Enyo Law acts for the Bank of Portugal in Supreme Court success

First instance and Court of Appeal

For a summary of the background leading up the Supreme Court judgment, please click **here**.

Summary of the Supreme Court judgment

In a strong outcome for the Bank of Portugal ("**BdP**") that will come as a relief to resolution authorities throughout the EU, the Supreme Court has upheld a ruling by the Court of Appeal that a debt claim brought by investors against Novo Banco ("**NB**"), a "bridge institution" established by BdP in 2014, must be pursued in the Portuguese courts.

The appeal relates to two decisions taken by BdP in August and December 2014, once it had become clear that Banco Espírito Santo ("**BES**"), one of Portugal's largest commercial banks, was in serious financial difficulties. Before the Supreme Court, BdP led the argument that, as a matter of Portuguese law, its August decision cannot be considered independently of its December decision and together they have the effect that a debt (referred to as the "**Oak Liability**") was never transferred to NB, such that the English courts have no jurisdiction to determine any claim relating to it. The Supreme Court unanimously agreed that the proper place for any action by the claimants to take place in relation to the Oak Liability is the administrative courts in Portugal.

Lord Sumption, delivering the judgment of the Supreme Court, dismissed the appeal brought by Goldman Sachs ("**GSI**") and a group of international investors referred to as the "New Zealand Claimants". Like the Court of Appeal before it, the Supreme Court accepted BdP's argument that, as a matter of English law, implementing the Reorganisation Directive, the August decision (as a reorganisation measure) must be given the effect that it has in Portugal as the home state.

For a copy of the judgment, please click **here**.

BdP's intervention

BdP instructed Enyo Law in May 2016 and sought permission to intervene in the pending Court of Appeal proceedings after NB had been unsuccessful at first instance before Hamblen J (as he then was). BdP was granted permission to intervene and Enyo Law instructed Mark Howard QC and Stephen Midwinter QC of Brick Court to appear on behalf of BdP in the Court of Appeal. The Court of Appeal unanimously overturned Hamblen J's decision, finding that GSI and the New Zealand Claimants did not have the better of the argument that NB was party to the facility agreement that provided for the English courts to have exclusive jurisdiction of disputes in connection with it.

At the Court of Appeal, BdP shifted the focus to the Reorganisation Directive rather than the European Banking Recovery and Resolution Directive 2014/59/EU (the "**EBBRD**"). As acknowledged by Lord Sumption in the judgment, "*in the Court of Appeal the argument took a different turn as a result of the intervention of Banco de Portugal. Mr Howard QC, who appeared for them both in the Court of Appeal and before us, put at the forefront of his case on recognition article 3 of the Reorganisation Directive.*"

Enyo Law instructed Mark Howard QC and Oliver Jones of Brick Court to appear on behalf of BdP in the Supreme Court. BdP relied on the same primary argument that it had raised before the Court of Appeal, namely that Article 3 of the Reorganisation Directive requires the August decision to be given effect to by the English courts in accordance with its meaning and effect under Portuguese law, and it is absolutely clear that under Portuguese law the decision was not effective to transfer the Oak Liability to NB.

Brief analysis

In his judgment, Lord Sumption noted the "*inherent implausibility*" in the appellants' submissions. The appellants agreed that the August decision was a "*reorganisation measure*" and was therefore entitled to recognition under Article 3 of the Reorganisation Directive, but nevertheless contended that it should be separated from the December decision. The "*paradoxical result*" of this approach was that the English court would be viewing the August decision in isolation, treating Portuguese law as having transferred the Oak Liability to NB in circumstances where a Portuguese court would come to a different conclusion.

Lord Sumption rejected the appellants' proposition that the effect of the August decision can be recognised without regard to the December decision, commenting: "*I do not think that it matters what the correct analysis of the December decision is, provided that it is accepted (as it is) that as a matter of Portuguese law it is conclusive of that point unless and until annulled by a Portuguese administrative court.*"

He went on to conclude that it followed from the agreed propositions of Portuguese law and Article 3 (2) of the Reorganisation Directive that the English courts were obliged to treat the liability as never having been transferred to NB, such that NB never became a party to the jurisdiction clause.

Lord Sumption also rejected the appellants' request for a reference to the CJEU. He did not consider there was any proper basis for a reference because, in his view, the relevant propositions of EU law were "*beyond serious argument.*"

Conclusion

The decision represents an important vindication of the actions taken by BdP through the resolution process when dealing with BES, and will no doubt bring considerable comfort to the wider EU resolution community.

As submitted by BdP before the Supreme Court, the whole point of the EU scheme contained in the Reorganisation Directive and the EBRRD is to ensure that resolution authorities throughout the EU have a similar toolbox of powers to use in times of crisis under their domestic legislation. Resolution authorities will be relieved to know that, when those powers are exercised, a reorganisation measure does not have a different effect in England from that which it has in its home state. The decision supports the approach taken by resolution authorities and regulators across the EU that the effect of resolution measures should fall to be determined according to the local law and procedure of the place where the bank subject to resolution measures is domiciled.

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