 Decision"). As a matter of Portuguese law and unless overturned in the Portuguese Administrative Court, the December 2014 decision was effective as at 3 August 2014.

Subsequent to BdP's December 2014 Decision, GSI made submissions to BdP and contended that, firstly, Oak was not acting on its behalf, and secondly, that it had not (contrary to its disclosures to the market) held a 2% stake in BES in the 2 years prior to 3 August 2014. BdP considered GSI's representations and on 11 February 2015 issued a further decision to confirm the December 2014 Decision.



On 26 February 2015, various parties which had invested in notes linked to the Oak Liability (“the NZ Claimants”) issued proceedings in the Commercial Court against NB. GSI, which had been assigned the right to bring the claim by two Oak Facility noteholders, issued separate proceedings against NB on the same day. Both the NZ Claimants and GSI alleged that a default had occurred under the Oak Facility in December 2014 and based on the assertion that NB had succeeded BES as the debtor by virtue of the August 2014 Decision, the NZ Claimants and GSI alleged that NB was responsible for its repayment.

In response, NB applied to have the Commercial Court proceedings set aside on the basis that the English court had no jurisdiction to determine the claims. NB’s position was that the August 2014 Decision and the December 2014 Decision, determining which liabilities were transferred to NB and which remained at BES, were binding as a matter of Portuguese law unless and until overturned by the Portuguese Administrative Court. In early 2015, both the NZ Claimants and GSI also sought to challenge the December 2014 Decision in the Portuguese Administrative Court.

Judgment of Mr Justice Hamblen

Following a hearing in the Commercial Court on 27 and 28 July 2015, Mr Justice Hamblen found, in summary, that GSI and the NZ Claimants had the better of the argument that NB became a party to the Oak Facility as a result of the August 2014 Decision. Consequently, he held that the status and effect of the December 2014 Decision fell to be determined by the English Courts by virtue of the jurisdiction clause in the Oak Facility. In reaching this decision, Mr Justice Hamblen concluded that the December 2014 decision was not an exercise of BdP’s powers under the EBRRD, in that it had not effected any transfer but had been confirmatory in nature.

NB appealed the decision and was given permission to appeal by Lord Justice Longmore in October 2015.

Subsequent resolution authority decisions by BdP

Following the decision of Mr Justice Hamblen, BdP issued further decisions as the Portuguese resolution authority in relation to the Oak Liability:

1. On 15 September 2015, BdP reconfirmed, for the avoidance of doubt, that the intention of its earlier decisions had been to confirm that the Oak Liability was an excluded liability, and that it remained with BES (or alternatively, to the extent necessary, it was re-transferred to BES from NB with effect from 3 August 2014); and
2. On 29 December 2015, BdP made three further decisions, the cumulative effect of which was to reiterate that the Oak Liability was a liability of BES, whether with retrospective effect from 3 August 2014 or by virtue of a prospective re-transfer with effect from the date of the decisions.



Intervention by the BdP

BdP instructed Enyo Law, and in May 2016 sought the permission of the Court of Appeal to intervene in the Appeal, which following a hearing on 5 July 2016, Lord Justice Moore-Bick granted.

The Appeal

The Appeal took place on 27 and 28 July 2016. In summary, NB and BdP argued that Mr Justice Hamblen had reached the wrong decision in finding that the English court had jurisdiction for the following reasons:

1. He had failed to consider, as a matter of Portuguese law, the effect of the August 2014 Decision. As a matter of Portuguese law, unless and until the December 2014 Decision (and the subsequent BdP decisions as outlined above) are set aside by the Portuguese Administrative Court, the Oak Liability is an excluded liability and remains with BES;
2. As a result, at the time that the alleged default under the Oak Facility took place in December 2014, the borrower under the Oak Facility was BES, not NB;
3. That an unduly restrictive approach had been adopted in concluding that the December 2014 Decision was not a re-organisation measure for the purposes of the EBRRD.

Appeal ruling awaited

The decision of the Court of Appeal is awaited and will be of interest to resolution authorities throughout the EU.

An update to this article will be published once the decision is known.



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