# Judgment of the Court of Appeal

**(1) Goldman Sachs International and**
**(2) Guardians of New Zealand Superannuation Fund & Ors.**
**- and -**
**Novo Banco S.A.**
**- and -**
**Banco de Portugal**
**(Intervener)**

## First instance decision

For a summary of the background to the Court of Appeal decision, please click here.

## Summary of the Appeal decision

Allowing the appeal, Lord Justice Moore-Bick, Lord Justice Sales and Lady Justice Gloster unanimously agreed that Novo Banco ('NB') had the better of the argument that, on 26 February 2015 when the various claimants issued the proceedings in the English Court, NB was not a party to the Oak Facility agreement.

Accordingly, should the various claimants wish to challenge the various decisions of BDP (acting as the Portuguese resolution authority), the appropriate forum in which to do so is the Portuguese Administrative Court.

## BDP's Intervention in the Appeal

Before turning to his analysis of the issues (with which Sales and Gloster LJJ agreed), Moore-Bick LJ observed that, given the fundamental importance of the questions raised in the appeal, it was "not surprising that Banco de Portugal sought permission to intervene in the appeal and, having obtained it, presented the central arguments in support of Novo Banco's case." BDP made the decision to seek to intervene in the proceedings after NB had been unsuccessful at first instance. Enyo Law instructed Mark Howard QC and Stephen Midwinter of Brick Court Chambers to appear on behalf of BDP at the Appeal hearing.

His Lord Justice also noted that certain arguments had not been considered in detail before Mr Justice Hamblen at first instance. BDP's focus on Directive 2014/24/EC ('Reorganisation Directive') rather than on the more prescriptive requirements of Directive 2014/59/EU ('EBBRD') was an important factor in the Lord Justices reaching the unanimous decision they did. This change of emphasis allowed the Court of Appeal to adopt a more pragmatic approach in considering BDP's December 2014 decision and to conclude that Hamblen J's analysis of it at first instance had been flawed.

## Brief Analysis

Moore-Bick LJ noted that the issue that divided the parties was whether, as well as BDP's August 2014 decision to form the "bridge bank" (i.e. NB), being a reorganisation measure, the English courts must also recognise and give effect to its December 2014 decision, which purported to declare the effect of that earlier decision, i.e. that the Oak Facility had not been transferred from BES to NB as part of its decision in August.

His Lord Justice accepted that the English courts are obliged to give decisions of BDP, acting both as the relevant administrative authority in BES's home Member State and as the resolution authority for Portugal, the effect they have under Portuguese law. The effect of the August decision under Portuguese law was determined by the December 2014 decision, which is binding on all parties, unless and until it is overturned by the Portuguese administrative courts. Hamblen J had erred by failing to take into account the fact that the obligation to recognise the August decision involved giving it the effect it had in Portuguese law at the date when the Respondents commenced the proceedings.

As a result of the December 2014 decision, the August decision had a more limited effect in Portuguese law than might otherwise have been supposed, but in Moore-Bick LJ's view the English courts were obliged under the Directives and under the relevant UK legislation to give it the same effect as it had under Portuguese law at the date when the issue arose. In other words, the English courts were bound to accept it was not effective to transfer the Oak liability to NB.

Moore-Bick LJ also concluded that, though it was not necessary to his decision, the December 2014 decision was a reorganisation measure even if, strictly, it did not fall within the categories of resolution measures under the EBRRD. The recent EU case of *Kotnik*[1] had confirmed that the definition of reorganisation measures is cast in broad terms in the Reorganisation Directive, and that measures of a kind that did not fall within the scope of the EBRRD could nonetheless fall within Article 2 of the Reorganisation Directive.

The fundamental principle underlying the reorganisation and winding up of financial institutions within the European Union is that it is for the home Member State to decide how to deal with a failing institution and that its decisions are to be accorded universal recognition. If that object is to be achieved, it is essential that Member States give reorganisation and resolution measures the effect which they have under the domestic law of the home state. If in the present case it were open to the English courts to hold that the effect of the August decision was different to that which it has under Portuguese law (which was the effect of Hamblen J's decision), there would be a violation of the principle of universal recognition on which the law in this area is based.

Moore-Bick LJ lastly rejected the Respondents' reliance on certain email exchanges between GSI and NB (in which NB confirmed the Oak liability had been transferred to it) as constituting an agreement on the part of NB that the Oak liability had been transferred. It was not clear that the email had been sent by someone who had the necessary authority to speak on NB's behalf in relation to such matters. In any event, there was nothing in the email to suggest that NB had intended to submit to the jurisdiction of the English courts.

## Conclusion

The Court of Appeal has correctly concluded that the "chronological" approach adopted at first instance, i.e. considering the August and December 2014 decisions separately, was incorrect. The Lord Justices recognised that the effect of the August decision had to be determined in accordance with Portuguese law and that that meant taking account of the December 2014 decision which interpreted it. Moreover, they held that the December 2014 decision was itself to be regarded as, or as part of, a reorganisation measure and was entitled to universal recognition under the Reorganisation Directive.

The emphasis of the arguments advanced by BDP's legal team in the Court of Appeal presented the Lord Justices with a clear path and basis on which to recognise the position as a matter of Portuguese law. In so doing, the Court of Appeal adopted an approach that did not undermine the scheme of universal recognition of measures taken by the home Member State to deal with failing financial institutions, which is fundamental to the scheme of European law in this field.

Enyo Law acted for BDP.

[1] ***Kotnik and Ors. v. Državni zbor Republike Slovenije*** **(Case C-526/14)**

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